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DINAMIKA HUKUM DALAM PARADIGMA DAS SOLLEN DAN DAS SEIN

Sebuah Karya dalam Rangka Memperingati Dies Natalis
Fakultas Hukum Universitas Internasional Batam yang Ke-20 Tahun

DINAMIKA HUKUM DALAM PARADIGMA DAS SOLLEN DAN DAS SEIN

Sebuah Karya dalam Rangka Memperingati Dies Natalis Fakultas Hukum Universitas Internasional Batam yang Ke-20 Tahun

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David Tan, S.H., M.H., M.Kn.
Nur Hadiyati, S.H., M.H.
Febri Jaya, S.H., M.H.

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Sebuah Karya dalam Rangka Memperingati Dies Natalis Fakultas Hukum Universitas Internasional Batan ke-20 Tahun

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Wisma Kalimetro, Jl. Joyosuko Metro 42 Malang
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Email: intrans_malang@yahoo.com

Daftar Kontributor

Dr. Lu Sudirman, S.H., M.M., M.Hum.
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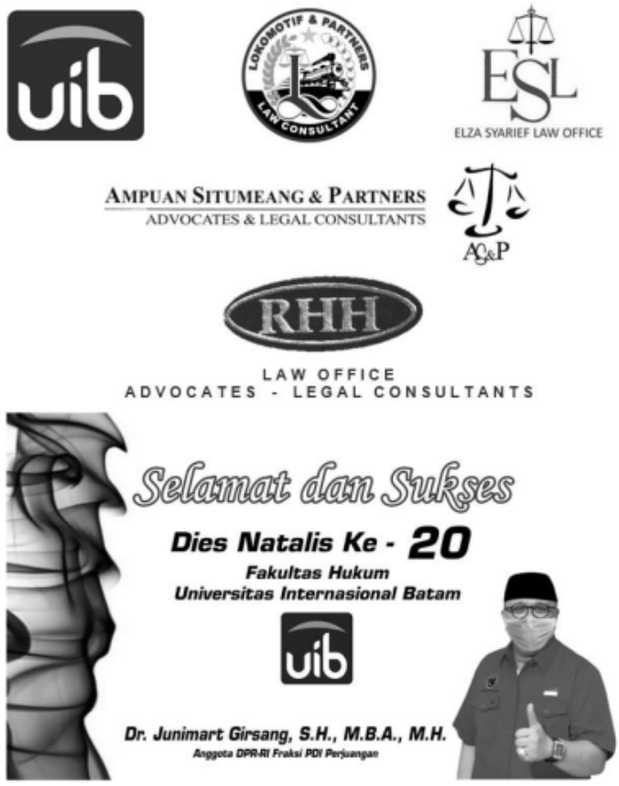

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Prof. Emiritus. Dr. H. Lili Rasjidi, S.H., S.Sos., LL.M.

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji Syukur kita panjatkan kepada Allah SWT karena dengan segala limpahan rahmat dan hidayah-Nya pada tanggal 23 Agustus 2020 Fakultas Hukum Universitas Internasional Batam (UIB) telah memasuki usia ke-20. Sebuah masa yang cukup panjang dalam upaya meningkatkan mutu berkelanjutan. Fakultas Hukum UIB telah memberikan kontribusi yang signifikan di bidang pendidikan dan hukum untuk pemerintah Kota Batam pada khususnya dan Indonesia pada umumnya dengan membuka akses yang seluas-luasnya kepada seluruh masyarakat Indonesia untuk menimba pengetahuan di bidang hukum yang terjangkau dan berkualitas. Dengan pemanfaatan teknologi informasi dan komunikasi (TIK), dewasa ini Fakultas Hukum UIB berkomitmen untuk memberikan pelayanan ke seluruh lapisan masyarakat tanpa terkendala hambatan geografis.

Penerbitan buku "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*" merupakan kontribusi para sivitas akademika Fakultas Hukum UIB dalam rangka Dies Natalis ke-20 Fakultas Hukum UIB. Buku ini berisikan berbagai macam masalah hukum yang diulas dengan lugas sehingga dapat dipahami oleh pembaca dari berbagai kalangan.

Sebagai Pembina Fakultas Hukum UIB sejak tahun 2011, saya mendoakan semoga seluruh sivitas akademika Fakultas Hukum UIB dapat terus berkontribusi secara optimal dalam rangka meningkatkan mutu pendidikan dan pembangunan hukum di Indonesia.

Sukses Fakultas Hukum Universitas Internasional Batam.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Bandung, Juni 2020

Prof. Emiritus. Dr. H. Lili Rasjidi, S.H., S.Sos., LL.M.

Kata Pengantar

GURU BESAR FAKULTAS HUKUM UNIVERSITAS PANCASILA, JAKARTA

Prof. Dr. Ade Saptomo, S.H., M.Si.

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji dan Syukur dipanjatkan kepada Allah SWT berkat rahmat dan hidayah-Nya Fakultas Hukum Universitas Internasional Batam (UIB) telah menginjak usia 20 tahun pada tanggal 23 Agustus 2020. Dalam kurun waktu tersebut, Fakultas Hukum UIB telah mengukir prestasi gemilang di mana dua Program Studi pada Fakultas Hukum UIB, yaitu Program Sarjana Hukum dan Program Magister Hukum telah memperoleh nilai akreditasi Adari Badan Akreditasi Nasional Perguruan Tinggi (BAN-PT). Sumbangsih Fakultas Hukum UIB tidak hanya dirasakan oleh masyarakat Kota Batam dan Provinsi Kepulauan Riau, tetapi juga masyarakat Indonesia secara umum melalui berbagai kegiatan di bidang Tri Dharma Perguruan Tinggi.

Salah satu sumbangsih Tri Dharma bidang Pendidikan dan Pengajaran dimaksud adalah kumpulan artikel hukum yang dihimpun ke dalam *book chapter* ini. Buku ini merupakan pikiran, gagasan para dosen dan alumni Fakultas Hukum untuk memberikan solusi terhadap berbagai permasalahan hukum di tingkat lokal, nasional dan internasional. Ulasan dan pendekatan yang digunakan dalam *book chapter* ini akan menambah khazanah keilmuan bidang hukum yang terus-menerus mengalami perubahan ke arah yang lebih baik.

Besar harapan saya bahwa Fakultas Hukum UIB akan semakin berkembang dan menghasilkan lulusan yang kompetitif di tingkat nasional dan internasional. Semoga Fakultas Hukum UIB berjaya selamanya.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Jakarta, Juni 2020

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Kata Pengantar

GURU BESAR FAKULTAS HUKUM
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Prof. Dr. H. Dudu Duswara M., Drs., S.H., M.Hum.

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji dan Syukur ke hadirat Allah SWT karena berkat karunia-Nya, Fakultas Hukum Universitas Internasional memasuki usia ke 20 tahun pada tanggal 23 Agustus 2020. Setelah mengarungi perjalanan panjang dan melewati berbagai tantangan, Fakultas Hukum Universitas Internasional Batam telah memberikan pendidikan terbaik di bidang hukum bagi masyarakat Indonesia, khususnya masyarakat Kota Batam.

