INTERPLAY BETWEEN NATIONAL INTEREST AND TRADE COMMITMENT UNDER INDONESIAN LAW

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ABSTRACT

This article analyses the under-explored phenomenon of "national interest" as the justification of Indonesian unilateral exit from international trade agreements. Although the national interest is very common as the basis for denunciation or withdrawal from treaties, the term is not a legal term; it is political. This article seeks upon new theoretical and empirical basis to interpret the national interest from political to legal matters. This is necessary to provide Indonesia a firm basis for justifying its treaty exit. It examines the national interest based on international law context. Since, under the Law Number 7 of 2014, national interest operates in the area of treaty exit, it has to carry a meaning according to the context of international treaty law. In order to give insight and in-depth understanding of interplay between national interest and international obligation, an element of case study presents in this research. This research will review the decision of Indonesian Constitutional Court No. 13/PUU-XVI/2018 about judicial review of Indonesian law on treaty making.

Keywords: Indonesia, International Trade Agreement, National Interest, Treaty Exit

INTRODUCTION

Year 2014 became the year that shocked many investment partners of Indonesia. The Indonesian government passed a legislation that allows a withdrawal from a Trade Agreement, based on Indonesian “national interest”. Under the Law Number 7 of 2014 on trade, the Indonesian Parliament or the President has a right to decide to exit from an international trade agreement if the treaty is considered eroding Indonesian national interest. This promulgation has raised “concerns among current and prospective foreign investors in Indonesia” (SSEK, 2016) since BITs provide the foundation for protection against government expropriation and nationalization. More than four years since the Law Number 7 of 2014 entered into force, the Indonesian government, according to (Bland & Donnan, 2014), at least, has terminated a Bilateral Investment Treaty (BIT) with the Netherlands and to terminate 60 other treaties.

Helfer (2005) explains that a state has exercised its option to exit a treaty as a result of shifts in the preferences of domestic interest groups that create a disconnect between national interests and international commitments. In the Indonesian case, indeed, the term “national interest” was the rationale behind the BIT exit. In this case, the government has extremely wide discretion to interpret the term, because “national interest” is too vague as a legal matter. The national interest even is summarized as an ambiguous or meaningless term, “both because of the difficulty of defining an interest and because of uncertainty over the relationship between particular interests and the national interest” (Clinton, 1994).

The national interest must be redefined according to a legal context in order to concretize it. Since, under the Law Number 7 of 2014, national interest operates in the area of treaty exit, it has to carry a meaning according to the context of treaty exit. Treaty withdrawal is regulated under treaty law regime. In this light, “International interest” has to be interpreted in the context of international law. It is crystal clear that under article 27 of the Vienna Convention on The Law of Treaty (VCLT) 1969, a state is not allowed to use its municipal law as a justification not to undertake its international obligations in a treaty.

Viewed even more broadly, taking “national interest” seriously complicates the existing understandings of the term within international law context. In order to bring national interest from political to legal sphere, firstly, we have to understand when a state can conduct unilateral exit from an international agreement. Secondly, this article will explain the legal and factual background of Indonesian exit from trade agreements. Finally, this article will provide a theoretical and empirical framework for understanding legal meaning of national interest and it will lay the groundwork for future legal research.

LITERATURE REVIEW

Unilateral Exit From International Agreements

The international treaty law system is derived from the most basic principle governing an interstate relation; pacta sunt servanda, which carries a meaning those treaties, must be obeyed as legally binding obligation once the states express their consent to it. Not a single state in the world can be imposed to accept a treaty without prior consent. Then, ggovernment officials representing a state in an international treaty negotiation are holding a key of their countries treaty commitments. Once the state ratified a treaty, if ratification is compulsory according to the treaty, it must be observed its treaty commitments in good faith.

