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Abstract

International Trade Treaty (hereinafter referred to as ITT) as regulated in Indonesia by Law No. 7 of 2014 on Trade[2] (hereinafter referred to as the Trade Law), especially Chapter XII, Article 84 paragraph (1), (2), and (3) letter (a), requires the approval of the Indonesian House of Representatives. However, ITT could not be ratified by legislation due to the substance of the ITT that does not meet the criteria set forth in Article 11 (2) of 1945 Constitution (hereinafter referred to as "Constitution") as well as Article 10 of Law No. 24 of 2000 on Treaties[3] (hereinafter referred to "Traety Law"). This paper will review the ITT with regard to State responsibility under international law and relevant national laws such as Article 4 (1) of the Constitution that specifies the power of government, the Trade Law, especially Chapters XII, and the Treaty Law. The President and the House of Representatives hold international responsibilities under international customary law and the 1969 Vienna Convention[4], Article 26 *acta sunt servanda*. This paper will specifically examine the separation of powers between the executive/the President and the legislative/House of Representatives with regard to the conclusion of international trade agreements that were considered not in accordance with and in contradiction to the national law of the Republic of Indonesia and international law. This paper applyies normative-empherical methodology to review the Trade Law.

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[2] Indonesia, *Undang-Undang Nomor 7 Tahun 2014 tentang Perdagangan* (The Trade Act), Lembar Negara Republik Indonesia Tahun 2014 Nomor 45, Tambahan Lembar Negara Republik Indonesia Nomor 5512.

[3] Indonesia, *Undang-Undang Nomor 24 Tahun 2000 tentang Perjanjian Internasional* (The International Treaty Act), Lembar Negara Republik Indonesia Tahun 2000 Nomor 185, Tambahan Lembar Negara Republik Indonesia Tahun 2000 Nomor 4012.

[4] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

Keywords: International trade cooperation, international trade agreements, international trade, treaty ratification.

1. Introduction

Association of Southeast Asian Nations (ASEAN) Free Trade has driven all its member states to reorganize management of export-import as well as to empower national economy and transform national regulations to complete the ASEAN Economic Community (AEC) blueprint. As one of ASEAN members Indonesia has to comply to the blueprint. Indonesia, therefore, promulgated Law on Trade in 2014, simplified export-import mechanisms and reduced taxes. Furthermore, one of national agenda of Indonesia is to grow national economy by expanding international trade.

To realize the national agenda, Indonesian President Joko Widodo has proactively engaged in trading negotiation with many Asian countries. The agenda could be realised if there is a clear, unequivocal, and definitive legal protection for international trade. Unfortunately, the agenda has not been implemented yet due to the serious problem regarding ratification process of International Trade Treaty (ITT). Many ITTs have not been ratified, due to equivocal ratification process with regard to Chapter XII of the Trade Law, such as 1) Agreement on Dispute Settlement Mechanism Under the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and the Republic of India, 2) Protocol to Amend the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India, 3) Agreement on Dispute Settlement Mechanism under the Framework Agreement between the ASEAN and the People's Republic of China, 4) Preferential Trade Agreement between Indonesia and Iran, 5) Protocol on the Preferential Tariff Scheme (PRETAS) for Trade Preferential System Among the Member States of the Organization of the Islamic Conference (TPS-OIC), 6) Trade Preferential System Among the Member States of the Organization of the Islamic Conference (TPS-OIC) Rules of Origin (RoO)[5]. These agreements have been concluded before the enactment of the Trade Law on 11 March 2014. However, one year after the promulgation of Trade, the agreements had not been ratified. Before the promulgation of the Trade Law, it took three months for the government to proceed ITT ratification after its conclusion. There are problems of ambiguity that the

[5] Government Performance Accountability Report, the Directorate General of International Trade Cooperation of Ministry of Trade Republic of Indonesia, 2014, p. 19.

Directorate of International Trade Cooperation of Ministry of Trade has to cope with regarding how to proceed ITT ratification.

The trade treaty ratification protocol is incompatible with Article 11 (2) of the Constitution and international treaty law is in contradiction with the Trade Law, Article 84 of paragraph (1), (2) and (3) letter (a). Trade Law is equivocal on ITT ratification process. This leads the executive to confusion and creates problems in international relations.

This paper reviews the president's constitutional authority set forth in Article 11 (1) of the Constitution to conclude international agreements. The authority is subject to Article 11 (2) of the Constitution that stated that when creating international agreements that give rise to consequences that are broad and fundamental to the life of the people, create financial burdens for the State and/or require amendments to legislation or the enactment of new legislation, the President must obtain approval of the House of Representatives.