Saya mengucapkan selamat atas terbitnya kumpulan artikel dosen dan alumni Fakultas Hukum Universitas Internasional Batam yang dikemas dalam *book chapter* dengan judul "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*". Buku ini telah memberikan berbagai pendekatan dalam menyelesaikan berbagai permasalahan hukum yang terjadi di Indonesia. Buku ini sangat bermanfaat tidak hanya bagi pembaca dari kalangan bidang hukum tetapi juga masyarakat luas yang ingin mengetahui perkembangan, permasalahan dan penyelesaian hukum di Indonesia saat ini.

Sebagai salah satu mitra pengajar di Fakultas Hukum Universitas Internasional Batam, saya turut merasa bangga dan turut mendoakan seluruh sivitas akademika Fakultas Hukum Universitas Internasional Batam untuk terus bersemangat dalam upaya mencerdaskan kehidupan anak bangsa.

Sukses selalu untuk Fakultas Hukum Universitas Internasional Batam.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Jakarta, Juni 2020

Prof. Dr. H. Dudu Duswara M., Drs., S.H., M.Hum.

Kata Pengantar

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Prof. Dr. Topo Santoso, S.H., M.H.

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji Syukur kita panjatkan kepada Allah SWT karena berkat rahmat dan hidayah-Nya, Fakultas Hukum Universitas Internasional Batam (UIB) telah menginjak usia ke-20 pada tanggal 23 Agustus 2020. Usia yang sudah cukup matang dan panjang dalam memberikan pelayanan pendidikan hukum di Indonesia terutama di Kota Batam.

Dalam rangka Dies Natalis ke-20 Fakultas Hukum UIB, dosen dan alumni, baik dari Program Sarjana Hukum dan Magister Hukum telah memberikan kontribusinya sebagai bentuk ucapan syukur melalui sebuah tulisan ilmiah dalam bentuk *book chapter* dengan judul "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*".

Sebagai salah satu mitra dari Fakultas Hukum UIB, saya mendoakan seluruh sivitas akademika UIB tetap semangat dalam memberikan pelayanan pendidikan hukum yang terbaik bagi anak bangsa di Indonesia. Kiranya semangat itu tidak pernah luntur tapi semakin bertambah.

Sukses selalu untuk Fakultas Hukum Universitas Internasional Batam.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Depok, Juni 2020

Prof. Dr. Topo Santoso, S.H., M.H.

Kata Pengantar

GURU BESAR FAKULTAS HUKUM
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Prof. Muhammad Hawin, S.H., LL.M., Ph.D

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji syukur kepada Allah SWT atas rahmat dan karunia-Nya yang menghantarkan Fakultas Hukum Universitas Internasional Batam sebagai institusi pendidikan tinggi dengan dedikasinya telah mengabdi untuk negeri selama 20 tahun terhitung sejak didirikan pada tanggal 23 Agustus 2020.

Pada kesempatan yang berbahagia ini, saya ucapkan selamat atas diterbitkannya *book chapter* dengan judul "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*". Buku ini merupakan karya dari pemikiran dan analisis kritis dari dosen dan alumni Fakultas Hukum Universitas Internasional Batam, baik dari Program Sarjana Hukum maupun Program Magister Hukum UIB atas fenomena hukum yang terjadi di masyarakat dalam rangka Dies Natalis ke-20 Fakultas Hukum Universitas Internasional Batam.

Suatu kebanggaan dan kehormatan tersendiri bagi saya dapat menjadi bagian dari Fakultas Hukum Universitas Internasional Batam. Doa saya aturkan kepada Allah SWT untuk kejayaan seluruh sivitas akademika Fakultas Hukum Universitas Internasional Batam yang telah mengarungi suka dan duka serta selalu bersemangat memberikan pelayanan terbaik di dunia pendidikan sehingga tetap memberikan inovasi dan performa terbaiknya dalam bidang hukum.

Viva Justicia, Fakultas Hukum Universitas Internasional Batam.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Yogyakarta, Juni 2020

Prof. Muhammad Hawin, S.H., LL.M., Ph.D

Kata Pengantar

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GURU BESAR FAKULTAS HUKUM UNIVERSITAS HASANUDDIN, MAKASSAR

Prof. Dr. Irwansyah, S.H., M.H.

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Assalamu'alaikum Warahmatullahi Wabarakatuh

Alhamdulillah, berkat rahmat dan hidayah Allah SWT, tepat pada tanggal 23 Agustus 2020 Fakultas Hukum Universitas Internasional Batam (UIB) telah berumur 20 tahun. Fakultas Hukum UIB memiliki komitmen dalam memajukan pendidikan hukum di Indonesia sudah secara konsisten selama 20 tahun dalam memberikan pelayanan pendidikan dalam bidang hukum. Fakultas Hukum UIB sudah memberikan kontribusinya secara signifikan dalam memajukan pendidikan hukum di Indonesia secara umum dan Kota Batam secara khususnya.

Dalam rangka Dies Natalis ke-20 Fakultas Hukum UIB, seluruh sivitas akademika Fakultas Hukum UIB menerbitkan sebuah Buku berjudul "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*". Saya mengapresiasi topik yang digagas buku ini yang menggambarkan sikap kritis dan respons kreatif terhadap kondisi aktual problematika hukum yang dihadapi bangsa Indonesia. Buku ini berisi sekumpulan tulisan ilmiah dari dosen dan alumni Fakultas Hukum sebagai suatu bentuk ucapan syukur dari seluruh dosen dan alumni Fakultas Hukum UIB.

Substansi tulisan pada buku ini menggambarkan percikan pikiran yang penuh optimisme, kaya gagasan ideal, inovatif dan tetap menjaga sikap kritis di tengah sistem hukum yang makin

formalistik dan kultur penegakan hukum yang makin menjauh dari moralitas dan esensi keadilan. Tulisan-tulisan ini juga sebagai refleksi torehan prestasi akademik dan menguatnya semangat kebersamaan kampus dan alumninya.

Sebagai mitra dari Fakultas Hukum UIB, saya ikut bangga atas kemajuan pesat, pencapaian yang prestatif, dan pertumbuhan kultur akademik Fakultas Hukum UIB yang begitu signifikan dan kreatif. Saya berharap dan penuh optimisme serta terus mendoakan agar Fakultas Hukum UIB dapat terus menorehkan prestasi yang membanggakan untuk kemajuan bangsa dan memberikan kontribusi inovatif dan kreatif dalam meningkatkan mutu pendidikan hukum di Indonesia agar sejajar dengan kemajuan bangsa lain di dunia. Kiranya semangat solidaritas, optimisme, dan kreativitas, serta inovatif terus terjaga dengan baik dalam meningkatkan mutu pendidikan hukum di Indonesia yang tidak akan pernah luntur dan terus dipertahankan untuk memberikan kesempatan dan semangat kepada anak bangsa yang memiliki kompetensi dan berkualitas di bidang hukum.

Sukses selalu untuk Fakultas Hukum Universitas Internasional Batam.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Makassar, Juni 2020

Prof. Dr. Irwansyah, S.H., M.H.

