

JUDICIAL PREVIEW ON THE BILL ON INTERNATIONAL TREATY RATIFICATION

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Abstract

This research is aimed to find and introduce a new idea on the state administration, which has implications on the international treaty ratification procedure followed by Indonesia and additional authorizations of the Constitutional Court of the Republic of Indonesia. The judicial preview in this research is an international treaty examination procedure by the Constitutional Court before an international treaty is transformed into a law, i.e. such international treaty is a Bill. The judicial preview shall have different terms in each country, such as Review *ex ante*, abstract review, judicial review. This procedure is applied when an international treaty has not been validated as a country's national law. The benefits of a judicial preview shall be a solution to connect an ambiguity between the state administrative law and international law. The judicial preview is also the inter-state institutions real check and balance on the international treaty. Out of benchmarking results of four countries following the monism doctrine, i.e. Russia, Germany, France, and Italy and two countries following the dualism doctrine, i.e. Hungary and Ecuador, several additional authorizations of the Constitutional Court shall be summarized, i.e. via the Amendment of 1945 Constitution of the Republic of Indonesia and/or regulations via laws. If both manners are not possible, the Constitutional Court may apply the judicial preview as a state administrative practice. An international treaty draft, which has passed through the judicial preview, may not be submitted to the Constitutional Court to be performed a judicial review, unless 5 (five) year-period has passed since the bill is enacted as a law.

Keywords: Judicial Preview, Constitutional Court, International Treaty, *Pacta Sunt Servanda*, Ratification

I. INTRODUCTION

A. Background

The subject which underlies this research is the Constitutional Court accepts the review application on Law Number 38 of 2008 on ASEAN Charter ratification (Asean Charter) submitted by the Institute for Global Justice in 2011¹ One of the reasons to submit the Judicial Review of the Law on ASEAN Charter Validation is economics treaties binding member countries via the ASEAN Charter shall be performed a free trade agreement between member countries and other countries other than ASEAN members. Such treaties significantly deduct the sovereignty of Indonesia as a country and liberalize the economic and labour, in which the liberalization may threaten the life sustainability of citizens of the Republic of Indonesia.² Related to the Judicial Review, Former Director of International Treaties at the Ministry of Foreign Affairs of the Republic of Indonesia, Damos Dumoli Agusman states his opinion as follows:

However, it shall be noted if the Constitutional Court decides that the ASEAN Charter contradicts with the 1945 Constitution, a legal dilemma will emerge for Indonesia (as a country), i.e. how to comply with the 1945 Constitution by breaching international laws or obey international laws by breaching the 1945 Constitution. According to international laws, Indonesia cannot reject the performance of treaties it consented to under a reason that they contradicts with the national laws.³

Regarding the rationale of Damos Dumoli Agusman aforesaid, there is a dilemma between the national and international laws which has not been settled until now. The 1945 Constitution often encounters a problem with international treaties in terms of state sovereignty, individual rights, etc. There is also a worry on the future of international treaties threatened to be aborted due to various contradictions between national and international laws. This concern is reasonable

¹ See Khaerudin, "MK Diminta Batalkan Ratifikasi Piagam Asean", *Kompas*, 23 September 2012, [...link...] <http://internasional.kompas.com/read/2012/11/23/2139259/MK.Diminta.Batalkan.Ratifikasi.Piagam.Asean>

² See also Simon Tumanggor, *Judicial Review Undang-Undang Pengesahan Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara Jendela Informasi Bidang Hukum Bidang Perdagangan* (Judicial Review on the Law on Association of Southeast Asian Nations' Charter as the Window for Commercial Legal Sector Information). (Ministry of Home Affairs of the Republic of Indonesia, 2011, (see <http://jdih.kemendag.go.id/files/pdf/2014/02/14/3-1392378065.pdf>)), Page 3

³ Damos Dumoli, *Judicial Review of ASEAN Charter*. See <http://www.sinarharapan.co.id/content/read/judicial-review-piagam-asean/>, See also *Majalah Opino Juris*, Vol. 4 (2012), Ministry of Foreign Affairs of the Republic of Indonesia.

considering several issues in the Indonesian state administrative and national laws which have not been settled with international treaties, among others:

1. Law No. 24 of 2000 on International Treaties does not expressly explain the position of international treaties in laws. It solely states that an international treaty is validated with a law/Presidential Decree without further explaining the meaning and consequence for Indonesian laws.
2. Other problem lies in the hierarchy of the laws as referred to in article 7 paragraph (1) of the Law No. 12 of 2011 on Laws Drafting. The provision does not explain the position of International Treaties in the national laws. If the ratification of international treaties is embodied via laws, it means the law on international treaties may be performed a Judicial Review under the most severe consequence of such law being stated as null and void and breaching the constitution or the 1945 Constitution of the Republic of Indonesia. The consequence of such international treaties cancellation may present a bad implication to the international politics and weaken the position of the Ministry of Foreign Affairs, which is the front line of the state diplomacy.
3. It is not clear whether Indonesia applies a Dualism or Monism in its international legal system. Until recently, Indonesia still applies a mixed doctrine, in which the monism doctrine is applied for international treaties related to the state's bound as an external international legal subject and the dualism doctrine along with a transformed action is applied for international treaties related to rights and obligations for all Indonesian citizens.

B. Research Questions

What is the mechanism and possibility of a Judicial Preview of the Bill on the Ratification of International Treaty?

C. Research Methodology

In this research, the main data are primary and secondary data. Primary data are interview results combined with normative data, such as treaty texts and laws, which are analysed by the Law and Change Theory, Pacta Sunt Servanda and Check and Balance and utilizing findings on several countries' international treaties norms to be compared one to another. In addition to primary data, this research is also supported by secondary data from legal literatures, such as dissertations and scientific journals. Approaches applied in this research shall be statute approach, conceptual approach and treaty approach and comparative

approach which are applied to compare the Judicial Preview on International Treaties by Russia, Germany, Hungary, France, Italy, and Ecuador.

II. RESULT AND DISCUSSION

Before we further discuss this research outcome, it is important to take note about decisions on the ASEAN Charter Judicial Review at the Constitutional Court, which are taken in February 2013. Even though such Judicial Review application is not granted by the Constitutional Court, it is only a temporary relief. Other international treaties are threatened to be cancelled before the Constitutional Court because International Treaties validated by law automatically become a test object at the Constitutional Court. However, it is important for us to carefully study several judges' opinions on the ASEAN Charter review case, among others:⁴

1. Judge Harjono shall think that even though Indonesia has bound itself in international treaties, as a sovereign country Indonesia remains have an independent right to terminate such agreement, if Indonesia thinks it is harmful or does not provide any benefits. ASEAN Charter is an agreement among ASEAN member countries. From the national point of view, it is a macro policy in the commercial sector. Such macro policies may be changed if it does not provide any benefits or causes harms. Therefore, the government and People's House of Representative need to review such agreement, in this case ASEAN Charter.

In addition, due the ASEAN Charter implementation relies on each ASEAN member country under Article 5 paragraph (2) of the ASEAN Charter, the Indonesian government shall make an implementing regulation which complies with the national interests under the 1945 Constitution. According to Harjono, a country's obligation does not occur because an international treaty has been ratified by a law. However, such obligation occurs because the parties (countries) as the legal subjects have collectively agreed to an agreement. It complies with the principle of *Pacta Sunt Servanda*.

2. Instead, having a different opinion with Judge Harjono and other Constitutional Judges, Judge Hamdan Zoelva and Judge Maria Farida think that the Law

⁴ See the Verdict of MK Number 33/PUU-IX/2011 on the review of ASEAN Charter

No. 38 of 2008, as the legal form of the People's House of Representative's approval for the ASEAN Charter, may not become a judicial review object against the 1945 Constitution, which is the authorization of the Court. Thus, this application should not be acceptable (*niet otvankelijk verklaard*). (See point 2 of the difference between the common law and UUPI)

Two different opinions in the legal consideration of the Constitutional Court Judges are also consequences of no express norm in the Indonesian national laws and regulations, which principally differentiate between common laws and international treaties laws. These differences are reasons why the Judicial Preview is urgent for Indonesia. The difference between both of them is described as follows:

1. Common laws, which are mostly belonging to the national legislation programme, are internal in nature for either its provisions or legal substance. Internal nature means that underlying legal sources and the procedure to draft this law include in the national scope. Meanwhile, an international treaty law is a law which prevails internally because it is "covered by" a law. However, the source and procedure to draft such international treaties to become a law come from international organizations, bilateral agreements, multilateral conventions, etc.
2. In terms of the laws format, laws shall principally have a fundamental difference with the international treaties ratification law, and it is stated by the Constitutional Judge Maria Indrati as follows:

Law Number 38 of 2008 on Ratification of the Charter of the Association of Southeast Asian Nations is the Law on ratification which serves as a ratification tool of a treaty performed by the Government and other countries or international institution. By law, either by Law No. 10 of 2004 and Law No. 12 of 2011 on the Enactment of Laws and Regulations, the provisions of the international treaty ratification Law are placed in a different sector with common laws and other laws and regulations. A different provisional placement between common laws (including other laws and regulations) and the Law on international treaties ratification of the treaty is reasonable. Therefore, the format or surface form (kenvorm) of both laws has a significantly fundamental difference, specifically the

*elaboration and wirting of both laws' body. In Law Number 12 of 2011 on the Drafting of Regulations*⁵

Furthermore, Maria Farida Indrati argued that the Law generally formulates the substance of various norms and such norms may be directly addressed to each person. Thus, the enactment of such Law will bind everyone.⁶ This is different to the Law on International Treaties Ratification, because the ratification is a state administrative institution on the ratification by the legislature for the Government's legal actions (which has signed a treaty) in accordance with the Law on International Treaties. Therefore, Indonesia is formally bound to the treaty. Thus, the promulgation of the Law on International Treaties Ratification is not binding to each person/people. However, it solely binds the parties who enter into the treaty. This complies with the principle that a treaty binds the parties entering into it (*pacta sunt servanda*) as referred to in Article 26 of the Vienna Convention⁷

3. The third issue which distinguishes common laws and the law on international treaties is the "law making" or making of norms or rules of law in both laws. Common laws are laws coming from the legislative and judicial agencies and they are discussed in the commission and plenary meetings before they are ratified and binding. Meanwhile, laws derived from international treaties are not discussed in a meeting, either the People's House of Representative's commission meeting or plenary meeting, which is aimed to make norms in the international treaties Bill. The meetings conducted by the People's House of Representative are held to solely ratify the Bill into the Law, totally without changing the content. The absence of a substantial discussion on international treaties by the People's House of Representative is stated by Prof. Dr. Maria Indrati in the Verdict No. 33/PUU-IX/2011 on ASEAN Charter review:

Regarding the substance in the body of the common laws, the laws drafters, both the People's House of Representative and the President will address the overall design of the Law, whether it is the considerations, legal

⁵ Verdict Number 33/PUU-IX/2011 on the ASEAN Charter review, pp. 202-203.

⁶ Maria Farida Indrati S. 2007, *Ilmu Perundang-undangan (1). (Jenis, Fungsi, Materi Muatan)*, Yogyakarta, Kanisius. page 53.

⁷ Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda Dalam Perjanjian Internasional", *Mimbar Hukum UGM*, Volume 21 No. 1, February 2009, Yogyakarta. pp. 155-170.

basis, and also Article 1 to last article. Therefore, if there is an opinion or improvement, they can change or even delete it. Once the entire bill is discussed and its corrections and formulations are performed, the bill will be collectively agreed upon by the People's House of Representative and the President. Then, the President ratifies such Law. This is different from the discussion on the Bill on the International Treaties Ratification, because the People's House of Representative and the President only focus on the ratification issue and they cannot change the intentional treaty substance made by the Government and other state (country) or international organization.

4. The fourth difference between common laws and laws derived from international treaties, is the law nullification status. If the laws are generally canceled through a Judicial Review by the Constitutional Court, such Law is automatically no longer binding. It is different if the Constitutional Court cancels a Law derived from an international treaty. The binding content of such international treaty is not automatically cancelled. This is explained by Damos Dumoli Agusman:⁸