The next review is on International Treaties Law, which its Article 10 specifies the President's authority on international treaties concerning matters pertaining to politics, peace, defence, and state security; alterations to or delimitation of the territory of the Republic of Indonesia; sovereignty or sovereign rights of a state; the formation of a new legal norm; foreign loans and/or grants-aid.

Finally, the paper reviews whether the ITTs regulated by Trade Law Article 84 paragraph (1), (2) and (3) letter (a) are in keeping with Article 11 (2) of the Constitution. Whether the President must obtain approval of the House of Representative to conclude ITTs? How is approval procedure of the House of Representative in concluding international trade treaties in relation to the Trade Law Article 84 of paragraph (1), (2) and (3) letter (a) without breaching Article 26 of the 1969 Vienna Convention, *Pacta Sunt Servanda*?

2. The executive authority to conclude trade treaties within national law

Any ratification to international treaties shall comply with Article 11 (2) of the Constitution. It is clear that the President has limited authority to conclude international treaty. The limitation is divided into three categories: (1) agreements that give rise to consequences that are broad and fundamental to the life of the people; (2) agreements that create financial burdens for the State; and (3) agreements that require

amendments legislation or the enactment of new legislation. These are guidelines for the executive to conclude international treaties. The president has no authority to ratify international treaty if the object and purposes a treaty breach the three criteria. As a matter of fact, the House of Representatives have a final say on the treatises ratification. Such a formulation is reaffirmed by Law No. 12 of 2011 on Formulation of Regulatory Legislation, elucidation of Article 10 (1) letter (c).

The Parliament shall deliver its opinion with regard to the criteria. However, it is not the capacity of the Parliament to dictate the executive in the conclusion of international treaties. Consequently, with regard to Article 11 (3) of the Constitution, the Parliament has passed Law on Treaties, which its Article 10 requires the President must obtain the approval of the Parliament if the objects and purposes of international treaty concerning matters pertaining to (1) politics, peace, defence, and state security; (2) alterations to or delimitation of the territory of the Republic of Indonesia; (3) sovereignty or sovereign rights of a state; (4) human rights and the environment; (5) the formation of a new legal norm; and (6) foreign loans and/or grants-aid. The Law on Treaties was adopted from government practices (Foreign Ministry) in ratifying international treaties and it has become customary law. The practice began following the enactment of the Presidential Letter of the Republic of Indonesia No. 2826/HK/1960 on 22 August 1960. Before the Law on Treaties has been promulgated, the Letter was a reference to ratify treaties. Any treaty gives rise to consequences that prone to change national politics or a treaty requires an amendment to or the enactment of a new law; it needs the approval of the Parliament.

With regard to Article 10 Law on Treaties it can be summarized that (1) to ratify ITT the President does not need the approval of the House of Representative if the objects and purposes of ITT do not pertain to points enumerated in the Article 10, the President can ratify that ITT by a presidential decree; (2) any treaty that pertains to the six points needs the approval of the parliament foot its ratification.

The object and purpose of ITT is export and import of goods and services that cross international borders. Therefore ITT's content is agreement pertains to economic activities carried out by countries. Countries engage in international trade that should be governed and bound by ITT. Because the economic purpose of ITT does not fall into the six points mentioned above the President does not need the approval of the Parliament and ITT could be ratified by a presidential decree.

International trade is one of government's activities to pursue and secure national interests through trade relations with other countries and/or institutions/international organizations. This definition explains that the government, in cooperation with other countries and international organizations in the field of trade, should prioritize national interest so that when ITT is implemented the government focuses (1) exclusively on national interests instead of the interests of others and (2) devotes thought to national advantage[6].

Then the author highlights the first criterion of Article 11 (2) the Constitution that 'give rise to consequences that are broad and fundamental to the life of the people'. So far there is no definitive reference whether a government's action or policy brings about broad and fundamental consequences to the life of the people. The discussion of the third amendment to the Constitution, the government's reference with regard to ITT, implies that if an international agreement will produce extensive and fundamental consequences to the life of the people, the ITT in question has to obtain the approval of the Parliament. It means that the government is free to interpret whether its actions or policies of will have extensive and fundamental consequence to the life of the people or not. However, in conducting its affairs the government has to comply with the governance principles such as legal certainty principle, Public administration principle, public interest principle, openness principle, proportionality principle, professionalism and accountability principles[7]. The author will assess whether an ITT that will produce extensive and fundamental consequences to the life of the people not by the principles of trade and the elements in the trade law.