It can be inferred from The VCLT of 1969 that the treaty norms were built from the four principles that regulate the binding nature and of an international agreement. The first is the free consent principle, which regulates that the states have freedom in giving their consent whether to be bound or not by an international agreement. A state cannot be pushed or threaten to give a consent to be bound by a treaty. The second is the good faith principle, which means states must have a good intention in negotiation, conclusion and in the implementation phase of the treaty. The third is the pacta sunt servanda principle. The principle gives a treaty legally binding power to the parties in a valid agreement. The last is a very important principle for this article that a state may not invoke its national law as a justification for its failure to perform an agreement.

International law provides a few legitimate challenges to the mechanism of treaty binding force to its parties. A state may suspend treaty enforcement where another party has materially breached the agreement by not conducting its obligations in the treaty. In most extreme case, a state even has an option to exit the treaty off. International law also regulates that invalidity, fundamental changes of circumstances, and other justification can be invoked by a state not to conduct a breach or a wrongdoing act in putting aside its treaty obligations. Using the justifications guaranteed by the iinternational law, a state cannot be categorized conducting treaty breaches. But such reciprocal acts of non-compliance, suspension, and exit are regulated strictly in The Vienna Convention on The Law of Treaties 1969, to avoid excessive breach that would quickly cause interstate cooperation to be destroyed. There are 10 articles directly regulate the termination of the treaty in the VCLT 1969.

The VCLT 1969 regulates in rather extensive provisions concerning the withdrawal and termination from an international agreement concluded between states. The convention is equipped by at least 10 articles about treaty termination or withdrawal. The extensive provision on this issue, as Paul Reuter puts, is "to increase the number of situations where the principle of the treaty is safeguarded."

It is worth to remember that Article 54 of the VCLT 1969 states:

> *The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of a treaty; or (b) at any time by consent of all the parties after consultations with the other contracting States.* (United Nations Treaty Series, 1980, p. 344)

As the term of cancellation is similar to the termination term, it may be inferred that the so-called 'cancellation' or termination of the treaty might be justified under international law, as long as the provisions of the treaty concerned contain a provision that allows treaty termination. However, if the treaty does not have such a provision, the consequence would be that the termination or cancellation of an international trade agreement promulgated in the Law No 7 of 2014 will be impossible to be undertaken.

The treaties and the condition in implementing a treaty change constantly. Hefer (2005) elaborates that neither treaties nor the geostrategic context in which they are implanted static. When shifts in the political landscape or domestic preferences undermine a treaty's objectives or extend its terms excessively difficult to carry out or obsolete, the international law directs states to avoid unilateral action in favour of negotiation with their treaty partners. The probable outcomes of such collaborative efforts are presented only by the parties' process of applying ideas to solve a problem. They range from a temporary suspension of the treaty to a modification of its terms, to withdrawal from the agreement.

Outside the VCLT 1969's limitation, most modern international agreements have a safeguarding provision that it often missed by scholars. The provisions promote international law's indisputable or clear command for states to obey treaties or if the state cannot do so, cooperate in terminating or revising the treaty. The provisions are widely known as denunciation or withdrawal clauses. Basically, the provision grants a party to withdraw from a treaty in force. The exit clauses create a lawful, public mechanism for a state to terminate its treaty obligations under the International law. The state using the clause to exit a treaty has a very different status from a state that breaches its obligations under a treaty. Different burdens, benefits, sanction prospects, reputational consequences, and different responses by other parties are applied differently between to the existing state and breaching state.

States' action to exit a treaty can also be mere an unilateral act, often be conducted simply by sending a notice to the other party in a timely manner, informing the termination. Such notification does not need a consent from the other party. The mechanism usually is governed in the treaty itself. Treaty clauses that authorize this kind of exit are extensive. Indonesia used the mechanism in terminating BIT with the Netherlands in 2014. Indonesia sent notification of termination to The Netherland before effectuating the termination. The BIT itself gave Indonesia an ability to legally to withdraw from the treaty. However, sometimes such exit clauses are not present at all in a treaty. This raises the interpretation that that treaty termination is implicitly impossible under international law.

