INFORMATION ETHICS AND SECURITY

Future of International World Time

SYLVIA KIERKEGAARD (Ed.)

Information Ethics and Security - Future of International World Time

LISBON, PORTUGAL

The 2014 IAITL Legal Conference Series

- **9th International Conference on Legal, Security and Privacy Issues in IT Law (LSPI)**
- **8th International Law and Trade Conference (ILTC)**
- **5th International Private Law Conference (IPL)**
- **4th International Public Law Conference (IPLC)**

Dates: 15-17 October, 2014

****** *N.B. Click here to view photographs from last years conference* *****

The 2014 IAITL Conference series will be held in Lisbon under the auspices of the **International Association of IT Lawyers.** The conference series is the first International conference of its kind, gathering experts from academia, government and industry to discuss key legal issues related to Legal, Security and Privacy Issues in IT, Private Law, Public Law and the intersection between economics and law.

This is the only conference where:

- All papers are blind reviewed by 2-3 experts and the result of the reviews are given within a week
- All papers are edited to ensure quality before book publication
- All papers are also published in **top international journals** after a second round of editing
- Authors participate in panel sessions, aside from giving an individual presentation
- Policy debates and workshops are conducted and the Conclusions are published in top journals
- Social and entertainment events are organized every night
- Buffet meals are provided
- University Partnership Agreements and Exchanges are forged
- Cooperation and projects are organized and developed

This conference was first held in May 2006 in Hamburg, Germany and it generated significant international participation from a broad spectrum of academics, government officials, lawyers, judges and industry representatives interested in information technology law and policy. Since then, we have been in Copenhagen, Istanbul, Beijing, New York, Prague, Malta, Barcelona, Nicosia, Athens and more recently Bangkok.

Hamburg 2006

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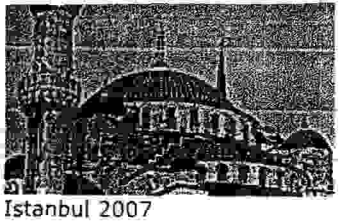
Istanbul 2007


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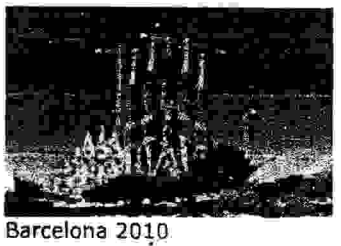
Barcelona 2010


Nicosia 2011


Athens 2012


Bangkok 2013

We are delighted to build on this success and develop a first-rate program for the upcoming conference in Lisbon, Portugal. The Conference is intended to bring together early career researchers from around the world interested to meet up with more established academics, judges, European Commission and other public sector specialists and industry leaders to discuss issues and topics at the heart of current developments.

Our conferences are devoted to expanding understanding and developing international relationships among those who are working with issues dealing with information technology, economic and public and private law. The guiding principle of the Conference is to encourage communication and discussion of ideas at the frontiers of research. IAITL provides a forum for the presentation and discussion of the latest research results and practical applications and stimulates interdisciplinary and international collaboration.

We are putting together a program that will fulfill this goal with an outstanding collection of speakers and discussants from all over the world. We will have an interesting mix of researchers, members of the judiciary, academic community, government policy executives and representatives from the ICT industry and trade.

The Conference will provide an opportunity for academics, practitioners and consultants from different backgrounds to come together and exchange ideas to discuss significant developments affecting practice and profession in Public and Private Law, including IT law, Trade and Economics, Technology and emerging issues on security.

Authors (Full Papers)

The following is a growing list of accepted authors (full papers). It will be continually updated up until the submission deadline has passed.

Author(s) profiles are sorted alphabetically according to surname. Click on the links to view the profile and abstract of the authors presentation.

A - F | G - J | K - L | M - N | O - R | S - S | T - Z

International Trade Law and Domestic Policy in Developing Countries - lesson from Indonesia mining policy by Kristianto P H, Atma Jaya Catholic University Law School, Jakarta, Indonesia.

Kristianto P H is a lawyer and a lecturer at Atma Jaya Catholic University Law School in Jakarta, Indonesia

Abstract
International Trade has played important role since the end of World War II because it gives access to world markets for goods and services which create employment opportunities, increase consumption, and encourage creativity which contribute to raise income and prosperity for many countries. Moreover, the establishment of World Trade Organization in 1994 has accelerated the growth of international trade activities. According to the WTO annual report of 2014, the global economy of international trade is worth up to US$ 1 trillion per year, and generating up to 21 million jobs around the world. The WTO annual report 2014, has shown that international trade law is one of the most important economic contribution for national wealth. Indonesian as one of developing countries also considers international trade as their important pillar to support their economic growth. However, from perspective of developing countries such as Indonesia, Indonesia needs to develop domestic policy that covers national interest which might impact Indonesian commitment to International Trade Law under WTO framework. Recently, Indonesian has enforced its national legislation regarding the use of Indonesia's Mineral Resources for Mining Company which obligated every mining company to process added value to mineral ore before trade it into international market. Therefore, any mining company who did not perform this obligation will not be able to export their ore mineral. Actually, Indonesia never applied banned export ore from Indonesia but it was the legal consequence for mining company in Indonesia which violated their added value obligation. This paper will try to describe the relationship between International Trade Law under WTO policy and its relation to national policy in Developing countries, especially in Indonesia. How will Indonesia balance between compliance of international trade law and the protection for national interest under its tr public order+ As also mentioned in WTO annual report 2014, the WTO monitors member's trade policies and practices, which conduct 15 trade policy reviews in 2013 allowing members to expand their understanding of the policies of their trading partner. National data and measurement will play significant role to determine if the national policy violated WTO regulation or not, but in principles there is an opportunity for developing countries to exercise their national policy to protect their interest without violate the WTO regulation.

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Legal Certainty as a Fundamental Principle of Private Foreign Investment Agreements in Indonesia Toward AEC by Koesrianti, Vice Dean for Finance and Resources, Law Faculty – Universitas Airlangga, Surabaya, Indonesia.

Ms. Koesrianti holds an LLM and PhD degree from the Law Faculty atUniversity of New South Wales (Australia) and an SH/LLB from Law Faculty Universitas Airlangga, Indonesia. She teaches international law, international business transactions, maritim law, and ASEAN law of Law Faculty Universitas Airlangga Surabaya. Her research interests include international law, ASEAN, migration law, and international business law.

