CRITICAL ANALYSIS OF INDONESIAN CONSTITUTIONAL COURT DECISION ON ASEAN CHARTER: AN INTERNATIONAL LAW PERSPECTIVE

A BACHLEOR DEGREE THESIS

By:

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Student Number : 14410353

INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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Presented as the Partial Fulfillment of the Requirements
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Bismillahirahmaanirrahiim

Yang bertandatangan di bawah ini, saya:

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No. Mahasiswa : **14410353**

Adalah benar-benar mahasiswa Program Internasional Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan karya tulis ilmiah (tugas akhir) berupa skripsi atau legal memorandum atau studi kasus hukum dengan judul:

CRITICAL ANALYSIS OF INDONESIAN CONSTITUTIONAL COURT DECISION ON ASEAN CHARTER: AN INTERNATIONAL LAW PERSPECTIVE

Karya ilmiah ini akan saya ajukan kepada tim penguji dalam ujian pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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Selanjutnya, berkaitan dengan hal di atas terutama pernyataan pada butir no. 1 dan 2, saya sanggup menerima sanksi baik sanksi administrasi, akademik, bahkan sanksi pidana jika saya terbukti secara kuat dan menyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersifat kooperatif untuk hadir menjawab, membuktikan, melakukan pembelaan terhadap hak-hak saya. Tim Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan Fakultas apabila ada tanda-tanda plagiat yang disinyalir terjadi pada karya tulis ilmiah saya ini oleh pihak Fakultas Hukum Universitas Islam Indonesia.

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MOTTO

“Oo Allah, do not make this *dunya* our biggest concern”

(Muhammad Peace be Upon Him)

"Jadilah manusia! kuat iman, kaya ilmu, kaya jasa dan kaya harta, Semoga dirimu sama dengan seribu orang bahkan sejuta amiin...”

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Although it is definite that this thesis is imperfect, I wish it could be a contribution towards the development of legal study, as well as the advancement of Indonesian legal system in its relation with international law. There are still many things to amend in our country's legal system. And it has always been our duty as today's generation to take a part in that amendment. Hopefully, this research can play its own role in that matter, and for that reason I will be among those who cooperate in making this state a better place.

Although this research means the end of my status as a student here, but it could never be the end of my study. It's a whole-life process.

Saufa Ata Taqiyya

TABLE OF CONTENT

ABSTRACT

In 2011, the Indonesian constitutional court for the first time dealt with a judicial review for promulgation law of a treaty. The court held that it had jurisdiction to review the law, as well as ASEAN Charter as the attachment. The case had drawn controversies from both constitutional law and international law point of view. This thesis will analyze the compatibility of the court's decision with international law, and the possible legal consequences of the courts authority to review promulgation law of a treaty. The research is a normative legal research. It is found that some *ratio decidendi* and *obitur dictum* of the court's decision are incompatible with international law. As for the possible legal consequences, the government could face a legal dilemma either to comply with international law or the court's decision if in any case a treaty binding to Indonesia is found to be unconstitutional.

Keywords: ASEAN Charter, Indonesian Constitutional Court, Judicial Review.

CHAPTER I

A. Context of Study

Compliance to international law is important to Indonesia, as the principle of *free and active* –Indonesia's principle in its foreign policy[1]- requires decent reputation and credibility, and adherence to international law can reflect both of them.[2] Besides, Indonesian Constitution stipulates that one of the main goal of Indonesia as a state is to "participate towards the establishment of a world order"[3] which, undeniably, could be realized only if Indonesia complies with International legal order. For these reasons, the state in all of its aspects whether in executive, legislative, or judiciary branches shall act with due regard to, and be compatible with International Law.

In relation to which, it is interesting to analyse a case in Indonesian constitutional court, on how the court deal with a treaty. In 2011, for the first time, a request on cancellation of ratification instrument of a Treaty was filed to Indonesian Constitutional Court. The case was concerning the constitutionality of ratification of ASEAN Charter, validated through act No. 38 Year 2008, with Indonesian Constitution. It was the first and the only case before the Court dealt with ratification instrument hitherto.

It is important to note that among the main functions of the Constitutional Court is the protection of citizens' constitutional rights set forth in the 1945

[1]Agus Haryanto,"Prinsip Bebas Aktif dalam Kebijakan Luar Negeri Indonesia: Perspektif Teori Peran," *Jurnal Ilmu Politik dan Komunikasi*, Vol. IV No.II/ December 2014, p. 22-23.

[2]Damos Dumoli Agusman, "Indonesia dan Hukum Internasional: Dinamika Posisi Indonesia Terhadap Hukum Internasional ," *Jurnal Opinio Juris*, Vol. 15, January-April 2014, p. 37

[3] Indonesian Constitution of 1945, preamble, para. 4

Constitution. As the rights of citizens are protected by the constitution, the court -which is known as the guardian and the sole interpreter of the constitution-,[4] plays an essential role in upholding those rights. Any law in the level of *Undang-undang* that potentially affects negatively towards the constitutional rights of the people can be annulled by the court.

For that reason, on May 2011,[5] *Institut Keadilan Global* (Institute for Global Justice), an institution focusing on research activities relating to International Trade Agreement,[6] along with several other institutions,[7] submitted a judicial review case on ASEAN Charter ratification law (Law No. 38 Year 2008) to Constitutional Court. From their perspective, the Charter promotes liberal economy which threatens the constructional rights of Indonesian.

To be more specific, the request was on the annulment of article 1 (5) of ASEAN Charter on free flow of goods, services, and investment, and article 2 (2) of the said charter on elimination of all barriers to regional economic development. The applicant opined that the articles violate the constitution in article 33 (1), (2), (3) on national economy of Indonesia and article 27 (2) on right to work for Indonesian citizen.[8] The request was supported by the facts that there were 140.504 termination of employment in 2006-2008 as the consequence of free trade area, as many local manufactures were shut down due to low

[4]Janedjri M. Gaffar, "Peran Putusan Mahkamah Konstitusi dalam Perlindungan Hak Asasi Manusia terkait Penyelenggaraan Pemilu," *Jurnal Konstitusi*, Vol. 10, No. 1, March 2013, p. 13-14

[5]Indonesian Constitutional Court Decision no. 33/PUU-IX/2011 on ASEAN Charter, p. 3 [Decision on ASEAN Charter]

[6]*Ibid*, p. 23.

[7]*Ibid*, p. 1-3.

[8]*Ibid*, p. 29-30.

competitiveness of local products compared to foreign products.[9] The applicant also proved that the rapid growth of food import had made the local price declined and as the consequence farmers and fishermen had to suffer from losses.[10] Indonesian economy, according to the applicants, as supported by the testimonies from a number of experts,[11] cannot be left to the market mechanism; on the contrary, it requires the role of the government in building it.[12]

For those reasons, the applicants requested the court to declare that article 1 (5) and 2 (2) of ASEAN Charter are against the constitution and having no legal force.[13] A spokesman from Institute for Global Justice stated that the purpose of the request was to annul the legally binding character of the rules, for which Indonesia will no longer be binding to the allegedly creating-loss instruments.[14]

In responding the request, the court, first, addressed its competence, before it proceeded to the merit of the case. The court decided that it has the competence, as the ASEAN Charter was attached to the Law no. 38 Year 2008 which must be regarded as an indivisible part of the law.[15] In accordance with Law no 23 Year 2004 on Constitutional Court, it's the authority of the court to examine the law. By admitting this competence, the court had acknowledged that it can annul the legal force of ASEAN Charter in Indonesia, a quiet surprising and controversial decision which was proven by two dissenting opinions on this matter by Judge

[9] I*bid*, p. 35.
[10] *Ibid*, p. 37-41.
[11] *Ibid*, p. 171-172 .
[12] *Ibid*, p. 30; Hukum online http://www.hukumonline.com/berita/baca/lt4dc2cf078aa3e/uu-ratifikasi , at 22 Feb 2018, 17.50 .
[13] Decision on ASEAN Charter, *Op.Cit.* p. 186-187.
[14] Hukum Online, *Op.Cit.*
[15] Decision on ASEAN Charter, *Op.Cit*, p.181.

Hamdan Zoelva[16] and Judge Maria Farida Indrati.[17] Both opinions are based on Constitutional Law perspective, inferring that the law on approval of ratification of treaty must be distinguished from *undang-undang* in general.[18]

However, on the decision of merit of the case, the Court rejected all the request of the applicants.[19] The reasoning was that, as explained in the court's decision, the provisions in ASEAN Charter will not effectively apply in Indonesia, unless the country takes its own actions to apply the provisions. Inferentially, article 1 (5) and 2 (2) of the Charter, although they are legally binding to Indonesia, will give no effect to Indonesia until the government have taken measures to apply this provision.[20] On that matter, the court urged the government to apply measures relating to the two articles in accordance with the 1945 Constitution.[21]

This thesis will focus more on the first issue -the court's decision on its competence- without discussing the merit of the case. However, the analysis will be limited to international law point of view, although several points can be discussed from constitutional law perspective. The result of this discussion will offer both theoretical and practical advantages, for the findings will question the compatibility of Indonesia's domestic law with International law, as well as evaluate the practice of Constitutional Court.

[16] *Ibid*, p. 199.
[17] *Ibid*, p. 202.
[18] *Ibid*, p. 199-205.
[19] *Ibid*, p. 197.
[20] *Ibid*, p. 196.
[21] *Ibid*, p. 194.

An International law perspective is essential in analyzing the decision, as this case has shown that the Constitutional Court was dominated by Indonesian constitutionalist who failed to take into account the international law aspect of this issue.[22] This thesis will attempt to fill the gaps left by the judges in harmonizing between Indonesian domestic law and International Law.

B. Problems Formulation

1. Is the Indonesian Constitutional Court decision in upholding its jurisdiction over judicial review of Act no. 28/2008 on ASEAN Charter ratification, including the *ratio decidendi* and *obiter dictum*, compatible with International law?
2. What legal implications can arise from the Indonesian Constitutional Court authority to examine ratification instrument of international

C. Research Objectives

1. To figure out the compatibility of Indonesian Constitutional Court decision upholding its jurisdiction over judicial review of Act no. 28/2008 on ASEAN Charter ratification, including the *ratio decidendi* and *obiter dictum,* with International Law.
2. To analyze the legal implications that can arise from the Indonesian Constitutional Court authority to examine ratification instrument of treaty.

[22]Damos Dumoli Agusman, Treaties under Indonesian Law a Comparative Study, Remaja Rosdakarya, Bandung, 2014, p.384, 474.

D. Originality of Research

No	Author(s)	Title	Problem Formulation/Problems Discussed	Distinction to the presently Proposed Research
1	Afidatussolihat	"*Pengujian Undang-Undang Ratifikasi Perjanjian Asean Charter oleh Mahkamah Konstitusi,"*	Evaluates the decision both in the court's competence and merit of the case. The article's finding was in favor of the court's decision in term of Constitutional Court competence in examining the law based on constitutional law perspective. However, the writer adds that there will be several bad impacts	The proposed research will examine the court's competence only based on international law perspective and will not move further to the merit of the case.

			resulting from the court's final decision to disapprove all the applicant's requests, indicating her tendency to the applicant's views on the impact of free trade agreement in ASEAN level.[23]	
2	Rohwidiana	*"Studi Putusan Mahkamah Konstitusi No 33/PUU-IX/2011 Mengenai Pengujian*	Analyzes whether the court decision was correct according to Indonesian law, and whether treaty in Indonesia can be implemented effectively after it	The proposed research differs from Rohwidiana's article in the sense that the former will focus the analysis on

[23]Afidatussolihat, "Pengujian Undang-Undang Ratifikasi Perjanjian Asean Charter oleh Mahkamah Konstitusi," *Jurnal Cita Hukum*, Vol. I No. 1 June 2014, p. 148-162

		Undang-Undang Nomor 38 Tahun 2008 Tentang Pengesahan Piagam ASEAN 2013,"	is transformed in an Indonesian law (*undang-undang*).[24]	international law aspect, while the latter focus on Indonesian law.
3.	Nurhidayatulloh	*"Dilema Pengujian Undang-Undang Ratifikasi Oleh Mahkamah Konstitusi dalam Konteks Ketetanegar*	Focuses on constitutional law perspective, and concludes at the end that the court has the competence to examine the ratification instrument as it is a law in the level of *undang-undang*.	The proposed research is different as it will focus on international law perspective.

