

Procedural Problems in Indonesia's Treaty Ratification Process: A Comparative Analysis

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Abstract

The study aims to find and explore the solution to procedural issues of treaty ratification process by looking at how other states organize on ratifying treaties and finding out which state's practice would suit Indonesia the most. The study is normative legal research. The legal research is carried out by examining secondary data through library research and employed statutory approach and conceptual approach. The data are analyzed by observing the laws and practices of treaty-ratification of particular states. The study shows that there are several procedural problems in Indonesia's rules on ratifying treaties. These problems stem from gaps in the existing laws as well as conflict between the general law on ratification and the more specific law that regulates ratification of trade treaties. The problems involve timing and inconsistency within the practice of treaty-ratification and its product. The issue of timing concerns the time that it takes to ratify a treaty, while the issue of practice highlights the inconsistency within the treaty-ratification practice because of a lack of procedures. In addition, the issue of product concerns an inconsistency within the result of ratifying a treaty.

Keywords: ratification procedures; treaties; treaty-making Process

1. Introduction

Indonesia has several procedural laws that dictate how international agreements are ratified (Syarip, 2020). The first example of this can be found in the 1945 Constitution (Kameo & Prasetyo, 2021), in Article 11, which establishes that the President must first obtain the approval of the House of Representatives of the Republic of Indonesia (DPR) in concluding international agreements that produce an extensive and fundamental impact on the lives of the people (Budi, 2022). A second example can be found in Act no. 24 of 2000 on International Agreements. Article 9(2) explains that the approval international agreements can be done through an act or a presidential decree (Matheson, 2017). Subsequently, Article 10 provides a list of treaty subject matters that can be approved through an act. After that, Article 11(1) states that any subject beyond what is listed in Article 10 shall be approved through a presidential decree. Article 11(2) then states that a copy of a presidential decree that ratifies an international agreement must be submitted by the government to the DPR to be evaluated.

A third example of procedural laws that regulate the ratification of treaties can be found in Act no. 7 of 2014 on Trade and Presidential Decree no. 71 of 2020 on the Procedure of the Approval of Agreements on International Trade (Amalia & Pratama, 2021). These two regulations only apply to international agreements concerning trade. Concerning the former,

articles that regulate the ratification process of international agreements can be found in Chapter XII, from Article 82 to Article 87. These regulations are unfortunately not enough to create a solid system of treaty ratification in Indonesia. The International Agreements Act lacks a lot of procedures that could possibly create a smoother process of treaty creation and ratification, while the Act on Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade only regulates trade in specific and being much more extensive compared to the International Agreements Act. This creates several issues found in the practice of ratification.

The first issue is an issue of time. The Act on International Agreements does not set any deadlines for how much time a treaty must be evaluated by the DPR, or how much time the government has to submit a treaty to the DPR to be evaluated after it has been signed. This can result in delays, which results in treaties taking a very long time to be ratified (Von Stein, 2018). An example of this can be seen with some of the conventions that Indonesia has signed. The Convention on the Rights of Persons with Disabilities was signed by Indonesia in March 30th, 2007 (Watson et al, 2022). The Convention was eventually ratified on November 30th, 2011 with Act no. 19 of 2011, more than four years after the Convention was signed. Another example would be the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Ruhs & Martin, 2017). The Convention was signed on September 22nd, 2004, and was ratified on May 31st, 2012, with Act no. 6 of 2012, more than eight years after the treaty was signed. These treaties were all ratified and signed after Act no. 24 of 2000 on International Agreements was created.

The second issue lies within the Act on Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade, as well in specific and general procedures as a whole. The existence of the two regulations may result in an inconsistency within the practice of treaty making (Starblanket, 2019). To illustrate this, the Act on Trade sets deadlines for certain procedures in the process of ratifying an international agreement; an exception in the issue of time that was mentioned earlier. One of these deadlines is the 90-day deadline for the submission of an international trade agreement that has been signed to the DPR. The Act on International Agreements does not have such procedures. The practice, as a result, will become inconsistent, and treaties on trade will have a guaranteed or at least an estimable time frame, while the time frame of other treaties might not even be estimable (Hobbs, 2019).

Concerning specific and general procedures as a whole, an issue might arise when a procedural law or regulation is created that governs the procedure of a specific type of international agreement. If such a procedure were to be made without the existence of a general procedure, it could possibly result in more inconsistent practices. For example, a law or regulation concerning procedures on ratifying defence treaties might give a 30-day time limit for the submission of a defence treaty that has been signed to the DPR.

The third issue concerns the "legal product" of ratification. Some international agreements that have been ratified and are very similar in terms of subject matter will have a different legal product (Anggriawan, 2020). The two Comprehensive Economic Partnership Agreements that Indonesia has made between Chile and Australia since the creation of the Trade Act will be used as an example. Both agreements are recognized by the respective regulations that ratified them as a trade agreement. The CEPA with Chile was ratified with a Presidential Agreement, which is in line with article 11 of the Act on International Agreements

and its elucidation. The CEPA with Australia, however, was ratified with an act, contradicting article 11. It is unclear as to why this is the case.