Abstract
The 2007 Indonesian investment law granted national treatment for foreign investors and established a transparent 'negative list' for out-of-bonds investment sectors were considered as an reformative regulation in Indonesia's economic strategy. However, decentralized system give autonomy to local governments to manage their projects and infrastructure themselves, that lead into increasing investment burdens through their opaque measures that are creating perceptions of risk of foreign investors. Accordingly, lack of legal certainty, inconsistent regulations and judiciary system would hamper investments. This article argues that Act 25/2007 should be supported by a comprehensive investment policy to attract more foreign investors to Indonesia. As a key element to establishing a competitive region is a free and open investment regime. This article addresses policy impediment to private investment in Indonesia as well as in ASEAN region. Indonesia and ASEAN should have non-discriminatory treatment extended to foreign investors including ASEAN-based investors, as the establishment of ASEAN Economic Community (AEC) will commence in 2015. Legal certainty of international business transaction of private investors is fostering investments both direct investment and indirect investment (portfolio). Parties to investment agreements include individuals, small, medium and large multinational corporations, and countries. In this centralized global atmosphere, Indonesian government has to provide guarantees to leverage private investments.

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The Principle Of Good Faith In The Implementation Of Arbitration Proceedings by Anita Dewi Anggraeni Kolopaking, Faculty of Law, Universitas Tarumanagara Jakarta, Indonesia.

Anita Dewi Anggraeni Kolopaking Faculty of Law, Universitas Tarumanagara Jakarta, Indonesia

Abstract
Business disputes that occur may be due to a bad will either on the dispute party, or belcause of its ignorance in looking at problems that occur, thus problem can continue with no settlement that could be reached, the dispute which was originally the things that can easily be fixed, evolved into a complex problem. With the arbitration clause agreement made by the parties as it is applicable as in the law as provided in Article 1338 paragraph (1) Indonesian Civil code which states "All agreements made in valid as the law applies to those who make it ." To the choice of dispute settlement that has been agreed by the parties set forth in the arbitration clause which is the law for the parties, must be followed in good faith for the parties to resolve it and believe in what has becoming an option for the parties, as provided in Article 1338 (3) Indonesian Civil code which states "the agreements must be performed in good faith." Thus the choice of dispute resolution through arbitration that has been set forth by the parties is a legal option which is known as the "law of the parties", thus it is fitting for the party who undergo an arbitration process must remain aware of the choice of law chosen by the parties in the dispute, namely as a form of settlement that is peaceful, fast and confidential is securely assured and the disputes experienced by the parties, so later at the end of any decision resulting from arbitration decision, the parties in the dispute should be elated accept the decision and voluntary establishing, without the need for efforts to force in carrying out the execution.

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Consumer Protection in Mobile Payments in China: Case Study on Alipay by Yue Liu, Professor, Economic Law Department, Shanghai University of Political Science and Law, China.

Nancy Yue Liu works at the Shanghai University of Political Science and Law. Prior to this, she lived in Norway and was a member of Schjødt's Industry/Trade and TMT group and the firm's China practice group. She specialized in data protection and information technology law, as well as M&A and regulatory issues. She holds a PhD in IT law from the University of Oslo and an LL.M. in IT law from Stockholm University. Nancy is a qualified lawyer in China, with a Bachelor's degree from Sichuan University. She has also significant experiences as a legal consultant in China National Petroleum Corporation and as an associate in banking and finance in Shudu Law Firm. Prior to joining Schjødt, she worked as a research fellow and lecturer in Norwegian Research Center for Computers and Law, in the law faculty of University of Oslo.

Abstract
Mobile payments are evolving quickly in China, which have great impact on the mobile payment consumers. Consumers are facing some new risks in this new business model. Various stake holders are involved, both traditional financial institutions and some non-financial institutions have participated actively into the m-payment market. Alipay is the biggest non-financial institution in China that provides M-payment services. This paper intends to use Alipay as an example to explore the various risks consumers are facing in mobile ecosystem and how the existing legal instruments in China could be applied to the mobile payments and protect consumers. Findings and suggestions are put forward in the end.

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Basel Agreements and the Myth of Rist-Free Sovereign by Gabriel Lochagin, University of São Paulo, Brazil.

Gabriel Lochagin (Ph.D. candidate, University of São Paulo; LL.M., University of São Paulo) is a researcher in Public Finance Law (Department of Economic, Public Finance and Tax Law) at the University of São Paulo, Brazil, and at the State of São Paulo Research Foundation (FAPESP). He is currently Visiting Researcher at the Humboldt Universität zu Berlin, in Germany. His main research topics are government b udget and sovereign debt. He is also a lawyer and member of the Brazilian Institute of Public Finance Law (IBDF).

Abstract
When financial investment decisions are taken, sovereign States are usually seen as very reliable havens for big money. This common belief is grounded on many different reasons, such as the fact that States cannot allegedly become insolvent. The perennial feature of sovereignty allows for levying greater taxes and other economic policy decisions, such as money and bonds issuance. Nonetheless, sovereign payment crisis are remarkably common events in the financial history of States. On that regard, there is a widespread opinion that present international banking regulation put forward by the Basel Agreements still do not address properly the question of sovereign risk, treating government bonds as risk-free assets. By underrating the odds, bad investment decisions could be stimulated by a still imperfect regulatory framework for international financial markets in the realm of sovereign debt. This paper argues that current regulation does not establish zero-weight standards for states' financial instruments. However, Basel directives have not been fully implemented, encouraging the perception that international rules are to blame for low regulatory capital concerning sovereign risk.

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Abstract Presenters (short papers)

The following is a growing list of accepted abstract presenters (short papers).

Abstract presenter profiles are sorted alphabetically according to surname. Click on the link to view the profile and abstract of the authors presentation.

Arabacil, Murat (Turkey): Google Glass And Turkish Criminal Law

Corbett, Susan (New Zealand): When is an online intermediary 'a publisher' of defamatory material?

Declerck, Charlotte (Belgium): Succession of Copyright in Europe

Griffin, Ronald (USA): Spying

Keeper, Trish (New Zealand): Combined, but not cohesive"— An analysis of the corporate disclosure framework of the Financial Markets Conduct Act 2013

Kgarabjang, Tshego (South Africa):Director's duty to act bona fide in the best interest of the company and for proper purpose: A comparison between South African Law and New Zealand Law

Latipulhayat, Atip (Indonesia): The New Indonesian Space Legislation Balancing between National Interest and International Responsibility In the Utilization of Outer Space

Moeller, Jochen (Germany): "Aletheia Project"

Mosier, Gregory C. (USA): Privacy Rights and Mobile Phones: What is the impact of Riley v. California on Data Searches and Probable Cause in the United States?

