

Treaty Making – Indonesian Practice*

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Foreword

As a sovereign nation, Indonesia is a party to many international treaties. The treaty making process in Indonesia is based on Article 11 of the 1945 Constitution. This Article grants the authority to the President to conclude treaties subject to the approval of the House of Representatives or the *Dewan Perwakilan Rakyat* (“DPR”). For the treaty making process under Article 11, the implementing regulation as such and guidelines had been a Letter from the President to the DPR. This letter is better known as Presidential Letter No. 2826 of 1960 on the Conclusion of Treaties with Foreign States.

In 2000, a Law was passed and enacted to replace Presidential Letter 2826 of 1960. The Law is referred to as the Law on International Treaties (hereinafter referred to as “Law on Treaties”).

This paper will discuss the substance of the Law on Treaties. Additionally, the paper will discuss the result of the study on Indonesian practices in treaty making. This study was conducted based on a survey of Indonesia’s treaty making practices in the field of human rights treaties and treaties related on economic issues.

Law on Treaties: The Substance

The Law on Treaties defined a treaty as an agreement, in a certain form and under a certain title, governed by international law that is made in writing and creates certain rights and obligations within the scope of public law. The Law

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also provides the definition of ratification which means any legal action to bind a party to the treaty through ratification, accession, acceptance, and approval.

To become a party to a treaty, the Minister of Foreign Affairs (“MOFA”) will give political consideration and take all the necessary steps to conclude and ratify treaties. In matters that relate to the public interest, the Government needs to have approval from the DPR.

A treaty is considered to have significance to public interest and, thus, require approval from the DPR if the matters concern any of the following:

- a. politics, peace, defence, and state security;
- b. alterations to or delimitation of the territory of the Republic of Indonesia;
- c. sovereignty or sovereign rights of a state;
- d. human rights and the environment;
- e. the formation of a new legal norm (law making Treaty); and
- f. foreign loans and/or grants-aid.

The instrument of ratification for a treaty that requires approval from the DPR will be in the form of Law.

For any other treaty which does not have public interest bearing, if instrument of ratification is necessary, the ratification will be in the form of a Presidential Decree (now Presidential Regulation). Nevertheless, under the Law on Treaties, the Government has the obligation to submit a copy of the Presidential Decree to the DPR.

The Law of Treaties stipulates that Indonesia will be bound to the terms of a treaty through the mechanisms of (a) signing, (b) ratification, (c) exchange of documents constituting a treaty/diplomatic notes, and (d) any other means as agreed upon by the parties to treaty.

The Government has the power and authority to conclude treaties with a state or states, international organizations, or other subjects of international law. The conclusion of the treaty must be based on the mutual consent of the parties and be performed in good faith.

To conclude a treaty, the Government is to be guided by the national interest and particularly the principles of equality and mutual benefit. The Government has to also consider the prevailing national and international laws and regulations.

State and government institutions, whether departmental or non-departmental, at the central or regional levels, who has the intention to conclude treaties, shall initially consult and coordinate with the Minister of Foreign Affairs.

Prior to concluding a treaty the Government shall initially determine the position of Indonesia and set-out this position in the guidelines prepared for the delegation. The guideline require the approval of the MOFA and will contain at least the following: (a) background of the issue; (b) analysis of the issue as viewed from the political and legal aspect as well as any other aspects that may be deemed to affect the national interest of Indonesia; and (c) the position taken by Indonesia, recommendations, and any adjustments or modifications that may be made for the purpose of reaching an agreement.

Negotiations on any draft of a treaty must be undertaken by a delegation led by a Minister or some other equivalent or appointed state official. The Minister or equivalent state official will be determined based on the subject matter of the draft treaty and the scope of their respective authorities.

A person or persons representing the Republic of Indonesia, with an intention to accept or sign the text of a treaty or consent to be bound by a treaty, shall be required to have full powers. State officials that do not require full powers are the President and the Minister of Foreign Affairs. In this regard full powers are defined as the authority to represent the President or the Minister of Foreign Affairs as the signatory to the treaty document.