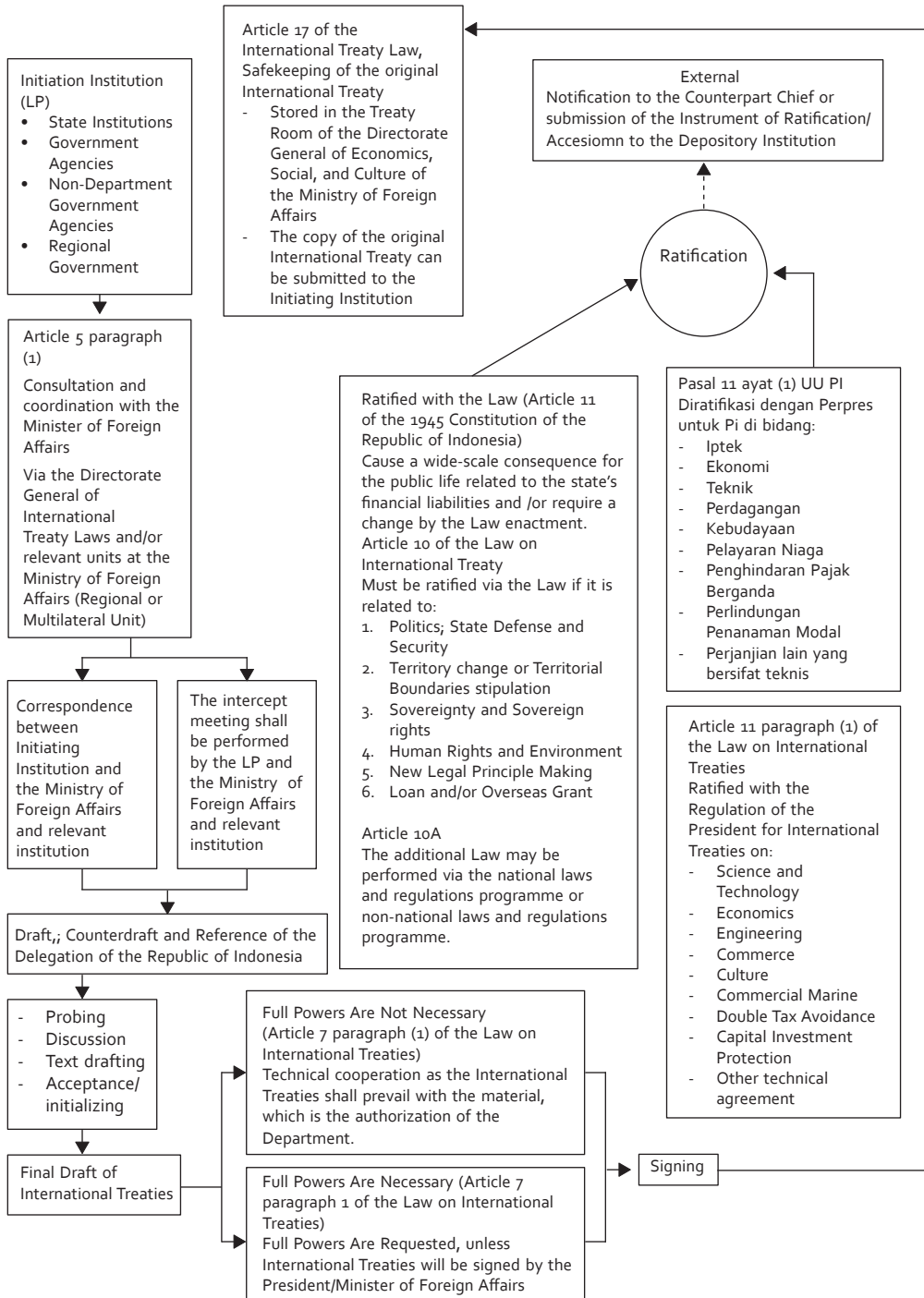
If it is observed from the legal source, the Dutch doctrine shall become the guideline for Indonesia. It means the Constitutional Court can only review Law No. 38 of 2008. It cannot review the ASEAN Charter, because the Law No. 38 of 2008 is only an approval by the People's House of Representative and is not intended to make the ASEAN Charter as a national law.

5. The last reason is the Constitutional Court of the Republic of Indonesia does not have any abstract review as European countries, among others Austria, Hungary, Germany and Italy. However, the need to settle the constitution issue between international treaties and national laws must be fulfilled. Indeed, the idea of a Judicial Preview of an international treaty bill is the same with the abstract review or ex ante review in the countries aforesaid. The use of the Judicial Preview term is a speciality applied to differentiate the abstract review of an international treaty bill and the abstract review of common laws and regulations, which are conducted by some European countries.

Then, let's we see the mechanism of an International Treaty and Judicial Review of Laws threatening the performance of an international treaty:

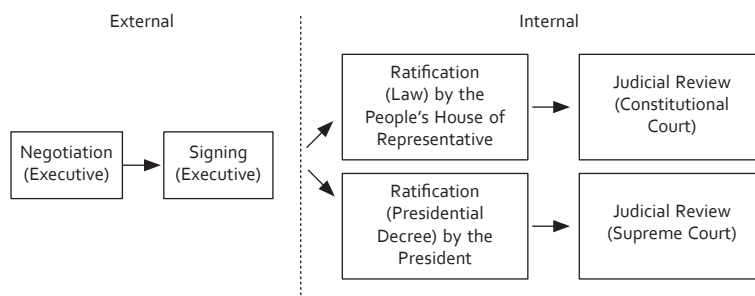
⁸ Opinio Juris Magazine, op.cit.