Ruhaeni, Neni (Indonesia): The Liability of Non-Governmental Entities in International Space Law Sailing Between International Regulation and National Legislation

Rahmah, Mas (Indonesia): Promoting Local Branding Under Geographical Indication : Prospect and Challenges for Protecting Indonesian Traditional Products

Truyens, Maarten and Van Eecke, Patrick (Belgium): The legal position of domain name registries

Turkut, Emre (Turkey): Crime Of Aggression Under Rome Statute: A Jus Ad Bellum Perspective

Sadjarwo, Isyana.W. (Indonesia): Security On Oil and Gas Natural Resource in the Agreement of Exploitation of Oil and Gas in the Framework of Developing the Indonesian Guarantee Law

Seung-Han, Kim (Korea): Main Characteristics and Contents of Internet Regulation in Korea

Sørensen, Evelyne J.B. (Denmark): The post that wasn't: Facebook monitors everything users type and not publish

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Google Glass And Turkish Criminal Law by Murat Arabacil, Research Assistant at Anadolu University Law Faculty, Turkey.

Murat Arabacil is a research assistant in Criminal and Criminal Procedural Law Department of Anadolu University Law Faculty. And I am PHD student at Public Law Department of Hacettepe University. I get the LLM degree from Public Law Department of Anadolu University. I research in the areas of Criminal and Criminal Procedural Law, IT law and Evidence Law. I wrote a thesis about "voluntary abandonment in criminal law".

Abstract
The United States Supreme Court recently recognized the privacy of information that is stored on a mobile phone and the requirement that law enforcement officers incident to an arrest must generally obtain a search warrant to access that information. The Supreme Court noted that "the scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server." While the opinion applies directly to the data stored on mobile phones and a search incident to arrest, this paper provides an analysis of how the privacy philosophy articulated in the case has application to data stored on telecommunication provider equipment and the application of the third party doctrine.

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The Liability of Non-Governmental Entities in International Space Law Sailing Between International Regulation and National Legislation by Neni Ruhaeni, Senior lecturer in International Law and Air and Space Law, Bandung Islamic University, Indonesia.

Neni Ruhaeni is a senior lecturer in international law and air and space law at the Faculty of Law, Bandung Islamic University – Indonesia. She graduated from Padjadjaran University Law School, Indonesia in 1994 for her LLB in international law and later obtained her LLM from Monash University Law School, Australia in 1999. Neni received her Ph.D in air and space law from Padjadjaran University in 2014. She is a member of International Institute of Space Law (IISL).

Abstract
The term non-governmental entity in international space law is a legal concept, which is subject to controversy in both its definition and application. Moreover, this has been exacerbated by the fact that the liability of this entity arising out from its involvement in outer space activities has not clearly been governed by the Outer Space Treaty 1967, which is regarded as the Magna Charta of international space law. Unlike the early development of the exploration and use of outer space that focused on research activities and states had been the main actors in that activities, today there has been a shifting focus in both activities and actors - commercialization and privatization of outer space and non-governmental entities as the new and promising actor in outer space activities. One of the main crucial legal issues associated with the non-governmental entities is that relating to the liability of this entity, because international space law provides that states shall bear international liability for their activities in outer space whether such activities are carried on by governmental agencies or non-governmental entities. The main question is that to what extent and in what forms non-governmental entities should be liable for their activities in outer space? Some have argued that the liability of non-governmental entities is completely subject to national space legislation, because only states that are internationally liable for that activities. In other words, international liability of non-governmental entities is indirect in nature. This paper argues that non-governmental entities should internationally liable for their activities in outer space, but the procedures and mechanism of the liability is subject to national legislation.

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Promoting Local Branding Under Geographical Indication : Prospect and Challenges for Protecting Indonesian Traditional Products by Mas Rahmah, Faculty of Law- Airlangga University-Indonesia.

Dr Mas Rahmah obtained her LLM from Monash University, Melbourne and Ph.D from Airlangga University. She is an active lecturer of Private Law at the Faculty of Law Universitas Airlangga, Surabaya, Indonesia. She teaches Investment law, Capital Market Law, Commercial Law, and Intellectual Property. She has published books and articles in a number of journals in the area of Intellectual Property, Capital Market Law and Investment law. She has also intensively conducted numerous researches with research interest in Investment Law, Capital Market Law and Intellectual Property. Her doctoral research focused on "Securitization of Intellectual Property". She has actively involved in academic association such as Intellectual Property Association (as secretary) and Australian Reference Group. Currently, she is the chief of Intellectual Property Centre of Universitas Airlangga.

Abstract
Indonesia has a diverse range of traditional products with unique quality and special characteristic associated with geographical factors such as Toraja Coffee, Deli Tobacco, Bali-Kintamani Coffee, Banda Nutmeg, Yogja Batik handcraft, etc that have gained prominence with high reputation either domestically or internationally.This paper argues that Indonesia should equip the reputation of traditional products and their intrinsic quality by promoting local branding under Geographical indications (GI) regime because GI protects a distinctive sign that permits the identification of products involving unique characteristics influenced by geographical factors. To visualize the above idea, this paper outlines the prospect of local branding based on GI and argues that the use of GI as a basis for local branding become an effective tool since it allows producers to gain competitive advantages, achieve market recognition, capture the premiums for their products in the marketplace by creating exoticness or scarcity images, differentiate their products from those produced elsewhere, and gain legal protection. However, promoting local branding under GI system looks uneasy to achieve and may spark challenges at normative and practical level. At normative level, the existing GI regulation under Indonesian trademark act is inherently insufficient because of limited scope of protection. At practical level, the problems may arise at every step of: a) preparation, (b) registration (c) monitoring and management, (d) promotion and marketing of GI products that are very time-consuming and costly, requiring complicated procedures, difficult researches, multiform equipment or infrastructure and the involvement of a wide range of stakeholders. To overcome the normative challenge, the paper recommends that the sui generis law seems the best solution to provide appropriate GI protection that can accommodate the basic elements of protection and solve the problems of insufficient GI protection under trademark regime. To solve the practical challenge, the paper will draw lessons from European Union Policy on GI and establishment of Indonesian "first GI" protection (Bali-Kintamani Coffee) as a model in promoting GI for other

traditional products from other origins in Indonesia.

