Harmonization of ASEAN Investment Law on the Perspective of Indonesian National Investment Law

*Jelly Leviza, Ningrum Natasya Sirait, T. Keizerina Devi

Faculty of Law, University of Sumatera Utara, Medan 20155, Indonesia;

*Corresponding Author: levizajelly@gmail.com

Abstract

ASEAN's decision to accelerate the implementation of the ASEAN Economic Community (AEC) by 2015 based on the Cebu Declaration, 2007. ASEAN then create a blueprint that describes the steps that must be reached in the AEC in 2015 such as the elimination of taxes and tariffs based on sectors which have been agreed, and all the factors of production such as labor and capital are allowed to move freely crossed the line of ten member countries through the common market. In the field of investment, ASEAN has an ASEAN Comprehensive Investment Agreement (ACIA) to conduct a review of the Framework Agreement on the ASEAN Investment Area (AIA) and ASEAN Investment Guarantee Agreement (IGA). The establishment of ACIA is to encourage a more liberal investment environment, transparent, competitive and facilitative. Indonesia has been preparing the investment regime under ASEAN for example by creating a variety of legal instruments to further open the influx of foreign investment and ensure equal treatment of foreign investors to domestic investors as desired by the ACIA. The problem today is that besides the existence of ACIA as regional investment agreements under the ASEAN there is also a multilateral investment agreement under the WTO (TRIMs). In most small scale there is also Bilateral Investment Treaty (BIT). That condition is still added to the national investment regimes of each country, including for example the Indonesian national investment laws. Based on the above, this paper will examine the ASEAN agreement on investment (ACIA) and the Indonesia national legal arrangements. Then it will also examine Indonesian Government policy on BIT with respect to the ACIA. The purpose of this study was to explain the relevance of Indonesia's national investment law harmonization with ASEAN Agreement and to determine the relevance of the BIT with the ACIA.

Key words: AEC 2015, investment, ACIA, BIT, Indonesian Government.

Introduction

ASEAN Community in 2015 has been in force by the end of 2015, Indonesia as one of the ASEAN Countries has to do a lot of researches in many fields based on become ASEAN regional agreement. Regarding the ASEAN Economic Community (AEC), investment is area that needs to be studied more. Legal product on investment areas in ASEAN is known as the ASEAN Comprehensive Investment Agreement (ACIA). It signed by the Government of Brunei Darussalam, the Kingdom of Cambodia, Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam in Cha-am, Thailand, on 26 February 2009. (http:// www.asean.org/news/asean-secretariat-news/item/asean-comprehensive-investment-agreementacia-enters-into-force-creating-a-stable-and-predictable-business-investment-environment).

Meanwhile in Indonesia, now, arrangement of investment is based on the Law No.25 of 2007 coupled with Bilateral Investment Treaty (BIT) made by the Government of Indonesia with a particular country. Today there are three regimes of investment law in Indonesia, ranging from national law (Law No. 25 of 2007 on Investment), international law in the scale of bilateral (Bilateral Investment Treaty) and international law at the regional scale (ACIA). Legal consequences come up from the three legal regimes is important to be studied to synchronize in order to provide legal certainty for both foreign investors and domestic investors.

Research Method

The study used the method of normative legal research that focuses on the study of the norms of law contained in the legislation. The legal norms applicable in this context are the investment legal norms contained in national law and international. Normative study conducted from product investment laws

national, bilateral and regional to see harmonization of the legal implications of these three legal regimes investments.