(1) The Scheme of the International Treaty Drafting⁹



⁹ Eddy Pratomo, *Hukum Perjanjian Internasional, Pengertian Status Hukum dan Ratifikasi*. Penerbit Alumni, Bandung 2011.

(2) The Scheme of the International Treaty Judicial Review



Along this time, in terms of international treaties making, the authority remains on both state's controlling institutions, i.e. executive in terms of making international treaties; the People's House of Representative of the Republic of Indonesia has an authority to ratify international treaties which has contents including in the law classifications; and other technical international treaties ratification other than laws ratification are the authority of the president (Presidential Decree).

The international treaties scheme aforesaid according to the Law on International Treaties has been significantly outdated, because the Law on International Treaties does not have norms regulating the possible Judicial Review against the Law on International Treaties. Even though the content of the Law on International Treaties is different to common laws, the status remains a Law, which may be subject to a judicial review before a Court.

The constitution and laws and regulations (Law of the Republic of Indonesia Number 12 of 2011 on the Enactment of Laws and Regulations (UUP₃) and Law No. 24 of 2000 on International Treaties) have indeed guaranteed the ratification of international treaties to become a part of national legal provisions via ratification. The most important unresolved issue in the constitution and laws and regulations in Indonesia is no classification of laws which can be cancelled by the Constitutional Court, even though the laws content can vary.

The second scheme aforesaid shows even though international treaties have been approved and have a binding effect, they may be filed in the Constitutional Court or the Supreme Court for a judicial review. If an international treaty is

declared unconstitutional by the Constitutional Court or the Supreme Court, the treaty cannot be implemented. In this case, a Judicial Preview is necessary. The Judicial Preview is basically an abstract norm test, which is, in principle, a preventive mechanism for the future of laws and regulations predicted to be unconstitutional.¹⁰ In other words, the Judicial Preview is a control on a bill prior to its enactment as a legally binding law. This means that there are preventive aspects of the Judicial Preview if it is enacted on the international treaty bill. This preventive aspect is a form of prudence if the international treaty bill is indeed contrary to the national interests and the 1945 Constitution.

The Judicial Preview on the ratification bill will be important to be studied for the effectiveness of the international treaties ratification and enactment process. If the bill has been legally enacted as a law and the ratification law can be tested, there is no legal certainty in the enactment of such bill. The test of the ASEAN Charter is an experience that the enacted international treaties law has a cancellation consequence. Once the agreement is made, it should be implemented as the *pacta sunt servanda* and good faith (the provisions of the Vienna Convention in Article 26). Furthermore, the results of this study can be a solution-based recommendation which can be applied as problem solving regarding the international treaties for other countries.

The researcher chose to compare the judicial preview of the countries embracing the Austria model or continental model,¹¹ because the Constitutional Court of the Republic of Indonesia is synonymous with the Constitutional Court of the countries adopting the Austrian model in some respects. First, Indonesia is a country which inherits the law of the European continent. Thus, it will be more consistent if a comparative study is carried out between the member countries which follow the Austria model or continental model, The second reason is Indonesia has a Constitutional Court, in which it is a characteristic of a country which adopts the Austria or Continental model. Therefore, the comparative study compares the state administration practice and judicial preview norms between countries adopting the Continental model. Some countries used

¹⁰ Jimly Ashshiddie, *Peradilan Konstitusi di Sepuluh Negara*. Jakarta, Konstitusi Press page 50.

¹¹ This model is also known as *kelsenian model*.