[24]Rohwidiana, "Studi Putusan Mahkamah Konstitusi No 33/PUU-IX/2011 Mengenai Pengujian Undang-Undang Nomor 38 Tahun 2008 Tentang Pengesahan Piagam ASEAN 2013," Article, International Law Department of Universitas Brawijaya, p. 9, retrieved from https://media.neliti.com/media/publications/34514-ID-studi-putusan-mahkamah-konstitusi-no-33puu-ix2011-mengenai-pengujian-undang-unda.pdf, at 20.34, March 3, 2018.

		aan RI"	He also maintains that the legal force of treaty in Indonesia is not because the treaty, but it is due to the national law which transforms it.[25]	
4.	Ni Ketut Aprilyawathi	*"Wewenang Mahkamah Konstitusi dalam Pengujian Undang-Undang Hasil Ratifikasi Perjanjian Internasional yang*	Focuses on authority of Constitutional Court based on Indonesian law, and the effect of the decision on the legal force of ASEAN charter.[26]	The proposed research will analyze the compatibility of constitutional court authority upheld by the court in its decision, with international law, and will not limit its

[25]Nurhidayatuloh, "Dilema Pengujian Undang-Undang Ratifikasi Oleh Mahkamah Konstitusi Dalam Konteks Ketetanegaraan RI," *Jurnal Konstitusi*, Vol. 9, No.1, March 2012, p. 113-134.

[26]Ni Ketut Aprilyawathi, "Wewenang Mahkamah Konstitusi dalam Pengujian Undang-Undang Hasil Ratifikasi Perjanjian Internasional Yang Bersifat Multilateral," *Jurnal Yuridika*: Vol. 30 No 1, January 2015, p. 166.

		Bersifat Multilateral"		discussion on the effect of the decision only to the legal force of ASEAN charter after the decision.
5.	Andi Sandi Ant.T.T and Agustina Merdekawati	*"Konsequensi Pembataan Undang-Udang Ratifikasi terhadap Ketereikatan Pemerintah Indonesia pada Perjanjian Internasion*	Whether the annulment of ratification instrument by constitutional court has direct bearing on Indonesia's obligation under international law for the annulled instrument. The writers' conclusion was; no effect.[27]	This proposed research will not limit the research only to the effect of the annulment to Indonesia's obligation for that annulled law. Instead, this research will go further with other legal effects.

[27]Andi Sandi Ant.T.T and Agustina Merdekawati, "Konsequensi Pembataan Undang-Udang Ratifikasi terhadap Ketereikatan Pemerintah Indonesia pada Perjanjian Internasional," *Mimbar Hukum*, vol. 24, no. 3, October 2012, p. 459-475.

		al"		
6.	Damos Dumoli Agusman	Treaties under Indonesian Law a Comparativ e Study	Discusses this decision in a relatively small part of his book. Damos criticizes some parts of the decision,[28] but his main assertion is that are ambiguities on legal status of treaty under Indonesian Law,[29] as also confirms by that constitutional court decision.[30] Therefore, Damos did not adequately address the compatibility of the constitutional court	This proposed research is distinct as it will focus not on treaty status in Indonesian law, but in the court's decision compatibility with international law.

[28]Damos Dumoli Agusman, *Op.Cit*, p. 382-384.
[29]*Ibid*, p. 473.
[30]*Ibid*, p. 383-384.

			decision with International law.	

E. Definition of Terms

1. Constitutional Court: A court whose jurisdiction is solely or primarily over claims that legislation (and sometimes executive action) is inconsistent with a nation's constitution.[31]
2. Decision : A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.[32] For the purpose of this research, the analysis on the decision will not be limited only to the final decision. Instead, it will extend to the *ratio decidendi* and *obiter dictum* of the decision.
3. ASEAN : The Association of Southeast Asian Nations (ASEAN) is a regional organization consisting of ten members in Southeast Asia Region,[33] working on the promotion of political, security, economic, and socio-cultural cooperation.[34]
4. ASEAN Charter : A document which serves as the legal and institutional framework for ASEAN.[35]

[31]Black Law Dictionary, *9th edition*, West Publishing, United States of America, 2009, p. 406

[32]*Ibid*, p. 467.
[33]ASEAN Charter, preamble.
[34]*Ibid*, art. 1 (2).
[35]ASEAN Charter, preamble.

5. International Law : rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.[36]
6. *Ratio Decidendi* : Latin, the reason for deciding. The principle or rule of law on which a court's decision is founded.[37]
7. *Obitur Dictum* : A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.[38]

F. Literature Review

i. Indonesian Constitutional Court.

Indonesian Constitutional Court is relatively a new judicial organ in Indonesia. Its' emergence was only after the fourth amendment of the 1945 Indonesian Constitution. The constitutional court is designed to be the sole interpreter and the guardian of constitution.[39] The History of Indonesian constitutional court is always related to its main function and authority; judicial review[40] to examine the constitutionality of law.

In Indonesia, the suggestion in regard with judicial review has actually started since the drafting negotiation of the Indonesian Constitution. It was

[36]Robert Beckman, Dagmar Butte, "Introduction to International Law," retrieved from https://www.ilsa.org/jessup/intlawintro.pdf, at March 15, 2018.
[37]Black Law Dictionary, op. cit. p. 1378.
[38]*Ibid*, p. 1177.
[39]Janedjri M. Gaffar, "Kedudukan, Fungsi dan Peran Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia," Constitutional Court of Republic of Indonesia, 2009, p. 1, retrieved from http://www.mahkamahkonstitusi.go.id/public/content/infoumum/artikel/pdf/makalah_makalah_17_oktober_2009.pdf at 21.52, March 20, 2018.
[40]*Ibid*, p. 2.

proposed by Muhammad Yamin that Indonesian Supreme Court shall have the authority on judicial review known as *materieele toetsingrecht*. However, this proposal was rejected.[41]

However, M. Yamin's proposal reappeared in the discussion of constitution amendment in Indonesia. As the result of a prolonged discussion, I was agreed that the constitution prescribes the authority of a new judicial organ in Indonesia to review the constitutionality *Undang-undang.*[42] This inclusion was done in the third amendment, and placed in article 24 of the Constitution.[43]

The authorities of the court, as set out in article 24C of the Indonesian constitution, are: "to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, deciding disputes over the results of general elections, and to issue a decision over an opinion of the DPR concerning alleged violations by the President and /or Vice-President."[44]

ii. Monism and Dualism.

One of the most classic debates in international law is its relation with municipal law (also known as state law, domestic law, or national law). Two major theories on the relation between them are (a) monism and (b) dualism, each are supported by opinion of international law experts. The followings are further explanation on the two theories;

[41]*Ibid*, p. 4.
[42]*Ibid*, p. 5.
[43]See. Indonesian Constitution art. 24A (1) - (5).
[44]Indonesian Constitution, art. 24C (1)-(2).

a. Monism

The origin of monism can be traced back to medieval era, when the world is viewed as single hierarchically organized legal system.[45] Monism theory asserts that municipal law and international law are components of a single body of law.[46] They are not separated; rather they apply in the same area. One of leading scholars supporting this theory is Hans Kelsen, who maintains in his concept of pyramid of law, that the basic norms of national legal order are based on international legal order.[47] In monists view, there is only a single legal order in which all norms, as includes national and international law, operate in harmony.[48] According to them, International law can be applied directly in national law, and therefore also binding to individuals. Measures to make international law applicable in national law, as the consequence, are not required.[49] In essence, this theory believes in the automatic incorporation of international law into domestic law.[50]

b. Dualism

Dualist scholars argue that International law and domestic law are distinct in nature; they are two completely different and separated legal

[45]Ololade O. Shyllon, "Monism/Dualism or Self Executory: The Application Of Human Rights Treaties By Domestic Courts In Africa," *Advanced Course On The International Protection of Human Rights Institute for Human Rights*, Abo Akademi University, 17 – 28 August 2009, p. 4, retrieved from http://web.abo.fi/instut/imr/secret/kurser/Advanced09/Essays/Working-group4/Shyllon_Monism%20Dualism%20or%20Self%20Executory.pdf, at 21.56, March 20, 2018.

[46]*Ibid*, p.5.

[47]Damos Dumoli Agusman, *Op.Cit*, p. 67.

[48]Damos Dumoli Agusman, *Op.Cit*, p. 66.

[49]Damos Dumoli Agusman, *Op.Cit*, p. 68.

[50]Ololade O. Shyllon, *Op.Cit*., p.5.

systems, as opposed to monism's concept of unity between the two. Among the leading exponents of this theory are Heinrich Triepel and Dionisio Anzilotti.[51] The two main arguments of the differences between municipal and international law are the social relation they govern, where international law governs relation between states and domestic law regulates individual interactions, and the source of law, as international law stems from common will of states, while national law is a product of legislation of a state.[52] This theory historically came from doctrine of separation of power in the English positivist school in seventeenth and eighteenth centuries, which rejected the concept of unity between international law and municipal law in favour of distinction between them.[53] Dualism suggests that in order for international law to be applied in national law, transformation is necessary, to change the international character of the law into a national one.[54] Such transformation shall be done through national acts of application regulated in the national legal order of a state.[55]

iii. Treaty Law.

The primary rules on treaty law are codified in the 1969 Vienna Convention on the Law of Treaty (VCLT), which was the priority of international law codification done by the International Law Commission (ILC) –a united

[51]Joseph G. Starke, *Normativity and Norms: Critical Perspectives on Kelsenian Theme*, Published to Oxford Scholarship Online: March 2012, p. 54.
[52]Ololade O. Shyllon, *Op.Cit*, p. 6
[53]Ololade O. Shyllon, *Op.Cit*, p. 5
[54]Damos Dumoli Agusman, *Op.Cit*, p. 65
[55]Damos Dumoli Agusman, *Op.Cit*, p. 65

nation organ focusing on the development of international law- in 1949.[56] Four British international law experts were appointed by ILC as the rapporteurs of this subject; they are Brierly, Hersch Lauterpacht, Fitzmaurice, and Waldock, who worked for around 15 years on this project.[57] However, this was not the first attempt on codification of treaty law. Previous most significant codification of the law was Harvard draft convention on the law of treaty. With many articles within reflecting customary international law, presently 105 states had been parties to this convention.[58] The convention was regarded a prime achievement of the ILC.[59]

VCLT is quiet flexible with many of its' articles allowing states to depart from its' provisions. It can be seen, for example, from article 7 (1)[60] of the convention on the capacity to conclude a treaty, or article 9 (2)[61] on adoption of text of a treaty in an international conference. Due to this, states are given more flexibility and make the practice very much in the hands of state.[62]

The convention set out rules and procedures related to treaty such as its making process, entry into force, and interpretation. However, it does not apply to all international law treaties, as only written agreement between states become the

[56]Anthony Aust, "Vienna Convention on the Law of Treaties (1969)," in *Max Planck Encyclopedia of Public International Law* [MPEPIL], June 2006, para. 2

[57]*Ibid.*

[58]*Ibid*, para. 4.

[59]*Ibid*, para. 2.

[60]Article 7 (1) of VCLT provides that;" A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) He produces appropriate full powers; or (b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers."

[61]Article 9 (2) of VCLT provides that;" The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."