According to Helfer (2005), there are four types of consequences when a state terminates or withdraw from a treaty. They include:

(1) Isolation, as in the case of North Korea;
(2) Unilateral or bilateral alternatives
(3) A la carte multilateralism, for example when Caribbean nations withdrew from a human rights treaty and then attempted to re-ratify the same treaty with a reservation concerning the death penalty; and
(4) The creation of a new treaty regime with competing norms or institutions, as occurred when Iceland denounced the International Convention for the Regulation of Whaling and, together with other pro-whaling states, established the North Atlantic Marine Mammal Commission.

RESEARCH MATERIAL AND METHODS

This research will mainly use the "Legal-Descriptive-Normative Approach." One part of this study is descriptive or Lex Lata. The research will make available of the comprehensive definition of "National Interest" as a terminology. Once it is reached, the study exposes the legal instruments, mainly in trade area, that reflects the definition.

In order to give insight and in-depth understanding of interplay between national interest and international obligation, an element of case study presents in this research. This research will review the decision of Indonesian Constitutional Court No. 13/PUU-XVI/2018 about judicial review of Indonesian law on treaty making.

RESEACH DISCUSSION

Indonesian Exit from a Trade Treaty

The Law No. 7 on Trade Law is relatively a long and comprehensive law to regulate international trade established by the Indonesian government. The law consists of 122 articles with 29 Chapters. The scope of regulation also relatively broad since the statute regulates the domestic trade, the foreign trade, the trade in the border areas, standardization, trade through electronic systems, the safeguard measures, the small and middle business, etc. However, this law contains flaws. One of which is located on Article 85. This article empowers the government to cancel an international agreement that it has signed. Adolf (2015) has translated the article from Indonesian to English:

> (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. (United Nations Treaty Series, 1980, 352).

The flaw occurs when The Law No. 7 on Trade Law does not explain clearly and comprehensively what does "cancellation" under article 85 means. The uncertainty of the article cannot be solved since the appendix of the Law is silent on this issue, when it only states that the provision under article 85) is sufficiently clear.

The Vienna Convention does not specifically regulate the issue of the cancellation of the Agreement as mentioned in the Law No. 7 of 2014. However, The Convention regulates in rather extensive provisions concerning the termination or withdrawal from a treaty. The term "cancellation" is interchangeable with "termination" and as (Huala, 2005) puts that:

> *The so-called 'cancellation' or termination of the treaty may be possible, as long as the provisions of the agreement or treaty concerned contain such a provision… if the treaty does not have such provision, then, the termination or the cancellation of the treaty as envisaged in the Law No 7 of 2014 will be impossible to be undertaken.*

Under VCLT 1969 and various works of literature, there are three terms used when a country does not want to be bounded to an international agreement, namely (1) denunciation, (2) termination and (3) withdrawal. Those three terms have differences when viewed from the consequences of international agreements.

Denunciation, as explained by Jennings & Watts (1996), is used when one of the parties to a bilateral agreement withdraws so that the overall international agreement ends. Withdrawals are often used in multilateral agreements related to membership in international organizations; the consequence does not affect the end of the agreement as a whole, even if one party withdraws. Unless an international agreement regulates otherwise, reservations for the international agreement can be withdrawn at any time. Such withdrawal does not require the consent of other parties to be effective. Then, if no other agreement is determined, withdrawal of the reservation applies in relation to the other party when the notification has been received by the other party

With regard to suspension and termination of the trade treaty and other fields than trade law, Indonesia has once terminated several international legal instruments as shown in table 1 below.