The government handles ITT arrangement with the aim of fulfilling domestic needs and for the benefit of the people. There four major components of trade, both nationally and internationally, namely (1) the trade actor; (2) the interest of the actor; (3) the object of trade; and (4) the agreement of exchange value. By the international trade actor the author of the paper refers to a State represented by its government that makes an agreement with a government of another country or a government that makes agreements with international organizations. In daily practice, however, the

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[6] Sekreatriat Jenderal dan Kepaniteraan Mahkaman Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Buku IV Kekuasaan Pemerintahan Negara Jilid 1*, p. 487 – 488.

[7] Undang-Undang No. 28 Tahun 1999 Tentang Penyelenggara Negara Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme, Lembar Negara Republik Indonesia Tahun 1999 Nomor 75, Tambahan Lembar Negara Republik Indonesia Nomor 3851, Art. 3.

actors of cross-border trades are private companies (society) that doing business with a state or foreign private companies. The society or private companies as trade actors are not classified as legal subjects of international trade discussed in this paper. State as the trade actor carries out country to country trade for the interest of the people and on behalf of the people. The second component of trade is the interests of trade actors, if a State considers that the traded object is not the state's needs, it is up to the concerned state not carry out international trade. No compulsion among the parties in transaction. To determine the actors' needs, the concerned State shall consider what its people needs. Determination of this second principle is interwoven with the third one regarding the object of the trade, when the people's needs cannot be met by the existing domestic resources the government has to afford them from other countries. Having determined the trading objects and the parties to provide them, then the concerned along with its trading partners determine the appropriate exchange rate for the trade in question. Such a value determination has calculated profits that the state and its trading partners will gain.

Freedom to trade is the most important element of international trade cooperation. This freedom can be observed when determining (1) who trade with whom, (2) object traded and (3) transaction value. Taking the principles and elements of trade into account, such a trade cannot be categorized as an act of government that will produce extensive and fundamental consequences to the life of the people.

The essence of international trade is a transaction of goods or services between countries by an 'obligation'[8]. The elements of obligation are formed when merchant (owner of goods) promises to transfer the ownership of the goods or services after the buyer (prospective buyer of goods) agrees to give reward or compensation[9] with agreed nominal value. Legal subjects of international trade are State and/or international organizations.

The obligation element also resided in ITT in which legal subjects of international trade law has approved and agree to yield goods for certain compensation. In trade transaction dealing, legal subjects have complete freedom to agree or disagree on conditions offered.

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[8] Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia 1*, 1987, Djambatan, p. 5.
[9] See UU No. 7/2014, *supra.*, Art 1 angka 1 "Perdagangan adalah tatanan kegiatan yang terkait dengan transaksi barang dan/atau jasa di dalam negeri dan melampaui batas wilayah negara dengan tujuan pengalihan hak atas barang dan/atau jasa untuk memperoleh imbalan atau kompensasi."

The objective of the government's decision to enter into ITT is to protect and secure national interest while taking national benefit into consideration. The Government will consider the market's interests[10] and improve market access[11] to ITT activities. National interest criterion as a reference for the government in establishing international trade cooperation is 'any trade policy should give the benefit for the interests of the nation, state and society over the interests of others'.

The State's engagement in ITT is inseparable from commercial law. Commercial law is a law that governs the behaviour of the actors who participate in trading for profit[12]. It is a principle that in any trading there is profit for its actors. This principle always serves as reference for the government's engagement in ITT. The government will, therefore, consider the advantage for the state in any international trade transactions with other countries. It is expected that with the entering into ITT the government could increase the state revenue, that ITT will not produce adverse effect on the state finance or financial burden for the state. Most importantly, international trade cooperation or ITT where the government enter into does not fall into the qualification of Article 11 (2) the Constitution second point as 'create financial burdens for the State'.

There are two areas of law that govern ITT legal action, namely private and public law areas. On the one hand, ITT belongs to the realm of public law because legal subject of ITT is a country or international organization. On the other hand, ITT also belongs to the realm of private law because it governs the freedom of contract and ITT as a source of law for ITT legal subject.

International trade cooperation that the government enters into and has been embodied in ITT was specified in several legislations such as regulations on international treaties, customs, healthy competition, consumer protection, protection of intellectual property rights, licensing of exports and imports of goods and taxation. ITT is a source of law for the parties; the State in this case. The state, thus, is subject to the provisions set forth in the concerned trade agreement. That is why, entering into international trade agreements, there is no need for the government to change or formulate a new statute for implementing ITT. Hence ITT cannot be categorized as IT

[10] See UU No. 7/2014, *supra*, Art. 1 angka 12, yang dimaksud dengan "(P)asar adalah lembaga ekonomi tempat bertemunya pembeli dan penjual, baik secara langsung maupun tidak langsung untuk melakukan transaksi perdagangan".
[11] See UU No. 7/2014, *Supra*, Art. 82 (1).
[12] Kansil, *Pokok-Pokok Hukum Dagang Indonesia,* 1985, Jakarta: Sinar Grafika, p. 7.

that requires the approval of the Parliament. ITT does not need to be submitted to the Parliament, a presidential regulation will be sufficient instead of legislation stipulated in Article 84 (3) letter (a) of Trade Law.