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The legal position of domain name registries by Maarten Truyens and Patrick Van Eecke, University of Antwerp, Belgium.

Maarten Truyens is a legal researcher at the University of Antwerp, specialised in the fields of privacy, e-commerce, open source software and IT-contracts. His current research is situated at the crossroads between legal science and information technology, including topics such as online profiling of consumers, text mining and privacy by design. In addition to his legal research, Maarten is an IT-lawyer at a major European financial services provider, while previously he was an IT-lawyer at a Belgian financial institution and at the IPT department of a global law firm. Recent publications include "Legal aspects of text mining" (Computer Law & Security Review), "L'Oréal v eBay: is the tide finally turning for hosting providers?" (Computer Law Review International) and "Privacy and social networks "(Computer Law & Security Review).

Prof. Dr. Patrick Van Eecke is professor at the University of Antwerp, teaching European Information and Communications Law. He teaches on Internet law at various universities, such as Vienna University, Kings College London and Queen Mary University of London. He is also a partner in the IPT department of DLA Piper in Brussels. He advises telecommunication companies, Internet service providers, software developers, governments and companies using and/or offering IT and telecommunications facilities and services. He holds the global co-chair of DLA Piper's international E-business practice group, steering its multijurisdictional E-business legal strategy. He is also the author of several legal articles and books on computer crime, electronic signatures, electronic contracting and privacy.

Abstract
Following the CJEU decisions in L'Oréal and Netlog, online platforms that refrain from actively interfering with their users' content are protected by the eCommerce Directive. In light of the difficulty to impose filtering/monitoring obligations on such platforms (or hold them liable), prejudiced parties and law enforcement agencies are now seeking alternatives. One such course of action is targeting registries, the central actors of the Internet's domain name system. By requesting them to remove the link between a domain name and its technical IP address, unwanted content can be effectively made inaccessible for the public. Despite the significant consequences of removal requests, however, registries are mere technical intermediaries who are not adequately trained or equipped to assess these requests. Unlike access and hosting providers, their legal position remains unclear. This presentation will discuss the issues at stake, the qualification of registries under the eCommerce Directive, their cooperation duties, as well as the impact of general EU law and international private law.

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Crime Of Aggression Under Rome Statute: A Jus Ad Bellum Perspective by Emre Turkut, Research Assistant at Turgut Ozal University Law School, Turkey.

Emre Turkut is a Research Assistant in Public International Law Department at Turgut Ozal University Law School, Turkey. He is an LLM Candidate at University of Kent at Canterbury, UK. His LLM dissertation titled "Toward a Right to Secede: An Examination of Remedial Secession under International Law in the Light of Kosovo and Quebec Cases" will be published next year. His main research areas are public international law, international human rights law and humanitarian law.

Abstract
In 2010, the delegates to Kampala Review Conference confronted strong oppositions to include the aggression within the jurisdiction of the International Criminal Court due to highly political nature of the concept of aggression itself. This picture, indeed, proves the intense differences of opinions about the definition of aggression. Under the jus ad bellum, any serious violation of the prohibition on the use of force constitutes aggression. However, the Rome Statute of the ICC provides a much narrower definition than the one within the jus ad bellum, and thus, a higher threshold for the international responsibility. Creating a narrower definition is understandable and convincing for the purposes of the ICC; however this approach has a potential to dilute the jus ad bellum. Therefore, at the outset, this paper aims to critically analyse the phenomenon of aggression in international criminal law. It particularly starts with searching the historical background of aggression, and then examines the definition of aggression under the Rome Statute as pointing the correlation between the crime of aggression under Rome Statute and the concept of aggression within jus ad bellum. In this way, it tries to show some problems and pitfalls regarding the forthcoming successful prosecutions of the ICC.

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Security On Oil and Gas Natural Resource In the Agreement of Exploitation of Oil and Gas in the Framework of Developing the Indonesian Guarantee Law by Isyana W. Sadjarwo, University of Padjadjaran, Bandung, Indonesia.

Isyana W. Sadjarwo is a Doctoral Student in Faculty of Law, University of Padjadjaran, Bandung, Indonesia.

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Untuk menghadiri dan mempresentasikan paper dalam The 2014 IAITL Legal Conference Series pada tanggal 15 s.d. 17 Oktober 2014 di Lisbon Portugal. Adapun judul paper yang akan dipresentasikan sebagai berikut :

1. Koesrianti, S.H., LL.M., Ph.D. : "Legal Certainty as a Fundamental Principle of Private Foreign Investment Agreements in Indonesia Toward AEC .
2. Dr. Mas Rahmah, S.H., M.H. LL.M. : "Promoting Local Branding Under Geographical Indication: Prospect and Challenges for Protecting Indonesian Traditional Products"

Demikian surat tugas ini diterbitkan agar dilaksanakan sebaik-baiknya.

8 Oktober 2014
Dekan

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Certificate for Presentation

This is to certify that the "Legal Certainty as a Fundamental Principle of Private Foreign Investment Agreements in Indonesia Toward AEC" written by Koesrianti, S.H., LL.M, Ph.D was accepted for presentation at the *International Association of IT Lawyers Conference Series* which organizers the 9th *Intl. Conference On Legal, Security and Privacy Issues conference (LSPI)* and the *8th International Law and Trade Conference (ILTC)*, *5th International Private Law Conference (IPL)* and the *4th International Public Law Conference (IPLC)* which was held in Lisbon, Portugal on October 15-17, 2014.

All papers published in the book "Information Ethics and Security: Future of International World Time"(ISBN: 978-87-994854-4-4) have been blind reviewed by three (3) Reviewers who are experts in the field and have the rank of professors or noted for their scholarly works. All the accepted papers are proof-read, and edited to ensure that quality standards have been met and that the authors have incorporated the Revisions suggested by the Reviewers. The papers are then published in paperback and hard-bound edition.

