ASEAN INVESTMENT LIBERALISATION REGIME AND THE IMPLICATION FOR INDONESIA

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ABSTRACT

The new agreement regulates investment in ASEAN namely ASEAN Comprehensive Investment Agreement (ACIA). Investment with a free and open regime are built through this regulation in order to create ASEAN as an attractive choice for investment. As an ACIA came into force on 29 March 2012, it becomes a binding legal document on investment in ASEAN. As ACIA becomes a binding instrument, it implicates the member to implement this agreement in their national law. Commitment or political will of each member is the main key for ACIA to be fully applied. This paper discussed the practice of Indonesia regarding its commitment in liberalising investment in ACIA era and the comparison between Indonesian Law on investment with ACIA's provisions and relation to Indonesia 1945 Constitution. Methodology of research used in this study was a normative juridical approach and legal comparative. The specifications used are descriptive analytical. Three important principles in ACIA that every ASEAN member must adhere are principles of protection, compensation and settlement of disputes. Indonesian Law on investment has adopt that three principle but lacks detailed provisions implementing three principles. Therefore it needs more extensive regulations in the Indonesian Law on investment.

Keywords: Investment, Liberalisation, Economic Cooperation, ACIA, ASEAN

INTRODUCTION

Rapid changes in the regional environment and the swift flow of globalization pose new challenges for Association of Southeast Asian Nations (ASEAN) as a regional organization. In order facing many new challenges especially in the economy cooperation and increasing economic advancement, ASEAN established ASEAN Economic Community, which has officially held on 19-22 November 2007 in Singapore throungh 13th Summit.[1] This Summit has produced two important documents were signed in the framework of ASEAN cooperation namely ASEAN Charter and ASEAN Economic Community Blueprint. ASEAN Charter entered into force on 15 December 2008. The intention of AEC Blueprint is making the ASEAN region more stable, more balance, and more competitive, allowing free flow of goods, services, investment and capital in ASEAN. Furthermore, AEC Agreement has come into force on December 2015. Apeldoorn, (2009).

The AEC is expected to affect most economic concerns of the AEC member, including in sphere of investment. It is because one of the fields that liberalized is the investment, which aims to integrate the flow of capital among ASEAN member. The services, trade in goods, and movement of persons are also field that liberalized. The instrument regulating investment liberalisation in ASEAN is the ASEAN Comprehensive Investment Agreement (ACIA). ACIA was signed in Cha-Am (Thailand) on 26 February 2009 and entered into force on 29 March 2012. [2]

According to Ministry of Trade of Republic Indonesia's data, investment flowing into ASEAN has tended to increase over the past few years due to the strong performance of global and regional economic. According to UNCTAD, share of ASEAN of the global Foreign Direct Investment (FDI), which had fallen from 8% to 2% after the Asian financial crisis in 1998, now has

returned to the level of 7.6% in 2011, it is almost equivalent to China's contribution about 8,1 percent. [3]As for intra-ASEAN investment flows, the ASEAN Secretariat reports that the investment has increased significantly. In 2011 intra-ASEAN investment flows reached US$ 26.3 trillion, an increase of 83.4% from the intra-ASEAN investment flows in 2010 which amounted to US $ 14.3 trillion. [4]

To meet the increasing competition for investment flows, ASEAN creates a more transparent and liberal investment climate. The formation of the AEC is ASEAN's effort in integrating the economies of ASEAN member through a single market. By applying a single market, then there is a freedom of cross-trade flows including investment. Therefore, through the ACIA agreement, there are several interesting legal issues to be elaborated Schreur, (n.d)

The legal issue surrounding the ACIA's implementation are the main concern on this paper. This paper look at the comparison of principles includes in both ACIA and Indonesian Law related to investment, the relation to Indonesia 1945 Consitution, the implementation of the ACIA in particular in Indonesia is examined. As country with largest territory, highest population and many resources in ASEAN, Indonesia is a more attractive destination for investment than other nine members.

This paper will analyse the realization of Indonesia's commitment to investment liberalization and enquires the Indonesian laws on investment and related policy that have been in line with the ACIA's provisions. In addition, the paper will analyse the ACIA's legal implication for Indonesia.