3. The President authority as the executive

The author will analyse whether the ITT falls into the president's authority as the executive so that the president does not require the approval of the Parliament in entering into ITT? To answer this question, the author proceeds by explaining the definition of international trade law, theory of state policy, state administrative law and the president's duties as a head of state. This section will be closed with the conclusion that ITT falls into the president's authority, but in exercising the authority the president ought to refer to the purpose of Indonesian independence declaration as stated in the fourth paragraph of the Preamble of the Constitution.

Schmitthoff[13] defines international trade law as '*...the body of rules governing commercial relationship of a private law nature involving different countries*'. According to Huala Adolf[14] this definition consists of two elements: (1) the body of rules governing commercial relationship of a private law nature involving different nations; (2) that legal rules regulate the transactions of different jurisdiction (country). International trade law, according to Sanson[15], '*can be defined as the regulation of the conduct of parties involved in the exchange of goods, services and technology between nations*'. According to Sanson international trade law is a public international law if a country-to-country trade is conducted by the States represented by their government. It is worth to note, however, that international trade law is also a private international trade law because its legal subjects also include companies with legal domicile in the territory of different countries. What this paper means by ITT is international trade that subjects to international public law provisions because it refers to Trade Statute according to which its legal subjects are States and international organizations.

[13] United Nations, 'Progressive Development of the Law of International Trade: Report of the Secretary General of the United Nations 1966', 1966, New York: United Nations, para. 10.
[14] Adolf, *Hukum Perdagangan Internasional*, 2005, Jakarta: PT. Raja Grafindo Persada, p. 4.
[15] Sanson, *Essential International Trade Law,* 2002, Sydney: Cavendish, p. 3.

In terms of state policy, according to James E. Anderson[16] '*Public policies are those policies developed by governmental bodies and officials*'. There are five elements of state policy, namely: (1) state policy has a specific purpose or constitutes a goal-oriented action; (2) policy that contains actions or patterns of actions of government officials; (3) policy as such is what is actually carried out by the government, (4) state policy has two characteristics: one is positive characteristic that is manifested in some government's actions on a particular issue, the other is negative characteristic that manifests in the decision of the government's officials not to do something; (5) the government's policy is always based on legislation and coercive (authoritative) in nature.

The characteristics of state policy that fall into the executive domain are (1) the state policy to determine government actions; (2) the state policy is not just to be declared rather be implemented in actuality; (3) the state policy to do or not do something has certain intent and purpose and has been based on them; (4) the state policy is always directed to the interests of all the society members [17].

Here, public policy is 'a series of actions that are defined and implemented or not implemented by the government which has the purpose or goal-oriented in the interest of the whole society'. It is the duty of the president as the executive to make the state policy in the name of public interest that is truly aimed to address problems and meet the desires and demands of all the society members[18].

Therefore ITT is a state policy conducted by the president because it falls into the executive domain. ITT falls into the executive domain because it is the government's policy that is made and implemented by the government with the goals set for the interests of the state and all the society members.

In the concept of administrative law there are two government actions, one is legal action (*rechts handeling*); the second is non-legal action (*feitelijke handeling*)[19]. Regarding the actions of state officials, Syachran[20] has categorized them as regular action and legal action. Legal action consists of public and private legal actions. Deed

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[16] Anderson, *Public Policy Making*, 1979, New York: Holt, Rinehart and Winston, 2nd, p. 3.
[17] Islamy, *Prinsip-Prinsip Perumusan Kebijaksanaan Negara*, 1988, Jakarta: P.T. Bina Aksara, 3rd, p. 20-21.
[18] *Ibid.*
[19] Saputra, *Hukum Administrasi Negara*, 1988, Rajawali Press, Jakarta, p. 43; See also, Purbopranoto, *Beberapa catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara*, 1981, p. 44.
[20] Basah, *Perlindungan Hukum Terhadap Sikap Tindak Administrasi Negara*, 1992, Alumni, Bandung, p. 6.

or legal action is an action that results in legal effect both privately and publicly. While the definition of ordinary legal action is an action that does not bring about legal consequences such as upgrading activities for bureaucratic personnel, working visits, etc. Similarly, Utrecht[21] said that the government action consists of action according to civil law and that of according to public law. Public legal action is related to the implementation of public interest, such as licensing, taxation, and levies. Civil legal actions is a legal action related to private parties that are contractual and are bound by the rules of civil law such as procurement contract agreements and international trade agreements. Donner theory divides government deed into two types (1) The deed of formulating legislation and regulations *taakstelling* or political task is the work of the government's political elite; and (2) the deed implementing the legislation and regulations referred to as *verwezenlijking* or technical task is the job of government officials[22].