Sincerely,

Sylvia Kierkegaard

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Legal Certainty as a Fundamental Principle of Private Foreign Investment Agreements in Indonesia Toward AEC

Koesrianti, Law Faculty
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Abstract: The 2007 Indonesian investment law granted national treatment for foreign investors, establishing a transparent 'negative list' for out-of-bonds investment sectors, and has been considered as a reformative regulation in Indonesia's economic strategy. However, decentralized systems give autonomy to local governments to manage their projects and infrastructure themselves. This leads into increasing investment burdens through their opaque measures that are creating perceptions of risk for foreign investors. As a result, lack of legal certainty, inconsistent regulations and judiciary system would hamper investments. This article argues that Law 25/2007 should be supported by a comprehensive investment policy to attract more foreign investors into Indonesia. A key element in establishing a competitive region is a free and open investment regime. This article addresses policy impediment to private investment in Indonesia as well as in the ASEAN region. Indonesia and ASEAN should have non-discriminatory treatment extended to foreign investors including ASEAN-based investors, as the establishment of ASEAN Economic Community (AEC) will commence in 2015. Legal certainty of international business transaction by private investors is fostering investments by both direct investment and indirect investment (portfolio). Parties to investment agreements include individuals, small, medium and large multinational corporations, and countries. In this centralized global atmosphere, the Indonesian government has to provide guarantees to leverage private investments.

1. Introduction

Indonesia develops its economic growth through Foreign Direct Investment (FDI) which is direct investments into production or businesses in Indonesia by companies from other countries. It plays a crucial role in establishing businesses, creating jobs, and setting up supply chains nationally as well as globally. FDI also has an impact on trade, jobs and capital movements, as foreign investments are one of the key elements of the economies in host countries. The movement of capital is essential in generating economic growth, jobs and reducing poverty.

In order to maximize the benefits from the foreign direct investment (FDI), states tend to introduce simultaneously policies that potentially resulted in opposite directions. On the one hand, in the wake of an intensified competition to attract FDI, states are compelled to liberalize domestic investment regimes to attract and promote inward foreign investments. On the other hand, foreign investors are often facing expropriations, nationalization or the imposition of new regulatory controls, and

breaches of the contract.[1] States are required to regulate and harness FDI in pursuit of broader policy objectives.[2]

Regarding the substantivity of the contract, most of the international investment agreements combine similar (sometimes identical) treaty-based standards for promotion and protection of foreign investment, with an investor-state arbitration mechanism that allows foreign investors to enforce these standards against host states.[3] The network of international investment agreements provide foreign investors with a powerful and dynamic method for international treaty enforcement so that states may insert these standards of treatment of foreign investors into the investment contracts. A foreign investor is usually a foreign company incorporated under the laws of its host nation; however foreign individuals are also acceptable.

Indonesia has enjoyed sustained periods of record economic growth and foreign investment for the last five years. In 2007, Indonesia enacted Law 25 year 2007 on Investment (Investment Law) that granted broader investment liberalization in Indonesia. However, Indonesia's business environment is still plagued by poor infrastructure and weak institutions as well as uncertainty about various regulations regarding transnational business transactions and implementation by the authorized institutions and local governments.[4] Excessive bureaucracy and a lack of coordination at the ministerial level also undermine the country's business environment.

In addition, Indonesia does not have a good reputation in an international survey as a potential and promising country for foreign investors. In 2013, Indonesia stood at rank 114 out of 177 countries, according to Transparency International's corruption perception index.[5] The rank of "Ease of doing business" and "Ease of Starting a business" measurements of Indonesia are very low, as Indonesia is ranked 120 and 175 out of 189 countries respectively. While on contract enforcement, Indonesia ranked as 147th, which is a very low rank.[6]

In the regional level, Indonesia joins the Association of Southeast of Asian Nations (ASEAN). ASEAN has an investment agreement that opens up the ASEAN region for foreign investors. ASEAN will be a major global trading bloc beyond 2015, with a combined GDP of USD 2 trillion, an abundance of natural resources, and an increasing educated workforce. ASEAN's single market and production base region in 2015 will

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[1] See generally N Rubins & N.S Kinsella, 2005, *International Investment, Political Risk and Dispute Resolution*, Dobbs Ferry, NY: Oceana Publications Inc.

[2] World Investment Report 2010: Investing in a Low-Carbon Economy, UN Pub, Sales, p. 75

[3] Host state refers to the state in which a foreign investor or investment is located. Home state refers to the state of which the investor is a national. See Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 2009, The Netherlands, Kluwer Law International, p. 2

[4] Indonesia's government is comprised of four levels: central, provincial, district, urban municipalities, and villages. Indonesian local government is divided into provincial as well as city/district levels of government. Provinces and city/districts have their own legislative bodies called Dewan Perwakilan Rakyat Daerah and their own government system. There are 34 Provincial Regions and 505 Local Region where the Local Regions are divided into 93 City governments (Pemerintah Kota) and 412 District governments (Pemerintah Kabupaten). Provincial local governments are headed by a governor. See http://otda.kemendagri.go.id/images/file/data2014/file_konten/jumlah_daerah_otonom_ri.pdf (as July 2013)

[5] See http://www.ey.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2013/$FILE/EY-Transparency-International-Corruption-Perceptions-Index-2013.pdf (visited 10/09/2014)

[6] Rank of doing business as June 2013, See http://www.doingbusiness.org/rankings (visited 10/09/2014)

comprise of five core elements, namely: free flow of goods, free flow of services, free flow of investment, free flow of capital and free flow of skilled labor.

This article is divided into three main sections and a conclusion in the end. The first section explores the Indonesian Law 25/2007 and negative list 2014 (NIL 2014) as well as investment policies. The second section highlights the Indonesian investment agreements, Bilateral Investment Treaty/BIT and multilateral, under the auspice of the ASEAN Economic Community (AEC), i.e., the ASEAN Comprehensive Investment Agreement (ACIA). It further draws a relation to the two different approaches, national and regional in giving protection to foreign investors. The third section deals with the legal certainty as a fundamental principle for foreign investment agreements in Indonesia, with special explanation on the role in international business transactions through the management of uncertainty and unpredictability to promote and protect foreign investments. The final section is a summary of assessment and a conclusion.

2. Indonesian Investment Law and Foreign Investment Policies

2.1 Indonesian Investment Law

Investment Law defines investment as direct investment and indirect investment. For Indirect investment (also known as portfolio investments), the transactions are made through the domestic capital market/stock exchanges of a country. Indonesia's 2011-2025 Development Plan comprises IDR 4,012 trillion (USD440 billion) of investment, with IDR 1,786 trillion (USD 196 billion) assigned for basic infrastructure with substantial investments planned for roads, railways, bridges, irrigation canals, telecommunication towers, ports and power plants among other undertakings. In 2014, for example, the government has allocated investments of new infrastructure projects of USD 35 billion, nearly half of which has been assigned for basic infrastructure.[7]

In this globalized era, the search for low labor costs and cheap raw materials has led to a proliferation of international transactions.[8] Business entities from two or more different countries usually enter into a contract to sell, lease, license, or invest goods or services. The legal aspects of international transactions remain deeply embedded within domestic laws rather than international law, regardless that the economics of these transactions have adapted to the demands of globalization.[9] Nevertheless, foreign investors are not eager to invest in Indonesia as investors often experience difficulties in settling contractual agreements and payments, when they adhere to the Indonesian legal system.