[62]Anthony Aust, *op. cit*, para. 6.

subject of this convention.[63] Oral agreement was excluded for reasons of clarity and simplicity.[64] However, such exclusion does not affect the legal force under international law of any treaty not in the scope of VCLT.[65]

Indonesia had formally ratified VCLT through law no. 1 of 1982. However, the provisions of the treaty have not been transformed to national law of Indonesia.

iv. Territorial Sovereignty

Brierly, defined territorial sovereignty in the context of exercise of rights over a territory,[66] which means that this concept is laying on the rights of a state to exercise its power over its territory. This principle has positive and negative aspects. The former give the state exclusive competence over its territory, while the latter obliges states to protect the rights of other states.[67]

The 1933 Montevideo Convention on Rights and Duties of State set forth that the fourth element of statehood is capacity to enter into relation.[68] However, the rapid development of international relation has replaced this old concept by sovereignty.[69]

Sovereignty means the highest authority owned by a state to freely exercise its functions and wills based on its interest so long as it does not contrive

[63]VCLT, art 2 (1) (a).
[64]Anthony Aust,o*p. cit.*, para. 12.
[65]VCLT, art 3 (a).
[66]Malcom N Shaw, *International Law*, 6th Edition, Cambridge University Press, New York, 2008, p. 490.
[67]*Ibid*.
[68]Montevideo Convention on the Rights and Duties of States, art. 1.
[69]Boer Mauna, *Hukum Internasional Pengertian Peranan dan Fungsi dalam Era Dinamika Global*, Penerbit Alumni, Bandung, 2000, p. 24.

international law.[70] It has three aspects; (i) external aspect where states are free to decide its international relations without intervention, (ii) internal aspects where states are free to determine its organs and enacting laws, (iii) sovereign territory aspects where states has full power over people and properties on its territory.[71]

This theory is important to discuss as the Constitutional Court has invoked this principle in its decision, to justify that Indonesia has the right to sign, ratify, or withdraw from a treaty if it is found that the treaty is creating loss i.e. against the constitution.[72]

G. Research Method

As described by Robert R. Mayer and Ernest Greenwood which then quoted by Barda Nawawi Arief that research method is a logic through which a research is conducted.[73] A suitability between the method used and research object is important as a researched is aimed at revealing the truth systematically, methodologically, and consistently.

i. Type of Research

This is a normative legal research which is defined as a scientific research to find the truth based on normative aspect of logical legal reasoning.[74]As what its defined, this research will only focus on legal norms. One of the forms of this type of research is seeking to find how and where a legal act is regulated through

[70]*Ibid.*
[71]*Ibid.*
[72]Decision on ASEAN Charter, *Op.Cit.*, p. 190.
[73]Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Genta Publising, Yogyakarta, 2010, p. 61.
[74]Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang, 2006, p.57.

analyzing legal facts and relevant applicable laws,[75] and this research will focus on that.

ii. Research Approach

This thesis will analyze the problems in five approaches. First, statutes approach because legal norms will be basis for the research.[76] Second, case approach, for the object of the research is a specific case on Indonesian constitutional court decision, and the research will evaluate the use of legal norms and principles in that case.[77] Third, analytical approach, as this research will also seek the meanings contained in certain legal norms,[78] to be applied in the case. Fourth, it will use conceptual to explain the concept of regulations or legal principles. Fifth, historical approach, for the research will require historical background of the legal basis. Last but not least, comparative approach, as some state practices will be taken into account in comparison with the current practice in Indonesia.

iii. Research Object

Research object is that which becomes the object of the analysis as stated in the problem formulation.[79] The object of current research is the Constitutional Court Decision no. 33/PUU-IX/2011 on ASEAN Charter and international law.

iv. Source of Data

[75]Depri Liber Sonata, "Metode Penelitian Hukum Normatif dan Empiris: Kharakteristik Khas dari Metode Meneliti Hukum," *Fiat Justisia*, Vol. 8 no. 1 January-March 2014, p. 26

[76]Johnny Ibrahim, *Op.Cit.*, p. 301.

[77]*Ibid*, p. 321.

[78]*Ibid*, p. 310.

[79]Team for Undergraduate Thesis Guide of Faculty of Law Universitas Islam Indonesia, *Pedoman Penulisan Tugas Akhir Program Studi S-1 Ilmu Hukum, Fakultas Hukum Universitas Islam Indonesia*, Yogyakarta, 2016, p. 12.

This research uses secondary source of data, which divided into primary, secondary, and tertiary legal materials.[80] Primary legal materials are those which have legal force,[81] and in this case they are VCLT, Customary International Law, Indonesian Constitutional Court Decision no. 33/PUU-IX/2011 on ASEAN Charter, Act no. 24 2003, and Act no. 8 2011 on Constitutional Court. As for the secondary legal materials which has no legal force[82] are commentary of conventions, journals, books, documents, and news from reliable sources covering various aspects and written by relatively qualified writers. A tertiary legal material in this research is dictionary.

v. Data Collection Method

Data for the research are collected through library studies by obtaining information and knowledge from books, journals, articles, documents, and sources of law of both national and international legal order.

vi. Method of Data Analysis

As data obtained in this research are not presented in the form of number, and therefore cannot be achieved by statistical procedure and quantification,[83] they will be analyzed by qualitative method, by which the data will be elaborated and described in greater details.[84]

[80]*Ibid*, p. 12.
[81]*Ibid.*
[82]*Ibid*, p. 13.
[83]Pupu Saeful Rahmat," Penelitian Kualitatif," *Jurnal Equilibrium*, Vol. 5, no. 9, January - June 2009, p. 2.
[84]*Ibid*, p. 3.

CHAPTER II

THEORIES ON THE RELATION BETWEEN DOMESTIC COURT AND INTERNATIONAL OBLIGATION

A. Judicial Review

Judicial Review is the authority of judiciary organ to examine the validity and applicability of any legal instrument issued by executive, legislative, or even judiciary branches of a state based on the constitution. For executive and legislative organs, it is the consequence on check and balance mechanism. As for the example of judicial review of product of judiciary organ is the authority of Germany Constitutional Court to examine the decision of the Supreme Court. Therefore, it can be inferred that theoretically, the object of judicial review covers the products of judiciary, executive, and legislative organs.[85]

Jimly Asshiddiqie divides judicial review into two categories; concrete norm review and abstract norm review. Abstract norm review comprises review on administrative decisions, as what become the competence of Administrative Court in Indonesia, and the verdict of general court in Indonesia. Abstract norm review includes the review of laws, which currently become the authority of Indonesian Constitutional Court and Supreme Court.[86]

As previously addressed, Indonesian Constitutional Court has the authority of abstract norm review; examining the constitutionality of acts issued by the

[85]Dian Rositawati," Judicial Review," *Seri Bahan Bacaan Kursus HAM untuk Pengacara XI*, Lembaga Studi dan Advokasi Masyarakat, 2007, p. 1.

[86]Pusat Studi Konstitusi FH Andalas, Perkembangan Pengujian Perundang- Undangan di Mahkamah Konstitusi, Jurnal Konstitusi, Volume 7, Nomor 6, Desember 2010, p.149-150.

legislative body. This has been set forth in article 24C (1) of the constitution,[87] and in chapter VIII (article 50-60) of law no 24/2003. Based on this authority, the court can review any laws in the level of *undang-undang* against the constitution.

Jimly Asshiddiqie asserts that this authority exists to guarantee effective application of constitutional provisions. Quoting from Hans Kelsen, he explains that the products of legislative body (laws) can be applied constitutionally only if there is another organ which has the authority to examine the constitutionality of those laws and to invalidate it when it is found that they are unconstitutional. It's for that purpose that Constitutional Court, which firstly introduced by Hans Kelsen, was established. That controlling organ (constitutional court) can abolish any laws when found unconstitutional and therefore will no longer be applied by any other organs.[88]

The judicial review before the constitutional court is divided into two categories; material law and formal law. This category is formed based on the object of the review, which resembles to the division of law review in general (*toetsingrecht*); (a) *formele toetsingrecht* dan (b) *materiele toetsingrecht.* Therefore, judicial review is also divided to formal judicial review and material judicial review. The former is about the procedure on the formulation of the law and the latter is about the substance of the law.[89]

[87]Artilce 24C (1) reads as follow: "The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections."

[88]Nurul Qamar, Kewenangan Judicial Review Mahkamah Konstitusi, Jurnal Konstitusi, Vol. I, No. 1, November 2012, p. 10

[89]Pusat Studi Konstitusi FH Andalas, *op. cit*, p. 151.

Sri Soemantri explains further on the difference between the two. According to him, formal judicial review is an authority to examine whether the law has been issued in accordance with applicable procedures in related laws. In another word, formal judicial review is review of procedure of law formulation. As for the material judicial review, it's an authority to examine the substance of a law, and then decide whether it is contradicting with higher law in hierarchy or not.[90] This division is also set forth in law no 24/2003 on Constitutional court.[91]

If a lawsuit is filed for the formal and material aspect, then the one which must be examine first by the judge is the formal one, because once it is proven that the procedure is against the law, and then the substance will also be considered as against the higher law.[92]

The decision of the court is final and binding.[93] Final means there is no way to re-review the decision after the verdict issued, unlike the ordinary court where appeal is still possible if any party is unsatisfied with the decision of a court. Binding means the decision possess legal force as soon as it is decided and read by the chamber in the proceeding. Binding decision shall be complied with by the parties, and any governmental institution.[94]

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[90]*Ibid*.

[91]Article 51 (3) of law no 2/2003 reads; *"Dalam permohonan sebagaimana dimaksud pada ayat (2), pemohon wajib menguraikan dengan jelas bahwa: a. pembentukan undang-undang tidak memenuhi ketentuan berdasarkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945; dan/atau b. materi muatan dalam ayat, pasal, dan/atau bagian undang-undang dianggap bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945."*

[92]*Ibid*, p. 151-152.

[93]Indonesian Constitution of 1945, art. 24C (1).

[94]Janedjri M. Gaffar, o*p. cit*, p. 17.

Any law that is found to be unconstitutional by the constitutional court can be regarded as having no legal force and no longer applicable.[95] Therefore, the discussion of judicial review is not limited to examination of constitutionality of any law, but it also extends to its effect; nullity of the law.

B. Treaty in Indonesian Law

i. Laws regulating treaty in Indonesia

Treaty has actually been governed in several regulations in Indonesia. In the highest norm, the constitution regulates treaty in article 11, stating that the president has the authority to conclude treaties. In addition to that, for treaty that has an extensive and fundamental impact to the lives of the people, parliament's approval is required before ratification.[96]

On a lower level of regulation, Law no. 24/2000 on Treaty provides procedural aspects of treaty. It regulates ratification, validation, termination, and other technicalities relating to treaty. However, there is no single article in the said law determines the legal consequence of treaty once it is ratified in Indonesian Law. Law no. 12/2011 on Indonesian Laws (*Peraturan Perundang-Undangan*) which sets out the level of every law in Indonesia has in fact mentioned treaty in some articles. [97] Nonetheless, none of those articles specify the way that international law, once ratified, enters into force in the Indonesian

[95]Law no. 24/2003 on Constitutional Court , art. 57 (1).

[96]Article 11 of the 1945 Indonesian Constitution reads:
(1) The President with the approval of the DPR may declare war, make peace and conclude treaties with other countries.
(2) The President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which linked to the state financial burden, and/or that will requires an amendment to or the enactment of a law, shall obtain the approval of the DPR.
(3) Further provisions regarding international agreements shall be regulated by law.

[97]See for example in article 10 (1) (c) and article 23.

legal system. It is because during the drafting process of the law, it is assumed that Indonesian is following monism theory, by which validation of ratification of treaty through law (undang-undang) or presidential decree will transform the treaty to national law of Indonesia.[98]

Additionally, another controversial thing about the law is stated in 18, where it is mentioned that Indonesia can terminate a treaty, *inter alia*, when the treaty threatens national interest.[99] The parameter of "national interest" which means public interest is relatively subjective and therefore provides no legal certainty.[100] The article later becomes the guidance on the formulation of law no.7/2014 on trade.[101] Therefore, it is unsurprising that in article 85 of the latter Indonesian government is also authorized to withdraw from a treaty unilaterally on the ground of national interest.[102]

It is interesting that law no. 39/1999 on Human Rights have also regulates international law on human rights in Indonesian Law. Article 7(2) of the law mentioned that every international human right law instrument that is accepted by Indonesia becomes the responsibility of the government.[103]

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[98]Damos Dumoli Agusman, "Status Hukum Perjanjian Internasional dalam Hukum Nasional RI," Indonesian Journal of International Law, Vol. 5, no.4, April 3, 2008, p.494-495

[99]Law no. 24/2000 on Treaty, art. 18(h);

[100]Sefriani, "Legal Analysis on the Unilateral Withdrawal from International Trade Treaties in lndonesia," Journal of Advanced Research in Law and Economics, (Volume VlI, Summer), 3(17): 609 – 619, p. 610.

[101]*Ibid*.