Results and Discussion

Harmonization of ASEAN Comprehensive Investment Agreement (ACIA) with the Indonesian National Investment Law Investment Law No.25 / 2007 is a product of the national investment law that replaces two previous legal products, i.e. the Law No.1 / 1967 on Foreign Investment and the Law 8/1968 on Domestic Investment. Whereas, the Law No.25 / 2007 have comply the investment principles contained in the ACIA, as can be seen below:

The Principle of Liberalization in Investment

This principle can be seen from Dictum Considering letter c of Law No.25 / 2007 states that to accelerate national economic development and realize the political and economic sovereignty, Indonesia need to enhance investment from potential economic into real economic strength by using capitals within the country or abroad. (Mukti Fajar, 2015, p. 4). Furthermore, this principle can also be seen in Article 12 of Law No. 25/2007 which stated that "All business sectors or types of business open to investment activity, except the areas of business or type of business that is declared closed and open with conditions". The area of business or type of business that is declared closed and opened with conditions stipulated in Presidential Regulation of the Republic of Indonesia Number 76 Year 2007, concerning Criteria and Requirements Making of Business Closed and Opened Business with the requirements in the Investment Sector. It further implemented in Presidential Decree Republic of Indonesia Number 36 Year 2010 concerning List of closed Business and Opened Business Area with requirement in the field of Investment. The principle of liberalization in line with Article 2 of the ACIA which states that "This Agreement shall create a liberal, facilitative, transparent and competitive investment environment in ASEAN ..."

National Treatment Principle

Equal treatment in the context of national treatment to the Law No. 25 Year 2007 on Investment is the guarantee of equal treatment of both governments towards foreign investment and domestic investment as set out in Article 4 paragraph (2). This principle in the ACIA contained in Article 5 (1) and (2), namely: *"1. Each Member State shall accord to investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory".2. Each Member State shall accord to investments of investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".*It should be noted that the equal treatment is desired in Law 25 of 2007, is limited by national interests. One form of national interest is listed directly in Article 4 paragraph (2) c. In other words, equal treatment between foreign and domestic is not applicable when the national interest requires the protection of the micro, small, medium and cooperative.

Most Favored Nation (MFN) Principle

MFN principle contained in Article 6 paragraph (1) of the Act No.25 / 2007 where the government should give equal treatment to all investors originating from any country that conduct investment activities in Indonesia in accordance with the provisions of the legislation. Exceptions to the application of the MFN principle in Law No. 25/2007 mentioned in Article 6 paragraph (2) that the treatment referred to in paragraph (1) shall not apply to investors of a country that gained privileges based on agreements with Indonesia. The elucidation of Article 6 paragraph (2) mentioned understanding of these privileges as a customs union, free trade area, common market, the monetary union, similar institution, and the agreement between the Indonesian government and seven foreign governments associated with certain privileges in the administration of capital investment (The MFN principle in Article 6). The ACIA is loaded on the principle of National Treatment and MFN above has actually been adopted by the ASEAN countries and the Government of Indonesia since ratified the Agreement on Establishing the World Trade Organization (WTO). Ratification for Indonesia made through Law No. 7 of 1994 which with the ratification, the government no longer would provide protection for all economic players both local and foreign (Yue & Tan, 1996, pp. 4-14).

Principles of Protection

This principle is reflected by Article 10 of Law No. 25/2007 which states that the company's investment should meet the needs of labor should give priority to employment of Indonesian citizens, however, fixed capital investment company is entitled to use the expertise of foreign nationals to certain positions

and expertise in accordance with the provisions of the legislation. Besides mentioning that investment companies are required to improve labor competencies for Indonesian citizens through vocational training in accordance with the provisions of laws and regulations. Lastly, Article 10 stipulates that the investment company employing foreign workers is required to conduct training and transferring technology to the work force Indonesian citizens in accordance with the provisions of the legislation. Principles facilitate or provide incentives to investors who require expansion or new investors given the specific conditions under Article 18. These facilities (incentives) can be administered in the form of a reduction in various taxes or customs duties. These things are generally arranged in a number of Minister of Finance. Furthermore, facilitation for obtaining permits foreign workers under Article 23 which is substantively similar to the one contained in Article 22 of the ACIA.

