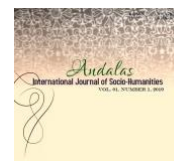




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Article

ASEAN Territorial Trading Liberalization Through ASEAN Charter Ratification for Indonesia Under The Legal Aspect Review

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A B S T R A C T

ASEAN Charter is the most important “legal instrument” and successor of Bangkok Declaration 1967. It also contain the status and position of ASEAN on the including agreement. The Charter come into effect since 15 December 2008 after ratification of ten ASEAN member-states. Indonesia was ratifying by Act No.38 of 2008 on ratification of ASEAN Charter. It had a legally binding to Indonesia. The content related to the establishment of ASEAN Economic Community in economy, socioculture, and security politics. Moreover, the agreement comprise a critical issue, trading liberalization or “ASEAN Single Market” through ASEAN Economic Community. Therefore, the ratification of ASEAN Charter gives significant influence to the Indonesia in the future. By the reasons, the objectives of research are, first, analyze the implication of Act No.38 of 2008 on ratification of ASEAN Charter to Indonesia in correlation with ASEAN Economic Community under legal aspect review, and second, analyze the challenge and opportunity in participation of ASEAN Economic Community as indonesia has ratified the Charter.

INTRODUCTION

Established in 8 August 1967 under Bangkok Declaration, ASEAN is a regional organization in southeast Asia has long been establish and considered by international trading. It is an association of nations with specific characteristic and plurality than any perspective. In accordance with the development of ASEAN, the Summit 13th at Singapore of 19-22 November 2007 has become a milestone of important change to the organization. It is caused by signed two documents of agreement, ASEAN Charter and ASEAN Community. The Charter come into effect since 15 December 2008 after ratification by the member-states thus it is validate the charter in built the regional block into the official institution for the first time in history since four decades of establishment.

The Charter come into effect in 15 December 2008 s member-states submit the ratification to the Secretary General of ASEAN. Inauguration carried out by president of Republic of Indonesia, Mr. Susilo Bambang Yudhoyono in ASEAN secretariat. The enforcement for Indonesia validated by Act No. 38 of 2008 on ratification a Charter of The Association of Southeast Asian Nations. The implementation was confirmed in ASEAN Summit 14th in Hua Hin, Thailand of 28 February – 1 March 2009 (Papp, 1996). In the ASEAN Charter was found a provision in create the ASEAN community of 2015. It is consist of 3 stakes, security political community, economic community, and socioculture community. To attain the ASEAN Community 2015, the organization create the blue print of 3 stakes. It is become a manual of direction for establishment. The blue print of ASEAN Economic Community ratified in ASEAN Summit 13th of 2007 at Singapore. Then, the remains, Security Political Community and Socioculture Community ratified in ASEAN Summit 14th of 2009 at Cha Am Hua Hin, Thailand. Moreover, in the summit signed Cha Am Hua Hin Declaration on road map of establishment ASEAN Community of 2009-2015.

In this case, an idea of community or ASEAN Economic Community early delivered by prime minister of Singapore, Goh Cok Tong in ASEAN Summit 8th in Phnom Penh of 4 November 2002. The Secretariat of ASEAN records the statement of Goh Cok Tong in 19 November 2002 that “ASEAN must be seen as working in a clear direction towards a clear goal. Our cooperation projects must be really working. Singapore proposes Asean Economic Community as an end point, not like EU now, but like the EEC of the earlier years with some suitable elements that could be adopted by ASEAN. Ministers and officials concerned should study and reports their finding and recommendation at the Asean Summit 9th.”

The progress in ASEAN continue until advent an idea regarding the formation of integrated ASEAN Economic Community (AEC) as well as the single market of European Union Society. European Single Market was establish the powerful economy among the member-states even more agree on single currency for Europe known as “Euro”. It is do not the currency only but unity and increase the trade traffic in the territory.

The ASEAN Charter of 2008 is a substitute of Bangkok Declaration of 1967 that was become an instrument of establishment of ASEAN. It is a milestone of ASEAN in signed relationship for the future. The Charter has made ASEAN powerful under “legal personality” as questionable by concerned parties. Another equally important thing is that the Charter containing long-term plan through the vision of ASEAN 2020 for ASEAN Community. Thereafter, ASEAN Summit of Cebu Philippine of 2007 was agreed to advance the ASEAN Community including 3 stakes, security political community, economic community, and socioculture community. they are related and support each other, but the ASEAN Economic Community is the most important issue as it come into contact with social economic activity (Puja, 2019).