Table 1 INDONESIAN SUSPENSION AND TERMINATION TO INTERNATIONAL LEGAL INSTRUMENTS		
No.	International Legal Instrument	Details
1	BIT between Indonesia and The Netherlands	The Netherlands was the first countries that receive Indonesian notification to terminate the between them. The event was taken place on 2015
2	Memorandum of Understanding between the United States of America and the Indonesian Republic, 2010 on Oceanic Research	The background for the termination was the alleged fraud.
3	Memorandum of Understanding between Malaysia-Indonesia, 2006 concerning the Domestic Workers	The MoU was suspended since the provision of the MoU permits one of the parties to do this due to the national security, natural interest, public order or public health.

Indonesia is planning to terminate more than 60 bilateral investment treaties that allow disgruntled foreign investors to bypass local courts and seek compensation in international tribunals, amid a growing global backlash against such provisions (Bland & Donnan, 2014). Development campaigners say that some multinational companies are exploiting BIT, which is meant to protect foreign investors, to circumvent national regulations and bully developing countries.

Indonesia's cancellation of the treaties was likely to be seen as a backward step. The investors worry about protection for their investment in Indonesia. The termination of thesis trade treaties removes a safeguard for the investors when they are looking at country risk. This will not be a prospectus for Indonesia.

National Interest as a Political Term

National Interest is an established concept under International Relations but not as a legal matter. All of the states in the world are always in a position of fulfilling or securing their national interests. The foreign policy and the international agreement of each state are negotiated and formulated on the basis of each state's national interest, to secure the national goals. It is a universally accepted under international law that every state possesses a right to secure and defend its national interests. However, a state cannot always justify its actions on the basis of its national interest. The behaviour of a state is always conditioned and governed by its national interests.

National Interest is too unclear and ambiguous for a legal term. So, it has to carry a meaning according to the context in which it is used. Government as policy-makers have always used it in ways suitable to them and to their objective of justifying the actions of their states. For example, Hitler justified his policies under the name of "German national interests"; The United States presidents have always legalized their decisions to go in for the development of more and more sophisticated yet destructive weapons technology for the sake of "United States of America national interest" (Clinton, 1994). Other examples would be China that justified its border disputes with India and the Soviet Union as attempts to secure China's national interests. However, several scholars have tried to define National Interest.

"Interest" as a concept in international affairs is very old. "William Richardson Davie a military officer and the tenth Governor of North Carolina from 1798 to 1799, quoted in The Records of the Federal Convention of 1787: "Interest, sir, has a most powerful influence over the human mind, and is the basis on which all the transactions of mankind are built" (Farrand, 1787).

Clinton (1994) explained that in law field, the concept of "justice" has a close relationship with interest. While interest could not be equated with justice, how the

community defines justice, could affect the definition of "interest". In relation to states, the interest of states operated in both domestic and foreign politics. In the domestic level, the interest of the state encompassed all private interest. In case of the conflict between private and state interest, the state interest prevails. Externally, the state's interest present when statesmen choose those foreign states with which it was politic to ally and those that it was necessary to oppose. The task of diplomacy was to recognize one's interest and to conduct policy toward other states and their interests accordingly"

National interest issue came into the surface in Indonesia because of the increasing number of arbitrations under the investment treaties. As this number increases, the Indonesian Government perception of their sovereignty and legitimacy decreases. Indonesia has responded by withdrew from BIT and announced not to extend the life of another BIT after its termination date over. Sornarajah (2010) indicated that there are three behaviours that a county would take if they consider that their national interest eroded. The first is withdrawal from BIT. The second, some states consider not to extend the continuance of their investment treaties after they expire. The third, states will withdraw from the ICSID Convention as Ecuador's case using Article 25(4) of the Convention.

The case of Indonesia withdrawn from BIT is because Indonesia seeks to avoid the International Dispute Settlement obligation under the BIT. This withdrawal decision is calculated outcomes based on the governments believe that the costs of arbitration outweigh the BIT benefits for Indonesia. Indonesian BIT exit is seen as an action to show that Indonesia has sovereignty.

