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The Indonesian Trade Law of 2014:

The Provision on the Annulment of International Trade Agreement

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Abstract: On March 2014, the Government of the Republic Indonesia promulgated the Law No. 7 of 2014 on Trade. No law on trade has ever been promulgated before. One of the controversial provisions embodied in the Law is the provision on the status of international trade agreement in Indonesia. The Law, as embodied in Article 85, states that the government, with the approval of the parliament, may review and annul the international trade agreements which have been signed by Indonesia.

This provision is controversial because, the international agreement, including the international trade agreement, is the product of the consensus of the states participating in it. With the promulgation of the Law and especially the provision of article 85, can the Law be effectively implemented in the future?

1. Introduction

On March 2014, the Government of the Republic of Indonesia promulgated the Law No. 7 on Trade (The Law)[1]. The Law is significant because the Law, for the first time since Indonesia's independence, has eventually had a clear legal policy relating to its trade.

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

One provision of the Law, however, that is worth commenting on is Article 85. This article empowers the government to *cancel* an international agreement that it has signed[2]. This article provides as follows:

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

The Law however does not state clearly what the word cancellation under article 85 means. The elucidation of the article 85 embodied in the appendix of the Law is silent on this issue. It only states that the provision (under article 85) is sufficiently clear. Article 85, including its elucidation, is also silent on the issue regarding its meaning of 'national interests' according to Indonesian law.

In order to reach an answer, it is necessary to take a short look at the principles regulating the international agreement, as enshrined in the Vienna Convention on the Law of Treaties of 1969, as the

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[1] State Gazette No 45 of 2014

[2] The term 'cancel' is the translation of the original text in Indonesian language for 'membatalkan.' The Original text of Article 85 para. (1) reads as follows:

"(1) Pemerintah dengan persetujuan Dewan Perwakilan Rakyat dapat meninjau kembali dan *membatalkan* perjanjian Perdagangan internasional yang persetujuannya dilakukan dengan undang-undang berdasarkan pertimbangan kepentingan nasional." (Emphasis added)

main source of law on the treaties. In this paper, the term agreement is used interchangeably with the term treaty.

2. The Principles of International (Trade) Agreement

2.1 The Vienna Convention on the Law of Treaties

The law regulating the state in concluding international agreements is laid down in the Vienna Convention on the Law of Treaties of 1969.

There are four main principles that regulate the binding force of a treaty which the State has given it consent to be bound to.

The first is the principle of free consent. This principle states that in making an international agreement, the states must give their free consent. This free consent must be free from the influence or pressure of other states[3].

The second is the principle of good faith[4]. The Convention requires the good faith of the negotiating state to international agreement. There is no clear meaning of this term. But, as commonly understood, the good faith principle should mean the good intention of the (negotiating) state during the negotiation, during the conclusion of the agreement or in the course of the implementation of the agreement or treaty.

The third is the principle of *pacta sunt servanda.* This principle states that a valid agreement binds the parties[5].

The fourth principle and very relevant to the present article, a State may not invoke its national law as a justification for its failure to perform an agreement or treaty[6].

2.2 The 'Cancellation' of the International Agreement

The Vienna Convention does not specifically regulate the issue of the cancellation of the Agreement (as recognized in the Law No. 7 of 2014 above). The Convention however regulates in rather extensive provisions concerning the termination or withdrawal from a treaty (agreement). There are at least 10 articles directly regulating the termination of the treaty. The extensive provision on this issue, as Paul Reuter puts it, is "to increase the number of situations where the principle of the treaty is safeguarded."[7]

It is quite interesting to note that Article 54 of the Convention states that '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."[8]

As the word cancellation is similar with the word termination, it may be concluded 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.

However, 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.

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[3] Preamble of the Vienna Convention 1969

[4] Preamble of the Vienna Convention 1969, also found in Article 26 (on *Pacta Sunt Servanda*) and Article 31 (on the General Rule of Interpretation).

[5] Preamble and article 26 of the Vienna Convention 1969

[6] Article 27 of the Vienna Convention 1969

[7] Paul Reuter, *Introduction to the Law of Treaties*, London & New York: Keagan Paul International, 1995, p. 138. Those articles under the Vienna Convention includes Articles 42 (2), 45,54, 56, 57, 59, 60, 61, 62, 70, 72. Article 42 (2) for example reads: "2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

[8] The Vienna Convention does not define the word 'termination.' The leading treaties on this subject, Lord MacNair's The Law of Treaties, Oxford, 1961), defines the term 'Termination' as the "ending of a treaty, by whatever method that may occur and whether by the act of one party or of all, or by the operation of the treaty itself or of the Law in certain evens as a State Succession or the outbreak of war." (Lord McNair, *The Law of Treaties*, 1961, p. 993).