as the comparisons are Russia, Germany, Hungary, United States of America, Italy and Ecuador as an input in the design of judicial preview to become the authority of the Constitutional Court of the Republic of Indonesia. Some matters compared are later broken down in the following table:

| Country | Doctrine | Ratification Authority | International Treaties Form following a Ratification | Name of the Institution | Terminology | Legal Basis of the Authority | Possible Judicial Review of the Law on International Treaties |
|-----------|----------|---|--|-----------------------------|---------------------------------|------------------------------|---|
| Russia | Monist | President, Parliament only some elements | Without transformation | Constitution Court | Abstract Review | Constitution, Laws | None |
| Germany | Monist | President | Without transformation | Constitution Court | - | Practice | Practice |
| Hungary | Dualist | President at the approval of the Parliament | Menjadi UU atau Keppres | Constitution Court | Review ex ante/ A priori review | Constitution, Laws | Yes |
| France | Monist | President | Without transformation | Constitution Council | A priori review | Constitution | None |
| Italy | Monist | President, Parliament only some elements | Without transformation, sometimes become a Law | Constitution Court | Abstract review | Constitution | Yes (ratified into a Law) |
| Ecuador | Dualist | President at the approval of the Parliament | Without transformation | Constitution Court | Judicial Review | Law | None |
| Indonesia | Dualist | Parliament and President | Become a Law or Presidential Decree | Constitution Court/ Council | Not Yet | Not Yet | Yes |

From the above comparative table, there are several matters which can be summarized from each country:

1. From the comparison table above, it can be seen that some countries adopt the Monism such as Russia, Germany, France and Italy. Agreed international

treaties no longer require a ratification instrument of Constitution. The agreed international treaties automatically become a part of the national law. However, for Russia and France, before the international treaties are ratified/signed, the treaties must pass the examination or review of the Constitutional Court and Constitutional Council. Unlike Germany, when the treaty is ratified by the President, the international treaty is self-executing¹².

2. The German Constitutional Court does not have any jurisdiction over a treaty review. However, Germany puts a state administrative action into practice, when the Constitutional Court reviews the international treaty on ECtHR prior to the entry into force (judicial preview) of the International Treaty on Double Tax Avoidance (judicial review). For Italy and Russia, the two countries are slightly inconsistent in the monism doctrine. Not all international treaties can be ratified by the President. Sometimes there are some specific treaties to be ratified by the Parliament and transformed into a Law.
3. For a country which adopts the dualism doctrine in international treaties such as Hungary, Ecuador and Indonesia, a law can be binding in domestic laws when it is approved by the parliament. The Hungarian and Italian Constitutional Court can review a bill on international treaties when the president or the government appeals to the constitutional court of each country. Nevertheless, this is different from Indonesia because the Constitutional Court does not have any authority to a priori review. Therefore, a law on international treaties can be cancelled by the Constitutional Court's verdict. In contrast to Ecuador, when Ecuador will implement an international treaty, the Ecuadorian Constitutional Court is automatically authorized to review the international treaty before it is passed by the parliament. Thus, the Constitutional Court of Ecuador is one of the authorities in the international treaties process. However, Ecuador does not transform an international treaties which have been to a law. Therefore, the ratified International Treaty is not included in the petition object to the Constitutional Court of Ecuador.

¹² Eddy Pratomo, *op.cit.*, pp 200-201.

4. For a country which adopts the monism doctrine, such as France, an international treaty cannot be petitioned for a judicial review by a Constitutional Court/Council since the treaty is adopted not in the form of a law. However, the state administrative practice of Germany, i.e. an abstract review, does not adopt any international treaty. Nevertheless, prevailing international treaties once exist in the state administrative practice, even though such treaty is not a review object of the German Constitutional Court. However, the Court remains performing the judicial review because the common legal principles shall have a priority below the German constitution. Thus, the constitutional review of international treaties remains valid to be tested against the German constitution.
5. In terms of countries adopting the dualism doctrine, such as Hungary, their Constitutional Court has an ex ante and abstract review which is one step more advanced than the Indonesian Constitutional Court. However, it may still be argued by the possible law on international treaties ratification agreed by Hungary, which is cancelled by the Constitutional Court. The solution taken is to eliminate the judicial review for this type of law, or the law on international treaties ratification may be materially reviewed. However, a period of time should be given for the review application of this law.
6. Related to the Indonesian Constitutional Court, as to be described next, Indonesia may perform a judicial preview for the international treaties ratification bill by several methods. First, amend the 1945 Constitution of the Republic of Indonesia and add the judicial preview authority for the Constitutional Court. Second, include an authority in a law on Constitutional Court. Therefore, it is not necessary to amend the constitution (take example from Ecuador). Third, perform the state administrative practice as Germany.