For Indonesia, welcoming ASEAN Economic Community become an opportunity and challenge. Indonesia signed the ASEAN Charter in 2008 and ratified by Act No. 38 of 2008 on Ratification of ASEAN Charter. Moreover, Indonesia involved in create the ASEAN Community Blue Print. The ratification through Act No. 38 of 2008 results in Indonesia being legally “bound by agreement” including support an establishment of collective single market in ASEAN territory. Therefore, Indonesia must prepare for trading competition with the other member-states of ASEAN. The existing provisions of trading must prepare and synchronized with the “blue print” of ASEAN Economic Community was agreed by the member-states for ASEAN single market through the trading liberalization mechanism.

RESULT AND DISCUSSION

An Implication Of ASEAN Charter Ratification To Indonesia For Trading Liberalization

The ASEAN Economic Community (AEC) is a concept was used first in Declaration of ASEAN Concord II in Bali (Bali Concord II), October 2003. It is one of the stake of implementation of ASEAN vision together with ASEAN Security Community (ASC) dan ASEAN Socio-Cultural Community (ASCC). AEC is final destination of economic integrity as depicted in ASEAN Vision 2020:

“... to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment, skilled labor and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.” (Buku Bank Indonesia, 2008)

By economic integrity process gradually ASEAN becomes territory releasing trade good and service and production factor (capital and labor), and harmonize the related regulations at once. The achievement strategy of AEC related to the Vientiane Action Programme (VAP) 2004-2010 as the strategy and implementation program of ASEAN Vision. By VAP, High Level Task Force (HLTF) evaluate and recommend for ASEAN to be the single market and production base as depicted in ASEAN Blue Print-AEC):

“The AEC will establish ASEAN as a single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labour and talents; and strengthening the institutional mechanisms of ASEAN. As a first step towards realising the ASEAN Economic Community, ASEAN has been implementing the recommendations of the High Level Task Force (HLTF) on ASEAN Economic Integration contained in the Bali Concord II.” (The ASEAN Secretariat, 2009)

Generally, HLTF recommend the economic integration approach through new procedure and policy in sustain the implementation of the existing economic initiatives, including ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (IAI); accelerate the regional integration of priority sector; facilitate the skilled workforce and business movement; empowering institution of ASEAN, including restitution of ASEAN Dispute Settlement Mechanism in assured the acceleration and legal power if any dispute occurred.

Thereafter, by Cebu Declaration of 13 January 2007 (ASEAN Summit 13th) it is decided to accelerate the establishment of AEC of 2015 in sustain competitiveness for global competition against China and India. In speed up the economic integration, ASEAN carried out the transformation of economic relationship through put the legal framework as the commitment base of ASEAN under signed ASEAN Charter in ASEAN Summit 13th of 20 November 2007. In common with signing the Charter, the Blue Print as the manual of AEC and strategic schedule of period and achievement phase the stakes agreed also. Moreover, the commitment to be a direction of AEC in the future whether in organization or nation individually. The nations should maintain the commitment that credibility of ASEAN better in the future. Technically, achievement of AEC arranged by ASEAN Baseline Report. (The ASEAN Secretariat, 2009).

The ASEAN Charter signing to be an inscription of evolution result of “brotherhood” cooperation to the organization with cohesive and rule based framework. In attempt to implement the collective expectation of ASEAN such as live in peace, secure, stable, wealth and prosperity, the Charter formulated in detail the purpose and principle of ASEAN (The ASEAN Secretariat, 2009). By establishment the ASEAN Charter in 2008 has make it becomes the “rule based framework” and had the legal personality as depicted in Article 3. In present, ASEAN as the cooperative organization intra government had personal identity apart from identity of the member-states. As the legal personality, it activate and built an agreement in the name of and sue and be “legally” sued.

The AEC considered in 2015 established by legal base in ASEAN Charter of 2008 and Bali Declaration of ASEAN Concord II on establishment of ASEAN Economic Community including Blue Print AEC of 2015. By two agreement principles of establishment community or AEC that considered in 2015, the attached system reviewed in legal aspect as follows:

a. “Pacta Sund Servanda” (binding agreement)