[102]*Ibid*; Indonesian Law no. 7/2014 on Trade.

[103]Article 7 (2) reads: *Ketentuan hukum internasional yang telah diterima negara Republik Indonesia yang menyangkut hak asasi manusia terutama menjadi tanggung jawab Pemerintah.*

ii. Practice relating to treaty

There are a number of practices in Indonesia both in national court and legislation which indicates whether treaty is directly applicable or not once Indonesia have ratified. In national legislation, the practice relating to the United Nations Convention on the Law of The Sea (UNCLOS) indicates that Indonesia follows dualist view. Although the convention has been ratified and consequently binding to Indonesia by law no. 17/1985, a subsequent transformation of the treaty to national law through law no. 6/1996 on waters, which substance are entirely taken from UNCLOS, was still needed. The latter law was the one which finally replaced previous Indonesian law on waters (law no. 4/1960) that remained in force even after the ratification of UNCLOS.[104]

A different view is reflected from Supreme Court practice. In its directive in regard with Saudi Arabia embassy land dispute in 2006 the court applied a principle in the Vienna Convention on Diplomatic Relation. Indonesia ratified the convention in 1982. Nonetheless, there was no law transforming the convention into Indonesian law at that moment. Yet, the court decided to adopt the immunity principle of the convention in its directive,[105] which is indicative of monist behaviour. But this practice seems to be inconsistent with previous case, in which the court refused to enforce foreign arbitral award. Indonesian had ratified the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in 1981 by Presidential Decree. But in fact, the court refused to enforce

[104]Damos Dumoli Agusman, "Status Hukum Perjanjian Internasional dalam Hukum Nasional RI," *op. cit*. p. 492, 495; Simon Butt, "Recent Development: The Position of International Law Within The Indonesian Legal System," Emory Int'l L. Rev. 1, 2014, p.6.

[105]*Ibid*, Simon Butt, p. 5; *Ibid*, Damos Dumoli Agusman, p. 192-493.

foreign arbitral award until the Chief of Justice issued Supreme Court regulation in 1990, allowing judges to enforce foreign arbitral award and set out the procedural aspects.[106]

Another Supreme Court practice is regarding landslide case started in 2003 before Bandung district court. The victims of landslide sued a state owned company, *Perhutani*, for mismanagement of the land which caused the landslide. The district court found that the defendant was liable based on precautionary principle adopted from the Rio Declaration. The defendant appealed to high court but was rejected. In the Supreme Court, a cassation was submitted on the ground that the district court erroneously applied the law as the principle has not been adopted in Indonesian law. However, the Supreme Court rejected this ground and decided that the lower court did not apply the wrong law, as the principle was used to fill legal vacuum. The court admitted that judges are allowed to use rules of international law if they are *jus cogens*.[107]

Constitutional Court also has several occasions when it dealt with international legal rules. In 2004, former Indonesian President Abdurrahman Wahid filed a case before the court for article 6 (1) of 2003 Election law, as the words "spiritually and physically capable of performing the duties and responsibilities of President or Vice President" opined as a discriminatory rule and against equality before the law principle which is upheld in the constitution of Indonesia in article 27(1). In dealing with the case, the court used Article 7 of the 1971 Declaration on the Rights of Mentally Retarded Persons to help in

[106] *Ibid*, Simon Butt, p. 9
[107] Ibid, p. 9-10.

interpreting the law. This document is actually not legally binding as it was merely a resolution of United Nations General Assembly.[108]

In the ASEAN charter case, the court reviewed the articles in ASEAN charter, considering that it has been ratified by Law no 38/2008, although there is no law transforming the charter into Indonesian national law. It indicates that the court viewed the charter as an applicable law in Indonesia; otherwise it would not have reviewed it.

The abovementioned practices signal an inconsistency of Indonesian judiciary and legislative organs in the legal consequence of treaty ratification by Indonesia. Some practices tended to follow monism and the others are like dualism behaviours. Inferentially, Indonesian laws and practices do not adequately regulate the legal status of treaty when it has been ratified.

C. Treaty Law

Treaty has a fundamental role in interstate relationships under International law. Numerous cooperation and problems are handled by agreement between states. In today's interdependent world, there is no state without agreement with another state, and no state is unregulated by international agreement in its international relations.[109] It is one among sources of International law to which the International Court of Justice shall refer to.[110]

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[108]Stephen M. Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law," Proceedings of the Annual Meeting (American Society of International Law), Vol. 73 (APRIL 26 - 28, 1979), pp. 301-309, Cambridge University Press, p. 301.

[109]Boer Mauna, *Hukum Internastional Pengertian Peranan dan Fungsi dalam Era Dinamika Global*, Alumni Publishing, Bandung, 2nd Edition, 2005, p.82

[110]Statute of the International Court of Justice, art. 38 (1).

Although there are various names of international agreement, they are all essentially has the same legal force, and binding to the parties. According to Myers there are 39 names used for international agreements.[111]

Until 1969, the treaty making process was only regulated by international customary law. In May 1969, Vienna Convention on the Law of Treaty (VCLT) was signed. Its contents were based on the draft convention made by the International Law Commission. It entered into force in January 27, 1980.[112]

Although Indonesia has not ratified the convention, most of the provisions within the convention has been recognized as customary International Law,[113] and are always used as basis and guide in treaty making process.[114]

i. Definition of Treaty

According to the VCLT, treaty is defined as an "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[115] The definition sets out four elements of a treaty; (i) agreement, (ii) between states, (iii) in written form, (iv) governed by International law. Any treaty that does not fulfil the four elements in the treaty does not fall in the regime of VCLT.

This definition is later developed in Indonesian law no. 37/1999 on Foreign Relation. The law defines treaty as "agreements in any form or

[111]Denys P. Myers, "The Names and Scope of Treaties", *American Journal of International Law*, Volume 51, Issue 3 July 1957 , pp. 574-605, p. 575 as quoted in *Ibid*, p. 83

[112]Boer Mauna, o*p. cit*, p. 83

[113]See Karl Zemanek, "Vienna Convention On The Law of Treaties," United Nations Audiovisual Library of International Law, United Nations, 2009.

[114]Boer Mauna, *op. cit*, p. 83

[115] The 1969 Vienna Convention on The Law of Treaty (VCLT), art. 1(a).

denomination that are governed by international law and concluded in writing by the Government of the Republic of Indonesia with one or more states, international organizations, or other international legal subjects, and invest the Government of the Republic of Indonesia with rights and obligations that are of a public law nature."[116]

ii. Treaty Process

This section will generally address the treaty process; formation of treaty, performance, cessation.

The first step in treaty formation is negotiation. Multilateral treaty is usually started when an international organs, such as The International Law Commission (ILC), or United Nations General Assembly (UNGA) decides that certain matter shall be subject to global concern. Treaty negotiation is often commenced from a preliminary negotiation in an International conference. The conference is attended by state representatives who are normally vested with "full powers."[117]

The following step after the negotiation is opening for signature. When a treaty is open for signature, states and participating international organizations are invited to sign the treaty, indicating that they have agreed generally to the wordings in the final draft of the treaty. After signature, treaty is ratified by states if they decide to accept all the rights and obligations emanating from the treaty.[118]

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[116] Law no. 39/1999 concerning Foreign Relation, art. 1 (3).

[117] William R. Slomason, *Fundamental Perspective on International Law*, Wadsworth, Belmont, USA, 3rd Edition, p.331.

[118] *Ibid*, p. 332.

However, signature can serve as consent to be bound by a treaty for a state when the treaty provides so.[119]

iii. Principles of International Law of Treaties

Pacta sunt servanda is a fundamental principle of treaty law.[120] During the drafting process of VCLT, the ILC considered whether this principle should be placed in the beginning of the articles or not to give it a prominence, and end up by placing it in article 26 of the convention due to the introductory character of provisions in part I of VLCT.[121] This principle covers not only obligation of the state to implement treaty obligation, but also the obligation to comply with withdrawal and termination mechanism under international law. The main objective of this treaty is to maintain the stability, balance, and trust for international society.[122]

Another important principle of treaty law is that national law cannot be a legal justification of a state in its failure to implement a treaty obligation.[123] Although internal law may be justification to invoke invalidity of a treaty, such law shall be relating to the incompetence of any state organ in representing that state for treaty conclusion.[124] Therefore, an ordinary national law such as law issued by legislative body or presidential decree regulating general matters do not constitute a ground to invalidate a treaty.

[119]VCLT, art. 12.
[120]VCLT Commentary, p. 211.
[121]Ibid.
[122]Sefriani, *op. cit*., p. 612.
[123]VCLT, art. 27.
[124]*Ibid*, art. 46.

iv. Invalidity, Suspension, Termination and Withdrawal

Treaty can also be invalidated although it has been ratified. Among the main reason of invalidity of a treaty is unequal bargaining position between the parties. Unequal treaty occurs when one party is forced by another nation, and not a product of a fair negotiation process. An example of unequal treaty is a treaty prior to World War II when Hitler forced Czechoslovakia to create a treaty placing the country under German protection by threatening to bomb it.[125] This practice is also codified in VCLT.[126] Other conditions which can be ground to invalidate a treaty are fraud, corruption, error, and contravention to the peremptory norms of International Law. An internal law justification on the violation on the competence to conclude a treaty may not be invoked unless the violation is manifest and the law must be that of fundamental importance.[127]

Beside invalidity of a treaty, termination and withdrawal from a treaty can also be done. According to VCLT, termination and withdrawal from a treaty can be done in conformity with the treaty provisions or at any time with consent and prior consultations with all state parties.[128] If there is no provision on the termination, denunciation or withdrawal in a treaty, a treaty shall not be subject to such things unless the party intended on the possibility of denunciation and withdrawal or it's implied by the nature of the treaty.[129] Since treaties today are

[125]William R. Slomason, o*p.cit*., p. 338.
[126]See VCLT art. 52.
[127]See VCLT art. 46-53.
[128]*Ibid*, art. 54.
[129]*Ibid*. art. 56.

common to include a withdrawal, termination or denunciation clause, it is much harder to find such ground for exception.[130]

Treaty law also allows termination of a treaty as a consequence of breach. Material breach by one party allows the other to invoke it as a ground for suspension or termination of the treaty. Material breach is defined as a repudiation of the treaty not sanctioned by VCLT or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Besides material breach, fundamental breach, namely those which goes to the root of the treaty, can also be invoked to terminate or suspend a treaty.[131]

When a treaty enters into force, it starts to be binding on the parties, but it does not necessarily become its national law. Treaty and internal law operates in different legal level.[132] However, it's important to note that provisions of internal law may not be invoked to justify failure to perform treaty obligations.[133] This has been a recognized principle of international law.[134] The word internal law encompasses laws in general and constitution.[135]

D. Responsibility of States under International Law

The law on state responsibility under international law determines whether a violation of international obligation had been conducted, whether a state is responsible for that, and what should be the consequences thereof. The ILC had

[130]Anthony Aust, *Handbook of International Law*, Cambridge University Press, 2005, p.103

[131]VCLT art. 60; *Ibid.* 103-104.

[132]Anthony Aust, o*p.cit.* p. 79.

[133]VCLT, art. 27

[134]United Nations Conference on The Law of Treaties, Second Session Vienna, 9 April-22 May 1969, Official Records, p. 53, para. 31.