The Law on Treaties provides that reservations or declarations can be made to the provisions of a treaty, unless otherwise stipulated under the treaty. The reservation exercised and declaration made at the signing of a treaty shall be expressly restated at the time of ratification of any such treaty. Any reservations and declarations made may be withdrawn at any time by way of a written statement or in any such manner as determined in the relevant treaty.

In ratifying a treaty, the initiating institution, which may either be a state or government institution, whether departmental or non-departmental, is to provide copies of the text of the treaty, the translation thereof, and a draft bill of the Law or a draft of the Presidential Decree concerning the ratification of the relevant treaty together with any other necessary documents. Furthermore, the initiating institution is to coordinate the deliberation process of all the materials being considered in consultation with all the relevant parties.

At the conclusion of the deliberation process the final draft of the Law or Presidential Decree that will ratify the treaty is to be submitted to the President through the office of the relevant Minister.

The MOFA signs the instrument of ratification to bind Indonesia to a treaty to be exchanged with another country or to be kept by a depositary state or institution at an international organization. Every Law or Presidential Decree concerning the ratification of a treaty shall be published in the State Gazette.

Study on Indonesian Practice in Treaty Making

The treaties in the field of human rights that have been surveyed, among others, are the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Political Rights of Women; and, the International Convention against Apartheid in Sports. Indonesia is also a party to various ILO sponsored conventions, such as the ILO Convention concerning Minimum Age for Admission to Employment and the ILO Convention concerning Discrimination in Respect of Employment and Occupation.

In the field of economic issues, Indonesia is a party to the Agreement establishing the World Trade Organization, apart from GATT. Indonesia has also concluded many loan agreements with countries and international financial institutions, such as the World Bank and International Monetary Fund.

Looking at various treaties concluded by Indonesia in the field of human rights and economic related issues, there are several findings worth noting.

No rejection from the DPR

First and foremost, it has to be noted that there are no treaties in the field of human rights or economic related issues that were submitted by the Government to the DPR have been rejected by the DPR. All treaties requiring ratification from the DPR have been approved.

Unresolved Issues

The Law on Treaties, the Law on the State Budget, and the Law on State Finance

In the field of loan agreements, there are a number of unresolved issues. The first issue is whether the Government has to have the approval of the DPR to enter into a loan agreement with other Government or financial institutions. The past view of the Government is that such approval is unnecessary since the DPR has already agreed in the proposed Law on the State Budget. In the Law on the State Budget there is a portion of the budget that comprises loans. The DPR, according the government's view, by approving the Law on the State Budget is considered to give approval of the foreign loan which the government enters with other state or international financial institutions.

In contrast, the DPR is of the opinion that approval on each loan agreement is necessary since the DPR needs to know the terms and conditions of a loan agreement and the implications for Indonesia and the obligations that the loan agreement gives rise to. The DPR position is based on the premise that the terms and conditions of the loan agreement will bind the Indonesian people and as such it is only natural for the DPR to have a say as the representatives of the people.

The DPR's concerns have been accommodated in the Law on Treaties as it is stipulated that any agreement on foreign loans has to be ratified by the DPR. This has been further reinforced in the State Finance Law (*Undang-undang Keuangan Negara*) where a similar requirement is stipulated.¹ The State Treasury Law (*Undang-undang Perbendaharaan Negara*), however, is silent on this issue.

In practice, approval from the DPR has not been sought without any objection from the DPR, even though the Law on Treaties require such approval.

The State Treasury Law

The second issue in the field of loan agreements is the debate as to who has the authority to conclude loan agreements. Traditionally, it has been the Minister of Finance. However, the Law on Treaties explicitly stipulates that all treaties are to be signed by the MOFA. The State Treasury Law provides that the Minister of Finance has the authority to sign Loan Agreements on behalf of the Indonesian Government.² This has created tension between Ministry of Finance and Ministry of Foreign Affairs.

Public and Private Capacity

The third issue is where there are provisions in a loan agreement, which are private in nature and concern specific state officials. For example, the provision of a waiver of immunity or the fact that Indonesia can be subject to a legal claim in a court of a foreign jurisdiction. If, Indonesia signs a loan agreement it has to be acknowledged that it acted in its private capacity.