Then, in general, following matters can be drawn from the judicial preview of above countries:

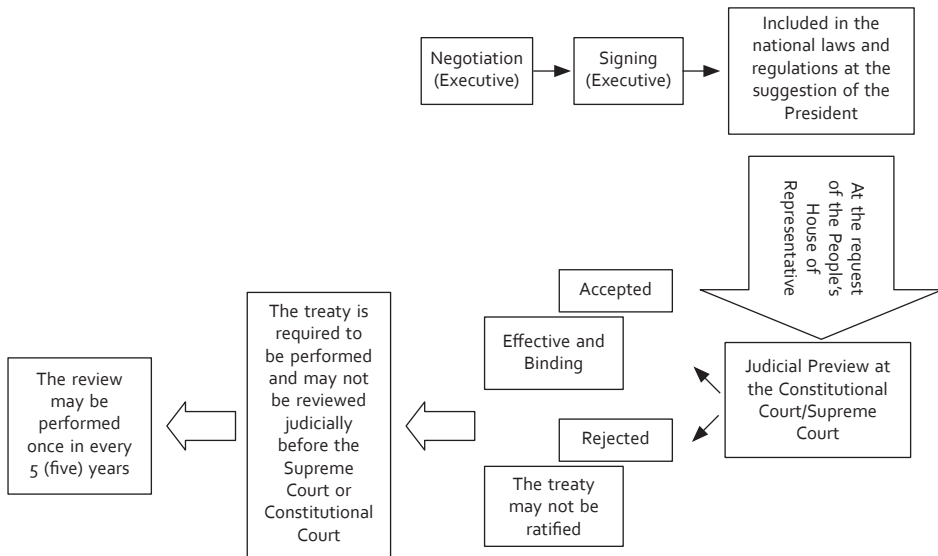
1. Even though there are countries which claims as monists, the dualism practice also occurs when there are countries transforming the international treaty into a law.

2. The countries' ratification authority model also varies. Some countries' parliament ratifies the law and some countries' President performs the ratification. Then, there is also some countries' Parliament and President who ratify the law, either individually by the Parliament (Law) and Presidential Decree (President) (the example of these countries is Indonesia) or collectively (the President at the approval of the parliament).
3. The naming of a constitutional institution mostly applies the term of "court" and it is classified into the judicial power. The exception applies for France which takes a Council form. Therefore, the members are not judges.
4. The term of International Treaties review prior to its binding effect is not uniform. Some countries name it as abstract review, *a priori* review, review *ex ante*, or judicial review. The naming of judicial review in this research is aimed to specifically point to the International Treaties Bill. Thus, the definition will not be mixed with the abstract review, *a priori* review, or review *ex ante*, which prevails in some countries for common laws.
5. The Legal Basis of each country's Constitutional Court's authorization is directly transferred via the Constitution and Laws. Then, some countries adopt a principle where the authority does not derive from the Constitution. It is solely derived from Laws. However, some countries do not have such authority in their constitution or laws. But, it is carried out as a legal practice (Germany).
6. Then, in terms of the judicial review, a treaty covered by the laws (laws/ act) may remain able to be reviewed by the Constitutional Court. However, it is different when it is not transformed as a monist practice. When it has been entered into and prevailed, an international treaty is no longer a case object of the Constitutional Court, unless there is a practice as Germany. It is related to the possible cancellation via a judicial review (for Dualist countries). A norm to govern every 5 (five) year may be added and the Law on International Treaties may be submitted for a judicial review before the Constitutional Court. It is aimed to guarantee individual rights concurrently as an evaluation moment on the progress of such Law on International

Treaties; whether the content of such agreement remains relevant or has been performed, etc.

The Judicial Preview is a real action in mediating the national state administrative issue and international laws (treaties). It may provide a new authority for the Constitutional Court of the Republic of Indonesia to perform the judicial preview on international treaties signed by the delegations, when such international treaties remain as a bill. In order to provide such new authority to the Constitutional Court, several procedures may be taken, i.e. Amendment of the 1945 Constitution (by including a new authority in Article 23 of the 1945 Constitution), Amend the Law on Constitutional Court, or stipulate a judicial preview as a state administrative practice. Such three solutions are taken by an exemption, in which the international treaties bill to be reviewed judicially by the Constitutional Court does no longer have any chances to be reviewed judicially when the international treaties bill has been ratified or taken a form of a law because it has undergone the judicial preview process.