Indonesia, as one of the ASEAN member countries, has a task to effectively implement the ASEAN investment agreement, namely ASEAN Comprehensive

[7] Of the 56 planned projects, 32 are meant to be partnerships between the private and public sector (PPP venture). The project is spread across the country, but many are on the islands of Java and Sumatra. Several are in the sprawling eastern island of Sulawesi and on resource-rich Kalimantan, on the island of Borneo, see *Reuters*, Indonesia plans $35 bln in infrastructure projects, some to begin in 2014, Nov 13, 2013.

[8] Globalization is a process of interaction and integration among the people, companies, and governments of different nations, a process driven by international trade and investment and aided by information technology. http://www.merriam-webster.com/dictionary/globalization

[9] John Flood, Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions, Indiana Journal of Global Legal Studies Vol 14#1 (Spring 2007), p. 36

Investment Agreement (ACIA), to ensure that Indonesia can reap the benefits of the agreement by giving protection to ASEAN and ASEAN-based foreign investors in order to take the advantages that ACIA provides. It is the investor who decides and selects the location for his investment, where production of goods and services would take place by considering all the socio, cultural and legal framework of the host country. ASEAN members believe that the important role that a foreign investment has is contributing to regional growth and the mandate of the integration of investments in the region under the ACIA. Consequently, Indonesia renews every three years, investment policies such as NIL, in order to attract and maintain legal certainty of foreign investments.

Law 25/2007, as the main regulation for investment, has introduced regulations including the extension of the right to use of land for a much longer period (75 years to 95 years), extension of freedom to repatriate and transfer profits, abolition of tariff on imported goods, and granting foreign direct investment the right to obtain shareholder majority in sectors strategic to public interest. It also brings important changes concerning investment approval procedures, land titles, and incentives. Pursuant to the licensing process, it introduced a one door-integrated service from the application to the issuance of the documents. It also offers equal and non-discriminatory treatment to foreign investors, meaning, government treats foreign investors similar to nationals. The government has launched bureaucracy reforms in investment services and fiscal incentives. The Investment Law gives regencies and cities an authority to self-manage investment approvals for the interest of the local communities.[10] It has diminished the authority of the central government by explicitly giving the authority to the regional government to organize investment affairs under their authority, based on the criteria of external, accountability, and efficiency. Article 30 para.1 of Law 25/2007 concerning organization of investment maintains that the Government and/or the Regional Government shall provide business with certainty and security in the implementation of the investment.

While the Government organizes cross-province investment, the Regional Government organizes cross-regency investments. Bearing in mind, to encourage local and international investment, Indonesia plans to abolish more than 800 regional restrictions on businesses which are with the national regulations.

2.2. Indonesian foreign investment policies

The government has issued some foreign investment policies as a follow up to the Investment Law. The government intends to improve the investment environment by providing online applications for business- and investment licenses when establishing a business. This will reduce the time involved and minimize potential corruption. For the right to use of land, the Government in 2012 enacted Law 2/2012 concerning Land Procurement for Development Purposes in Public Interest. It aims to improve and clarify the land acquisition framework. The government in the same year issued Presidential Regulation No.71/2012 concerning Administration of Land Procurement for Development Purposes in Public Interest as an organic regulation for Law 2/2012. Regulation of National Board for Land/BPN No. 5/2012 was subsequently issued by

[10] For the proliferation of local laws in Indonesia, see, Simon Butt, Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia, 2010 *Sing.J.Legal Stud.*1

setting up technical implementation guidelines and rules. In short, foreign individuals are permitted to acquire land or land rights with a number of restrictions.

In 2012, the World Bank approved a project to support the newly established Indonesian Infrastructure Guarantee Fund (IIGF) as an institution under the Ministry of Finance. It would be responsible for providing guarantees for infrastructure projects, or more specifically Public-Private Partnership (PPP) projects. With the World Bank's support, the IIGF will be able to provide guarantees to leverage private investments in infrastructure projects.

In the context of government institution, BKPM serves as the 'front office' for PPP projects. BKPM's role is to be the primary interface between private investors and the government. In addition, the Ministry of Finance (MOF) established PT Sarana Multi Infrastruktur (SMI) in 2009. [11] Its role is to become a catalyst in the acceleration of the infrastructure development by providing alternative sources for project financing work together with stakeholders, or by promoting PPPs in financing infrastructure projects and by increasing the size and capacity of SMI through partnerships with third parties. The MOF also established PT Indonesia Infrastructure Finance (PT IIF) in 2010 as an infrastructure financing company. PT IIF is majority privately owned with initial shareholders being the Asian Development Bank (ADB), International Finance Corporation (IFC), Deutsche Investitions-und Entwicklungsgessellschaft mbH (DEG) and PT SMI. In order to accommodate the PPP principles, a Project Development Facility (PDF) has been established and is being administrated by BAPPENAS with funding from ADB. The PDF's objectives are to assist in project preparation, to select appropriate private partners and to monitor the project and secure the transactions are conducted in accordance with PPP principles.

Due to Indonesia's ban policy on ore exports to force mining companies to process the metal in Indonesia before exporting, the mining industry's output fell from USD1.7 billion to USD1.1 billion in the second quarter of 2014.[12] US Mining company Newmont Mining Corp was in dispute with the government over an export tax that they say violated its contract of work. Newmont halted copper production at its mine and the government threatened to hand the license to a state-owned mining firm. The dispute has since been resolved by international arbitration that held the respondent to reimburse the claimant (the Indonesian Government) for a major part of its costs in the arbitration. This is the first time that Indonesia has had to enforce its rights against an investor through arbitration or litigation.[13]

2.3. Indonesia's Negative List of Investment (NIL 2014)

Indonesia's Investment Law states that all business sectors are open to foreign investment, except those listed in the Presidential Regulation commonly known as the Negative List (NIL). The NIL identifies the business sectors that are closed to foreign investment, or open subject to conditions. Sectors that are open and subject to

[11] PT SMI was established based on Government Regulation No. 66/2007 on State Equity Participation in the Establishment of Perusahaan Perseroan in the Sector of Infrastructure Financing.