Kata Pengantar

HAKIM AD HOC TINDAK PIDANA KORUPSI PADA MAHKAMAH AGUNG REPUBLIK INDONESIA

Prof. Dr. H. Abdul Latif, S.H., M.Hum.

Assalamu'alaikum Warahmatullahi Wabarakatuh

Puji dan syukur ke hadirat Allah SWT karena atas berkah dan hidayah-Nya, Fakultas Hukum Universitas Internasional Batam memperingati Dies Natalis ke-20 pada tanggal 23 Agustus 2020. Peringatan hari lahir (Dies Natalis) dalam berbagai budaya dianggap sebagai momen yang sangat signifikan karena menandakan awal mulanya suatu penciptaan. Dies Natalis juga menjadi saat yang tepat untuk merefleksikan perjalanan, perjuangan dan dewasanya suatu institusi. Bertepatan dalam rangka Dies Natalis Fakultas Hukum Universitas Internasional Batam yang ke-20 ini, saya telah menyaksikan tumbuhnya serta dewasanya Fakultas Hukum Universitas Internasional Batam. Mengapa tidak? Fakultas Hukum Universitas Internasional Batam tidak hanya menjadi suatu wadah untuk menuntut ilmu saja, melainkan ia telah menjadi suatu suar yang memberikan pengharapan kepada masa depan hukum dan keadilan di Indonesia yang lebih baik melalui berbagai karya tulis dosen sebagai upaya peningkatan kualitas diri akan mampu menuju kemandirian dan keunggulan Universitas Internasional Batam di kancah nasional dan global dalam bertransformasi menuju kompetensi yang menjawab tantangan global.

Buku yang berjudul "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*" ini memuat karya dari dosen-dosen dan mahasiswa Fakultas Hukum Universitas Internasional Batam. Satu hal yang paling mencolok dari buku ini adalah luasnya jangkauan serta pengaruh dari hukum terhadap seluruh aspek kehidupan dalam masyarakat kita. Tulisan-tulisan yang ada di dalam buku ini merupakan gagasan dari para akademisi yang berusaha merespons fenomena hukum yang terjadi di tengah-tengah masyarakat. Beraneka ragamnya persoalan tentang hukum yang diangkat, menjadi bukti nyata kontribusi Fakultas Hukum Universitas Internasional Batam untuk terus bersumbangsih demi pengembangan hukum yang lebih baik lagi. Semoga buku ini dapat bermanfaat bagi kita semua dan selamat membaca.

Menutup kata pengantar dalam buku ini, relevan kiranya jika saya ucapkan selamat atas 20 tahun berdirinya Fakultas Hukum Universitas Internasional Batam. Semoga Fakultas Hukum Universitas Internasional Batam dapat terus berkontribusi dalam meningkatkan mutu pendidikan tinggi hukum di negeri tercinta ini.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Jakarta, Juni 2020

Prof. Dr. H. Abdul Latif, S.H., M.Hum.

Kata Sambutan

DEKAN FAKULTAS HUKUM UNIVERSITAS INTERNASIONAL BATAM

Dr. Lu Sudirman, S.H., M.M., M.Hum.

Puji syukur kepada Tuhan Yang Maha Esa atas rahmat-Nya, Fakultas Hukum Universitas Internasional Batam dapat menyusun buku "Dinamika Hukum dalam Paradigma *Das Sollen* dan *Das Sein*" dalam rangka Dies Natalis Fakultas Hukum". Penyusunan buku ini dibuat dalam rangka memperingati 20 tahun berdirinya Fakultas Hukum Universitas Internasional Batam yang didirikan pada tanggal 23 Agustus 2000 berdasarkan Keputusan Menteri Pendidikan Nasional Republik Indonesia Nomor 160/D/O/2000. Fakultas Hukum Universitas Internasional Batam memiliki 2 (dua) program studi yaitu Program Sarjana Hukum yang telah memperoleh akreditasi A berdasarkan Keputusan Badan Akreditasi Nasional Perguruan Tinggi Nomor 5094/SK/BAN-PT/Akred/S/VII/2017 dan Program Magister Hukum yang juga telah memperoleh akreditasi A berdasarkan Keputusan Badan Akreditasi Nasional Perguruan Tinggi Nomor 1228/SK/BAN-PT/Akred/M/IV/2019. Pencapaian ini tidak terlepas dari kerja cerdas Pejabat Struktural Fakultas Hukum (Dekan) bersama dengan Ketua dan Sekretaris Program Studi dalam menjalankan Sistem Penjaminan Mutu Internal (SPMI) yang berkelanjutan dengan menerapkan Model Manajemen SPMI berdasarkan pada PPEPP (Penetapan Standar, Pelaksanaan Standar, Evaluasi Pelaksanaan Standar, Pengendalian Standar, dan Peningkatan Standar).

Dalam menyusun buku ini, dosen dan alumni Fakultas Hukum Universitas Internasional Batam termasuk mitra dari Youngsan

University, Korea telah memberikan kontribusinya dengan menyumbangkan artikel ilmiahnya sesuai dengan bidang keilmuan masing-masing. Berbagai bidang keilmuan dalam tulisan buku ini menunjukkan bahwa perbedaan ilmu tidaklah menghilangkan keinginan untuk menyatu dalam sajian sebuah buku. Hal ini merupakan salah satu bukti semangat dan rasa syukur dari sivitas akademika Fakultas Hukum Universitas Internasional Batam bahwa Fakultas Hukum Universitas Internasional Batam dapat berdiri hingga pada usia yang ke-20 tahun, sekaligus wujud kontribusi keilmuan dan kependidikan tinggi bagi bangsa dan negara. Kerja keras dan kerja cerdas Fakultas Hukum Universitas Internasional Batam selama 20 tahun ini didukung oleh seluruh pihak baik dari sivitas akademika termasuk pengguna lulusan dan mitra kerja sama Fakultas Hukum Universitas Internasional Batam. Semangat ini tidak akan pernah luntur, akan terus dipertahankan dan ditingkatkan ke depannya, khususnya dalam mempertahankan dan meningkatkan penjaminan mutu di aras fakultas.

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Batam, Juni 2020

Dr. Lu Sudirman, S.H., M.M., M.Hum.

Dekan Fakultas Hukum Universitas Internasional Batam

Daftar Isi

Enforceability of Self-Executing Treaties in Public and Private Law in Indonesia

Rina Shahriyani Shahrullah
School of Law, Universitas Internasional Batam (Indonesia)
Jihyun Park
School of Law, Youngsan University (South Korea)

Abstract

The existence of self-executing treaty is frequently questioned regarding the approaches of Indonesia in international business agreements, particularly the enforceability of Article 44 of the Vienna Convention 1969 regarding separability of treaty provisions. To answer the question, this research adopts a normative legal research which uses secondary data and specifically examines Law No.24 of 2000 on Treaties (the Indonesian Treaty Law), the Vienna Convention 1969, the ASEAN Free Trade Agreement (ASEAN FTA), the ASEAN-Korea Free Trade Agreement (AKFTA) and relevant Indonesian court decisions. The secondary data was analysed by using a qualitative approach. The research finds and concludes that self-executing treaties do not exist in Indonesia. Ratification of a treaty is merely deemed to bind Indonesia as a party at international level. At national level, all persons and legal subjects in Indonesia are bound by laws (Peraturan Perundang-undangan) provided by Article 7 of Law No. 12 of 2011. The Indonesian Treaty Law does not contain provisions on the separability of treaty provisions. To fill this lacuna, Article 44 of the Vienna Convention 1969 may be used as a customary international law by Indonesian judges to make decisions when they handle cases relating to a treaty containing this provision. Indonesian nationals may submit their disputes pursuant to the implementation of a treaty in the area of public and private law including free trade agreement before Indonesian courts.