An international agreement with the states agreed to involve through signed by the representative in negotiation, under substance categorized into the trivial agreement or technical. Thus, the signing by representative as the statement of binding agreement, it has made the states was bound. The signature carried out simultaneously by representatives of the states at the end of negotiation (Parthiana, 2002). In line with that, according to the Article 11 of Vienna Convention 1969 on international agreement depicted that “agreement” of the state in bound the agreement can declared by “signature, instrument exchange of agreement, ratification, acceptance, approval, or accession, or through other means.” Thus the Vienna Convention of 1969 establish the international agreement has agreed and categorized. In other side, currently in practice, the bilateral or multilateral agreement, can made the agreement valid in signature if the condition required; for example, agreement in ASEAN multilateral framework valid since signed (Agusman, 2010). Thus, in the international agreement known as “Pacta Sund Servanda” that if the party has agree with the international agreement whether in signature or ratification, it will bound the parties. In the case of ASEAN Charter and Blue Print the AEC was signed by the member-states in 20 November 2007. Moreover, the Charter was ratified by all the member-states of ASEAN in 2008 that it is legally binding. It is legally distinguishess between agreement and commitments of ASEAN member-states before and after ASEAN Charter 2008 established. In this case, before establishment and just based on ASEAN Declaration the commitment of member-states in implement the agreement is feeble and without obligation or responsibility to implementation. The consequence is that the direction and attained purpose of ASEAN undirected as it just the morality thus the obligation to conform is weak and without punishment if agreement disobey. By the ASEAN Charter 2008, however, it has made the member-states binding and oblige to implement the agreement as there is a powerful legal aspect. Therefore, the implemented agreement signed and ratified by ASEAN member-states according to the Article 47 of ASEAN Charter and Community Blue Print or AEC was “binding” them through the principle of “Pacta Sund Servanda”. Thus, the community or AEC planned in 2015 will implemented by all member-state of ASEAN including Indonesia that was signed and ratifying with all consequences of the agreement.

b. Clause “Most-Favoured Nation (MFN) or Non-Discrimination”

According to the clause “Most-Favoured Nation (MFN) or Non-Discrimination”, the state should give the right to other as it was given to the third state (Schwarzenberger, 1962). The standard beneficial in unconditional model is that it is generally undertake the benefit of agreement to the member-states as given by one of them to third state. It is implement without consider the socio-political structure and economy of member (Syahmin, 2006). The ASEAN Charter itself use the similar system with clause of “Most-Favoured Nation (MFN) or Non-Discrimination” as depicted on Purpose of Charter in Article 1 (Pharagraph 6) described that: decrease poverty and slight the development gap in ASEAN through aid and “mutual relationship.” Moreover, in Article 5 point 1 of ASEAN Charter depicted that “the member-states have an equal right and responsibility under the Charter.” Therefore, the establishment of AEC in 2015 also had the system with “Most-Favoured Nation (MFN) or Non-Discrimination” base that all the member-states must implement the agreement including the blue print of AEC without discrimination among the member-states.

Challenge and Opportunity of Trading Liberalization in ASEAN Economic Community to Indonesia

There are any challenge opposed by Indonesia to the establishment of community or AEC as follows (Buku Bank Indonesia, 2007):

- a. Low productivity. The productivity is determinant factor of competitiveness whether in individual, business, or industry. Based on survey of Asian Productivity Organization (APO) of 2004, development rate of Total Factor Productivity (TFP) of Indonesia is lowest than 5 member-states of ASEAN even of the Vietnam as the new member and smaller state than Indonesia. The low TFP of Indonesia (even negative) shows any problems in labour such as expensive wage and minimum investment in modern machines used. Compared to the development countries in ASEAN, there are two disadvantages was found. Nominally, the labor wages is high relatively. In productivity, Indonesian labor had low productivity that cost per unit of product expensive reasonably. The low productivity is comparable with the utilization capacity, especially in industrial sector is low of 65%.
- b. High cost. Indonesian product have lost competitiveness in international market as the high cost must be spend the employer including complicated process of verification in harbor and delay the shipping resulting in high cost. Cost of loading and discharge in harbor such as handling charge and freight is very high in Indonesia than Singapore, Thailand, Malaysia, and Vietnam. The labor problem including the high wage and extortion, worst infrastructure such as transportation, road, harbor, unstable electricity, and law enforcement. Moreover, the extortion by local government especially since local autonomy was established burden the employer. The consequences are many export material unable to compete as the charge must burden to the customer that result in expensive product.
- c. Unfavourable investment climate. Although Indonesia have a promising potential but the unfavourable investment climate results in unable to attract the investor as before financial crisis. There are complicated problem on investment such as security; socio-political stability; legal uncertainty; feeble infrastructure; unstable electricity supply; telecommunication and road infrastructure as well harbor; and getting worst the labor

situation. The unfavourable climate results in the foreign company with low cost labor such as electronic, textile, garment, and shoes easily move the product into the neighbor such as Thailand, Malaysia, and Vietnam. Compared to the other member-states of ASEAN, Indonesia had a lot of problem to attract the foreign investment. The main problem experienced is expensive labor wage especially since establish regulation of minimum wage. In ASEAN territory, Singapore is the favourite destination of investor as there are many convenience received by investor in start the business.