The provision similar to Article 54 may be found in Article XV of the Agreement Establishing the World Trade Agreement, with a number of additional requirements be fulfilled. Article XV provides the following:

> "1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.
> 2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

The possible step that the Indonesian government may take is to withdraw from a treaty. But, this may only be possible if the other contracting States, or member States of the Treaty, approve or give its consent to this measure. This consent, however, does not seem easy, since there must be held a consultation to enable all the contracting States to reach that consent.

The requirement of consultation is important. The requirement seems to purport to avoid the termination of the international agreement easily. The principles of good faith, free consent and *pacta sunt servanda* do not reflect a (unilateral) measure of a contracting State to terminate the treaty.[9]

2.3 The Indonesian Practice

Indonesia has been taking active part in joining multilateral, regional and bilateral trade agreements. Indonesia, for example, is a party to the Agreement Establishing the World Trade Organization. In the region, Indonesia is also a member to the ASEAN Charter of 2007 where major ASEAN Trade-related agreements are administered.

Within the membership of ASEAN, Indonesia is also an active member to various intra-regional trade agreements, for example, the agreements between ASEAN, Australia and New Zealand; China; India; Japan; and Korea. Indonesia has a bilateral FTA with Japan.

In terms of legislation, Indonesia has its own legislation on international treaties, namely Law No 24 of 2000. Like the Vienna Convention of 1967, the Law No 24 of 2000 also has the provision on the termination of the agreement. The Law however is silent on the conclusion of the Agreement or the suspension of the international agreement.[10]

With regard to the cancellation or termination of the trade treaty, as far as the practice of Indonesia on this issue is concerned, there has been no reported case(s) on this issue.

In other fields, however, Indonesia has once terminated the Memorandum of Understanding (MoU) between the United States and Indonesia of 2010 concerning the Oceanic Research. The main reason for the termination was the alleged fraud with regard to the MoU.[11]

Indonesia has also suspended the application of the MoU between Malaysia-Indonesia of 2006 concerning the Domestic Workers. The suspension was made since the provision of the MoU permits one of the parties to suspend the MoU due to the 'national security, natural interest, public order or public health.'[12]

3. The Meaning of National Interest

On the second issue, namely the meaning of national interest, reference should be made to the Indonesian laws relating to this issue. The Meaning of the word *national interest* can be found in Law No. 24 of 2000

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[9] See above the opinion of Paul Reuter.

[10] Damos Dumoli Agusman, *Hukum Perjanjian Internasional: Kajian Teori dan Praktik Indonesia*, Bandung: Refika, 2010, p. 65.

[11] Damos Dumoli Agusman, *Op.cit.*, p. 65. The ground for termination is Article 49 of the Vienna Convention which reads: "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

[12] Damos Dumoli Agusman, *Op.cit.*, p. 65.

on International Relations. Article 18 of this Law state the termination of a treaty may be made if, among others, the provisions of the treaty harm national interest.[13]

The elucidation of Article 18 of the Law points out that the meaning of national interest includes the public's interest, the protection of legal subjects of Indonesia, Indonesia's sovereignty and jurisdiction. As its meaning shows, the term 'the public's interest', 'the protection of legal subjects' and 'sovereign jurisdiction' is used broadly.

The broad interpretation of the term national interest, according to the present author, should not be used independently, freely or loosely as a reason for termination or cancellation of the agreement. Indeed, a policy to cancel international agreement is a norm in the Indonesian Laws. But the termination or cancellation of the agreement needs careful consideration.

The termination of the cancellation of an international agreement, including in the field of international trade, should be done with caution. The problem is, the cancellation of international trade agreements relating to trade affects the interests international (communities) in general, in particular the contracting States.

4. Closing Remarks

Article 85 of the Trade Law is a positive law in Indonesia. The provision, however, is not in harmony with the prevailing principles, or at least with the provisions on the termination in the Vienna Convention of 1969.

The practice of Indonesia on treaties demonstrated that the ground for cancellation (or termination) of the treaty due to the national interest, have never been made. This is so far a good sign. Despite that the provision on cancellation of termination is already on the table, it is not expected that the government of Indonesia would invoke this provision to terminate future treaties that it has signed.

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[13] As mentioned above, the Vienna Convention on the Law of Treaties does not incorporate the national interest as the ground for the termination of the treaty. (See also: Damos Dumoli Agusman, *Op.cit.*, p.67).