Keywords: *Self-executing Treaty, Free Trade Agreement, Separability Provisions, Indonesia*

Abstrak

Eksistensi *self-executing treaty* sering dipertanyakan terkait pendekatan Indonesia dalam perjanjian bisnis internasional, khususnya berkaitan dengan pemberlakuan Pasal 44 Konvensi Wina 1969 tentang pemisahan ketentuan perjanjian. Untuk menjawab pertanyaan tersebut, penelitian ini mengadopsi penelitian hukum normatif yang menggunakan data sekunder dan secara khusus menganalisis Undang-Undang No. 24 tahun 2000 tentang Perjanjian (the Indonesian Treaty Law), Konvensi Wina 1969, Perjanjian Perdagangan Bebas ASEAN (ASEAN FTA), Perjanjian Perdagangan Bebas ASEAN-Korea (AKFTA) dan keputusan pengadilan Indonesia yang relevan. Data sekunder tersebut dianalisis dengan menggunakan pendekatan kualitatif. Penelitian ini menemukan dan menyimpulkan bahwa tidak terdapat *self-executing treaty* di Indonesia. Ratifikasi sebuah perjanjian hanya dianggap mengikat Indonesia sebagai pihak di tingkat internasional. Di tingkat nasional, semua organ dan subjek hukum di Indonesia terikat oleh hukum (Peraturan Perundang-undangan) sebagaimana yang tercantum pada Pasal 7 UU No. 12 tahun 2011. Undang-Undang Perjanjian Indonesia tidak memuat ketentuan tentang keterpisahan ketentuan perjanjian. Untuk mengisi kekosongan ini, Pasal 44 Konvensi Wina 1969 dapat digunakan sebagai hukum kebiasaan internasional oleh hakim Indonesia untuk membuat keputusan ketika mereka menangani kasus yang berkaitan dengan perjanjian bisnisinternasional yang memuat ketentuan ini. Oleh karena itu, warga negara Indonesia dapat mengajukan sengketa mereka sesuai dengan implementasi perjanjian di bidang hukum publikdan privat termasukperjanjian perdagangan bebas di hadapan pengadilan Indonesia.

Kata Kunci: *Self-executing Treaty*, Perjanjian Perdagangan Bebas, Ketentuan Pemisahan, Indonesia

A. Background

Up to present, Indonesia has not ratified the Vienna Convention 1969 on the Law of Treaties (hereinafter referred to as the Vienna

Convention 1969),[1] yet it is it can be used as reference by Indonesian judges to make their decisions[2] since it is treated as customary international law.[3] Indonesia established its own national law pertaining to a treaty and named as Law No.24 of 2000 on Treaties (hereinafter referred to as Indonesian Treaty Law). Although in the absence of ratification, a treaty is treated as a customary international law, ratification remains to be 'the most essential part in a treaty making process'[4] in Indonesia. Upon a ratification, Indonesia is officially bound by the said treaty.[5] The Law elucidates further that after a ratification of treaty, the promulgation of a legislation is necessary 'to clearly govern and guarantee the legal certainty of every aspect involved in the conclusion and ratification of a treaty'.[6] In this regard, there is a need of legislative action after ratifying a treaty.

However, to determine whether a treaty is self-executing or not, it merely depends whether it can be directly applied by a national court without being necessary to promulgate an implementing legislation.[7] Vazquez[8] advanced a similar approach by categorising a treaty is self-executing when 'a treaty that may be enforced in the courts

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[1] Vienna Convention on the Law of Treaties 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations Treaty Series, vol. 1155, p. 331.

[2] Direktorat Perjanjian Ekonomi Sosial dan Budaya, Direktorat Jenderal Hukum dan Perjanjian Internasional Departemen Luar Negeri, Perjanjian Internasional Dalam Teori Dan Praktek Indonesia: Kompilasi Permasalahan (TOR Deplu Mengenai Studi Tentang Sistem Hukum Suatu Negara Terkait Dengan Proses Pengesahan Dan Pemberlakuan Perjanjian Internasional Serta Pengolahan Naskah Perjanjian Internasional Oleh Suatu Negara Dan Organisasi Internasional (Jakarta: 2008), Accessed May 5, 2017, https://www.scribd.com/doc/17598286/Perjanjian-Internasional-Dalam-Teori-Dan-Praktek-Di-Indonesia-Kompilasi-Permasalahan

[3] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* ICJ Reports 2002 para 37, p.4. The ICJ confirms that through Article 31 and 32 of the Vienna Convention 1969, Indonesia subscribes to the provisions of the Convention by virtue of customary international law'.

[4] General Elucidation of Law No.24 of 2000 on Treaties.

[5] The Elucidation of Law No.24 of 2000 on Treaties explicitly categorises the ratification of treaty, namely:

a. ratification, in which a state intending to adopt a treaty signed the text of the treaty;
b. accession, in which a state intending to adopt a treaty did not sign the text of the treaty; and
c . acceptance and approval,which are, the declaration of the acceptance or approval of a party state to a treaty on the amendment thereto.

[6] General Elucidation of Law No.24 of 2000 on Treaties.

[7] T. Buerghental,. "Modern Constitution and Human Rights Treaties," 36 *Columbia Journal of Transnational Law*, 1997. p.211.

[8] C. M.Vazquez, "The Four Doctrines of Self-Executing Treaties," *American Journal of International Law*, Volume 89, Issue 4, 1995.

without prior legislation by Congress". Evans opines that self-executing treaties can be directly executed and therefore they do not require an implementation by Congress.[9] Agusman[10] makes a summary conclusion regarding the requirement of implementing legislation after surveying municipal practices in US and Europe. He concludes that an implementing legislation is needed when:

a. 'Treaties contain norms but according to the respective constitutional law such norms should be given effect only by municipal legislation, such as creating a criminal offence rule'.
b. 'Treaties establish permissive or discretionary rules and shall be determined by the respective states, such as to declare that they are archipelagic states'.
c. 'Treaties require states to make a prescribed municipal act such as determining base lines for the measuring of maritime zones'.

B. Research Questions

Based on the nature of nature of self-executing treaty elaborated above, a number of questions arise, namely:

a. What are the Indonesian approaches to self-executing treaties in public law?
b. What are the Indonesian approaches to self-executing treaties in private law, particularly international business?
c. What are the effects of the above approaches on the enforceability of Article 44 of the Vienna Convention 1969 regarding separability of treaty provisions?