[135]*Ibid*.

begun the study in this subject since 1956, but it was only in 2001 the final draft completed. It was called as the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Arsiwa), which was circulated by the UNGA in 2001.[136]

State responsibility law is customary international law, which is developed by state practices and judgements of international tribunals, to which Arsiwa is referring to. The draft has been followed closely by states. It was adopted without vote, with consensus virtually in all points. Although the draft articles also include progressive development in international law, it is essentially a codification of customary international law. International courts and tribunals had cited the previous draft articles with approval. Despite the fact that Arsiwa has not been turned into convention, it continues to be influential with international courts and tribunals.[137]

i. General Points in Arsiwa

The first important point of Arsiwa is that the draft has a residual function. They do not apply if the matters on states' internationally wrongful act and implementation of it had been regulated by a specific international law.[138] A sample of such *lex specialis* is Article of the Convention on the International Liability for Damage Caused by Space Objects 1972 which provides for joint and several liability for damage to a third state caused by a collision between space

[136]Anthony Aust, *Op.Cit.* p. 407.
[137]*Ibid*, p. 408.
[138]Arsiwa, art. 55.

objects launched by two states as well as the World Trade Organization (WTO) System which set forth the consequences of breach of its regulations.[139]

In the subsequent article (article 56), Arsiwa upholds that the matters on responsibility of states not governed by the articles continues to be governed by applicable rules of international law, including the liability for injurious activities that are not prohibited by international law.[140]

ii. General Principles

The first principle in Arsiwa, is that every internationally wrongful act entails international responsibility of that state.[141] The term "international responsibility" indicates a new legal relation under international law arising from the internationally wrongful act[142]. An internationally wrongful act requires that the conduct or omission is attributable to the state under international law and that it constitutes a breach of international obligation.[143] Arsiwa also makes it clear that the characterization of an act as internationally wrongful is determined by international law and not national law.[144] States cannot escape from the wrongful character of an act or omission by saying that is done to comply with national law.[145]

An act or omission will be attributable to the state in certain circumstances. First and clearest situation is when an act or omission is done by

[139]Anthony Aust, *Op.CIt.* p. 409.
[140]*Ibid*.
[141]Arsiwa, art. 1.
[142]Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001, art. 1 para 1. (Arsiwa Commentary).
[143]Ariswa, art. 2
[144]Arsiwa, art. 3.
[145]Arsiwa Commentary, o*p. cit*, art. 3 para. 1.

the organ of the state,[146] acting in its capacity on behalf of that state.[147] Second, conduct of person or organ which is not an organ of a state but given power to exercise elements of governmental authority. [148] Additionally, any act not falling into the first or second criteria may still be attributable to the state if it's a conduct/omission which directed or controlled by a state,[149] adopted or acknowledged by state,[150] or exercises elements of governmental authority due to absence or default of the official authority.[151]

Even if a conduct/omission is attributable to the state, it would not be an internationally wrongful act unless that conduct/omission is a breach of an international obligation binding to that state when the conduct happens.[152] An internationally wrongful act has no continuing character although the effects continue.[153] When an internationally wrongful act ceases but the effects continue, it is only relevant to the amount of compensation.[154] Discussion on the continuing character of an act is important particularly if a court has no jurisdiction when the act started but it acquires jurisdiction later.[155]

However, there are contending theories on the responsibility of a state when it conducted an internationally wrongful act. The principle of objective responsibility maintains that liability of a state is strict; once internationally wrongful acts elements are fulfilled, that state is responsible for that irrespective

[146]Arsiwa, art. 4.
[147]Arsiwa Commentary, o*p. cit*, art. 4 para. 1, 3.
[148]Arsiwa, *op. cit.*, art. 5.
[149]*Ibid*. art. 8.
[150]*Ibid*, art. 11.
[151]*Ibid*, art. 9.
[152]*Ibid*, art. 13.
[153]*Ibid*, art. 14(1).
[154]Anthony Aust, *op. cit*, p. 415.
[155]*Ibid*.

good or bad faith. The other one, the principle of subjective responsibility maintains that element of intentional or negligence is necessary for a liability of state.[156]

iii. Consequences of Internationally Wrongful Act

The legal consequence of an internationally wrongful act does not affect the duty to comply with the obligation that has been breached, i.e. the violation does not terminate the obligation[157]. Any state with internationally wrongful act also has the obligation to cease that act, with assurance of non-repetition.[158]

A state conducting internationally wrongful act is also under an obligation to make full reparation for the injuries,[159] which includes moral and material damages.[160] Forms of reparations for injuries as described in the draft articles covers "restitution, compensation and satisfaction, either singly or in combination."[161]

Restitution means to re-establish the situation which existed before the wrongful act was committed if it not materially impossible and not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[162] This is done for example by releasing detainee or returning property.[163]

[156]Malcom N. Shaw, o*p. cit*., p.783.
[157]Arsiwa, *op. cit*., art. 29.
[158]*Ibid*, art. 30.
[159]*Ibid*, art. 31 (1).
[160]*Ibid*, art. 31 (2).
[161]*Ibid*, art. 34.
[162]*Ibid*, art. 35.
[163]Anthony Aust, *op. cit*, p. 420.

Compensation is done when the damage is not made good by restitution.[164] If the damage is still not made good by restitution and compensation, satisfaction by acknowledgement of breach, regret, or formal apology is allowed, so long as it does not take a form which humiliating the state concerned.[165]

iv. Internationally wrongful act and treaty obligation

An internationally wrongful act requires breach of international obligation.[166] Such breach exists when a state is conducting any act which contrary to what required by an international obligation,[167]including an obligation from treaty binding to that state.[168] Therefore, violating treaty means doing an internationally wrongful act.

E. Globalization; impact of international law to domestic law

Globalization is thought to have brought a fundamental change to the development of law, and it relates to difficulties in distinguishing between national law and international law, as what dualism and monism believes. [169] This change started from the end of the World War II, when European Legal Order was formed and post-cold war era when the globalization accelerated.

International law has developed in many aspects by the adoption of a number of legal instruments such as Universal Declaration of Human Rights, the establishment of World Trade Organization in international trade law, Kyoto Protocol in environmental law, and the Rome Statute of the International Criminal

[164]Arsiwa, Op. Cit., art. 36.
[165]*Ibid*. art 37.
[166]Arsiwa, art.2
[167]Arsiwa Commentary, p. 54-55.
[168]*Ibid*; Gabˇ cíkovo-Nagymaros Project , Hungary v. Slovakia, International Court of Justice Reports of Judgments, Advisory Opinions And Orders, 1997, p. 46, para. 57.
[169]Damos, *Treaties under Indonesian Law a Comparative Study*, *op. cit*, p. 119

Court (ICC) in International Criminal Law.[170] Those international law rules contain obligations which must be implemented through internal regulations of states. Human rights treaties always require domestic law to protect the rights of every Individual. International trade law requires states to adjust their internal regulations, and so does environmental law and international criminal law.

Scholars describe this phenomenon as the moment when the sovereignty of states is no longer absolute as it used to be.[171] It is because the international community began to rethink the old concept of sovereignty, considering the devastating impact of the modern warfare including the use of nuclear weapon. They realized that international security and peace is a global responsibility, and therefore absolute sovereignty of state must be limited. According to Jost Delbruck, the causes of this are *inter alia* global threats to environment, global threats to peace and security, global challenge of mass migration, and globalizing forces of the market.[172]

On the other hand, the rise of democratization, good governance and rule of law has led the communities to be more cautious to foreign influences to protect their interest, national values, and identity.[173] For this reason, the acceptance of a state to Treaty will also be subject to people's attention, in accordance with democratic principle of a state.

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[170]*Ibid*, p. 120

[171]See Eric C. Ip, "Globalization and The Future of The Law of The Sovereign State," *International Journal of Constitutional Law*, Volume 8, Issue 3, 1 July 2010, Pages 636–655; Jost Delbruck, "Globalization of Law, Politics, and Markets -Implications for Domestic Law - A European Perspective," *Global Legal Studies Journal*, Studies: Vol. 1 Isuue 1, Fall 1993,

[172]Jost Delbruck, *op. cit*, p. 14-16.

[173]Damos Dumoli Agusman, *Treaties under Indonesian Law a Comparative Study*, *op. cit,.,* p. 121.

It also happens in Indonesia. The highest sovereignty in the state, according to the constitution is vested in the hand of the people.[174] The adoption of treaty, although in some cases parliamentary approval is needed, can be done solely by decision of executive organ of state without involvement of the people (or their representative).[175] Even when the treaty has passed parliamentary approval, some groups of community will maybe think that their voices are not well represented. Therefore, after treaty ratification, it's very likely that the treaty will be subject to disagreement from some groups, which may be in the form of mass protest or legal efforts. It is exactly what happened in the ASEAN Charter case before the Constitutional Court. People objected the ratification of the Charter, arguing that it violates their constitutional rights. It is reasonable that objections ensued, as they felt that the charter affects them economically.[176] The lawsuit was an example of the interplay between the developments of international law in the globalization era and the response of people in democratic state.

Such phenomenon happens not only in Indonesia. Even in the United States of America, the nationalist shows their insistence through national law and discourage international law to enter into municipal law, by arguing that international law is less democratic.[177]

[174]1945 Constitution of the Republic of Indonesia, art. 1(2).

[175]*Ibid*, art. 11. It can be inferred from the article that only certain treaties which has extensive impact that requires parliamentary approval.

[176]For the background of the case, see Chapter I in Context of Study.

[177]Damos Dumoli Agusman, *Treaties under Indonesian Law a Comparative Study* , *op. cit*, p. 122.

It also proves that democratization in globalization era has made state's system where it is no longer a solid entity as a subject in international law. Traditional doctrine held that the voice of the government is the voice of the state. Therefore diplomatic representatives of state are the state itself. Their voices represent state's voice. However, as democracy develops, coupled with the separation of power doctrine which divides the states organ into judiciary, executive, and legislative, the capacity of executive body to represent the state including legislative and judiciary body in interstate relation is questionable.[178]

To conclude, given the characteristic of international law in globalization era, where it is hardly possible to separate between national law and international law, the lawsuit against ratification instrument will most likely happen in the future.

F. Constitutionality of Treaty in other Countries.

Indonesian law is apparently left far behind compared to the other states in term of examination over the constitutionality of treaty. The followings are few practices from other states in regard with constitutional court's authority over treaties to be learned from;

i. Germany

Although there is no specific statutory provisions authorizing Federal Constitutional Court of Germany to examine treaty toward the Basic Law (the constitution of Germany), in practices the court will also review treaties. Judicial review occurs when legislative procedures are completed, but before the state

[178] *Ibid.*

gives it consent to be bound by the treaty, thus avoiding the binding force of treaties to Germany before review by federal constitutional court.[179] In 2009, for example, the Federal Court reviewed the constitutionality of European Union Lisbon Treaty, when Germany has ratified and signed it, but had not completed the ratification process by handing over the paper in Rome.[180]

ii. Hungary

Review on constitutionality of treaties has clear status under article 36 (1) of act on the constitution court of Hungary. It is regulated that the President or the government may request a review over constitutionality of a treaty or its provisions before ratifying it.[181]

iii. Tunisia

Article 20 of the Constitution of Tunisia placed treaty above statutes but below the constitution. As the consequence, Tunisia constitutional court is authorized to verify the constitutionality of treaties. However, only the President has the authority to refer such case to the court. It is noteworthy that this authority does not cover treaties that Tunisia already ratified, implemented, and in force.[182]

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[179]Wolfgang Zeidler, "Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms," *Notre Dame Law Review*, Volume 62, Issue 4, 1987, pp. 504-525, footnote. 3.

[180]"German constitutional court to examine Lisbon treaty," retrieved from https://euobserver.com/institutional/27452 , at 20.33, April 29, 2018.

[181]Press Release on The Constitutionality of The Act of Promulgation of The Lisbon Treaty, 20 July 2010, retrieved from https://hunconcourt.hu/kozlemeny/press-release-on-the-constitutionality-of-the-act-of-promulgation-of-the-lisbon-treaty/ , at. 20.04, April 29, 2018.

[182]Xavier Philippe, "Jurisdictional control and the Constitutional court in the Tunisian Constitution," p. 4, retrieved from http://www.arabstates.undp.org/content/dam/rbas/doc/Compendium%20English/part%203/47%20Xavier%20Philipe%20EN.pdf , at 19.57, April 29, 2018.

iv. Austria

According to article 140a of the Federal Constitutional Law of Austria, Constitutional court has an authority to review constitutionality of treaty. However, the court is not in position to invalidate the treaty if it's found to be against the constitution. It only declares it unconstitutional or unlawful.[183]

v. Czech Republic

Based on Constitutional Act No. 395/2001, in article 87 (2), Constitutional Court of Czech Republic has jurisdiction to review the conformity of treaty with constitutional order, prior to the ratification of any treaty which requires approval from the parliament under the national law. The treaty may not be ratified before the court issues its judgment.[184]

vi. South Korea

Article 111 of the Korean Constitution maintains that the constitutional court shall have jurisdiction over the constitutionality of a law upon the request from Korean court. This article serves a legal basis for the court to review treaties as their position under Korean law is lower to that of the constitution. All constitutional law scholars in Korea agreed on the supremacy of the constitution over treaties and propose the judicial review of treaty. Unconstitutional treaty will

[183]Verfassungsgerichtshof Österreichischer, retrieved from https://www.vfgh.gv.at/downloads/VfGH_Broschuere_E.pdf , at 20.49, April 29, 2018, p. 9.