[12] The Jakarta Post, Indonesia Implements Ban on Unprocessed Ore Export, January 12, 2014, see http://www.thejakartapost.com/news/2014/01/12/indonesia-implements-ban-unprocessed-ore-export.html

[13] Karen Mills, Indonesia: Government of the Republic of Indonesia v PT Newmont Nusa Tenggara; Specific Enforcement of Contractual Obligation, Int. A.L.R. 2009, 12 (3), N41-42

conditions usually involve restrictions on the maximum foreign ownership permitted and can carry specific requirements, such as approval from specific ministries or agencies. The sectors in the NIL are derived from the Indonesian Standard Classification of Economic Activities (KBLI). The latest NIL is effective from 24 April 2014 under the Presidential Decree number 39 of 2014 on List of Business Fields Closed to Investment and Business Fields Open with Conditions to Investment (NIL 2014). This is the implementation of articles 12 (4) and 13 (1) of Law 25/2007. Its objective is to increase investment activities in Indonesia as well as the implementation of Indonesia's commitment to the AEC. It stipulates policies concerning business fields closed to foreign investment and open with conditions based on three categories as follow:

a. businesses reserved for micro, small, medium enterprises and cooperatives;
b. businesses requiring partnership;
c. businesses requiring certain capital ownership, a certain location, and special permit.

The underlying principle is that if Indonesians are capable of conducting business in a certain industry, then that sector will be closed to foreign investment. The new NIL does not apply to foreign investment limited liability companies (PMA Company) which has already obtained the relevant Indonesian Investment Co-ordination Board (BKPM) approval.

This grandfathering protection will be preserved under the considerations as follow:

a. If a foreign investor sells its current interest to another foreign investor, provided there is no change in the overall foreign ownership percentage in the relevant PMA Company. Similarly, if a foreign investor sells part of its current interest to a domestic investor (e.g. in compliance with other law, regulation or policies), it will be entitled to retain its interest above the maximum foreign ownership permitted under the new NIL, but it will not be able to revert back to its higher interest prior to that sale.
b. If a PMA Company undergoes a merger or acquisition, with the maximum foreign ownership permitted remaining that of the surviving or acquiring company (respectively) under its original BKPM approval (although it is unclear whether this original maximum applies if the merged or acquired company operates in a different business sector).

In contrast, if a PMA Company undergoes a consolidation, the maximum foreign ownership will be as determined in relation to the new company. If a PMA Company expands its business activities through an increase of capital from its foreign investors (without any domestic investor participation), the maximum foreign ownership remains as noted under the original BKPM approval. If this increase of capital exceeds the maximum, it must sell the excess either to domestic investors (through an Indonesian stock exchange public offering) or by the PMA Company repurchasing them.

3. Legal Certainty Principle of International Business Transaction in Indonesia

Indonesia has intensified its efforts in keeping its' competitive strength, vis-à-vis the changing global economic landscape through national regulation and investment policies giving protection and legal certainty to foreign investors. The Investment Law, for example, consists of basic principles that comprises of legal certainty, transparency, accountability, equitable, non-discriminatory, togetherness, and efficiency in justice. It should bear in mind that national law, regional agreements, and multilateral agreements must protect foreign investors, especially infrastructure projects due to the long-term period of these projects. In this context, the Indonesian Investment Law states that every investor shall be entitled to obtain certainty of right, legal certainty and protection certainty, as well as open information about the businesses it is running, service and facilities according to the rule of law (Article 14 Law 25/2007). On the other side, investors are required to apply the principle of good company management, implement the company's social liability, make report on investment activity and submit it to the Investment Coordinating Board, respect cultural tradition of communities around the location of the business investment , and comply with all of the rules of law (Article 14 Law 25/2007).

In the last few years, Indonesia has had a number of cases involving foreign investors including those of Manulife, Prudential, PT Danareksa Jakarta, PT Tripolyta, and Asia Pulp & Paper and its subsidiaries in Indonesia.[14] Those cases illustrate the indifference of the courts with regard to the legitimacy of international commercial transactions. The judiciary system have not put honor to the sanctity of a contract. This has had a significant effect on the credibility of Indonesia in the international capital markets and direct in flow of capital. In many cases, the transnational business contracts tend to raise legal problems, solved by an international private law approach and often leading to new problems due to the various recognized legal systems in the world.[15] The parties often try to preempt domestic law by extensively putting the terms of their deals in a great detail in the contract including their respective rights and duties should certain foreseeable problems or contingencies occur. It can be said that the local courts' decisions might be affected by bias, corruption and inefficiency. The investors try to avoid the application of domestic law by leaving as few gaps as possible in their contract. Investors began to use various contractual mechanisms, including stabilization, choice of law and international arbitration clauses as well as political risk insurance in order to mitigate political risks. In many cases the parties have regulated their deals contractually, with the tribunal or arbitration serving merely as an enforcement body if their agreement ends up in a court or arbitration.

Investments have a close relation with trade as it is inter-dependent and complementary. The majority of trade in the world is conducted by private parties or multinational enterprises that exchange intermediate goods and services. Enterprises from India and China have a huge impact on ASEAN. The inflow FDI from China, for example, are mostly invested in industries that can create more. These industries include infrastructure, energy and mining, and manufacture industries, which require a large

[14] See at http://www.lsmlaw.co.id/index.php?option=com_content&view=article&id=201%3Ainvesting-legal-certainty-for-better-investment-climate&catid=49%3Aarticles&itemid=18&lang=en

[15] The recognized legal systems are common law, Civil law, Islamic law, customary law, and Hybrid.

amount of capital, high risk, and have long payback periods. China consequently makes a serious commitment to the long-term development of the individual ASEAN member countries, including Indonesia, by monitoring progress closely to ensure that everything runs smoothly in order to get return from its investments.

Both the multinational enterprises and private parties tend to invest in countries with reliable investment regulation and stable regulatory authorities in which they can minimize their risk. They also seek rights' protection from the international agreements and bilateral investment agreement as well as international dispute resolution mechanisms. The present multi-faceted and multi-layered network of international agreements aimed at protecting rights for foreign investors and providing mechanisms for amicable dispute resolution is growing, alongside an increasing emphasis on the rights of the state to regulate foreign investments to protect essential public interests.