According to the meaning of Article 4 (1) the Constitution, the president as head of state has power in government both in formal and material terms[23]. This power gives special authority for the president to govern, conduct, regulate (*verordnungsgewalt*) and decide (*entschidungsgewalt*). Bearing this in mind, it can be said that the president has executive, legislative and judicial role. The legislative function owned by the president based on (i) Article 5 (2) of the Constitution specified that the President may issue government regulations as required to implement laws, (ii) Article 22 (1) of the Constitution stipulated that the President shall have right to establish government regulation in lieu of laws, (iii) Law No. 12 of 2011 on the Establishment of Laws and Legislations[24] Article 13 stipulated that the President may assign presidential regulation (the power of regulation and formation). Government functions of the President in the field of judicial owned based on (i) Article 14 (1) of the 1945 Constitution '(T)he President may grant clemency and restoration of rights and shall in so doing have regard to the opinion of the Supreme Court'; (ii) Article 14 (2) of the 1945 Constitution '(T)he President may grant

[21] Utrecht, *Pengantar Hukum Administrasi Negara Indonesia*, 1960, *FH Unpad*, Bandung, p. 53-65.
[22] Irfan, *supra* p. 20.
[23] Attamimi, 'Peranan Keputusa Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara', 1990, *Disertasi, PPS UI*, p. 181.
[24] Undang-Undang No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembar Negara Republik Indonesia Tahun 2011 Nomor 82, Tambahan Lembar Negara Republik Indonesia 5234.

amnesty and dropping and shall in so doing have regard to the opinion of the House of Representative'[25].

The 1945 Constitution have included two goals of Indonesian independence declaration set forth in the fourth paragraph of the Preamble of the Constitution which shall

> protect all the people of Indonesian and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice.

The purpose of independence declaration was divided into two objectives, namely (a) the national development, and (b) the involvement of Indonesian nation with other nations and joining of Indonesia in international relations. The first goal of national development, every action and policy of the president in implementing the functions as head of the State Government of Indonesia should aim to (1) protect all Indonesia citizens; (2) maintain the Indonesia sovereignty; (3) to realize the welfare of the entire nation; and (4) educate the Indonesian people. The second objective of cooperation Indonesian nation with other nations and joining of Indonesia in international relations is (1) The Indonesian people are involved in a world order based on freedom; (2) creating peace in the world; and (3) social justice.

The President must always hold the principle of national and international goals contained in the fourth paragraph of the Preamble of 1945 Constitution. In carrying out duties, functions and authority the President must hold the principle of social justice. Therefore, in any cooperation with other nations the president must hold on to social justice principle.

From the above description, the author draws three conclusions; first, ITT falls into the President duty with regard to public policy aspect that should be taken by the President on behalf of public interests. The second conclusion, reviewed from the four characteristics of state policy according to Irfan, which included in the executive domain, ITT is the domain of the president so that in the ratification process of the presidential ITT does not require the approval of the House of Representatives. The third conclusion is reviewed from five elements of policy according to Anderson, that (1) ITT is conducted with the goal of national interest and national advantage, (2) ITT

[25] Firdaus, *Pertanggungjawaban Presiden Dalam Negara Hukum Demokrasi*, 2007, Bandung: Yrama Widya, p. 153-154.

contains government policy in implementing the trade between nations, (3) the act of trade between nations as stated in ITT will be implemented by the government, (4) ITT is a policy that is positive because the government hold the ITT is based on the needs of the community, (5) after the government hold ITT, the president will endorse in the form of a presidential decree[26]. The fourth conclusion is drawn from legal aspects of state administration according to Utrecht, the actions of international trade cooperation as stated in the ITT is the domain of the president in the form of legal action. This legal action falls into the realm of private law because an ITT is a contract in essence. According to Donner, as the executive the President acts *verwezenlijking* as the executor of laws and regulations.

With regard to the above four conclusions, the author concludes by answering the above question that the president in conducting ITT does not require approval of the House of Representative and it is only need presidential decree for the ratification form, not legislation. Why validation is not conducted through legislation? Because according to Law No. 12 of 2011 Article 10 the substance of the legislation is (1) further settings Constitution (human rights, the rights and obligations of citizens, the executor and enforcement of the country's sovereignty and the division of state power, the division of the country and the region, citizenship and population as well as state financial), (2) act command, (3) the ratification of certain ITT, (4) the follow-up of the Constitutional Court decision, and (5) the fulfilment of the law in society. The Article 10 on the Establishment of ITT Legislations and Regulations does not include ITT that requires the approval of the House of Representative in endorsement.