This paper will attempt to find a solution to all of the aforementioned issues by looking at how other states go about ratifying treaties and finding out which state's practice would suit Indonesia the most.

2. Method

This type of research is normative legal research. In this context, this legal research is carried out by examining secondary data through library research. In this study, the author used several approaches the statutory approach by examining regulations related to international agreements, and the conceptual approach used by examining and understanding the concepts of the international legal regime and treaty making process. In doing so, the relevant books and journals will be analyzed to understand the treaty making process and the procedural problems surrounding it.

3. Discussion and Analysis

3.1. The Issue of Timing

The issue of timing can be resolved simply by imposing deadlines upon the DPR and the government. These deadlines should cover all types of treaties and should act as a sort of general guideline to ensure consistency within the practice (Roberts, 2018). When observing the Act on Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade, each step of the ratification procedure has its own varying deadlines (Huda et al, 2021). For example, the process of delivering the signed treaty from the body that initiated the creation of the treaty to the minister that governs international governmental affairs has a deadline of 40 days after the signing of the treaty . The process of delivering the signed treaty from the minister that governs international governmental affairs to the President has a deadline of 60 days .

The question is whether or not those deadlines should be used for deadlines of a more general procedure, instead of coming up with different deadlines. Using the deadlines that have already been set by the current law would result in consistency and certainty (Köke & Lange, 2017). However, it might be good to observe the laws and practices of other states and see if said laws and practices might provide some benefit to our current system.

An ideal state would have to be one that has a similar system of law to Indonesia (so a civil law system); follows Indonesia's practice of implementing international law into domestic law (i.e. does the state practice monism, dualism, or a mix of both?); and has procedural laws on the ratification of international agreements, but ultimately, what matters most is the latter point. At a glance, the Netherlands might be a good candidate. It adopts a civil law system and has a law for the approval of treaties in the form of the Kingdom Act on the Approval and Publication of Treaties . The issue is that Indonesia is a formally monist and practically dualist state , while the Netherlands is a monist state that is "open to external influences" . In addition to that, the Kingdom Act on the Approval and Publication of Treaties does not set deadlines on any procedures that are similar to Indonesia's (Bertolini & Romeo, 2017).

Let us take a look at Switzerland as another example. Switzerland is a civil law country (Lienhard, 2020). It does not have a specific law that regulates treaty-making practice; in lieu of that it has some articles in its Constitution that regulate treaty-making practice (Haas & MacCabe, 2020). When looking further at the laws and practices of other states, it seems that most states do not impose deadlines on their treaty ratification procedures (Achmad et al, 2021). These states have procedures for ratifying treaties but they do not impose deadlines on the procedures (Bayefsky, 2021). Practice suggests that because of this, other states face a problem similar to Indonesia's, in that the time of ratification is inconsistent, even among treaties that are within the same categories. For example, when it comes to the Netherlands and their ratification of treaties, their timing of ratifying human rights treaties is quite inconsistent. The Convention for the Protection of All Persons from Enforced Disappearance was signed by the Netherlands on the 29th of April, 2008 and ratified on the 23rd of March, 2011 (Łasak, 2019). The Convention on the Rights of Persons with Disabilities was signed on the 30th of March, 2007 and ratified on the 14th of June 2016 (Arstein-Kerslake, 2017). Switzerland's practice is slightly more consistent but there are still some minor inconsistencies: the Convention on the Elimination of All Forms of Discrimination against Women was signed on the 23rd of January, 1987 and ratified on the 27th of March, 1997 .

Concerning treaties on trade, while the Act on Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade provides deadlines on certain procedures, it might be the case that certain procedures do not have to have deadlines that can span up to 90 days. Shorter deadlines could speed up the process, but the process would not be as thorough.

3.2. The Issue of General v. Specific Procedures

It would make sense for Indonesia to put a lot of focus into creating a procedural law for the ratification of trade agreements, seeing that agreements such as free trade agreements are quite important for the economy and have a very direct impact on the people, with said impact coming in the form of tariffs or the exception thereof. Nonetheless, it is still strange that the DPR would create ratification procedures on trade agreements before even creating procedures on treaty ratification that apply to all types of treaties. It is even stranger if we consider the existence of the Presidential Decree on the Procedure of the Approval of Agreements on International Trade.

This issue does not seem to be a common issue among some states because they do not have procedures that are as extensive as Indonesia's Act on Trade or the Presidential Decree on the Procedure of the Approval of Agreements on International Trade. Switzerland for example only has regulations on treaty-making contained within the Constitution; the same applies to the Philippines.

3.3. The Issue of Legal Product

As said before, in Indonesia, when ratifying a treaty, the legal product comes in either the form of an act or a presidential decree. The Act on International Agreements is actually quite clear with this, so the issue might not be one of inconsistency in the law. There are some other possible reasons as to why the practice may be inconsistent, such as perhaps political reasons, or a lack of enforcement. It remains unclear.