C. Research Methodology

To answer the questions above, this research adopts a normative legal research. [11] This type of research focuses more legal materials and it excludes social factors. Anormative legal research is interpreted as an approach that uses a legal concept. This concept considers that the law is identical with written norms created and promulgated by the authorized institutions or officials.[12] The legal materials may consist of

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[9] A. E. Evans,"Some Aspects of the Problem of Self-Executing Treaties", 45 *Am. Soc'y Int'l L. Proc.*,1951, p. 73.

[10] D. D. Agusman, "Self-Executingand Non Selfexecuting Treaties What Does It Mean?", *Jurnal Hukum Internasional*, Volume 11, Number 3, April 2014, p. 320-344.

[11] Soerjono and H. Abdurahman, *Metode Penelitian Hukum* (Jakarta, 2003), p. 56.

[12] R. H, Soemitro, *Metodologi Penelitian Hukum dan Jurimetri* (Jakarta, 1988).

primary legal materials, secondary legal materials and tertiary legal materials.[13] Hence, this research specifically examines the primary legal materials namely the Indonesian Treaty Law the Vienna Convention 1969, the ASEAN Free Trade Agreement (ASEAN FTA), the ASEAN-Korea Free Trade Agreement (AKFTA) and relevant court decisions. It also utilises secondary legal materials which consist of research reports, journal articles, books and internet sources.[14] The entire data was analysed by using a qualitative approach.[15] The data collected will then be processed by:

1. Editing is to re-examine the completeness of the data obtained, if it is still incomplete, an attempt is made to complete it again by re-doing the data source. It also checks if there are errors in the data obtained.
2. Systematization in which the compilation and placement of data on each subject is systematically arranged to facilitate discussion.
3. Classification is to classify or grouping the data according to predetermined subjects.

D. Research Findings and Discussions

1. The Indonesian Approaches to Self-Executing Treaties in Public Law

Based on the nature of self-executing treaties above, it can be concluded that a treaty is considered to be self-executing when it does not require an implementing legislation to be enforceable in a national court. However, according to Dewanto,[16] most of Indonesian academicians have different understandings regarding the meaning of self-executing treaty. To them, a self-executing treaty only requires a signature without ratification. Dewanto criticizes this definition by stating that the meaning of self-executing treaty in Indonesia has been interpreted so differently from its true nature.[17] He further

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[13] Amiruddin and Z. Asikin, Pengantar Metode Penelitian Hukum (Jakarta, 2012).

[14] M, Marzuki, *Penelitian Hukum* (Jakarta 2005).

[15] Qualitative research is a type of scientific research that aims to seek answers to the questions 'what', 'how' or 'why' of a phenomenon. See S. B. Coutin, Qualitative research in law and social scienc Department of Criminology, Law, and Society (Boston, 2015), Accessed May 5, 2017, http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf.

[16] W. A. Dewanto, "Problematika Keberlakuan Dan Status Hukum Perjanjian Internasional Kajian Putusan Mahkamah Konstitusi Nomor 33/PUU-IX/2011", *Jurnal Yudisial*, Vol. 6, No. 2, Agustus 2013, p.107 – 122.

[17] *Ibid.*

reveals that the misunderstanding regarding the concept of self-executing treaty in Indonesia is derived from a need of legislative action by the Indonesian House of Representatives (*Dewan Perwakilan Rakyat/DPR*) (hereinafter refer to as DPR). He asserts that 'legislative action' should mean as an action of the DPR to make an implementing legislation in order that a treaty is enforceable in Indonesian courts. In other word, 'legislative action' does not relate to the ratification of a treaty conducted by the DPR. For example, the Berne Convention on the Protection of Artwork approved by the President through Presidential Decree No. 19 of 1997. The norms under the Convention are only applicable in Indonesia after the DPR promulgated Law No.19 of 2002 on Copyright.[18] The Convention on Climate Change which was ratified by Indonesia through Law No. 6 of 1994. Yet, the norms of the Convention are enforceable in Indonesia through Law No. 32 of 2009 on Protection and Environment Management.

The debate above may come to end when the Indonesian Constitutional Court made a Decision No. 33/PUU-IX/2011. The crux of the matter is whether Law No. 38 of 2008 which purports to ratify a treaty (ASEAN Charter) can be judicially reviewed against the 1945 Constitution. Dewanto who deeply examined and analysed the Court's decision, concludes that[19]:

a. 'A law for the purpose of ratifying a treaty made by the DPR is a formal form of the DPR approval to the President who ratifies a treaty as it is stipulated by Article 11 (1) of the 1945 Constitution[20] and Article 9(2) of Indonesian Treaty Law.[21] Both the DPR and President in this regard carry out their function as 'treaty-making power, but not as law maker' as it is stipulated by Article 20 of the 1945 Constitution.[22]

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[18] W. A. Dewanto, Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia: Studi Kasus Konvensi Palermo 2000, Accessed January 11, 2019, file:///C:/Users/IT-82/Downloads/1416-2952-1-SM.pdf

[19] *Supra* note 16.

[20] Article 11(1) of the 1945 Constitution states that 'the President with the approval of the DPR may declare war, make peace and conclude treaties with other countries'.

[21] Article 9(2) of Law No.24 of 2000 on Treaties states that 'states 'Ratification of a treaty as referred to in paragraph (1) shall be conducted by way of a law or a presidential decree'.

[22] Article 20 of the 1945 Constitution states:
(1) The DPR shall hold the authority to establish laws.
(2) Each bill shall be discussed by the DPR and the President to reach joint approval.

b. 'A law for ratifying a treaty is not a legal base for the enforceability of a treaty in Indonesia, therefore it cannot be judicially reviewed against the 1945 Constitution'.

c. 'The status of a treaty ratified by the Government of Indonesia only applies to Indonesia, it is not enforceable in Indonesian courts without an implementing legislation. In other words, all treaties in Indonesia are not self-executing'.

The same results advanced by Widagdo *et.al.*[23] After making an analysis of the Constitutional Court Decision No. 33/PUU-IX/2011, they clarify that a law for the purpose of ratifying a treaty does not automatically make the treaty as a part of Indonesian law. The approach of the Constitutional Court in its Decision No. 33/PUU-IX/2011 is also supported by the Decision No.13/PUU-XVI/2018 dated on the 22nd of November 2018. It states that 'ratification is one way to declare to be bound by a treaty (consent to be bound by a treaty)'. In this regard, Indonesia as a ratifying state to a treaty is bound by the treaty at international level. At national level, the treaty does not bind Indonesian courts because judges are only bound by laws made by the DPR.[24] Similarly, Hadhyono submits that Indonesian judges are not absolutely bound by a treaty ratified by the executive body (President). Yet, they are bound by laws made by the legislative body (the DPR). Nevertheless, treaty constitutes as one of the legal sources in Indonesia; therefore, it can be used as a tool to interpret national laws.[25] This indicates that Indonesia are foreign to self-executing treaties since all treaties are only enforceable in Indonesia courts through their implementing legislation. The same conclusion is withdrawn by Ant.T.T. and Merdekawati, they precisely conclude that in practice a treaty requires an implementing legislation to be

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(3)) If a bill fails to reach joint approval, that bill shall not be reintroduced within the same DPR term of sessions.