Out of this benchmarking result, the scheme of the international treaties judicial preview is formulated in this research:



As a follow-up, there are several actions which may be taken, so the Constitutional Court may have an authority regarding the judicial preview on the international treaty ratification bill, among others:

1. Add the Authority of the Constitutional Court in the 1945 Constitution

An idea to include the Constitutional Court in the international treaties process in Indonesia is relatively new. If the Constitutional Court is to be included in an international treaties process, the Judicial Preview authority by the Constitutional Court may be added by amending the 1945 Constitution. The authority granting to the Constitutional Court by amending the 1945 Constitution will be considered as an over-the-top action by some people, because the 1945 Constitution is highly sacred. However, it does not mean that this amendment cannot be performed. The amendment of the 1945 Constitution is a token that our constitution is not entirely reserved and cannot be amended. In the name of national interests and public order, the amendment can be taken. One point to be noted is the amendment of the 1945 Constitution is not the only means. There are other means to provide a new authority to the Constitutional Court. However, the amendment of the 1945 Constitutional is the most realistic means if we consider a positive law, which requires all norms and provisions to be in a written form.

2. The authority granting to the Constitutional Court via Laws

The second option is to grant authorities to the Constitutional Court via Laws. If it is considered too difficult and impossible to amend the 1945 Constitutional, it is a choice. In order to grant a new authority to the Constitutional Court is not a prohibited or bad matter if the purpose is aimed for the Indonesian national interests. We can see the example from Ecuador whose constitution does not explain about any review authorities on international treaties prior to the ratification. This authority is only mentioned in the organic law of the Ecuadorian Constitutional Court. Likewise, the Thailand Constitutional Court grants the authority expansion to approve the recommendation of the Corruption Eradication Commission, in which the Thailand Constitutional Court may suggest to the Prime Minister not to

appoint any public officials, who do not submit a true asset report. Observing the examples of the Constitutional Court's authority expansion from the above countries, which materialize a legal certainty on the international treaties performance, this authority expansion may be carried out by amending the Law on Constitutional Court for the third time.

3. **Judicial Preview via the State Administrative Practice at the Constitutional Court**

The forms of state administration system which are not set out in the laws and regulations, are nothing new in the world. We can see how Germany, as a developed country, does not always have laws and regulations in its state administrative practice. The judges of the Constitutional Court of the Federal Republic of Germany are very progressive in terms of the constitutional practice, but they still consider the state's constitution and national laws.

Indonesia, as the country with a Constitutional Court, has also significantly been performing state administrative practices which have not been regulated by laws and regulations. For example, when the Constitutional Court issues a verdict, which is *ultra petita* in nature and considered to go beyond the authority of the Constitutional Court, it is intended that the law is not left behind to changes in society and the national and international political constellation. Although the Law on International Treaties is no longer be petitioned for a judicial review, each five (5) year-period³³ is given as an opportunity for parties, who wish to file an application for a Judicial Review. It aims to maintain the relevance of laws and regulations and times, and provide an opportunity for the public to review the treaty by submitting a Judicial Review.

³³ Discussion outcome with Prof. Jimly Ashsiddiqie, Jakarta 2016

III. CONCLUSION

- Being aware of the outdated Law on International Treaties against the Law on Constitutional Court and norms of the judicial review, the People's House of Representative should immediately revise the Law on International Treaties in order to conform to the Law on Constitutional Court and other legal norms.
- The judicial preview has a different naming in each country, such as review *ex ante*, abstract review, judicial review.
- The judicial preview is useful to balance the division of authority between state institutions in making international treaties. If the Constitutional Court of the Republic of Indonesia is given an authority to review the bill of international treaties, the authority to make international treaties is not limited to the executive body (negotiation stage) and legislative (ratification stage). Therefore, the check and balance principle can be realized.
- The judicial preview may become the authority of the Constitutional Court of the Republic of Indonesia by amending the 1945 Constitution of the Republic of Indonesia and/or the Constitutional Court's authority is added via the Law on Constitutional Court (such as, the authority of the Russian judicial preview is only regulated in the Organic Law). However, if both are not possible, the Court can review the constitutionality of an international treaty bill as a form of constitutional practice (e.g. *Bundesverfassungsgericht* Germany which does not have the authority (in written) on the judicial preview and judicial review of international treaties, but it takes the initiative to review the treaty before such treaties are binding).
- This judicial preview concept obviously can become a bid to other countries, which also have a Constitutional Court and a cooperation tool of the Constitutional Courts among countries, specifically considering that the Constitutional Court of the Republic of Indonesia has many useful collaborations to advance the interstate constitutional system and the

Judicial Preview is an important breakthrough to ensure the implementation of international treaties and of course carry out the functions of the Constitutional Court of any country in the world as a Guardian of Constitution.

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