The national interest as the basis for treaty exit can also carry a meaning under the context of customary international. A national interest of a state can be seen as a necessity in the event of an economic crisis that threatens national security. A national interest also presents in the event of force majeure, where a state is faced with circumstances where it has no alternative but to take a course on action to exit or put aside its international obligations. A national Interest also can be seen in the context of human rights where a state must protect the human rights of its own citizen. The most obvious case in this interpretation is where a BIT violates the human rights of a tribe which is protected under the permanent sovereignty over natural resources.

The investment protected by BIT can be threatening Indonesia national security. Developing countries, including Indonesia, the national interest manifested in national security are very crucial during politic and economic crisis. A throwback to the 1997-1998 period, Indonesian economic crisis has led to political and even military threat that destroying Indonesian citizen's living conditions even more. The economic crisis finally caused the fall of Suharto's government regime at a cost from widespread riot and turmoil on the streets of Jakarta. The condition is clearly seen as a threat to the national condition. In this kind of situation, the government of Indonesia held an option to closed its economy and recourse to IMF loans. These measures will affect the foreign investor in Indonesia. The Indonesian government, for example, was able to take some economic measures that impacted adversely on foreign investment within the country. However, they cannot use the protection under BIT due to Indonesian national security being threatened and there is the principle of necessity for doing the measures.

National interest is also in the heart of force majeure norm. This is different from the previous principle of necessity for handling national security threat. Regarding the force majeure, a state is fall to the situation which gives no options but to take an action; different to the case of necessity where a state intentionally takes measures to handle a situation. Force majeure, on the other hand, is invoked to avoid responsibility for treaty breaches related to investment situation. Force majeure has been used in many foreign investment disputes. One of which was the awards related to the 1998 Indonesian economic crisis that overthrown of the Suharto regime. As explained by Sornarajah (2010), the Indonesian government, on the advice of the IMF, suspended several project contracts it had made with foreign investors.

One of the cases called Karaha Bodas dispute which causing force majeure defend to be pleaded; however, the plea was rejected on the ground that there was a clause in Karaha Bodas contract anticipating such events and obliged Indonesia to take the risk of such event (ad hoc arbitration under the United Nations Commission on International Trade Law rules, Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak dan Gas Bumi, 2000).

Human rights also become a platform for expressing national interest of a state. The international regimes of human rights can also provide states' rights to do put aside investment safeguard norm under a BIT. The state will be justified to take measures against foreign investors when the investment activity facing the public interest that human rights law represents. When human rights clash with investor protection under BIT, that the international human rights norm representing public interest will override the BIT Protection. The permanent sovereignty over natural resources is one of the examples. The principle of permanent sovereignty over natural resources, as restated by (Ng'ambi, 2015), essentially advances the argument that resource-rich nations should have control over their natural resources. The investment that violates this sovereignty (for example, an investment destroying a land area as living space of aboriginal people in Australia), should be avoided and cannot be protected under BIT or any trade law.

Interplay between National Interest and International Trade Obligation in Indonesian Constitutional Court Decision No. 13/PUU-XVI/2018

The Judicial Review Case for The Law No. 24 of 2000 about International Agreement raised by a group of plaintiffs, mainly because the current process of Indonesian international trade negotiations with several international counterparts. The Petitioners submitted a letter dated February 14, 2018, and received by the Registrar's Office of the Constitutional Court on Wednesday, February 14, 2018, which basically outlines the following matters explained hereinafter.

In Indonesian national law, rules regarding the technical and procedural provisions of Indonesia's binding to international treaties refer to Law Number 24 of 2000 concerning International Treaties. Meanwhile, under international law, as it is clear, that the VCLT 1969 plays an important role in governing treaty making between states. Indonesian government to that fact firmly stated that it will not ratify the VCLT 1969 because the norms and principle under VCLT 1969 was incorporated by the Law No. 24 of 2000. Indonesian government acknowledged VCLT 1969 as state practices and opinion juries save necessitates which make it international customary law.