(4)) President signs a jointly approved bill to become a law.

(5)) If the President fails to sign a jointly approved bill within 30 days following such approval, that bill shall legally become a law and must be promulgated.

[23] S.Widagdo, *et.al*, "Judicial Review of the Law on Ratification of Treaty (A Study on Judicial Review Case of the Law on Ratification towards ASEAN Charter)", *Journal of Law, Policy and Globalization* Vol.32, 2014.

[24] *Supra* note 16.

[25] S. Hadhyono, Praktek Penerapan Perjanjian Internasional Dalam Putusan Hakim, Accessed January 11, 2019, https://perjanjian-internasional.blogspot.com/2012/04/praktek-penerapan-perjanjian_03.html

enforceable, consequently the Indonesian legal system is only familiar with non self-executing treaties.[26]

2. The Indonesian Approaches To Self-Executing Treaties Relating To International Business

Based on the discussion above, it is clear that an implementing legislation is required for the enforceability of a treaty in Indonesia. It is important to note here that the term 'treaty' under Article 1 (1) of the Indonesian Treaty Law is merely within the scope of public law. Hence, it may be questioned whether a treaty made in the area of private law, particularly international business such as free trade agreements also adopts the same approaches. The discussion below focuses on the ASEAN Free Trade Area (FTA), more specifically the ASEAN-Korea FTA. Indonesia through ASEAN has concluded international trade agreements with several states,[27] namely:

a. ASEAN-China ratified by the Presidential Decree No.48 of 2004;
b. ASEAN-India ratified by the Presidential Decree No.69 of 2004;
c. ASEAN-Korea Free Trade Area ratified by the Presidential Regulation No.11 of 2007;
d. Indonesia-Japan (IJ-EPA) ratified by the Presidential Regulation No.50 of 2009;
e. ASEAN-Australia-New Zealand by the Presidential Regulation No. 26 of 2011.

In 2018, the Indonesian President Joko Widodo has signed and issued seven Presidential Regulations (*Peraturan President/Perpres*)[28] on international trade agreements which are meant to ratify the following agreements:

a. First Protocol to Amend the AANZFTAAgreement.
b. Agreement on Trade in Services under the ASEAN-India FTA (AITISA).

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[26] A.S.Ant.T.T. and A.Merdekawati, "Konsekuensi Pembatalan Undang-Undang Ratifikasi Terhadap Keterikatan Pemerintah Indonesia Pada Perjanjian Internasional", *Mimbar Hukum*, Volume 24, Nomor 3, Oktober 2012, p. 473.

[27]Kemendag. Indonesia in FTA, Accessed January 11, 2019, djpen.kemendag.go.id/app_frontend/contents/53-indonesia-in-fta

[28] Article 11 paragraph (1) of Law No.24 of 2000 on Treaties

c. Third Protocol to Amend the Agreement on Trade in Goods under ASEAN-Korea FTA (AKFTA).
d. Protocol to Amend the Framework Agreement under ASEAN-China FTA (ACFTA).
e. ASEAN Agreement on Medical Device Directive (AMDD).
f. Protocol to Implement the 9th ASEAN Framework Agreement on Services (AFAS-9).
g. Protocol to Amend Indonesia-Pakistan PTA (IP-PTA).

ASEAN - Korea Free Trade Area (hereinafter refer to as AKFTA) which is discussed in detail in this research, is an international trade agreement involving ASEAN member states and South Korea which aims to implement free trade and to facilitate the flow of goods and capital. This trade cooperation carries out the international trade principles of the World Trade Organization (WTO).[29] It began in 1989 when the South Korean Government and the Governments of ASEAN member states initiated a dialogue forum to develop various cooperation plans. South Korea became ASEAN dialogue partners in 1991. The collaboration between the two parties continued at the November 2004 ASEAN-Korea Summit in Vientiane, Laos. The Heads of State/ASEAN Government and South Korea agreed to establish a Joint Declaration on Comprehensive Cooperation Partnership between ASEAN and South Korea through the ASEAN-Korea Free Trade Area. It is the legal basis for the establishment of AKFTA.[30] It was ratified by Indonesia through The Presidential Regulation No.11 of 2007. The question arises whether a FTA, such as the AKFTArequires an implementing legislation to be enforceable in Indonesia. This question may be correctly answered from the approaches of the Indonesian Constitutional Court when it handled the ASEAN Charter Case.[31]

The case was initiated by a number of NGOs, namely the Global Justice Institute Association, INFID Association, Indonesian Farmers Association (API), Indonesian Farmers Association (SPI), KIARA Association, National Front of the Indonesian Workers' Struggle

[29]Kemendag. ASEAN – Korea, Accessed January 11, 2019, http://ditjenppi.kemendag.go.id/index.php/asean/asean-1-fta/asean-korea

[30] *Ibid.*

[31] Decision of Constitutional Court, ASEAN Charter Case 33/PUU-IX/2011.

(FNPBI), Indonesian Association for Sovereign Migrant Workers (Migrant Care), Associates for Small Business Women (ASPPUK), and individuals, namely Salamuddin, Dian Setiawan and Line Rusly. They requested a judicial review before the Constitutional Court on the 4th February 2013 and challenged the constitutionality of Law No. 38 of 2008 which ratified the Charter. In relation to the implementation of FTA, they argued that:

a. The ASEAN Charter is not only a legal basis for enforcement ASEAN Free Trade Area (AFTA), but it provides a strong legal basis for Free Trade Agreement (FTA) conducted through ASEAN with other countries and regions in the world.
b. The FTA between ASEAN and other countries with strong economics such as the US, EU, Japan, China cause unbalanced relationships; thus, it affects several Indonesian industries because of losing competition which result in the number of Indonesian workers have lost their jobs and closed their opportunities to live properly. Consequently, it violates Article 27(2) and Article 33 of the 1945 Constitution which aims to protect people of Indonesia.

In this case, the Indonesian Government advanced its counter-arguments as follows:

a. ASEAN Free Trade Area (AFTA) which was established based on the Agreement on ASEAN Preferential Trading Arrangement and then it was followed up by the Agreement on Common Effective Preferential Tariff (CEPT) scheme for the ASEAN Free Trade Area was signed 15 years before the ASEAN Charter was signed. It proves that the argument which stated that the ASEAN Charter is the basis for the formation of AFTA is inappropriate.
b. Law No. 38 of 2008 is a legal instrument that is merely a legal basis for the Indonesian Government to commit to the ASEAN Charter. For Indonesia, the norms of international agreements can be implemented effectively at the national level after they are transformed into national legislation.

The Constitutional Court in its considerations states that:

a. [The ratification of] ASEAN Charter by the Government of the Republic of Indonesia is conducted in the form of a Law, namely Law No.38 of 2008;

b. The substance ASEAN of Charter contains macro policies relating to trade agreed upon by ASEAN member states;

c. The application of the macro policies at national level depends on each ASEAN member states to implement Article 5 (2) ASEAN Charter.[32] If a state including Indonesia fails to apply Article 5(2) of ASEAN Charter, then it is not applicable in Indonesia.