The AEC and the Purpose of the ACIA

When ASEAN was established in 1967 it was initially set up to ease the political and security tensions among countries in South-East Asia, most notably Indonesia, Philippines, Malaysia, Singapore, Thailand and Brunei Darussalam. Furthermore, an economic cooperation is prioritized as a main development agendas in ASEAN. At the beginning, the focus of economic cooperation conducted by ASEAN member inludes joint ventures, preferential trade program, complementation arrangengement between member governments and private parties in ASEAN region, such as the ASEAN Industrial Projects Plan conducted in 1976. Other agendas are Preferential Trading Arrangement in 1977, ASEAN Industrial Complementation scheme in 1981, ASEAN Industrial Joint-Ventures scheme in 1983, then Enhanced Preferential Trading arrangementin 1987. In the 80s and 90s era, when countries in various parts of the world started making the efforts in removing economic barriers, ASEAN realized that open up and integrate their economies in purpose of creating integrated regional economic is such a suitable way. Knörich, & Berger (2014).

One interesting to note that there is an evolution of ASEAN as a regional political group then moved toward a main focus on economic matters. This includes how members settle their differences, members have always tried as hard as possible to settle their differences not through legal means but by way of a mutually accepted solution. This means of dispute settlement has been called the ASEAN Way.[5]

Since its birth in 1967 and its evolution toward the AEC, numerous negotiations including significant events have helped shaped this Asean Economic Community. Those include: (a) the 1992 ASEAN Free Trade Area (AFTA); (b) the 1997 Summit; (c) the 2003 Decision; (d) the 2007 Decision and the 2007 Blueprint; (and e) the ASEAN Charter. Andrew, & Lluis (2009)

The seed of the AEC may be considered as the establishment of the AFTA in 1992. By applying tariff and non-tariff barriers elimination among members, it was expected could encourage productivity, higher efficiency in economy and competitiveness. As a whole, the purpose of the AFTA is promoting competitive advantage in region as a single production unit. The impact of the

establishment of AFTA was quite significant. It was reported that per 1 January 2005, the reduction of the tarrifs on almost 99 percent of the products on the inclusion list of the ASEAN-6 (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, and Thailand) was successfully reached to 5 percent. More than 60 percent of these products have zero tariffs.[6]

After that, one of the most important summits considered essential relating with future development of ASEAN was the ASEAN Leaders Summit held on December 1997 in Kuala Lumpur. The transformation of ASEAN into a competitive region by developing Soeroso (2009) fair economic and reducing poverty also socio-economic dispcrepancy in region, were decided. This decision was also called the ASEAN Vision 2020.[7]

In 2003 at the Bali Summit the "ASEAN Vision of 2020" was put forward. According to all ASEAN leader in this Summit, they agreed that an ASEAN Community shall be reached by 2020. At the 12th ASEAN Summit on January 2007, strong commitment are shown by leaders to quicken the ASEAN Community establishment, completing by 2015. Then Declaration on the Acceleration of the Establishment of the ASEAN Community by 2015 was signed by ASEAN leaders in Cebu.[8]

With the three pillars agreed upon on 2003 Summit, the leaders then agreed bringing forward the AEC establishment to 2015 and transforming ASEAN into a region with free movement of goods, services, investment, skilled labour, and free flow of capital.

A series of cooperation are needed in supporting the realization Sornarajah (2010) of the five free movements above. The series of cooperation include in the development of human resources and capacity building; professional qualifications's recognition; closer consultation on macroeconomic and financial policies; trade financing measures; infrastructure and communications connectivity are enhanced; development of electronic transactions through e-ASEAN; promoting regional sourcing by integrating industries across the region; and enhancing private sector involvement for the building of the AEC.[9]

As a master plan guiding the establishment of AEC, The AEC Blueprint then was adopted. AEC's characteristics and unsure are identified clearly both targets and scheduled for various measures implementation, and also pre-agreed flexibilities in accommodating all ASEAN Member' interest. AEC envisages following key characteristics: a) a single market and production base, b) a highly competitive economic region, c) a region of equitable economic development and d) a region fully integrated into the global economy.[10]

In 2007, ASEAN Charter was adopted. This Charter contains three particulary important provisions regarding the status of ASEAN and the ASEAN Community. Firstly, ASEAN moves from being a 'diplomatic-consensus' community to being a 'rule-based community.'[11] Secondly, as an international organisation, ASEAN has its own legal personality.[12] Thirdly, the three pillars establishment supporting the AEC; the ASEAN Security Community and the ASEAN Socio-Cultural Community, was reaffirms in the Charter.[13]

Indonesia ratified the Charter to enable it enforceable in law by Law No 38 of 2007 on the Ratification of the Charter of the ASEAN ("*Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara*").