[184]Eliška Wagnerová, Report of The Czech Constitutional Court Doctrines on Community and Union Law, Review by The Constitutional Courts of Proceedings Before Ordinary Courts Applying Community Law, Kosice, Slovak Republic, 1-2 June 2006, p. 2-3.

be nullified under national legal order of Korea, however the international obligation of Korea as a state to implement the treaty still remain.[185]

vii. Singapore

In Singapore, courts can review the conformity of treaties with the constitution when they have been incorporated in national legal order by the legislative branch. Singapore courts are also authorized to declare any statutory provision which is incorporated from treaty null and void if it violates constitution.[186] It is important to note that the declared provision is statutory provision, which is a national law and not international law.

These state practices seems to reflect the same patterns in when and how courts deal with constitutionality of treaties; *first*, in some states judicial review over conformity of treaties with constitution could only be done before the consent to be bound to the treaty, and avoiding examination over those which had been implemented and entered into force. This mechanism is practiced by Czech Republic, Tunisia, Hungary and Germany. *Second*, treaties can still be reviewed although they had been binding to the state, however in such case the nullity of the treaty provisions only happens in the national legal order, with the state's obligation under international law still remain. It is done by Singapore and South Korea. *Third*, treaties can be reviewed although it is binding to state, nevertheless, the court's authority is limited to declaration of such treaty as unconstitutional

[185]Nohyoung Park, "Application of International Law in Korean Court," *Asia Law Review*, vol. 1, 2004, pp.45-67, p. 55-56.

[186]"Introduction to Singapore's Engagement with International Law-Making," retrieved from http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-5, at 22.58, April 29, 2018.

without invalidating that treaty. As a lesson learned, Indonesia can either follow one among those patterns or combine them, or even formulate the new one.

G. Treaty on Islamic Law Perspective

Islamic law on treaty is maybe best exemplified by *mu'ahadat* In its ordinary meaning *mu'ahadat* means covenant between two parties, it is a verbal noun from '*ahd* which has the same meaning; covenant, pact, treaty or agreement that requires commitment and fulfilment whenever it is concluded and enforced.[187] The basis of treaty/agreement in Islam is based on the following verses of Al-quran:

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ ۚ وَأَوْفُوا بِالْعَهْدِ ۖ

إِنَّ الْعَهْدَ كَانَ مَسْئُولًا - 17:34

"And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned."

And

وَإِنِ اسْتَنصَرُوكُمْ فِي الدِّينِ فَعَلَيْكُمُ النَّصْرُ إِلَّا عَلَىٰ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُم

مِّيثَاقٌ ۗ وَاللَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ - 8:72

"And if they seek help of you for the religion, then you must help, except against a people between yourselves and whom is a treaty. And Allah is seeing of what you do."

[187]Labeeb Ahmed Bsoul, *International Treaties {Mu'abadaf) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law),* A thesis for the degree of Doctor of Philosophy, Institute of Islamic Studies McGill University, Montreal, August 2003, p. 159-160.

Additionally, Rasulullah (Peace be Upon Him) once stated:

وَالْمُسْلِمُوْنَ عَلَى شُرُوْطِهِمْ إِلاَّ شَرْطًا حَرَّمَ حَلاَلاً أَوْ أَحَلَّ حَرَامًا

" And the Moslems have to fulfill their agreed terms unless those which prohibit what are allowed or allow what are prohibited." (Narrated by Imam Bukhari)

This prophet tradition, besides it obliges Muslims to obey an agreement they made, it is also a basis for the principle of freedom of contract in Islam. That Muslims can conclude any agreement, on the condition that it does not contradict sharia laws.

As Islamic law is based on religious values, the performance of agreement in Islam is motivated by the belief in life after death and resurrection. Therefore, people are obeying the law not because of legal coerce, but of retaliation in life after death. Determination on what is allowed, obliged, and prohibited is under the authority of God alone.[188]

i. *Mu'ahadat* between Muslims and Non-Muslim Communities

Mu'ahadat in the context of its comparison with treaty law is defined by majority of Islamic jurist as *muhadana*, which means a contract concluded for the sake of ending fighting for a fixed time period with or without compensation.[189]

According to Shaybani, *mu'ahadat* with non-Muslim can be done in either of two conditions; when Muslims are in position of power or when they are not.[190] When Qur'an exhorts Muslims to fight, it also prohibits them to take arms against

[188]Jaber Seyvanizad, "Islamic International Law concerning law of Treaties," International Conference on Law, Political Science and Islamic Instructions, Tehran, 2017, p. 4.
[189]Labeeb Ahmed Bsoul, *Op. Cit.*, p. 162.
[190]*Ibid*, p. 163-164.

whom they have a treaty.[191] In each condition, Muslims have to maintain their honor, prestige, and dignity and considering the *maslaha* (public interest).[192]

ii. Requirements on the Validity of *Mu'ahadat.*[193]

a. Signed by the Imam

The first requirement of Muahadat is that it shall be signed by the imam (leader) on behalf of the Muslim community. However, the Imam also can assign his deputy to sign it.[194]

b. Consent

As what applied in treaty law,[195] *mu'ahadat* also requires consent from the parties. It is based on Quran in Chapter An-Nisa, verse no. 29 saying:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ ۚ وَلَا تَقْتُلُوا أَنفُسَكُمْ ۚ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا - 4:29

"O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful."

c. Public Interest

According to Muslim scholars, *mu'ahadat* must serve the interest of *ummah* (Muslim community). It applies for example when they are in fear of a

[191]Chapter An-Nisa (4) verse no. 90: "Except for those who take refuge with a people between yourselves and whom is a treaty or those who come to you, their hearts strained at [the prospect of] fighting you or fighting their own people."
[192]Labeeb Ahmed Bsoul, *op. cit,.,* p. 163.
[193]*Ibid*, p. 171-179.
[194]*Ibid*, p. 171.
[195]See VCLT art. 11.

threat to peace and security, and also in order to bring to an end a fighting/war. If this requirement is not met, the agreement will be invalid.[196]

a. No Contradiction with Islamic Law

In order to be valid *mu'ahadat* shall not contradict with principles in Islamic law as stipulated in Qur'an and prophet traditions. One of the prophet tradition states that every condition which has no root in Qur'an is void. [197] For example when the agreement requires Muslims not to prohibit prostitution, such agreement is void.

b. Designated Period of *Mu'ahadat*

The last condition of *mu'ahadat* is it's designation of period on its applicability. This condition is founded so as to make the parties aware of the period of *mu'ahadat*. The period of *mu'ahadat* is flexible; it can be long, short, or even permanent.[198]

iii. Termination of *Mu'ahadat*

Mu'ahadat in Islam can be terminated in certain ways;

a. Consent[199]

As the most basic and fundamental principle in agreement, including mu'hadat is consent, termination of *mu'ahadat* is also possible by means of consent from both parties.

b. Violation by other Party

[196]Labeeb Ahmed Bsoul, *op. cit*, p. 174-176.
[197]*Ibid*, p. 177.
[198]*Ibid*, p. 179-180.
[199]*Ibid*, p. 216.

Termination a *mu'ahadat* by Muslim is also possible when the other party violated the content of *mu'ahadat* by not performing their obligations. No prior notification is needed when such thing happens.[200]

Termination before such violation happens is also possible, if Muslims are in fear of treachery by the other party. In this case, prior notification is needed.[201]

c. Change of Circumstances

As mentioned earlier, *maslaha* is one of main consideration in concluding a *mu'ahadat*. When circumstances changes and it lead to injustice, Muslims can terminate the agreement. It happens when, for example, the outcome of the *mu'ahadat* is different from what had been agreed upon before. However, it is only permissible if done with prior notification, otherwise such act would be against Qur'an and Sunnah.[202]

History of Islam recorded some practices of *mu'ahadat*. One of the famous one is Hudaybiya treaty, which was concluded by the Prophet Muhammad (Peace be Upon Him) and Suhayl ibn Umr, a representative of Quraisy in Mecca. The treaty then become a model which is followed by Muslims in making agreement.[203]

[200] *Ibid*, p. 217.
[201] *Ibid*, p. 218.
[202] *Ibid*, p. 220-221.
[203] *Ibid*, p. 231.

CHAPTER III

ANALYSIS OF THE CONSTITUTIONAL COURT DECISION AND ITS AUTHORITY

A. Compatibility of the Indonesian Constitutional Court decision, including the *ratio decidendi* and *obiter dictum,* in upholding its jurisdiction over judicial review of Act no. 28/2008 on ASEAN Charter ratification.

This section will analyse the decision of the court in upholding its jurisdiction over judicial review of ASEAN Charter ratification, including *ratio decidendi* and *obitur dicta*, based on international law perspective. In light of which, this section will not discuss the whole decision; rather it will focus only on certain parts of it which are linked to international law without arguing on the merit of the case. The analyses are divided into some categories based on the issue raised by the court.

i. Constitutional Court's *Ratio Decidendi* on its Decision to Uphold Jurisdiction over Law no. 38/2008 and Binding Force of Treaty

The court decided to uphold its jurisdiction over the judicial review of ASEAN Charter Ratification instrument.[204] It was based on the reason that according to Indonesian law, attachment of a law is an inseparable part of it,[205]

[204]Decision on ASEAN Charter, p.18. the decision reads: *Menimbang bahwa permohonan para Pemohon adalah pengujian konstitusionalitas norma Undang-Undang, yaitu Pasal 1 angka 5 dan Pasal 2 ayat (2) huruf n ASEAN Charter yang merupakan lampiran dan bagian yang tidak terpisahkan dari UU 38/2008 (vide Pasal 1 UU 38/2008), dengan demikian, Mahkamah berwenang untuk mengadili permohonan a quo*.

[205]*Ibid*; Law no. 38/2008 on ASEAN Charter Ratification, art. 1.

and therefore the charter in this case had constituted a law which constitutionality can be examined by the court.[206]

However, the decision does not imply that the court in doing this had followed dualist perspective -who argues that an international law rule can be binding in domestic level when it had been transformed into national law, and it is that transformation law which becomes binding in a state-[207] and reviewed the charter as a national law rather than international law, as it is also reflected in another part of the decision that the court assessed the charter as an international law binding to state parties.[208] Inferentially, the court was reviewing ASEAN Charter articles as an treaty, which takes a form as an Indonesian law (*undang-undang*) and for this reason also binding to legal subjects in Indonesia.

The court's position can be analysed based on two legal issues; the courts' authority to examine the charter and the charter position in court's perspective.

First, the court's jurisdiction to examine the charter is quite problematic. Examination of constitutionality of the charter alone would probably be fine on international law perspective for it does not prohibit states to review a treaty. A number of states have practiced it in their national legal system, such as Germany[209] and Hungary.[210] However, Indonesian constitutional court case is different as this was not a mere examination of constitutionality, because by

[206]Decision on ASEAN Charter, p.181.
[207]Damos Dumoli Agusman, *op. cit*, p. 65
[208]Decision on ASEAN Charter, p. 194: The Court stated that the law is binding to state parties as an international law.
[209]Honor Mahony, "German constitutional court to examine Lisbon treaty," Retrieved from https://euobserver.com/institutional/27452, at 09.36, April 24, 2018.
[210]"Press Release on The Constitutionality of The Act of Promulgation of The Lisbon Treaty," retrieved from https://hunconcourt.hu/kozlemeny/press-release-on-the-constitutionality-of-the-act-of-promulgation-of-the-lisbon-treaty/, at 09.42, April 24, 2018.

claiming the authority to decide constitutionality of charter, it could only means that the court also admitted that it can repeal the legal force of the treaty,[211] as the automatic consequence of treaty's unconstitutionality.[212]

It is incompatible with international law, as there is no procedure under international law by which a national court can revoke the legal force of a treaty. Binding character of a treaty when it has been ratified by state can only be abolished by certain ways as determined by treaty law. The VCLT addresses this matter in part V of the treaty which covers provisions on invalidity,[213] termination,[214] withdrawal,[215] denunciation,[216] and suspension[217] of a treaty. None of those mechanisms fits the condition under the ASEAN Charter case. The closest argument is probably the ground of invalidity due to violation of internal law provision.[218] Such violation must be manifest and the law must be of fundamental importance.[219] This fundamental character, according to Boer Mauna, includes constitution of a state.[220] However, the law limits the violation only to provisions on the competence to conclude a treaty,[221] which is irrelevant to the present case.