To be bound by an international agreement, states have to express its consent to be bound to that agreement, and if a country does not give its agreement to be bound by international agreements then the agreement will never be binding. Therefore, approval or refusal to be bound by an agreement is a manifestation of the sovereignty of each country. The consequences of the submission of a country to an international agreement are divided into two aspects: internal and external. The external aspect is that the country bears obligations and accepts the rights of international treaties. While the internal aspect is that the international agreement enters and applies as part of its national law. Therefore, the petitioner of the Judicial Review Case argued that it needs careful consideration and people control of the state to be bound by international treaties is important before the country gives its consent to be bound. In the current case, the petitions stated that The Law No. 24 of 2000 International Treaties consist an inaccuracy in locating and determining which areas of national law apply, in this case state administration law and state administration law on the one hand, with areas of international law enforceability on the other. Indonesian House of Representatives (the "Dewan Perwakilan Rakyat"/ "DPR") approval or rejection is an action within the scope of national law, while the consent to be bound by the government as an international legal action, need to be based on the DPR's approval earlier.

Not every treaty needs the DPR approval, certain category of treaties listed under article 10 of Law No. 24 of 2000 only require the sole decision from the President. Seeing the facts during the period of 14 years, the article 10 seems to be obsolete. It is not clear in Indonesian ratification process whether international trade agreements (including infestation agreement) need to pass the congress approval or not. Mistakes in qualifying international trade treaties will certainly have an impact on the loss of people control represented by the DPR) to carefully tie Indonesia to international treaties which will have a direct impact on state sovereignty. So that people's rights will not be harmed and will not be violated by the application of international treaties into national law. Article 10 of Law Number 24 of 2000 contradicts Article 11 paragraph (2) of Indonesian Constitution as long as the phrase "has broad and fundamental effects on people's lives related to the financial burden of the State and/or requires changes or establishment. the law "means only limited to the categories: a) political issues, peace, defence, and state security; b) changes in territory or determination of the territory of the Republic of Indonesia; c) sovereignty or sovereign rights of the state; d) human rights and the environment; e) the establishment of new legal rules; f) foreign loans and/or grants." The limitation ignores other international treaties that have broad and fundamental effects on people's lives related to the financial burden of the state.

International agreements in the field of economics, especially international trade, are the most widely made agreements because it is fundamental in the international community relations. Without economic development, there will be no development in other sectors. Nowadays, the agreement has gone beyond traditional practices, which only regulate export and import activities. The free trade agreement regime has developed in such a way and covers aspects of investment, intellectual property rights, the role of state-owned enterprises and business competition, dispute resolution mechanisms, etc. So, formally, the name of this agreement no longer uses the term international trade agreement but an economic partnership agreement, for example as in the 'Trans-Pacific Economic Partnership Agreement', 'Regional Comprehensive Economic Partnership' (RCEP), and 'Comprehensive Economic Partnership Agreement' (CEPA).

In ASEAN context, although free trade agreements are not made in one comprehensive agreement, they are arranged in a series of agreements that covers many aspects. Not only about tariffs and reduction/elimination of trade barriers to goods but also concerns investment, dispute resolution, financial services, freedom of movement of people, etc. All of which were made as an integrated legal framework for the basis of free trade or for the realization of the ASEAN economic community. Indonesia ratified the ASEAN agreements: ASEAN Trade in Goods Agreement (ATIGA), ASEAN Comprehensive Investment Agreement (ACIA) and the ASEAN Framework Agreement on Services (AFAS), by Presidential Decrees. So far, Indonesia also its BIT by presidential Degree, for example BIT between Indonesia and Singapore which was ratified by Presidential Decree Number 6 of 2006, and the BIT between Indonesia and India with Presidential Decree Number 93 of 2003. Even though, the contents in the agreement is procedural or technical matters, the agreement contains provisions to oblige Indonesia to accept he jurisdiction of foreign investors in international arbitration, using Investor to State Dispute Settlement/ISDS mechanism.