From the description above, the author concludes that the approval of the House of Representatives in ITT is non-constitutional action because Article 83, Article 84 (1), (2), (3), (4), (5), (6), (7), Article 85 (1), (2) and (3) of the Trade Law are in contradiction with Article 11 (2) of the 1945 Constitution[27].

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[26] See UU No. 10/2004, *supra* Pasal 1 angka 6 "(P)eraturan Presiden adalah peraturan perundang-undangan yang dibuat oleh presiden", Pasal 7 (1) "Jenis dan hierarki peraturan perundang-undangan adalah sebagai berikut (a) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, (b) Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang, (c) Peraturan Pemerintah, (d) Peraturan Presiden, (d) Peraturan Daerah".

[27] Pratomo. 'Analisis Kritis Terhadap Pasal 11 UUD 1945 Dan Permasalahannya Terkait Dengan Perjanjian Internasional', 17 November 2014, *Seminar Nasional Mengenai Undang-Undang No. 24/2000 tentang Perjanjian Internasional, Fakultas Hukum UPH*, diselenggarakan oleh Kemlu RI dan UPH, Tangerang.

4. National and international responsibility in the implementation of international trade cooperation

4.1. State responsibilities under the 1969 Vienna Convention

Indonesia as a fully sovereign nation has international responsibility in conducting ITT with other nations. International responsibility in conducting of each IT, including ITT, with other countries arose based on the principle set forth in the 1969 Vienna Convention. The 1969 Vienna Convention is a codification of practices that occur in each of the countries ("customary international law") in holding IT[28]. International responsibility which is owned by Indonesia is to implement any ITT that have been signed with goodwill (good faith)[29]. How this responsibility can be implemented by Indonesia when viewed from the Trade Act Article 84 (6), Article 85 (1) and (2)?

Before answering those questions, the author will describe general provisions on the ITT as a part of IT that subject to international law. The discussion will begin with the ITT that is based on the principle of international treaties and international law. The 1969 Vienna Convention in its Article 2 (1) letter "a" stated that '*treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation*'. Schwarzenberger[30] defines international treaties formulated as '*agreements between subjects of international law creating binding obligations in international law. They may be bilateral (i.e. concluded between contracting parties) or multilateral (i.e. concluded more than contracting parties)*'. Definition of IT according to Kusumaatmadja[31] reads as follows 'international treaty is an agreement concluded between members of the community of nations that aim to result in certain legal consequences'.

Elements of international treaties set forth in the 1969 Vienna Convention are (1) an agreement that was agreed by the state with the state; (2) written agreement; (3) regulated or subject to international law; (4) is embodied in a single instrument or more; and (5) has a specific purpose.

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[28] Aust, *Handbook of International Law*, 2010, 2nd Cambridge, p. 50.
[29] See *Vienna Convention, supra, Art. 26 "(E)very treaty in force is binding upon the parties to it and must be performed by them in good faith"*.
[30] Schwarzenberger, *A Manual of International Law*, 1984, London, Steven & Sons, p. 26.
[31] Kusumaatmadja, *Pengantar Hukum Internasional*, 1996, Bandung: Binacipta, p. 38.

From the definition of IT under the Vienna Convention Article 2 (1) and the Law No. 24 of 2000 and the Law No. 7 of 2014, it can be said that ITT is IT because (a) ITT is IT approved by the subjects of international law (states and international organizations), (b) ITT made in written form, (c) subject to the sources of international law, namely conventions, customary international law, the principles of law generally recognized by any state, court decisions and opinions of reputable and respected experts from various countries[32]. Legal consequences that must be considered by the government in negotiating, ratifying and implementing the ITT are that those should be subjected to all legal obligations both national law and international law. Consequences aroused by ITT should not be contrary to the principles set out in the Vienna Convention although Indonesia has not ratified the Vienna Convention but several provisions in the Vienna Convention is a codification of customary international law and the general principles recognized by the world and Indonesia.

Indonesia will get the violation of international law, in particular Article 12 of the Vienna Convention that regulates the state approval of IT expressed by the signing of IT (consent to be bound by a treaty Expressed by signature). Trade Law Article 84 (1) and (6) is in contradiction with Article 12 of the Vienna Convention which considers that the signing of ITT has not expressed engagement of government to the ITT.