The Constitutional Court in its decision rejected the requests of the NGOs and Indonesian nationals in their entirety in the ASEAN Charter case. Again, it is correct to be submitted here that the enforceability of a treaty in Indonesia requires an implementing legislation as it is evidenced in the case of ASEAN Charter. However, it may be arguedthatArticle 5(2) ofASEANCharter is a non-self-executing treaty since it requires each member states to take all necessary measures, including the enactment of appropriate domestic legislation to implement the Charter. The New York Convention is considered as a self-executing treaty.[33] It was ratified through Presidential Decree No. 34 of 1981 (*Keputusan Presiden No. 34 Tahun 1981*). However, it could not be enforced in Indonesia in the absence of an implementing regulation.[34] As the result, the Supreme Court issued a Supreme Court Regulation No. 1 of 1990 (*Peraturan Mahkamah Agung Republik Indonesia No. 1 Tahun 1990*) which contains the conditions and procedures for the recognition and enforcement of foreign arbitral awards in Indonesia. Hence, it is obvious that the approach of non-self-executing treaty is also applied to self-executing treaty. It is then clear that all treaties both in public or private law require an implementing legislation as Dewanto asserts that 'all treaties in Indonesia are not self-executing'.[35]

Indonesia through ASEAN entered into an international agreement on ASEAN-Korea Free Trade Area which was ratified by the Presidential Regulation No.11 of 2007. Article 5.5 (2) of the AKFTA

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[32] Article 5(2) ASEAN Charter states that 'Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.

[33] Y. Harahap, *Arbitrase Ditinjau Dari Reglement Acara Perdata (Rv), Peraturan Prosedur BANI, International Centre for the Settlement of Investment Disputes (ICSID), UNCITRAL Arbitration Rules, Convention on the Recognition and Enforcement of Foreign Arbitral Award, PERMA No.1 Tahun 1990*, edisi kedua, (Bandung, 2001).

[34] Supreme Court Decision, case No. 2944 K/Pdt/1983. See: E. Rajagukguk, *Arbitrase dalam Putusan Pengadilan*, (Jakarta, 2001) pp. 284-288.

[35] *Supra* note 16.

Agreement stipulates that 'the Parties may adopt legal instruments in the future pursuant to the provisions of this Framework Agreement. Upon their respective entry into force, such instruments shall form part of this Framework Agreement'. Based on this provision, the Indonesian Minister of Finance issued a Regulation No.118/PMK.011/2012 on the Establishment of Tariffs on Import Duty in the ASEAN-Korea Free Trade Area (AKFTA) Framework (*Peraturan Menteri Keuangan Republik Indonesia Nomor 118/PMK.011/2012 Tentang Penetapan Tarif Bea Masuk Dalam Rangka ASEAN-Korea Free Trade Area (AKFTA)*. This Regulation is amended by the Regulation of the Indonesian Minister of Finance No. 85/PMK.010/2016 on theAmendment of Regulation of the Minister of Finance No. 118/PMK.011/2012 on the Establishment of Tariffs on Import Duty in the ASEAN-Korea Free Trade Area (AKFTA) Framework *(Peraturan Menteri Keuangan Republik Indonesia Nomor 85/PMK.010/2016 Tentang Perubahan Atas Peraturan Menteri Keuangan Nomor 118/PMK.011/2012 Tentang Penetapan Tarif Bea Masuk Dalam Rangka ASEAN-Korea Free Trade Area (AKFTA)*.

Article 1.4 of the AKFTAAgreement provides an Agreement on Dispute Settlement Mechanism to anticipate disputes that may arise from the AKFTA. It was signed by the ASEAN Economic Ministers and Korea on the 13th December 2005 in Kuala Lumpur, Malaysia. It was ratified by the Indonesian Presidential Regulation No.76 of 2008. The dispute settlement provided by the Agreement is Consultations (Article 3), Good Offices, Conciliation, Mediation (Article 4) and Arbitration (Article 5). Accordingly, any dispute or difference among parties (ASEAN member states and South Korea) regarding the AKFTA, must be resolved based on the dispute settlement provided by the AKFTA Dispute Settlement Agreement.

It may be questioned whether Indonesian nationals may use the AKFTA Agreement as their legal base in Indonesian courts. Indonesian nationals may submit their cases relating to the implementation of the AKFTA to Indonesian courts. However, they cannot rely directly to this international agreement. This is because the enforceable laws which bind all persons and legal subjects in Indonesia is governed by Article 7 of Law No. 12 of 2011 which provides the hierarchy of law in Indonesia, namely:

(1) The 1945 Constitution;
(2) The Decision of the People's Consultative Assembly;
(3) Law;
(4) The Law/Government Regulations Replacing the Law;
(5) Government Regulation;
(6) Presidential Regulation;
(7) Provincial Regulation; and
(8) Municipality/City Regulations.

Accordingly, they must argue their cases based on the legal instruments above which are relevant to the AKFTA Agreement. For example, in the case involving the Director General of Customs and Excise against PT AICA Indonesia, the Director General via its lawyers requested a judicial review to the Indonesia Supreme Court. Although the Court Decision No. 1465/B/PK/PJK/2017 rejected the request of the Director General,[36] this case evidences that the parties submitted their arguments based on the legal instruments provided by Law No. 12 of 2011, namely Law No.10 of 1995 on Customs as amended by Law No.17 of 2006 and the Regulation of the Minister of Finance No.118/PMK.011/2012 on the Establishment of Tariffs on Import Duty in the ASEAN-Korea Free Trade Area (AKFTA) Framework (PMK-118). In this case, PT AICA was alleged to violate Article 13(1) Letter a and Article 17(1) Law No.10 of 1995 on Customs as amended by Law No.17 of 2006. However, it argued that it does not violate Article 13(1) Letter a of the Customs Law. It further argued that all the requirements to enjoy tariff preferences based on the AKFTA as it is stipulated by PMK-118 were fulfilled. Hence, it could enjoy the preferential rates based on the AKFTAfor its imported goods from Korea. Although, it also directly referred to Appendix 1 of Annex 3 of the AKFTA on Operational Certification Procedures

[36] The Supreme Court's legal consideration: the request of judicial review was submitted on the 13th of June 2016, while the notification of the decision which has permanent legal force, namely the Tax Court Decision No. Put-67753/PP/M.VIIB/19/2016 dated on the 21st of January 2016, was carried out on the 11th of February 2016; consequently it has passed the 3 (three) months period determined in Article 92(3) of Law No.14 of 2002 on Tax Court in conjunction with the Supreme Court Regulation No. 3 of 2002 on the Procedure for Submitting Requests for Judicial Review. Therefore, a review request submitted by the Director General of Customs and Excise was rejected by the Supreme Court.