RESEARCH METHOD

The research method used in this study are as follow:

1. The approach used is normative juridical, which is reviewing and analyzing research objects by focusing on juridical aspects through library research both primary, secondary and tertiary legal materials. Research also approaches the comparative law. Comparison is a method of investigation or research by conducting a comparison between two or more objects of inquiry to add and deepen knowledge about the objects being investigated. Through comparison can be found elements of similarity and also elements of difference from two or more research objects.

2. The specifications that will be used in this study are descriptive analytical research specifications, which describe the object of a problem.
3. Data collection techniques are conducted by library research. Literature research is reviewing library materials to collect secondary data sources conducted by studying literature books, regulations, cases and relevant documents.
4. Data analysis was performed using qualitative normative methods. Normative means this research used the conventions of international law and existing legislation as positive law. Qualitative means the data obtained are presented descriptively or the data is described through the decomposition of sentences by not using either formulas or numbers and analyzed qualitatively with research data steps classified according to research problems, namely the provisions applicable in international law. The results of the data classification are further systematized. This is done to reach the clarity of the problem discussed.

THE ACIA INTRODUCTION

The ACIA is the main provision regulating investment in the region. Creating regime of investment which open and free at ASEAN to acquire final intention of economic assimilation under AEC is the main objective of the ACIA.[14]

Before ACIA was formed in 2009, ASEAN had already had several regional agreements in the investment sector namely the 1987 ASEAN Investment Guarantee Agreement or ASEAN IGA) and the 1998 Framework Agreement on the ASEAN Investment Area (known as "AIA Agreement"). ACIA is a result of revision and combination of the AIA and the ASEAN-IGA. ACIA covers four main pillars which include: liberalization, protection, facilitation and promotion. With the 2015 AEC blueprint agreed, ACIA is an extensive agreement regulates investment in ASIAN covers many sectors and would be described in other part ot this paper. ACIA came into force on March 29, 2012.

In regard to reaching this objective, first of all, one has to ask whether the provisions under the ACIA are moving in the right direction. It is as well worth examining whether Investment Law - in particular Law No 25 of 2007 on Investment- is in harmony with the ACIA.

In this vein, a recent study by two German commentators is quite interesting. Regarding the RoI's Investment Law, they argued that as an evolving state, Indonesia has over the past decades often adopted international investment agreement without adequately considering their national legal system for investment."[15]

First is the principle of protection meaning whether the ACIA lays down legal protection to the investors. This includes among others issues the application of the non-discriminatory principle. Second is the compensation formula in effect when the nationalisation happens most importantly whether the compensation to be paid is according to the formula accepted in IIAs international investment agreement in general. Third is the principle governing the dispute settlement in investment. The yardstick for this principle as recognized by many instruments in IIAs is settlement by (international) arbitration.[16]

Before examining these principles, a brief overview on the provisions of the ACIA will be provided. To a certain degree, a comparison with other regional agreement, (in particular the North American Free Trade Agreement (NAFTA) specifically regulating the investment will also be made.

The choice of NAFTA as a comparison to the ACIA is pertinent. As one of the leading regional trade and investment, NAFTA contains a set of comprehensive regulations on investment, including the provisions on dispute settlement. This agreement has frequently been used by parties in the resolution of their investment disputes.[17]

Substantive Provisions [18]

ACIA is a rather short legal instrument and has only three sections. Sections A, B and C together have 49 articles and two annexes. Section A (Articles 1 – 27) embodies the main provisions concerning the protection and promotion of investment within ASEAN. Section B (Articles 28–42) contains the provisions concerning the dispute settlement. Section C cover the house-keeping provisions of the Agreement. Annex I has the title *Approval in writing* and requires the parties to submit their investment undertakings. These include the name and contact details of the competent authority and the status in writing of the application of investment. Annex II lays down further requirements concerning expropriation and compensation.