Perhaps one way to resolve this issue is by restricting the role of ratification to only one body of government, but it can be possible that a singular body may create more than one legal product. The enforcement of the law, in that case, has to be strict, and the practice has to be consistent. Something that must also be considered is when different treaties have to be ratified through different legal products, such as in Indonesia's law. France, for example, has this kind of system, where article 53 of its Constitution states that

"Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament."

The practice in some states is that the executive is the one who has the power to introduce a legislation that approves a treaty. In Germany, for example, practice follows that the executive is the sole body that is allowed to introduce bills that approve of treaties. The legislature on the other hand is only formal even though the Basic Law allows for the Bundestag (Germany's legislature) to introduce laws. In the implementation of treaties, the executive plays a much larger role than the parliament. Switzerland is also a bit similar in this regard as well in that the executive shall be the one to sign treaties and ratify them. If the executive plays a bigger role than the parliament in the issuance of a law that ratifies a treaty, it would ensure consistency in the legal product, but that comes at the cost of the parliament's role being diminished in the treaty making process. However, keeping the separation of powers in mind, it would seem fair that the role of the parliament in the treaty making process is delegated merely to the approval of a treaty.

Some other states only allow the parliament to ratify treaties. India for example gives its parliament the power to give effect to international agreements. Malaysia is also the same. More parliament involvement in general could be beneficial for the state, but the extent of it has to be limited, because we need to keep the functions of the legislative and the executive in mind. Here, considering that the parliament's involvement merely extends up to ratifying a treaty, it would seem safe to think that parliament involvement is already quite enough.

Legislative involvement in a treaty is a fine line that needs to be treaded carefully (Gunawan, 2022). There would be a good reason as to why legislators would want to be involved in negotiations. Legislative involvement would mean that legislators have a better understanding in the matters concerned, get to have a say in the matter, and can provide knowledge that even experts in the field might not know about. Additionally, as the representative of the people, the people get to have a say in the matter as well, to a certain extent. Keeping the balance of power in mind however, interference in the functions of the executive should not happen. This is most likely why the legislative is mostly assigned a consultative function, which is a function that the DPR can perform according to art. 2 of the Act on International Agreements. As long as the legislative is not directly involved in the creation of the treaty and knows its functions as well as limitations,

Judicial involvement in treaty-making has mostly been about examining an international agreement's compatibility with the domestic law (Anggriawan et al, 2022). Germany's judiciary for example has the task of comparing a treaty with its Basic Law to see if the former is compatible with the latter. The Supreme Court of the Philippines also has the

function of examining the constitutional compatibility of an international agreement .
Judiciaries usually do not produce a law or regulation ratifying a treaty (Sicurelli, 2020).

4. Conclusion

Concerning the issue of timing, one way to solve this issue would be to amend the current Act on International Agreements and implementing the Act of Trade's procedures. This way, treaties have an estimable time of ratification and will not take more than several years to be ratified. The inconsistencies in practice between trade agreements and other agreements in general can be solved simply by implementing the Act of Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade's procedures. For the issue of general and specific procedures, the issue can be solved by amending the laws that are currently in place, i.e., an amendment of the Act on International Agreements. Alternatively, a new law can also be made. The question then is whether or not the Act on Trade and the Presidential Decree on the Procedure of the Approval of Agreements on International Trade should also be amended or a new law or regulation should be made that overrides both regulations. As for the issue of legal product, the possible solution could be to hand over the task of ratification to one body only: either the legislative or the executive. Because only one legal product is guaranteed to come out of an institution when ratifying an international agreement in Indonesia, assigning the task to only one government body should guarantee that the legal product comes out in a consistent manner. The legislative, therefore the DPR, seems to be a better candidate, because it is in line with the functions of a legislature to pass bills and there is a chance for the people to be more involved in affairs that have the potential to have a great impact on their lives. The balance of power should still be kept in mind however.

This seems to be a non-issue at first because the only time that this has happened is with the Comprehensive Economic Partnership Agreement (CEPA) of Indonesia and Australia and the CEPA of Indonesia and Chile, and it does not seem to bear any legal consequence or implication. However, since this issue was overlooked by the relevant institutions, it shows that even if the law seems clear enough in its wording the practice has the potential to be even more inconsistent as time passes. It is also important to consider that with trade agreements, it is the DPR that gets to decide if a treaty is ratified through the executive or the legislative body. The mindset and reasoning of the DPR should therefore be something to consider. It is not unreasonable to think that politics potentially plays a part in this issue. Hopefully, this issue should be a one-time occurrence at best. There are some other smaller problems that are perhaps worth consideration. For example, while Indonesia has a legal product for the ratification of treaties, it does not have a legal product for when it does not ratify or disapprove of a treaty. Something like this is worth considering for the sake of evidence, and it would check the box of transparency in the list of principles of good governance. The aforementioned issues seem to be fairly uncommon or under-looked. There is a lack of literature concerning this area, both in the Indonesian sphere and the international sphere. The case for the international sphere might be that these issues are not as common, especially with countries that have had plenty of years of treaty practice or better compliance with the laws that are in place.

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