According to the abovementioned background, the petitioner also questioning the Article 2 of Law Number 24 of 2000. It deems to be contradicted to Article 11 paragraph (2) of Indonesians Constitution, because it has replaced the phrase "with the approval of the DPR" with the phrase "consulting with the DPR in matters relating to the public interest". Article 2 Law Number 24 of 2000 itself states that the Minister of Foreign Affairs gives political considerations and takes the necessary steps in the making and ratification international agreements, in consultation with the House of Representatives on matters relating to public interest. The norm is causing uncertainty according the petitioners. Whenever the House of Representatives object to a ratification plan of an international

agreement, the objection can be ignored by the minister, because of the authority is only to consult not to approve.

The third article reviewed by the constitutional court was the Article 9 Law 24 of 2000, which stipulated that the ratification of the international agreement is by national act/ legislation (‘undang-undang’) or presidential degree (‘keputusan presiden’). The petitioners were questioning the approval form of the DPR. Ratification by enacting an act, requires the consent of the House of Representatives. In the other hand, the ratification by the presidential does not require DPR approval. The only administrative obligation for the president is notify the DPR afterward. The petitioner position was that the approval or rejection of the DPR is regarded as a legal action or action within the scope of national law governed by national law, while the binding statement made by the Government (based on the aforementioned DPR's agreement), is an action or act of international law carried out under international law. Thus, the phrase 'ratification of an international treaty by law or a presidential decree' should not exist, but the phrase 'approval of an international agreement by the House of Representatives' as referred to in Article 11 paragraph (1) and paragraph (2) of the 1945 Constitution And the word 'agreement' itself must be interpreted as an act of the DPR accepting or rejecting the government's actions to bind the country to a specific international agreement. Because the Article 9 has reduced the meaning of the phrase with the ‘consent of the House of Representatives’ to ‘ratification by act or presidential decree’ the norm is in contrary with Article 11 paragraph (2) of the Indonesian Constitution of 1945. The Indonesian government used Article 11 paragraph (1) Law Number 24 of 2000 as its justification which stated that ratification of an international treaty which is not mentioned in the list of Article 10 can be ratified by presidential decree.

The Indonesian Constitutional Court finally decided under Decision No. 13/PUU-XVI/2018, that Article 10 of Law Number 24 of 2000 is in contrary with the 1945 Constitution of the Republic of Indonesia and has no binding legal force. It cannot be interpreted that only the types of international agreements under the list in it, that require the approval of the DPR. The court rejected other petitioner applications. In deciding the case, the constitutional court answers the two main questions:

1. Whether any international agreements always require the approval of the House of Representatives (DPR)?
2. Considering the process of making an international agreement consists of several stages, at which stage the approval of the DPR must be given?

The court consider that the executive power in the hands of the Indonesia President, and the involvement of the DPR in the form of giving national approval in the process of making international treaties does not apply to all international treaties, but only to international treaties that are considered important. For example, agreements that are technical or administrative the national approval of parliament is not needed. In general, international treaties that are considered important are agreements that have a political dimension that has to do with the sovereignty of the state, including agreements that affect national borders; affect the state's financial burden; which affects the balance or division of power; or has a broad impact so that new legislation is needed. These examples can certainly increase according to the national needs or considerations. As for other international agreements, parliament is generally sufficient only to receive a notification. The executive requires sufficient freedom of movement which in the context of international which enables it to carry out governance effectively, without compromising state sovereignty, without unnecessary interference.

On the other question (at which stage the DPR's approval must be given?), the Court considers several things. First, it must be distinguished, between the approval of the DPR and the international act to be bound by an international treaty. Second, the "stages" referred to in this case are the stages of making international treaties in the context of national law, not in

the context of international law. Third, it must be distinguished between ratification of international treaties according to international law and ratification of international treaties according to national law.