It is stipulated that by the ACIA coming into force, therefore two previous ASEAN Instruments on investment, namely ASEAN IGA and AIA Agreement will end. ACIA then viewed as an integral step on ASEAN's part toward single instrument on investment in the region.[19] This agreement involves many provisions about investment completely to be applied in ASEAN region.

The creation of a liberal, facilitative, transparent and competitive investment environment among members is the main principles regarding investment embodied in the ACIA.[20] The principles enshrined in the ACIA include: [21]

a) Protection, liberalisation, facilitation of investment and promotion
b) Investment progressive liberalisation
c) Benefit investors
d) Maintaining and according preferential treatment amid member
e) No back-tracking on commitments create under asean iga and aia agreement
f) Special and differential treatment and other flexibilities are granting to member country determined by their sectoral sensitivities and development level
g) Where appropriate, there is reciprocal treatment in concessions joy amid member states;
h) Scope extension of acia in covering other sectors in the future are accommodated.

Another important provision under the ACIA is the meaning of investment which covers in article 4. Then, the sectors covered in the ACIA are limited to these sectors: [22] manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying, and any other sectors, as may be agreed upon by all Member States. ACIA also provides a guarantee (under Article 11). Article 11 Para 2, also further explains fair and equitable principles and full protection and security principle

According to M. Sornarajah's view, ACIA tries combining liberal movement of ASEAN investment with the protection of such investment.[23] It tries striking a balance between the preservation of regulatory control in the national interest and protection of investment. [24] By implementing ACIA, the potency of investment in ASEAN will increase. For developing countries, this will be an opportunity as well as a challenge in economic development, an opportunity that is in terms of job creation, technology transfer and knowledge exchange, while the challenge is commodity or natural resources which are the object of investment, then indirectly management and the profits are managed by investors For developed countries that invest, investors enjoy a variety of reduction and removal of obstacles that become obstacles in investment. All of that aspect shall be balanced through ACIA provision.

Principle of Protection

Surprisingly, ACIA has incorporated the principle of non-discrimination and prohibition of investment measures in its provisions. The principle of non-discrimination is reflected on Article 5 under the heading of national treatment and Article 6 on most-favoured-nation treatment.

Article 5 is a standard provision which states that every member have to correspond to investors of any other Member the treatment which no less favourable than it accords. Similarly Article 6 on most-favoured-nation also proscribes non-discriminatory treatment against the investors of member countries.

. Inclusion of trade-related investment measures (TRIMs) into ACIA is a unique provision of ACIA as the TRIMs do not have direct relation to investment but relates mainly to trade. The TRIMs consists of two measures, firstly the entry requirements and secondly the performance requirement. [25]

Principle of Compensation

ACIA clearly states that Member States shall not, under article 14, conduct the expropriation or nationalisation a covered investment. The second sentence of Article 14 para. 1 however provides the exception to the first sentence. If nationalisation or expropriation takes place, it just might be undertaken a) for public purpose; b) in a non-discriminatory manner; c) on payment of prompt, adequate, and effective compensation; and d) in accordance with due process of law.

Requirements a to c above are common requirements recognized in most IIAs. Requirement d however, which states "in accordance with due process of law" is similar to the wordings found in the NAFTA Agreement.

Requirement c is further elaborated in paragraph 2, which states that the compensation referred to in sub-paragraph 1(c) must a) be no delay on paid; b) be equal with fair market value of the investment which be expropriated and must be immediately, c) no change in value; and d) realization fully and freely transferable.

. Reference to fair market value standard for payment of compensation is reflecting a provision commonly found in IIA. NAFTA, for example, also contains this principle in Article 1110 para. 2 which in part states that compensation have to be equal with fair market value and must be immediate before the expropriation conducted (date of expropriation), and must no change in value. Criteria of valuation must involve going concern value, asset value comprising declared tax value of tangible property, and other criteria, as appropriate, in determining fair market value.

Principle of Settlement of Dispute

Provisions relating to dispute settlements dominate most of the ACIA. ACIA recognizes two broad kinds of disputes: firstly, disputes between or among Member States (Article 27) and secondly occupying most of the provisions, disputes between an investor and Member State.

