

Memorandum of Understanding in the Context of Indonesian International Treaty

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Abstract—Memorandum of Understanding (MoU) is one form of international instrument made by the subjects of international law. In the practice of the states, there are times when the MoU is not legally binding, but other state practices emphasize the principle that any international treaty made by states has binding power to them. This article uses normative legal research, especially research on legal principles. The practice of Indonesia regarding the MoU differs from that in other countries, especially common law countries. Where in the context of Indonesian international treaty, the MoU has a binding power as to which other international agreements are followed by Indonesia. This study revealed that differences in binding power of the MoU between participating countries, have not had a significant impact on the implementation of the MoU.

Keywords: *MoU, international agreement, Indonesia*

I. INTRODUCTION

Based on Article 38 paragraph (1) of the Statute of the International Court, sources of international law consist of International Treaties, international customs, general legal principles recognized by civilized nations, judges' decisions and opinions of prominent legal experts. International treaties and international customs are primary sources and general legal principles recognized by civilized nations and judges' decisions and opinions of leading experts are additional legal sources / secondary.

Development in international treaties are becoming increasingly rapid, this is due to the increasing number of countries after the end of World War II, especially with the United Nations Resolution 1514 on Granting Independence to the Colonial State and Society. The newly independent countries, which are subject to international law, then incessantly collaborate with other countries, which are contained in an international agreement.

In international law, provisions regarding international agreements can be found in the 1969 Vienna Convention on the Law of the Agreement (Vienna Convention on the Law of Treaty). The 1969 Vienna Convention is a provision on agreements made between one country and another, while international agreements between countries and international organizations and agreements between international

organizations and other international organizations are regulated in the 1986 Vienna Convention (Vienna Convention on the Law of Treaties) between States and International Organizations or Between International Organizations).

In making international treaties, there are various terms used to name treaties made. Some agreements terms that are usually used by countries include Statute, Charter, Declaration, Convention, Agreement, Memorandum of Understanding (MoU), and covenant. The naming or term of the international agreement is determined freely by the parties. This means that the term used to name a fully agreed international agreement is the agreement of the parties who promised.

In practice in Indonesia, the position of "treaty" tends to be higher than "agreement" and "agreement" is higher than "MoU". Although Law No. 24 of 2000 concerning International Treaties does not specifically regulate the use of nomenclature or the name of an international treaty, but there is a tendency to use "agreement" as an umbrella instrument and then "MoU" and "arrangement" for its derivative instruments [1].

Eddy Pratomo further stated that the MoU was one of the international treaty models that caused controversy. This is because in the practice of common law countries, the MoU is an instrument that is generally no legally binding and needs to be distinguished from treaties, while practice in Indonesia emphasizes the principle that treaties made by the state, including the MoU, have binding power as treaties [1]. This condition will become a problem if in practice Indonesia enters into an MoU with common law countries.

Based on the 1969 Vienna Convention, an international agreement is 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. Whereas in Law No. 24 of 2000 concerning International Agreements states that international treaties are agreements, in certain forms and names, regulated in international law that are made in writing and give rise to rights and obligations in the field of public law. There are several different meanings of the two provisions. The Vienna Convention states explicitly, that international treaties are agreements made between countries

and made in written form, but related to the parties to the agreement and the form of the agreement is not included in the criteria of international agreement according to Law No. 24 of 2000, so that agreements made by Indonesia and International Organizations, the arrangements also refer to Law No. 24 of 2000.

In practice in Indonesia there are several commonly used international agreement terms. These terms or nomenclature are:

A. Treaty

Damos Dumoli Agusman states that treaty is an international treaty that regulates matters that are very important and state-wide as a whole [2]. Treaty is usually a multilateral international agreement. Data from the Ministry of Foreign Affairs noted that Indonesia had signed 36 treaties. At the beginning of independence, the treaty signed by Indonesia was the Treaty of Friendship with Syria in 1947. This treaty nomenclature refers to matters that are political and diplomatic in nature. But in its development, the agreement that uses the treaty nomenclature does not merely contain matters that are diplomatic and political in nature.