4.2. Pacta Sunt Servanda Principle

The whole nations including Indonesia acknowledge pacta sunt servanda is the basic principle in applying treaties law and generally acknowledged by all countries[33] and are the most important principle in international law[34]. Pacta sunt servanda was acknowledged as a norm customary and the pacta sunt servanda principle is applied as a whole (non-derogable) or referred to by the general principle recognized by states as well as the basic norm of international law or the called *jus cogens*[35]. Any country has

[32] Statute of the Interantional Court of Justice (1945), 15 UNCIO 355, Art. 38.
[33] Buergenthal & Murphy, *Public International La* 985, West, p. 119.
[34] Report of International Law Commission, 1966, reprinted in 61 American Journal International Law 24 1967, Para. 334.
[35] Wehberg, 'Pacta Sunt Servanda', 1959, 53 American Journal of International Law 775; see also Janis. 'The Nature of Jus Cogens (1988)', *3* Connecticut Journal of International Law 359, 361; see

the same understanding of pacta sunt servanda that any agreement should be implemented with goodwill. This is emphasized in Article 26 of the Vienna Convention so that the power to bind each country to comply basic norms of pacta sunt servanda is getting stronger. Therefore, every country should organize and implement the ITT with goodwill. The state is not allowed to cancel or not to implement the provisions set forth in ITT unilaterally for any reason without the consent of the parties involved in ITT.

In international trade law the following three basic principles are well-known: (1) the freedom of contract. Each ITT participant countries have the freedom to determine the things set forth in the ITT so long those things does not contrary to law, public interest, morality, courtesy and requirements set forth in the legal system; (2) The pacta sunt servanda; (3) arbitration use[36].

4.3. The national law and the compliance to international agreements

Pacta sunt servanda should be linked to the Vienna Convention Article 27 and Article 46[37]. In implementing ITT with goodwill must be implicit in every act of government, even though in the process of ITT implementation regarded that ITT material has been contrary to national law. It is strictly stated in Article 27 of the Vienna Convention that the parties in ITT should not use the excuse that ITT is in contradiction with national law so that the government cannot implement the ITT. Trading Act Article 85 (1) and (2) have been contrary to the Vienna Convention Article 27 and 46. The principle set out in the Vienna Convention Article 27 and 46 is a fundamental principle ("a fundamental principle of international law")[38].

4.4. State responsibilities under the 1986 Vienna Convention[39]

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also Boas, *Public International Law, Contemporary Principles and Perspectives*, 2012, Edward Elgar Publishing Limited, p. 58.

[36] Goldstajn, 'The New Law of Merchant', L: 1961, p. 12.

[37] See Vienna Convention, *supra* Art. 27 "*(A) party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46*". *Art. 46 (1) "(A) state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance". Art. 46 (2) "(A) violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in food faith".*

[38] Ergenthal *supra*.

[39] 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, ILM 543.

The 1986 Vienna Convention regulates the IT made by the state and international organizations, but the principles and provisions set forth in the Convention are same with the principles and provisions of the 1969 Vienna Convention [40]. The International Court decision in 1949 [41] acknowledged that international organization as a subject of law in international law, therefore international organizations have rights and obligations and that any action should be accountable to the laws. Many countries have established international agreements with the international organizations, for example headquarters agreements, environmental agreements and trade agreements (trade and commodities)[42].

4.5. State responsibilities under Law No. 24 of 2000 on International Agreements

International Agreements Law are agreements in a particular form and name regulated in international law that is in writing and causing rights and obligations in the field of public law[43]. The legal subject of the agreement is the state and/or international organizations[44]. The principle that must be held by the government in holding each ITT is (1) an agreement between the parties; (2) the parties implement their obligations with the goodwill[45]; (3) the national interest; (4) equality; (5) mutual benefit; and (6) it is not contrary with the national and international law[46]. According to the International Agreements Law the government has a legal responsibility to hold ITT in so that (a) the government can implement the obligations of ITT with the goodwill for the national interest, (b) the things set out in the ITT should not be contrary to the law, both nationally and internationally, (c) ITT ratification process must be in accordance with customary law, national and international law, (d) ITT was implemented for mutual benefit, especially for the Indonesian nation. Legal subject of ITT mentioned in this Law is the Government of the Republic of Indonesia, represents the subject of law in international law is the country and international organizations. Companies, both domestic companies and multinational companies are

[40] See Aust, *supra* p. 56.
[41] Reparations, Advisory Opinion, ICJ Reports (1949), para. 174.
[42] Aus, *supra*
[43] See UU No. 24/2000, *supra* Pasal 1 angka 1.
[44] *Ibid.* Pasal 4 (1).
[45] *Ibid.*
[46] *Ibid.* Pasal 4 (2).

not the subject to law should be subject to the provisions of the Trade Law and the International Agreements Law. Cross-country trade agreements between countries with the companies, both foreign companies and multinational companies are not subject to the provisions set forth in Trade Law. Trade Law quietly has adopted some of the principles in the 1969 Vienna Convention, which regulates the IT held between countries to country. Whereas the 1968 Vienna Convention sets the IT hold between the state and international organizations or between international organizations.