. On the first kind of dispute, disputes between or among Member State, Article 27 clearly gives the way as to how such dispute may be settled refering to the mechanism in ASEAN Protocol on Enhanced Dispute Settlement Mechanism which signed in Vientiane, Lao PDR on 29 November 2004, as amended. [26]

. The rest of the provisions under Section B contain a rather complicated mechanism regulating dispute settlement between investors and Member States. This section regulates in detail the settlement between investor and a state and reflect the seriousness or importance of such a the dispute,which is why greater detail is required.

Under Section B. there are three mechanisms for the settlement of disputes. They are conciliation which is stated in Article 30; consultation, stated in article 31; and arbitration,provided in article 33 para. 2.

Conciliation under article 30 is similar to the negotiated settlement. This mechanism is not same with the mechanism through conciliation as found in Article 33 United Nations Charter or the provisions on conciliation in International Centre for the Settlement of Investment Dispute (ICSID)

Convention. [27] Article 30 para. 1 states that conciliation could be started any time and could be ended at the investors' request at any time.

Consultation under Article 31 is an initial procedure taken by the parties at the time a dispute regarding investment arises. Article 31 states that to initiate the consultation the disputing party investor may send a written request delivered to disputing Member Country (Article 31 para. 1). The consultation shall be concluded in 180 days of receipt by a disputing Member Coutry of a request for consultations. If consultation fails, arbitration mechanism might be taken by the parties. Disputing member may submit the dispute to arbitration (Article 32). Of course, it could be conducted according to the consent of the parties,

Rest of the articles lay down the requirement and the conduct of arbitration, the notice of arbitration (Article 33), conditions and limitation on submission of a claim to arbitration (Article 34), selections of arbitrators (Article 35), transparency of arbitral proceedings (Article 39), and the arbitral awards (Article 41).

Also of importance is the provision concerning the governing law. Article 40 contains this provision, which is rather describing or elaborating the interest of member countries or host countries. Article 40 is, in terms of principle rather different to other IIAs. Article 40 in a glance states that at a time claim was acknowledged under Article 33 (Submission of a Claim), dispute issues in line with this Agreement, any other applicable agreements between the Member Country, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member Country must be decided by tribunal.

Governing law according to Article 1131 of NAFTA is limited to two laws, NAFTA and international law. This article stipulates that the Tribunal which established based on this Section must conclude problems in dispute in regard to this Agreement and applicable rules of international law.

Constitution of Republic of Indonesia 1945, Indonesia Investment Law No 25 of 2007 and Various Investment-related Laws in Indonesia

The discussion on the ROI investment Law will be confined to and follow the three sub-headings above, namely the principles of protection, compensation and settlement of investment disputes.

Indonesia is a country that adopts a civil law system that prioritizes written rules [28] as a legal basis in the form of laws [29] and regulations being the basic foundation for taking legal action both within the country and in relations between countries. The Republic of Indonesia of 1945 Constitution, outlines national economic constitution on arrticle 33. Article 33 of 1945 Constitution Fourth Amendment Section XIV regulates the National Economy and Social Welfare, in summarize states:

(1) Familial principles become the based for the economy structure.
(2) State controls the production sectors which are crucial to the country and give the influence of most Indonesia Republic's population.
(3) States control the land, the waters and the natural riches, and the sources to be exploited shall give the greatest benefit of the people.
(4) Economic democracy must become the based for the organization of the national economy, the principles of solidarity, efficiency along with fairness sustainability shall be applied.

Regulations concerning foreign investment in Indonesia, were previously regulated in Law No 1 of 1967 concerning Foreign Investment as amended by Law No 11 of 1970 and Law No 6 of 1968 concerning Domestic Investment as amended by Law Number 12 of 1970. Due to the rapid changes and the law was no longer in accordance with the needs of accelerating development and

development of national law, the two laws were changed into Law No 25 of 2007 concerning Investment.