B. Convention

According to Boer Mauna, conventions cover the understanding of international treaties in general [3]. In international practice, the term convention is used for multilateral agreements, where the agreement consists of many parties.

C. Agreement

Agreement is generally a bilateral agreement. The 1969 Vienna Convention uses the nomenclature agreement widely, namely all international instruments, both those that qualify as treaty or not. Usually the agreement is lower than treaty and convention [3].

D. Memorandum of Understanding (MoU)

An MoU is an agreement aimed at regulating the operational technical implementation of a master agreement, so there is no need for a master agreement. This model of agreement usually does not require authorization and takes effect immediately after signing [3].

II. METHODS

The research method chosen is normative legal research, namely legal research based on secondary data, including personal data / documents, public data such as official data sourced from the government [4]. Data sources are primary legal material and secondary legal material, which consist of Indonesian legislations, and international legal sources, as well as scientific articles and books related to the subject matter examined.

III. RESULTS AND DISCUSSION

In the United States, a treaty is considered a "supreme law of the land", thus a treaty has an equivalent status with federal

statutes passed by Congress and subordinate to the Constitutions, so a treaty can be declared unconstitutional by the Supreme Court [5].

Klabbers doubts that the MoU and treaties are two different instruments [6]. He argued that all agreements made by countries and would affect future conditions (normative) and not subject to another (domestic) legal system, were treaty. Furthermore, Klabbers does not see the difference between treaty and MoU, because these two things form an agreement.

In countries with a common law system, the MoU is a document that is not legally binding, different from treaty. Anthony Aust states that the MoU is not a treaty so it is not a legally binding instrument [6]. Thus there is no state obligation to publish it. He also believes that the MoU can be effectively implemented by the parties simply by signing without the need for further action.

The meaning of legally binding an international agreement is that one of the parties can force the implementation of the agreement through international justice channels, or through force that is usually done to implement an international agreement. In common law countries, non-legally binding instruments mean that these documents cannot be used as evidence or are forced to be carried out through the courts. The advantage of a non-binding agreement is that the agreement can be quickly approved by the parties, which cannot be found in a treaty, since treaty is usually takes a long process to be approved. In addition, non-binding agreements technically have fewer legal constraints compared to binding instruments [7].

Eddy Pratomo writes that some experts suggest that the term MoU is used by countries for political reasons, with a view to avoiding using the term Agreement which is considered more formal and binding [1]. However, practice in Indonesia places the MoU as an agreement made between countries and has binding power like treaty.

Anthony Aust suggested several issues that became a problem in the use of the term MoU for an agreement, namely, firstly because of the nature of the MoU which is not legally binding, so that sometimes the parties are tempted to not have a serious commitment to the MoU, Aust further argues that although the MoU has no legal consequences for the parties, it does not mean that countries can freely ignore the contents of the MoU [6]. Such actions are certainly not commendable and can invite political problems between the parties. Second, the negotiating parties tend not to give the same attention as the treaty, during the MoU negotiations.

The Indonesian Ministry of Foreign Affairs Treaty Room noted that until 2019 there were 1130 Memorandums of Understanding signed by Indonesia. When viewed from this number, the MoU is one of the most popular agreements for Indonesia. The practice that occurs in Indonesia emphasizes the principle that all agreements made by countries, including the MoU, have binding power as well as treaty [2]. Thus, the MoU made by Indonesia is a legally binding instrument for the parties. So, if a dispute related to the MoU is made, the solution can be through international court of justice.

IV. CONCLUSION

There are differences of opinion among international law experts on the status of the MoU. Likewise, in the practice of countries. Anthony Aust said that the MoU was a non-legally binding instrument, while Klabbers said that MoU has bound as treaty. Practices in countries, especially countries with common law systems, MoUs are non-legally binding instruments, but Indonesia's practice places MoUs as legally binding instruments. And in Indonesia, the differences in binding power of the MoU between participating countries, have not had a significant impact on the implementation of the MoU.

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