Post- Ratification Follow-Up

In Indonesia post-ratification follow-up has been consistently lacking. Once a treaty has been signed there is little follow-up to transform the rights and obligations contained in treaty into national laws. It is notable that on many of the treaties that Indonesia is a party to that there have been negligible efforts, possibly even resistance, to amend or introduce legislation that would codify into

¹ Article 23(1) the Law on State Finance

² Article 7(2) (j) and Article 38(1) the State Treasury Law

national legislation Indonesia's obligations as a party to a treaty. In short and on the whole, treaties ratified by Indonesia have failed to be codified into national legislation.

Ratifying as a Means to Acquiring Legitimacy

Many treaties, in particular multilateral treaties, are signed not for the right purpose. Sometimes a treaty is signed in order to have public legitimacy and clearly the purpose of becoming a party is not to implement any obligations that may arise as a result. The outcome of signing a treaty in the area of human rights, for example, is to highlight that Indonesia respects human rights or the rights of labour and other groups.

Historically, it should be acknowledged that the Government signed a treaty due to international pressure or pressure from domestic and international Non-Governmental Organizations. Conventions sponsored by the International Labor Organization, for example, have been ratified but Indonesia has still to codify any of these obligations into national laws that would allow for enforcement on a national level. It is fair to say that implementation of the rights or obligations that a treaty may give rise to is far from secure in the Indonesian context.

A Treaty as a Political Instrument to Intervene

Politicians and bureaucrats in Indonesia are sometimes not aware or fail to understand the implications that signature and subsequent ratification have with respect to national laws. After Indonesia became independent, the only way to intervene³ in Indonesian law was through treaties. For example, as a consequence of Indonesia's signature to the TRIPs agreement, Indonesia was required to amend its intellectual property rights laws. The Patent Law, the Copyright Law, and the Trademark Law were amended in 2000 and 2001. This was in spite of an earlier amendment made in 1997 as the 1997 amendment did not comply with the new obligations contained in the TRIPs agreement.

To reiterate an earlier point, this amendment is clearly not based on any public demand by the Indonesian community as a result of their increased understanding or respect for internationally accepted standards for intellectual property rights, rather it is a reflection of an obligation deriving from Indonesia's signature to the international trade treaties regime.

Inability to Implement

³ Intervene is used in this context to highlight that Indonesian laws may be required to be amended to ensure that they comply with international standards that may be contained in a treaty to which Indonesia is a party despite their being no domestic demand for an amendment to be made.

The Government and the DPR when ratifying a treaty have not taken into serious consideration whether or not the treaty can be implemented in the Indonesian legal system in the relevant form. It is important to note that many treaties are drafted or proposed by developed countries whose legal systems are best described as stable. A stable legal system in this sense is one where the written law is reflected in state and community practice and acceptance of the provisions of the treaty as codified in national law. These treaties have been drafted and made based on the context of developed countries, but are expected to be signed and ratified by developing countries, such as Indonesia.

It is hardly surprising that problems arise when developing countries do sign and ratify a treaty and then for the reasons noted above fail to follow-up with codification in national law. In many developing countries what is written in the law is not necessarily reflected in the society. There are various reasons for this, including that the legal infrastructure necessary to facilitate and support enforcement of the new laws and regulations is neither in place nor, where it is in place, functioning.

A further reason, although not uniquely Indonesian, is that policy makers tend to see Indonesia as only big cities. Traditionally, there has been a considerable failure to comprehend that Indonesia has vast rural areas that are also subject to these new laws and regulations but no mechanisms are either contemplated or put into place to support enforcement. This failure has often led to considerable disparity between the enforcement in cities and the enforcement in rural areas where a myriad of other considerations are relevant but yet to be considered.

Closing remarks

It is clear that the treaty making process in Indonesia needs to be improved. Government has to assess the consequences of becoming a party to treaty before concluding one. It must also be acknowledged that the DPR has a role to play in this area.

There are at least three roles which the DPR can conceivably play. First, is to become a sparring partner for the Government. Second, to verify and confirm the Government's intentions in concluding a treaty. Lastly, the DPR can voice public concern over certain treaties and the likely implications for Indonesia.