Law No 25 of 2007 replaces two previous laws, namely Law No 1 of 1967 on Foreign Investment and Law No 6 of 1968 on Domestic Investment Law. Before Law was promulgated, the two laws regulating investments provided different treatment to domestic and foreign investors. This discriminatory treatment was scrapped with the enactment of the Law. [30]

Based on Article 1 paragraph 1 Law Number 25 of 2007 concerning Investment, in summarize states that all forms of investing activities, both by domestic investors and investors foreigners to do business in the territory of the Republic of Indonesia called "Investment."

Then, based on Article 1 paragraph 3 of Law Number 25 of 2007 concerning Investment, states that an investment activity for accomplishing business in the Republic of Indonesia's territorry which is executed by foreign investors, both those who use foreign capital fully and those who are affiliated with domestic investors called foreign investment."

There is no longer difference in the provisions between foreign investment and domestic investment in The Law 25 of 2007. Beside the Law 25 of 2007, there are many legal rules regulates investment in Indonesia. For the exaple is tha law issued by Indonesian presidents, which is called Presidential Regulations. There are:

a. Presidential Regulation no 76 year 2007 about Criteria and Requirements for (List of) Closed and Open Business Sectors for Investment with Certain Condition;
b. Presidential Regulation no 111 year 2007, Amendment to Presidential Regulation 77 year 2007 regulating List of Closed and Open Business Sectors for Investment with Certain Condition by Presidential Decree No. 39/2014 regulating (with List of) Closed and Open Business Sectors for Investment with Certain Condition;
c. Government Regulation No. 42 year 2007 concerning on Franchise, etc.

Furthermore, other relevant rule also regulates the investment. Those announced by distinct government agencies, involving the Ministry of Industry, Ministry of Trade. The Local, Provincial or Regional Authorities also have various regulation. Then also there is an assort of provisions circulated by Head of the Investment Coordinating Board (BKPM stands for Badan Koordinasi Penanaman Modal).

Regulations issued by the Head of BKPM such as:

a. The Head of BKPM Regulation No. 12/2009 concerning Guidance and Procedure for Applying the Investment License;
b. The Head of BKPM Regulation No. 13/2009 concerning Guidance and Procedure for Controlling the Implementation of Investment,
c. The Head of BKPM Regulation No. 14/2009 concerning Information Services and Electronic Investment Licensing System (SPIPISE), etc.

There are many essential principle in Law 25 of 2007, the principle adopt in Indonesian law are:

Principle of Protection

The basic principle of protection under the Law 25 of 2007 is to provide non-discriminatory treatment to all investors, foreign and domestic. This policy is laid down in Article 4 para. (2) which states that government accord equal treatment to domestic and foreign investors, while taking into account the national interests. [31]

Furthermore, still under the same article, the government is committed in providing legal certainty, business certainty, and security to investors until the end of the investment.

Principle of Compensation

On compensation in the event of nationalisation, the Law contains a standard provision on this issue. Article 7 provides that the government shall not take any nationalisation measures or take over the ownership of an investment. In the event the nationalization takes place, the government will give compensation according to the market value.

Principle of Settlement of Disputes

There is only a single article on this issue. It appears in Article 32 of the Law and consisits of four paragraphs. Paragraph 1 contains the basic principle in the dispute settlement, namely that when a dispute arises, the parties shall seek a negotiation to settle the dispute.

Para. 2 states that, when the negotiation fails (without mentioning conditions, for example, the time for consultation or negotiation required), the dispute could be submitted to arbitration by the parties or to the Alterrnative Dispute Resoluton or the Court in line with the Laws.

Para. 3 of the Law clearly states that the when a dispute arises between government and domestic investors, it will be settled by arbitration with the consent of the parties. If no consent is reached, the dispute will be settled by the Court.

Para. 4 provides that if the dispute arises between government and foreign investors, then the dispute shall be settled by an international arbitration of a form which must be agreed by all parties.

Legal Implication for Indonesia

ASEAN market share is considered as one of the forced markets related to world markets. More than 600 million people and the encouraging one of the population in Southeast Asia is Indonesia's population of more than 250 million. Population, natural resource wealth, labor, income per capita are factors which taken into account in dong investment partnership, and ASEAN member have great potency of that.nesia. A positive and synergic relationship between regional integration and direct investment is expected to increase investment intra-ASEAN.