Agreement on Investment in the Framework Agreement BIT and Presence ACIA

Applicability ACIA has brought changes to the member states, historically the majority of member states to make the investment agreement on a bilateral basis by taking models commonly used in the world, including agreement model bilateral investment used United States, Canada, a model North American Free Trade Agreement (NAFTA), or the United Nations Conference on Trade and Development (UNCTAD). Clause national treatment and most-favored nation in the ACIA more profitable investor compared with bilateral agreements that made Indonesia. Meanwhile, a clause on fair and equitable treatment and full protection and security is more favorable to investors under a bilateral agreement setting. ACIA is still unclear, especially since there is no regulation on the implementation of the ACIA and bilateral agreements. There are no explicit arrangements, whether bilateral agreements will remain in effect or be terminated (Protect Foreign Investors, Indonesia Requested End of the Investment Agreement, as accessed on http://m.hukumonline.com/ On February 24, 2016 14:00 AM GMT). However, there was a view that the obligations born of BIT remain relevant for Indonesia despite the enactment of ACIA (Losari, 2013, p. 5).

Indonesian Government Policy on BIT related to ACIA's presence

Indonesian Government Policy on BIT is doing the review process within three steps: first, reviewing the existing international investment agreements, second, reassessing the existing BIT and last, developing a new model of BIT. In these efforts, the Government of Indonesia involves academics, national and international lawyers, non-governmental organizations (NGO), UNCTAD and experts from various countries and international institutions to contribute their perspective.

The first step taken by Indonesia is stopping 17 of 64 BIT. This incremental approach is taken to avoid the implications that may potentially damage the position of Indonesia. The second step, every single BIT dissected to find the most problematic provisions such as the 'scope' and 'definition of investment', 'Most Favorite Nation Treatment principle', the principle of 'National Treatment'. Assessment is primarily to examine the provisions which provide protection to investors and the impact on government policy space. The third step is the development of the Model Treaty.

Conclusions

International investment agreements within the framework of the ACIA are something that must be obeyed by the Government of Indonesia. Indonesian National Investment Law is sufficient to accommodate the principles in the ACIA without immolating the national importance.

Governments need to reexamine the provisions of the BIT that give wide and much opportunity for foreign investors there by limiting the sovereignty and independence in determining the national development policy. Some of the BIT agreement is disrupting Indonesia, for example in the case of Bank Century. In this case, the lawsuit is based on the BIT between Indonesia and UK.

ACIA is not able to wipe out the obligations within the BIT that made between the Government of Indonesia and other countries. Termination of BIT can be carried out according to the collective agreement and applicable international law.

References

Sauvé, P., & Zampetti, A. B. (2007). International investment. In A. Guzman & A. O. Sykes *Research handbook in international economic law* (pp. 211-270), Cheltenham: Edward Elgar.

ASEAN Comprehensive Investment Agreement. Available at: http://www.asean.org/resources/publications/asean-publications/item/asean-comprehensive-investment-agreement

Malik, C. (2007). Jaminan kepastian hukum dalam kegiatan penanaman modal di Indonesia. *Jurnal Hukum Bisnis, 26*(4). Available at: http://lib.law.ugm.ac.id/ojs/index.php/jhb/article/view/1788

Bilateral Investment Treaty. Available at: http://en.wikipedia.org/wiki/Bilateral_investment_treaty#cite_note-3

Hukum Investasi Indonesia Menghadapi ASEAN Economic Community. Available at: http://www.unib.ac.id/2014/12/hukum-investasi-indonesia-menghadapi-asean-economic-community-2015/

Konsultan Hukum Investasi. Available at: https://hukuminvestasi.wordpress.com/2010/09/16/trade-related-investment-measure-trims/

Suatma, J. (2012). Kesiapan Indonesia dalam menghadapi ASEAN Economic Community 2015. *Jurnal STIE Semarang, 4*(1). Available at: jurnal.stiesemarang.ac.id/index.php/JSS/article/download/2/2

Fuady, M. (2008). *Pengantar hukum bisnis: Menata bisnis modern di era global*. Bandung: PT Citra Aditya Bakti.

Hasibuan, M. R. (2006). Harmonisasi hukum investasi dan hukum dagang di negara-negara ASEAN. *Lex Jurnalica, 3*(3). Available at: http://ejurnal.esaunggul.ac.id/index.php/Lex/article/viewFile/251/228