(OCP) for the Rules of Origin, it merely aimed to support its argument to evidence that the mandates of the AKFTA has been embedded in PMK-118. In short, it can be submitted that nationals of Indonesia when having disputes relating to the implementation of the AKFTA, they must rely on PMK-118 and other relevant national laws, for example Law No. 10 of 1995 on Customs as amended by Law No. 17 of 2006.

3. The Effect of The Indonesian Approaches to Self-Executing Treaties on The Enforceability of Article 44 of the Vienna Convention 1969 regarding Separability of Treaty Provisions

One of the provisions of the Vienna Convention 1969, namely Article 44 which governs the separability of treaty provisions are not specifically provided in detail by the Indonesian Treaty Law. Article 44 of the Convention stipulates that:

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.
2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.
3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
   (a) The said clauses are separable from the remainder of the treaty with regard to their application;
   (b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
   (c) Continued performance of the remainder of the treaty would not be unjust.
4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

It is questioned whether the Indonesian approaches which consider that all treaties are non-self-executing may affect the enforceability of the above provision. The Indonesian Treaty Law is silent about the separability of treaty provisions, yet a provision under the Law which may closely correspond with Article 44 of the Vienna Convention 1969 is Article 19. It stipulates that 'a treaty which terminates before the end of its designated term shall not, subject to the agreement of the parties thereto, affect the completion of any arrangement contained therein which has not been performed fully at the time the treaty is terminated'. It is clear that Article 19 of the Indonesian Treaty Law mere indicates that the obligations arise from a treaty are still intact only if it is terminated[37] before it ends.

Indonesia used to withdraw from the operation of the New York Agreement regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot. It was concluded on the 5th May 1999 in New York between the government of Indonesia, Portugal and the Secretary General of the United Nations for the purpose of finding a fair solution pertaining to the problem of East Timor. It imposed an obligation on the Indonesian Government to guarantee a safe, free and fair condition for the referendum process. The Government was also responsible for the security of the United Nations staff. It was a very significant agreement since it related to the Indonesian territory; therefore the Government had to consult this matter with the DPR before concluding it. However, the Indonesian Prime Minister Ali Alatas did not conduct it.[38] The failure

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[37] Article 18 of Law No.24 of 2000 on Treaties states that:
A treaty shall terminate if:
a. the parties thereto agree to terminate the treaty by the procedure prescribed therein;
b. the objective of the treaty has been achieved;
c. a fundamental change of circumstances occurs which affects the implementation of the treaty;
d. either party to the treaty fails to comply with or breaches the provisions therein;
e. a new treaty is concluded which replaces the previous treaty;
f. emergence of a new peremptory norm of international law;
g. the object of the treaty ceases to exist;
h. contains a prejudicial effect to the national interest.

[38] Tim Penulis Bagian Hukum Internasional Universitas Gajah Mada, *Pengantar Hukum Internasional* (Yogyakarta, 2013), p. 121.

of consulting the DPR was one reason to withdraw for the agreement. The other reason was that the substances of the New York Agreement was also contrary with the fundamental national law of Indonesia namely Law No.7 of 1976 and TAP MPR VI / MPR / 1978 which governed the integration of East Timor within the territory of Indonesia. The Indonesian Government withdrew from the operation of the New York Agreement entirely. In this regard, it is important to note that Article 44 (1) of the Vienna Convention 1969 permits to exercise some parts of a treaty if it permits or parties to a treaty agree to do so. In the case under discussion, the New York Agreement did not provide a separability provision and there was no specific agreement made by the parties.

It is obvious that the Indonesian Treaty Law does not specifically provide provisions relating to the separability of treaty provisions. Accordingly, it is questioned whether the Vienna Convention 1969 may be also used to fill the lacuna of law under the Indonesia Treaty Law. If the answer is affirmative, then the separability of treaty provisions under Article 44 of the Vienna Convention 1969 may be used as a reference to fill in the lacuna of the Indonesian Treaty Law, particularly when Indonesian judges handle cases containing a treaty with separability provisions in the future. In practice, the Constitutional Court when making Decision No.13/PUU-XVI/2018 also made a reference to the Vienna Convention 1969. It is further questioned whether the approach of Indonesia which considers all treaties to be non self-executing may affect the utility of the Vienna Convention, particularly Article 44 of the Convention. The answer to this question is negative since the substances of Article 44 are merely used as a guideline for judges to fill the lacuna in the Indonesian Treaty Law. In practice, the Indonesian Constitutional Court when reviewing Law No.22 of 2001 on Oil and Gas utilised the provision of the Vienna Convention 1969 to define the term 'treaty' rather than referring it to the Elucidation of the Indonesia Treaty Law.[39] However, in the absence of an implementing legislation, it is merely optional for Indonesian judges to refer to the norms under the Convention. If it is not against the sense of justice of Indonesian

[39] D.D.Agusman, Treaties Under Indonesian Law: A Comparative Study (Bandung, 2014), p.377.

people, national interest and the Indonesian legal system, it is most likely they refer to the Convention when making decisions to fill the lacuna of law.[40] This is because Article 16(1) of Law No. 4 of 2004 on Judicial Power mandates that judges may not refuse a case submitted to them on the ground that there is no law or it is unclear. They are oblige to examine and prosecute it. Today, the Indonesia Treaty Law has been registered in the National Legislation Program 2015-2019.[41] It is expected that the revised Indonesian Treaty Law corresponds with all provisions of the Vienna Convention 1969 to facilitate judges when making decisions pursuant to a treaty with a separability provision and more importantly to ensure the legal certainty of the enforceability of Article 44 of the Convention in Indonesia.

E. Conclusions

Based on the discussions above, it can be generally concluded that:

a. The Indonesian Treaty Law is foreign to self-executing treaties. This is because treaties in public and private law are only enforceable after the promulgation of an implementing legislation. A law (*Undang-Undang Ratifikasi*) which ratifies a treaty is only deemed to bind Indonesia as a party to a treaty at international level. The said treaty does not bind Indonesian courts. At national level, all persons and legal subjects in Indonesia are bound by laws (*Peraturan Perundang-undangan*) provided by Article 7 of Law No. 12 of 2011.

b. The Indonesian Treaty Law is silent about the separability of treaty provisions since it does not provide specific provisions regarding this matter. If this circumstance is regarded as a lacuna of the Law, then the Vienna Convention 1969 may be used by Indonesian judges as a tool aid to fill this lacuna when they handle cases relating to a treaty containing separability provisions. In this regard, the Convention is treated as a customary international law since Indonesia has not ratified it. Accordingly, the approaches

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[40] *Supra* note 25.

[41] Sistem Informasi Direktorat Jenderal Peraturan Perundang-Undangan, Kementerian Hukum dan HAM, Accessed May 5, 2017, http://peraturan.go.id/ruu-tentang-perubahan-atas-undang-undang-nomor-24-tahun-2000-tentang-perjanjian-internasional-1.html

of Indonesia which regard that all treaties are non-self-executing, does not affect the utility of Article 44 of the Vienna Convention.

c. Indonesian nationals may submit their disputes which are relevant to the implementation of a treaty for public and private law before Indonesian courts. Yet, they cannot establish their arguments merely on the treaty without referring it to its implementing legislation or other laws which have transformed this treaty.

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