As on February 26, 2009 all ASEAN member including Government of the Republic Indonesia have signed the ACIA and as it came into force in 2012, than it needs the ratification by all ASEAN member. In this case, all ASEAN member countries. have ratified the ACIA agreement. With this ratification, all ASEAN member coun are bound to carry out and to applied the contents of the agreement contained in the ACIA. Indonesia has ratified the ACIA agreement through Presidential Regulation No. 49 of 2011 concerning Ratification of the ASEAN Comprehensive Investment Agreement on August 8, 2011. That is the expression of Indonesia to be bound by a treaty. According to the Vienna Convention onthe Law of Traties 1969, the way of State consent to be bound by a treaty might be expressed by many ways, such as by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. In this case, Indonesia has conducted the expression.

By the increasing of the investment potency in ASEAN as the implication of ACIA, there will be a lot of opportunity and challenge in investment, and the potency of dispute. Therefore, a series of formation and harmonization of domestic regulations in ASEAN countries needs to be conducted with legislation, strengthen the provisions and mechanisms for resolving disputes.

With the harmonization of law, the limitations of differences, conflicting matters and irregularities in the law try to be adjusted and uniformed in order to realize harmony, compatibility, balance between legal norms in the legislation as a legal system in a single unit Related to harmonization in investment rules, it cannot be separated from global regulations on investment which will be harmonized with regulations at the regional and national levels.

Indonesia has Law No. 25 of 2007 governing investment, and its provisions include general principles of international law which are recognized and widely used in the international community and are also contained in Law No. 25 of 2007 as in Article Article 3 (d), Article 4 paragraph (2a) and Article 6 para (1) of Law No. 25 of 2007 which involves the same treatment or better known as the Most Favored Nation (MFN) principle. This is in accordance with the principles in the ACIA.

Indonesia must be in line with the mandate of the 1945 Constitution which outlines the national economic constitution in article 33. The country must build the economy as a common endeavor and vital production sectors which give big effect to the all population must be controlled by the state. In summary, economic democracy become the key factor of economic development in Indonesia. By implementing ACIA, Indonesia must balance the national interest and irs international commitment. Achivieng national interest and harmonizing its international commitment might be reflected by actively participating in economic cooperation regionally such in ASEAN and implement all the principle in the agreement.

Harmonizing the Indonesia's commitment in international forum for example in ASEAN Economic Community, and the national interest as stated in the consitution is the right way to adopt a good national policy.

CONCLUSIONS

The three principles above on investment have also been to a certain degree recognised in the IIAs. If we carefully read throughout the three principles under the ACIA above, those principles under these twobinstruments are quite surprisingly similar: the Law provides a non-discriminatory treatment to investors; the principle of compensation is to apply the market value; and in regard to, the principle of dispute settlement both instruments recognise international arbitration as the main forum for the settlement of investment dispute.

In some respects, however, Indonesian Investment Law only provides a modest provision on these principles. The settlement of dispute is crystal clear and has only a single article. Nonetheles, it surely needs detailed provisions to enable the parties directly take the process of the settlement. A short or even a single article regarding the complicated problem of investment disputes, will lead to different and even tricky interpretations and implementation of the Agreement.

There many legal factors which need negotiating in the near future means that there will be various working groups, task forces or other small or specialised groupings that will negotiate further on this ambitious agenda. This also means there will be many talks on the structure of these groupings that will lead the negotiations and, harnmonize the agreements.

In addition, there would be, as consequence, huge adjustments to national laws or legislations within the AEC Member States. The adjustment is needed to accommodate the future outcome of the negotiation on the various sectors negotiated under the AEC..

Most of them are important sectors directly affecting the Indoneian economy or notably trade, services, investment, IPRs, (skilled) labour, etc.

The laws regulating those sectors are already its earliest stage, such as on the investment sector namely the ACIA, or the services sectors namely the ASEAN Framework Agreement on Services (AFAS). The other sectors are still in negotiation process such as the sub-sectors of the services and financial sectors, the labour services, competition, etc.

The substantive provisions of ACIA elaborated above are the three important principles that every member of ASEAN must adhere. They are the principles of protection, compensation and settlement of disputes. The elaboration suggested that the Indonesian Law on investment lacks detailed provisions implementing the three principles above. Therefore it needs more extensive

regulations in the Indonesian Law on investment to ensure that the three principles are properly incorporated.