Not to mention that the court did not even try to justify their jurisdiction and authority to end the binding force of the treaty based on those treaty law

[211]Decision on ASEAN Charter, p. 187; Law no. 24/2003 on Constitutional Court, art. 57;
[212]Law no. 24/2003 on Constitutional Court, art. 57.
[213]VCLT art. 46-53.
[214]*Ibid*, art. 54.
[215]*Ibid*. art. 54, 56.
[216]*Ibid*, art. 56.
[217]*bid*, art. 57-64.
[218]VCLT, art. 46
[219]*Ibid*, art. 46 (1).
[220]Boer Mauna *op. cit.*
[221]VCLT, art. 46.

mechanisms. The only argument they brought was the sovereignty of state to determine its own action,[222] which will further be discussed in later part.

Additionally, all the abovementioned mechanisms are to be done in respect to the whole part of the treaty.[223] Measure taken for certain clauses –as what happened in ASEAN Charter judicial review case[224]- is allowed when three conditions are met; the clauses are separable from the other part of the treaty in its application, the clauses are not essential basis for the consent of the parties to the treaty, and the continued performance of the remainder part of treaty would not be unjust.[225] The present case obviously does not meet the second requirement, as ASEAN single market is an important element of ASEAN Charter.[226] Therefore, the court's decision in upholding its jurisdiction is incompatible with treaty law in respect to mechanisms by which states can exempt from the binding force of ratified treaty.

Accordingly, it will also be incompatible with *pacta sunt servanda* principle which obliges states to respect treaty obligation[227] and withdraw from or terminate treaty only based on the applicable rules of international law.[228]

[222]Decision on ASEAN Charter, p. 190.
[223]VCLT, art. 44 (1),(2).
[224]The request of judicial review was to examine art. 1(5) and 2(2) of ASEAN Charter.
[225]VCLT, art. 44(3)
[226]One of the purpose of ASEAN is an economically integrated community as stated in the preamble of the Charter; "CONVINCED of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities."
[227]VCLT, art. 26.
[228]Sefriani, *op. cit.*, p. 612.

Violation of this principle will affect trust, balance and stability international community as they are the main objective of the principle.[229]

Second, as previously discussed the beginning of this section, the position of the court in dealing with treaty status in domestic law is vague. The court mentioned that they review ASEAN Charter because it has been incorporated to an Indonesian law,[230] which is a typical dualist perspective, indicating that it does not follow monism.[231] However, it also evaluated the charter and treating it as an treaty binding to state parties, which is not a signal of dualism perspective either.[232] This position has made the treaty status become unclear on whether it is binding because of national law or international law.

Nevertheless, this lack of clarity does not necessarily mean that the court's view is incompatible with international law. Dualism and monism as a doctrine on the domestic status of treaty arises to govern a domestic implementation of international law; how state can comply with its international obligation through its legislative, judiciary, and executive organs.[233] International law leaves states to decide upon this matter and determine their own way to assure such compliance.[234]

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[229]*Ibid*.

[230]Decision on ASEAN Charter, p.181.

[231]Damos Dumoli Agusman, o*p.cit*, p. 65

[232]*Ibid*. it is explained that dualism acknowledges the provisions of an treaty because of its transformation instrument, which has national law character, and not because of the binding status of that treaty to state under international law. Therefore, a dualist will see the adopted treaty provision as a national law and not international law.

[233]Brindusa Marian, "The Dualist and Monist Theories. International Law's Comprehension of these Theories," *The Juridical Current* vol. 1, 2007, 16-27, p. 16.

[234]Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford University Press, 2011, p. 3.

Although the court's position is still compatible with international law, it is noteworthy that such unclear position will confuse the domestic implementation of treaty in Indonesia.[235] Therefore, defining the court's position when it deals with treaty is important.

ii. Constitutional Court's *Ratio Decidendi* regarding Sovereignty of State

The court justified its opinion on the possibility to end the binding force of the charter by the sovereignty principle.[236] It is asserted in the decision that: "Although Indonesian has bound itself to an treaty, as a sovereign state Indonesia has an independent right to terminate the binding force of a treaty to which it has bound itself, after taking into account internally the loss and advantages of being bound or not to that treaty...".[237] It is clear that according to the court Indonesia has in independent right to terminate ASEAN Charter on the ground of sovereignty principle.

In the writer's opinion, if we read the abovementioned court's opinion together with previous analysis[238]of the court decision, it is reasonable to conclude that the court justified its jurisdiction to review, and subsequently to repeal the legal force of the Charter if it's found to be unconstitutional, by sovereignty principle.

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[235]Without clear position in either dualism or monism in every case, organs of state will not be able to understand easily when they shall apply international law and when they shall not.

[236]Decision on ASEAN Charter, p. 190.

[237]*Ibid*. The decision reads: *Meskipun Negara Indonesia telah mengikatkan diri dalam suatu perjanjian internasional, namun sebagai sebuah negara yang berdaulat Negara Indonesia tetap mempunyai hak secara mandiri untuk memutus keterikatan dengan perjanjian internasional yang telah dibuat atau yang padanya negara Indonesia terikat, setelah secara internal mempertimbangkan keuntungan atau kerugiannya baik untuk tetap terikat*…"

[238]See this thesis section **III (A) (i).**

This reasoning portrays sovereignty principle as a blank check, by which states can do whatever they want based on their own political will. If this concept is to be accepted, any state can do anything as a sovereign entity. Potential misuse of the concept would be very high.

Contemporary sovereignty principle under internationally actually does not work in such a way. The court's perspective resembles the old concept of sovereignty. In the middle ages era, sovereignty was defined as the highest authority. According to Jean Bodin sovereignty is absolute, perpetual, indivisible, inalienable and imprescriptible.[239]

However, the principle had evolved in 20th century, when it became more flexible, lenient, and puts more emphasis on interstate relation particularly on international obligation of state.[240] Pasquale Fiore stated that sovereign state can act without interference from other states, but within the limits set out by International law. Similarly, Jean Delvaux maintained that as the principle is limited by international law, sovereignty does no longer means arbitrary power and without reservation.[241]

This development is also recorded in the United Nations Declaration of 1970 which set forth that the elements of sovereignty are; enjoyment of full sovereignty rights by each state; freedom to choose and develop state's own political, social, and cultural system; obligation to respect the sovereignty of other

[239]Jana Maftei, "Sovereignty in International Law," Acta Universitatis Danubius. Juridica, Vol 11, No 1 (2015), online version accessed at http://journals.univ-danubius.ro/index.php/juridica/article/view/2798/2585, April 27, 2018.

[240]*Ibid*.

[241]*Ibid*.

state; inviolability of territorial integrity and political independence; duty to perform international obligation in good faith and live in peace with others.[242] Those elements clearly confirm that beside the rights that state can gain from this principle, there are also obligations to be respected, thus limiting state's freedom to prevent potential abuse of power, both internally in domestic level and externally in interstate relations.

Indeed that Indonesia has the right to end its treaty obligation by termination. However, such act is subject to provisions of treaty law, which does not allow termination solely by a national court decision.[243] Therefore, the court's justification for its authority to terminate the binding force the charter on account of sovereignty principle is incompatible with current concept of sovereignty in International law.

iii. Constitutional Court's *Obitur Dictum* on National Ratification Law and Other State Obligations

In the last parts of the judgement the court discussed the binding force of ASEAN Charter which is a form of law in Indonesia –by law no. 38/2008- and simultaneously an international agreement between states, and the consequence thereof.[244]

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[242]Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution no. A/RES/25/2625. This declaration is often called as declaration on Friendly Relation, and the International Court of Justice in Nicaragua had accepted the declaration as an authentic interpretation on UN Charter; See United Nations Document at http://legal.un.org/ilc/reports/2015/english/chp8.pdf , footnote. 329.

[243] For mechanism of lawful termination under international law see this thesis in section **III (A) (i).**

[244]Decision on ASEAN Charter, p. 194-196.

According to the court, Indonesian law no. 38/2008 is also binding to the state parties to the charter, because the character of law (*undang-undang*) is binding to subjects. Due to the fact that the ASEAN Charter's subjects are states, and the Charter took the form of law no. 38/2008, accordingly the other state party to ASEAN Charter are bound by law no. 38/2008.[245] However, this opinion is denied by the court itself, stating that the agreement is binding to states because it was agreed by the parties in accordance with *pacta sunt servanda* principle, and not because it has been incorporated into Indonesian law.[246] Later, the court address another question, on whether Indonesia has the right to seek for legal remedy before Indonesian court, suing another state on the ground that the said state has breached an Indonesian ratification law of certain treaty. It is also as the legal consequence of a ratification which takes a form as law (*undang-undang*). The court provided no answer for the last question. [247] However, at the end the court proposed that the ratification instrument which is a form of approval from the parliament in the form of law (*undang-undang*) should be studied further.[248]

It can be understood from the previous paragraph that the court did not aim to make a legal opinion. It only raised questions on the issue which requires

[245]*Ibid*, p. 194. The court held that: "*Karena Undang-Undang berlaku sebagai norma hukum, maka Negara Indonesia dan negara lain, dalam hal ini negara ASEAN wajib terikat secara hukum oleh UU 38/2008.*"

[246]*Ibid*, p. 195. The court maintained: "*….tentu saja tidak. Kewajiban yang dibebankan kepada suatu negara oleh perjanjian internasional tidaklah lahir karena perjanjian internasional bersangkutan telah disahkan sebagai Undang-Undang oleh pihak negara lain tetapi kewajiban tersebut lahir karena para pihak dalam hal ini negara-negara sebagai subjek hukumnya telah menyetujui bersama suatu perjanjian. Hal demikian sesuai dengan asas pacta sunt servanda*."

[247]*Ibid*, p. 196. The court stated: "*Demikian pula sebaliknya apakah Pemerintah Indonesia dapat melakukan upaya hukum berupa gugatan terhadap negara lain sebagai pihak pembuat perjanjian internasional di pengadilan Indonesia dengan alasan bahwa negara tersebut telah melanggar Undang-Undang pengesahan perjanjian internasional*."

[248]*Ibid*. the court concluded that : "*Dengan mempertimbangkan hal-hal tersebut di atas, pilihan bentuk hukum ratifikasi perjanjian internasional dalam bentuk formil Undang-Undang, khususnya pada ASEAN Charter yang disahkan dengan UU 38/2008 perlu ditinjau kembali*."

further consideration. Nonetheless, the author would still like to discuss the matter from an international law perspective, without addressing the court's *obitur dictum* compatibility with international law.

In international law perspective, the court denial was correct. An international agreement is binding based on *pacta sunt servanda* principle.[249] The principle is widely recognized by international community and constitutes a customary international law.[250] It also has been codified in the VCLT.[251] *Pacta sunt servanda* is the rule that treaties are binding on the parties and must be performed in good faith.[252]The binding force emanates from state's own will[253] as expressed *inter alia* by ratification of a treaty.[254] Even without Indonesian adopting a treaty in its internal law, once it becomes a party to a treaty, it is binding to Indonesia.

However, the reasoning of the court that Indonesia will be able to sue another country before Indonesian national court, as the consequence of law no. 38/2008 is contrary to the rules of international law. States are equal in international relation based on sovereign equality principle.[255] This principle

[249]VCLT art. 26

[250]Lea Brilmayer, Isaias Yemane Tesfalidet, "Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences," The Yale Law Journal, vol. 120, 2010-2011, retrieved from https://www.yalelawjournal.org/forum/treaty-denunciation-and-qwithdrawalq-from-customary-international-law-an-erroneous-analogy-with-dangerous-consequences , at 16.03, April 29, 2018.