- d. Low mastery of technology. As described in prior, since development period up to present the product of Indonesia still has the natural resources base and manufacture product is low technology and labor intensive. The material export with low technology touch absolutely does not have an added value and less competitive. Based on the experiences of the states such as South Korea, Singapore, and Malaysia, more advanced technology in result the product, generally it is tend to have added value per unit export and showing dynamic the market segment in international trading. The characteristic and specialization of export product of Indonesia in industrial sector dominated by textile, wood, palm oil, and footwear as the product with had the technological touch.

There are any huge challenge in addition to the mentioned above, such as “similarity of the regions comparative advantage”. By mapping the advantages of ASEAN member-states in integration priority sector, almost the states superior in agriculture, fisheries, rubber products, wood-based product, and electronics. It is shows that similarity in superior of export product that also results in trading market share of intra-ASEAN about 20-25 percents of total trading of ASEAN. Indonesia should carried out the increasing strategy of added value to the export product to make “different” than other member-state of ASEAN and consider to the potential increasing of import substitution impact through removing any impediments of trading and production in ASEAN. In the intra-ASEAN trading itself, market-share of Indonesia (26 percents) below Singapore (31.8 percents) and Malaysia (29 percents).

A progress of comparative superiority in the integration priority sector. By using of RCA position of 2004, Thailand have higher comparative superiority in ASEAN on 7 priority sectors. Indonesia have five involves wood, agriculture, fisheries, rubber product, and electronic. Even though Malaysia and Philipine just have four superiority sectors, their competitiveness has become the priority. Even more, the recent progress is possible to change the comparative superiority in priority sector. Meanwhile, until present, the ten superior commodities of Indonesia are depending on the textile, electronic, mineral (cooper, coal, and nickel), machines, chemical product, palm oil, rubber and pulp paper with restricted superiority excluding palm oil with RCA 46.6 in 2004 (Buku Bank Indonesia, 2007).

Through the community or ASEAN Economic Community declared, the opportunity could be taken as follows (Buku Bank Indonesia, 2007):

- a. “Total worforce”, almost population of ASEAN (39.1 percents) is in Indonesia. Thus, it can gives the potential supply of workforce and market to be industrial center. In other side, also Indonesia can made ASEAN as the target of work in charge the investment arranged through community or AEC 2015. Standardization by Mutual Recognition Arrangements (MRAs) can facilitate an effort of workforce.
- b. “Production market”, total population and the promising prospect of economy has made the ASEAN to be a target of Indonesia export. Cummulatively, since 1973-1983 Indonesia just make 26 percents of total export in intra-ASEAN. It is means that,

Indonesia have the product can be offer in ASEAN and potential to improve of market share and diversification the target state of export. Moreover, Indonesia also is the coordinator of integrated priority sector through community or AEC for products such as wooden product and automotive. In other side, there are automotive product that was export to ASEAN. Both of them shows a potential benefit to Indonesia.

- c. “Investment acceleration”, since the financial crisis the member-states of ASEAN was suffering investment ratio to the GDP caused by regional hub-production development. To Indonesia, however, one of triggering factors are investment climate has not improved and infrastructure restriction. In order to the ASEAN Economic Community, any regional cooperation to improve of infrastructure (gas pipe, information technology) or cost becomes an agenda. The opportunity opened to increase of investment climate through the useful regional cooperation program, especially to expedite of restructuring program of domestic infrastructure. Moreover, the harmonizing interest regionally becomes precondition to adjust the related investment regulation according to the territorial standard.
- d. “attracting foreign capital flow”, ASEAN has known as the target of global capital investment, including CLMV especially to the Vietnam. Through Community or AEC, it was given opportunity to Indonesia in attract the capital flow into territory and put in rupiah denominated asset. The capital flow is not only in form of foreign investment in real sector. By necessity of regional harmonization, the opportunity of Indonesia to improve of capital investment in foreign investment opened extensively.

Thus the agreement of establishment of ASEAN Economic Community (AEC) becomes an attempt to economic integration between member-states of ASEAN through the regional agreement to implement the prosperous and stable society. To Indonesia, as one of the member-states of ASEAN, there are any attempts to sustain the community or AEC with any challenge and the opportunities.

CONCLUSION

Through two agreement principles of ASEAN Economic Community, the existing system considered by legal aspect, “Pacta Sunt Servanda” (binding agreement). In the international agreement the term means that when the parties was “agree” with international agreement; it will binding the parties. The ASEAN Charter and Blue Print of ASEAN Economic Community was signed by all member-states of ASEAN in 20 November 2007. Moreover, the Charter was ratified by the member-states in 2008. Therefore, according to the Article 47 the Charter and Blue Print of AEC was binding all member-states of ASEAN through the principle system of “Pacta Sunt Servanda.” Therefore, the agreement of AEC must implement by the member-states of ASEAN including Indonesia that was signature and ratified binding with all consequences that arise in agreement likes trading liberalization in the ASEAN.

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