The implication of ACIA for investment is the wider application of the principle of non-discrimination such as the National Treatment and Most Favored Nation, in all ASEAN countries, thus providing more flexible treatment for investors. With the ACIA, ASEAN is expected to increase investment potential in the region and attract more foreign investment in ASEAN. However, equality of economic development and poverty grouping are also pursued for the people of ASEAN countries.

Realisation and implementation of ASEAN goals in creating fresh and new regime of investment through ACIA provision should be shown in practice by all members. Regional prosperity could be achieved and domestic prosperity for sure through well cooperation and commitment.

For Indonesia, the existence of foreign investment for Indonesia's economic growth and development must be accomplished in line with commitments in international agreements, but still prioritizing the welfare and prosperity of the people so that there is a need for harmonization rules that do not conflict with the spirit of national law, especially the 1945 Constitution as the norm highest in Indonesia which is the basis of national and state life. Balancing international commitment and national commitment beome a key factors in implementing the regulation

ENDNOTES

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4. Ibid
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6. See: www.aseansec.org.
7. Paragraph 1 under the Title of ASEAN Vision 2020
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11. Preamble of the ASEAN Charter and Article 1 (1), Article 2 (h).
12. Preamble of the ASEAN Charter.
13. Preamble of the ASEAN Charter. Cf., Chin Kin Wah argued that the regional association toward being a more integrated, rule-based community (in the political/security, economic and social-cultural dimensions) with enhanced institutional capacity including dispute settlement mechanism, a strengthened secretariat, a human rights body and legal standing in international law. (Chin Kin Wah, The ASEAN Charter: A Mirror to their Domestic Shelves, Institute of South East Asia Stuidies, Opinion Asia, 23 November 1997, p. 3.
14. Article 1 ACIA
15. Jan Knörich and Axel Berger, Friends of Foes? Interactions between Indonesia International Investment Agreements and National Investment Law, Deutsches Institut für Intweklungspolitik, Bonn, 2014, p. 4.
16. Christoph Schreur, Investments, International Protection, Manuscript, pp. 48; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standard of Treatment, The Netherlands: Wolters Kluwers, 2009, pp. 65 (on the discussion of structure and scope of applications of IIAs).
17. See for example. Gustavo Vega Cánocas, The Experience of NAFTA Dispute Settlement Mechanisms: Lessons for the FTAA, March 20, 2003, p. 2. (In 2003, NAFTA hadbeen used to resolve 23 cases. Since then, the number has increased (Ibid., p. 3).
18. For general observation but with strong analysis on this issue, see: M. Sornarajah, The International Law on Foreign Investment, Cambridge: Cambridge U.P., 3rd.ed., 2010.

19. Article 47 ACIA.
20. Article 2 ACIA.
21. Article 2 ACIA.
22. Article 3 ACIA.
23. M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press, Third Edition, United Kingdom: 2010, p. 255.
24. Ibid
25. For further discussion of TRIMs, see the author's work: Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO), Jakarta: Rajawali Pers, 2004.
26. The 2004 Protocol for Enhanced Dispute Settlement Mechanism (EDSM) covers to disputes dealimg with all subsequent economic engagement in ASEAN along with retroactively to earlier key economic agreements. (http://cil.nus.edu.sg/dispute-settlement-in-asean/) (5 October 2014).
27. Under the ICSID Convention, for example, conciliation is regulated under Chapter III, Articles 28 etc. According to this Chapter, conciliation is a kind of proceedings requested by a party of another party.
28. L.J. Van Apeldoorn, Pengantar Ilmu Hukum, Jakarta: Pradnya Paramita, 2009, hlm. 80.
29. R. Soeroso, Pengantar Ilmu Hukum, Jakarta: Sinar Grafika, 2009, hlm. 117-119.
30. One commentator has, however argued that Indonesian Law on Investment has been moving toward liberalisation.: Tim Wilson, Innovating Indonesia Investment Regulation: The Need for Further Reform, Institute of Public Affairs, May 2011, p. 2.
31. This non-discriminatory treatment is further stated in Article 6 of the Law.

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