[251]VCLT art. 26

[252]VCLT Commentary, p. 211.

[253]Lotus Case, PCIJ, Series A, No. 10, p. 18; R. P. Anand, Sovereign Equality of States in International Law, Hope India Publication, Delhi, 2008, p. 14.

[254]VCLT, art. 14.

[255]United Nations Charter, art. 2(1).

becomes a basis for states immunity under international law,[256] which protects States from the jurisdiction of the courts of other countries.[257] Sovereign equality also means equality of state, preventing any state to be legally subordinated to the others without their consent.[258]If Indonesia uses its national court to sue another state, it will make that state legally subordinated to Indonesia, and it is against the principle of sovereign equality. National law of a state shall only have exclusive jurisdiction over people and territory of that state, not over other sovereign state.[259]

One more thing we can understand from the questions of the court, and its legal reasoning, is that Indonesian constitutional court judges are not knowledgeable of international law principles. Or, even if they are, they put aside that international law perspectives and give more weight to constitutional law perspective.

B. Legal Implications Which Can Arise from the Indonesian Constitutional Court's Authority to Examine Ratification Instrument of Treaty.

As discussed in previous part of the thesis, the constitutional court had claimed a jurisdiction over the judicial review of law on ratification of treaty.[260] The following section will elaborate further legal implication that can arise from such jurisdiction.

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[256]Juliane Kokott, "States, Sovereign Equality," Max Planck Encyclopedia of Public International Law, Heidelberg and Oxford University Press, 2010, p. 6.

[257]*Ibid*.

[258]*Ibid*, p. 8.

[259]Sefriani, *Peran Hukum nternasional dalam Hubungan Internasional Kontemporer*, Raja Grafindo Persada, Jakarta, 2016, p. 38-39.

[260]See this thesis section **III (A) (i).**

It is highly necessary to discuss this issue, as there are greater possibilities that other ratification law will be reviewed by the court, considering the rapid development of international law in globalization era. Globalization had brought a fundamental change which will make it difficult to strictly separate between national law and international law.[261] International law today had governed aspects which previously were under the authority of one state alone. Such laws usually require states to implement the treaty provisions by enacting or abolishing certain regulation for specific issue.

An obvious example is the establishment of World Trade Organization which compel states to adjust its internal regulations on trade to international trade law principles such as national treatment principle[262] and lowering trade barriers.[263] In a greater case, European Union (EU) can be a good illustration. EU member states had agreed to delegate part of their sovereignty to the organization. Areas which are commonly governed by national law such as legislative process and some decision making process are to be done the Union.[264] In such case, more previously national affairs will be governed by International law.

The development of international law, coupled with many Indonesian communities cautiousness for foreign influences[265] will most likely result in more

[261]Damos Dumoli Agusman, *op. cit*, p. 119

[262]Principles of the trading system, World Trade Organization, retrieved from https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm , at 5.48, April 29, 2018. This Principle requires WTO members to treat local and foreign product equally.

[263]*Ibid*. This principle necessitates state members to gradually abolish trade barriers such as tariffs, import ban or quota.

[264]Klaus-Dieter Borchardt, "The ABC of European Union law," Publications Office of the European Union, 2010, p. 98; "How the European Union works," European Commission, Directorate-General for Communication Citizens information, Publications Office of the European Union, 2014, p. 3.

[265]Damos Dumoli Agusman,, *op. cit*,., p. 121.

judicial reviews cases for treaty in the future. It is proven by the on-going case before Indonesian constitutional court; a judicial review for law no. 24/2000 on treaty. The applicants demand that more ratification of treaty shall be done with prior approval from the parliament.[266]

With more possibilities of the occurrence of future cases, it is important to discuss the legal effects that can arise from the court's authority in reviewing international agreements.

i. Legal Dilemma

There will be several consequences if the court, in the future, claims the same jurisdiction. If the court decides to refuse the request from the applicant and maintain that a treaty is constitutional, indeed there would be no problem. However, if the court decides otherwise, saying that some clauses of treaty are against the constitution, the condition will be much more complicated in legal perspective. The following section will analyse the legal consequences assuming that the latter condition occurs.

The first and direct legal consequence of unconstitutionality of a law clause is the revocation of the binding force of the clause (legally *null and void*).[267] Once a treaty clause or the whole treaty is decided as unconstitutional, they will no longer have any binding force under Indonesian law. At the same time, the treaty is still in force and binding under international law, because the

[266]Retrieved from https://www.gatra.com/rubrik/ekonomi/308658-gugat-uu-perjanjian-internasional-ke-mk-aktivis-ingin-rakyat-berdaulat , at. 06.37, April 29, 2018.

[267]Law no. 24/2003 on Constitutional Court, see part**. III.I.I.**

decision of constitutional court cannot revoke the binding force of a treaty under international law.[268]

Here lays a dilemma; to comply with treaty and disregarding the court's decision or to follow the court's decision and many other complicated mechanisms awaiting.

a. Decision to Comply with International Law

If the government chooses to comply with international law, there would be no difficulties in regard with Indonesia's international obligation. However, if it's the decisions there will be violation of national law. There are two issues on Indonesian national law if the government act in favour of international law.

First, the government's acts in implementing the treaty will be a violation of the constitution with at least two constitutional provisions violated. The first principle is *rechtstata*[269] which requires government acts to be exercised based on regulation (*weitmatigheid van bestuur*).[270] Implementation of a treaty without clear legal ground is therefore against the principle that Indonesia is a state based on rule of law. The second constitutional provision is the provision upon which the constitutional hold the unconstitutionality of the treaty. To illustrate this, we can assume if, for example, the court had decided that article 1 (5) and 2 (2) of ASEAN Charter contravene article 33 of the constitution. When the government

[268]VCLT, art. 46-53; See this thesis in section **III (A) (i)** for mechanisms of termination, withdrawal, denunciation, and invalidity of treaty under international law.

[269]The 1945 Constitution of Republic of Indonesia, art. 1(3). The article reads: "The State of Indonesia shall be a state based on the rule of law."

[270]Dody Nur Andriyan, *Hukum Tata Negara dan Sistem Politik: Kombinasi Presidensial dengan Multipartai di Indonesia*, Deepublish, Sleman, June 2016, p. 37.

still apply the two Charter provisions in Indonesia, that act will inevitably violate article 33 of the constitution.

Second, it will undermine the dignity and spirit of constitutional court as a judiciary organ of state[271] with an authority to protect citizen's constitutional rights. Research suggests that despite the fact that constitutional court is a prestigious organ of state, the sole interpreter of the constitution and the guardian of it;[272] numerous decisions of the court are not obeyed by government institutions on account of nonexistence of an execution mechanism which can coerce state organs to carry out the decision.[273] For this reason, the disobedience of government to constitutional court decision will worsen this problem, which also means a threat to citizen's constitutional rights.

b. Decision to Comply with Constitutional Court Judgement

If the government chooses to comply with constitutional court decision and directly stop the implementation of a treaty, an internationally wrongful act will occur. To avoid this, international law provides mechanisms to end the legal force of a treaty by termination or withdrawal.[274]

However, those mechanisms are subject to several requirements under international law. *First*, termination or withdrawal from a treaty can be done only if the treaty expressly[275] or impliedly (either by nature of the treaty or intention of

[271]The 1945 Constitution of Republic of Indonesia, art. 24 (C).
[272]Janedjri M. Gaffar, *op. cit*.
[273]Nanda Narendra Putra, Agus Sahbani, "SETARA Institute: Belasan Lembaga Negara 'Membangkang' Terhadap Putusan MK," retrieved from http://www.hukumonline.com/berita/baca/lt57b5dbcd0b8ed/setara-institute--belasan-lembaga-negara-membangkang-terhadap-putusan-mk , at. 14.28, April 29, 2018.
[274]VCLT, art. 54-56.
[275]VCLT, art. 54.

the parties)[276] provides possibility of such action or by consent of all parties to that treaty.[277] Otherwise, Indonesia will still be bound to the treaty. Which means that if a treaty provides no possibility of termination or withdrawal, and the other party does not give consent, Indonesian will still be bound to obligations in that treaty.

Second, such termination or withdrawal shall be done with respect to the whole part of the treaty.[278] Although the court decides that only some clauses in the treaty are unconstitutional, Indonesia, when it chooses to withdraw from or terminate the treaty shall do that to the whole part of the treaty. Nonetheless, there is an exception for this if (i) the clauses are separable from the remainder of the treaty in term of their application; (ii) the clause was not an essential basis of the consent of the other party or parties to be bound by the treaty; and (iii) continued performance of the remainder of the treaty would not be unjust.[279] If any of those requirements is not met, Indonesia has to withdraw or terminate the whole treaty.

If termination or withdrawal is not possible, due to abovementioned numerous conditions that must be fulfilled, Indonesia will comply with constitutional court decision at the expense of fulfilment of international obligations. In such condition, justification based on national court decision in unacceptable under international law.[280] Even if the act of a state is done to fulfil a constitutional obligation under national law, if that act breaches an international

[276] *Ibid*, art. 56.
[277] *Ibid*, art. 54.
[278] *Ibid*, art. 44.
[279] *Ibid*, art. 44 (3).
[280] *Ibid*, art. 27.

law obligation, it will still be an internationally wrongful act,[281] from which other state can claim reparation of injuries.[282]

[281]Arsiwa, art. 3.
[282]*Ibid*, art. 31.

CHAPTER IV

CLOSURE

A. Conclusion

The ASEAN Charter case before the Indonesian constitutional court is the first time for the court to deal with judicial review of treaty. It is important for Indonesian to evaluate the court decision and position in reviewing the charter, as in this globalization era, it will be much harder to strictly separate between national law and international law, while at the same time the state shall comply with all its international obligations. For those reasons this thesis have examined the decision of the court based on two main questions; whether the decision of the court, including its *obitur dictum*, and *ratio decidendi*, compatible with international law, and what are legal problems/consequence that may occur as a result of the court's competence to review treaty. This study found that;

i. The court's decision in upholding its jurisdiction over judicial review of the charter contains various statements which correlate to international law. The author divides the analysis into three issues; First, on the court's *ratio decidendi* for the decision to uphold its jurisdiction over Law no. 38/2008, it is found incompatible with international law particularly on the mechanisms of termination and withdrawal from treaty and *pacta sunt servanda* principle. It is important to note that he first *ratio decidnedi* discussed in this these reflect that the court did not have clear position in treating the charter based on dualism or monism principle.

Second; on the courts' *ratio decidendi* based on sovereignty of state it is also incompatible with the contemporary concept of sovereignty under international law. Third, on the court's *obitur dictum* about legal subordination of other state parties of ASEAN Charter to Indonesian court, it is also found incompatible with international law, specifically sovereign equality principle. From those analyses, one thing is clear; the constitutional court judges are not knowledgeable of international law principles, or they put aside the perspective of international law.

ii. The legal consequence if the court has the jurisdiction over judicial review of treaty promulgation law will be complicated if it's found that the treaty is unconstitutional. In that situation, the government will face a legal dilemma; either to follow international law or to follow the court decision. If the government chooses to follow international law, it will have to violate constitution and at the same time undermining the court's dignity as the guardian of constitution. If the decision is to follow the court's decision then Indonesia will potentially omit its international obligation and violates international law. To avoid such violation, Indonesia can withdraw or terminate the treaty, but unfortunately not all treaty allows such actions.

B. Recommendation

Facing those legal problems, the author recommends that:

i. The chamber within constitutional court needs to include an international law expert as a judge, or at least a constitutional law expert with good understanding of international law to avoid incompatibility of the court's decision with international law.

ii. Indonesia to change the mechanisms of treaty review. There are three patterns which is used by other states, however, the author suggest to follow the practice of Austria where treaty can be reviewed although its already in force, but limiting the court's ability to only declaring the constitutionality of treaty without rendering it null and void with the international obligation of state to remain.

iii. As a preventive measure, in the preparation of treaty ratification or accession, constitutional law experts shall also be involved to avoid future conflict between treaty and the Constitution.

iv. Indonesian to include withdrawal or termination clause in every treaty negotiation if the treaty is potential to contradict with constitution. To ease withdraw or terminate the treaty if later found to be unconstitutional.

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