The House of Representatives assesses that ITT could potentially harm the national interests thus the House of Representatives rejected to approve the ITT. The House of Representatives' Assessment is given after the ITT was signed by the government set in the Trade Law Article 84 (6), Article 85 (1) and (2) were considered contrary to the principles of goodwill regulated in International Agreements Act Article 4 (1) and the principle of pacta sunt servanda (Article 27 of the Vienna Convention). The general principle in IT is also adopted by Indonesia in implementing the ITT that the government cannot withdraw or saying that ITT cannot be implemented in the country without the consent of other participant countries. Although the reasons that have been stated about ITT material contrary to the law in Indonesia or in the judgment of the House of Representatives, ITT material contrary to the national interest. If this is done by the government and House of Representatives, the government has violated the fundamental principle of international law set out in the 1969 Vienna Convention, Articles 27 and 46. These two articles are the principles set out in customary international law. If this inconsistency practice remains to be implemented by the Indonesian government to ratify and implement the ITT, it is worried that Indonesia will be sued based on the principle of pacta sunt servanda, the fundamental principle of international law and jus cogens as well as other provisions set forth in ITT. The argumentation states above is in conformity of the UN's documents that highlightes the Article 12 on the Responsibility of States for Internationally Wrongful Acts, 'There is a breach of an international obligation by a State when an act of that State not in conformity with what is required of it by that obligation, regardless of its origin or character.' "The breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State - i.e between the reguirement of international law and the facts of the matter.

… ICJ expresses as 'incopatibility with the obligations'[47] of a State, acts 'contrary to' or 'inconsistent with'[48] a given rule, and 'failure to comply with its treaty obligations'[49]."[50]

5. The planning process of proposal, negotiation and ratification of international trading agreements in accordance with national and international law

If the government, both central and local, plans to hold a trade agreement with other countries or with international organizations, the government will hold a proposal to the Ministry of Foreign Affairs Republic of Indonesia (Kemenlu) and the Ministry of Trade (Kemerindag). ITT draft is discussed with the ministry by involving the ITT originator institution. After the discussion of the ITT draft finished, Kemerindag ask for a written opinion from the Supreme Court (MA), the Constitutional Court (MK) and the House of Representatives. The written opinion of the Supreme Court is required by Kemerindag to assess the ITT substance whether ITT substance is contrary to government regulations, presidential regulations, local laws or other regulations. Whereas written opinion from the Constitutional Court is required to review whether the ITT material (1) is contrary to the Constitution, (2) contrary to the other laws, or (3) the ITT material is a material that is included in the category of Article 11 (2) of the Constitution so that requires the approval from House of Representatives and ratification should be through legislation? The written opinion from the House of Representatives needed so that the House of Representatives aware that the government will hold ITT, with whom and what kind of trading will be done by the government.

After getting the written opinion from the MA, MK, DPR that these three agreed that the government hold ITT, the government will do negotiations with other countries or international organizations. From the results of these negotiations the

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[47] *Case Concerning United States Diplomatic and Counsular Staff in Tehran (The United States v. Ir…* Advisory Opinions and Orders, Judgment of 24 May 1980, [1980], p. 29, para. 56.

[48] *Military and Para military Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 500, p. 64, para. 115, and p. 98, para. 186, respectively.

[49] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),* Advisory Opinions and Orders, Judgment of 25 September 1997, [1997], p. 46, para. 57.

[50] United Nations Legislative Series, 'Materials on The Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, http://legal.un.org/legislativeseries/documents/Book25/Book25_part1_ch3.pdf, p. 98.

government assess the ITT will bring benefits to Indonesia, the government will ratify the ITT in the form of presidential decree. The final results of the presidential decree reported to the MA, MK, and DPR.

Through this process it is expected that the government stays consistent in holding ITT negotiations and validation. The consistency of the Indonesian government foreign policy will not violate the principle of goodwill (*pacta sunt servanda*) and the fundamental principle of international law.

6. Conclusion

Any government's policy in international trade requires a consistent attitude and does not violate the provisions set forth in national and international law. The government has to maintain good relations with other countries while upholding the principles of (a) good governance, (b) social justice, (c) prosperity, (d) the welfare for the people of Indonesia, (e) economic democracy with the principle of togetherness, (f) equitable justice, (g) sustainability, (h) environmental orientation, (i) independence and (j) maintaining balance between progress and (k) unity of national economy.

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