In relation to the first issue, according to VCLT1969, an international agreement can be made in two stages or in three stages. The former, only requires the negotiation stage and the signature stage. In this type of international agreement, the signing stage is at the same time a statement to be bound to an international agreement (consent to be bound by a treaty). Meanwhile, the latter, consists of the negotiation stage, the signature stage, and the ratification stage. Unlike an international agreement which consists of two stages, in an international agreement which consists of three stages, the signing stage is not consent to be bound but rather as a kind of statement that the representatives of the parties in the negotiations have reached an agreement on matters that negotiated. Therefore, the purpose of the DPR's approval in Article 11 paragraph (1) and paragraph (2) of the 1945 Constitution is only applies to the treaty making process which requires 3 stages process.

With regard to the second issue (the distinction between treaty making according to international law and treaty making process under national law), the stages in international law are dependent on the type of agreement, namely an international agreement consisting of two stages and an agreement international consisting of three stages. While the stages according to national law, it depends on the national law of each party (state).

Furthermore, with regard to the third issue (the distinction between ratification of international treaties under international law and ratification of international treaties under national law), a ratification under international law (VCLT 1969) is also a statement of consent to be bound in an international agreement. Whereas ratification of international treaties according to national law, in the context of Indonesia, is referring to the follow-up to international treaties which require the ratification in which is carried out by enactment of a law or presidential degree? This means that ratification at the national level, regardless of whatever form of the law at the is fully falls to the relevant national organs of a state.

Indonesian Constitutional court on its consideration states that although the 1945 Constitution does not determine the existence of a certain legal form for the approval of the aforementioned DPR, according to reasonable reasoning, the presence or absence of the DPR's approval can be known from the results of the implementation of the consultative phase. In the Indonesian practices, in the consultation process, DPR will provide recommendations. Although the form is only a recommendation, which is not legally binding, the recommendation is highly respected by the Government. For example, the Government did not continue the ratification of the 2007 RI-Singapore Defence agreement because the results of consultations with the DPR indicated a rejection of this agreement where the termination process was carried out using the mechanism as regulated in Article 2 of Law 24/2000. Such practice makes it clear that the consultation mechanism as regulated in Article 2 of Law 24/2000 is at the same time a mechanism to find out whether or not the DPR's approval of a substance of an international agreement is. Thus, the consultation mechanism also means a process to bring together the views of the President (government) and the Parliament. According to the Court, because the 1945 Constitution does not require certain legal forms for the statement of DPR's approval of the substance of an international agreement, the legal form of ‘recommendations’ does not conflict with the 1945 Constitution.

CONCLUSION

A state national interest has to be present somewhere in the municipal law, whether in the constitution, legislation, or government policies. Analysing to the Constitutional Court Decision No. 13/PUU-XVI/2018, it can be inferred that the national approval of the DPR in the form of ‘Recommendation’ open a room for the consideration of Indonesian national interest in ratification a trade agreement. The national interest in this stage is the national

interest in the political meaning. The national interest in the legal context as explained and clarified in the previous parts of this article is not applicable at this stage.

Clearly under international law, there is no room for national interest in the political context related to treaty making. It is beyond the national legislation's pale to govern the matter that falls into an international mechanism. Yet, Indonesia is not a party to the VCLT 1969, the norm and principles under VCLT 1969 became the customary international law that binds Indonesia. The national interest as the basis for treaty exit can also carry a meaning under the context of customary international. A national interest of a state can be seen as a necessity in the event of an economic crisis that threatens national security. A national interest also presents in the event of force majeure, where a state is faced with circumstances where it has no alternative but to take a course on action to exit or put aside its international obligations. A national Interest also can be seen in the context of human rights where a state must protect the human rights of its own citizen. The most obvious case in this interpretation is where a BIT violates the human rights of a tribe which is protected under the permanent sovereignty over natural resources.

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