3.1 The Legal Certainty Principle of International Business Transaction

National laws and policies on FDI are different from county to country depending on national law/policy-makers and other factors. However the policy-makers have to consider at least the following common problems:[16]

(1) how to attract foreign investment without incurring a damaging drain on domestic foreign exchange savings and other resources;
(2) how to preserve the foreign investor's legal rights and give it adequate protection while, at the same time, keeping its domination and negative effects to a minimum; and
(3) how to design their laws and tax systems in such a way as to simultaneously foster economic growth and attract foreign investment while concurrently raising enough revenue to meet the budgetary requirements of the governments.

In this context investment law can be seen as a mean as well as a consequence of state intervention in the economic process to keep balance between the above three problems.[17] Likewise, investment agreements established by regional organizations, such as ASEAN, are depending on the leaders of such organization as the policy-maker for legalization of the agreements they create.[18] The elements of legalization are obligation, precision and delegation. Obligation refers to international actors are being legally bound by legal rules and procedures, whether international or domestic. Such

[16] Solomon, D and D.H Mirsky, 1990-1991, Direct Foreign Investment in the Carribean: A Legal and Policy Analysis, North-Western Journal of International Law and Business 11: 257-92, cited in Sherif H. Seid, 2002, *Global Regulation of Foreign Direct Investment*, Ashgate, p. 33

[17] Seid, ibid

[18] Legalization is a concept in the literature on international relation for 'the use and consequences of law in international politics', see, Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, Introduction: Legalization and World Politics (2000) 54 Int'l Org. 385 at 386, see also Michael Ewing Chow, ASEAN Feature Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration.?, 12 Sing Year Book of International Law. 225, p. 230

legal rules and procedures impose obligations that are distinct from obligations resulting from coercion, comity and morality.[19]

For foreign investors in Indonesia, the most relevant are laws regarding: foreign investment, company law, business licensing and trade, taxation and customs, labor law, land and buildings, and local government's regulations. It is also important to have some knowledge on the Indonesian civil law system as it requires certain clauses to be applied to all agreements unless specifically excluded. International business transactions are made of three stages, namely preparation, performance and enforcement in every stage.[20] Having said that, failing to understand all of these aspects has rendered the non-performance of international business contracts. Accordingly, agreements frequently involve some chance of noncompliance, and the future is almost always uncertain. The parties to the international business transactions will calculate all possible conditions to know their attitudes toward risk. Some say that states oppose risk with respect to individual commitments.[21] However, an assumption of risk aversion leads to a range of results in which uncertainty affects behavior and reduces states' willingness to enter agreements or to delegate in some way.[22]

The concept of legal certainty is recognized by all legal systems in the world.[23] For example, the concept of legal certainty is recognized as one of the general principles of European Union (EU) law by the European Court of Justice since 1960s.[24] In the EU law context, it means that the law must be certain, clear, precise, and its legal implications foreseeable, especially when applied to financial obligations. Theoretically legal rules produce the legal certainty and predictability that is required by capitalism and liberalism.[25] Those who are subject to the law must know the legislation of the states, which implement the law, so that it is clearly understandable.[26]

It is apparent from the foreign investors' point of view that Indonesia's litigation can be unpredictable and time consuming so it is normally not an effective route to resolve disputes. There were inconsistencies of court judgments dealing with the facts and the available evidence thus making it unappealing to foreign investors. In anticipation of a later disagreement, an additional clause is inserted in the contract, namely, choice of law or choice of forum. The parties to the contract commonly choose arbitration for resolution of disputes, either Indonesian or international arbitration. The majority of contracts choose Singapore under the rules and regulations of the Singapore International Arbitration Centre, where the award of arbitration can be enforced in the Indonesian Courts. International arbitration was seen as a neutral forum by the foreign

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[19] Kenneth W Abbott, et.all, The Concept of Legalization, (2000), 54 Int'l Org. 401 at 403

[20] Erman Rajaguguk, *Hukum Investasi di Indonesia: Pokok Bahasan* (Investment Law in Indonesia: Main Discussion), Fakultas Hukum, Universitas Indonesia, Jakarta, 2005, pp. 98-107

[21] Barbara Koremenos, Charles Lipson, and Duncan Snidal, 2001, The Rational Design of International Institutions. Special Issue, International Organization, 55: 761-99, cited in Andrew T Gusman, 2008, *How International Law Works: A Rational Choice Theory*, Oxford University Press, p. 122

[22] Gusman, ibid

[23] It should be noted that the concept of legal certainty is generally used in Civil Law Systems. In Common Law, the closest equivalent would be the principle of rule of law, see Alexander Peczenik, On Law and Reason, (1989), 31 as cited in Elina Paunio, Beyond Predictability – Reflections on Legal Certainty and The Discourse Theory of Law in th EU Legal Order, (2009) German Law Journal, Vol. 10 No.11, 1470, p 1471

[24] Paunio, ibid

[25] Ofer Raban, The Fallacy of Legal Certainty: Why Vague Legal Standards May be Better for Capitalism and Liberalism, *Public Interest Law Journal*, 2010, Vol. 19, p 175

[26] *Ibid*

investors, although developing countries including Indonesia were initially skeptical about it.

There was a period with international effort to regulate foreign investment that took only place at the time of the inception of the UN.[27] That was when the developing countries gained a numerical majority in the UN; they sought to use the UN system to introduce fundamental reforms to the laws governing international economic relations among states, addressing the issues of economic equality and prosperity for all, namely, the New International Economic Order (NIEO) within the UN.[28] Currently multilateral instruments on foreign investment, customary of international law, and bilateral investment treaties are protecting the foreign investment. In the heart of the principles of international foreign investment law, such as the MFN principle, National standard of treatment, fair and equitable standard, full protection and security,[29] is ensuring non-discrimination in the conduct of international business so that foreign investors get a certain level of security from the host countries.[30] International foreign investment rules that it would give flexibility to individual countries to manage their own affairs based on their priorities as well as economic and social objectives, while at the same time seeking some form of internationally agreed framework, thereby giving certainty to investors. The certainty arises at two levels – national rules and at the level of national rules that cannot be changed to flout the principles in the international agreement.[31] Indeed, legal certainty requires a balance between stability and flexibility. Accordingly there is a distinction between formal and substantive legal certainty, between predictability and acceptability of legal decision-making. While formal legal certainty deals with the notion that laws, and in particular adjudication must be predictable, substantive legal certainty concerned with the rational acceptability of legal decision-making. In this context, law and adjudication are not only predictable but also acceptable by the legal community involved. Laws must satisfy requirement of clarity, stability and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions as well as the outcome of legal proceedings.[32]

4. The Establishment of AEC and Challenges in Protecting ASEAN –based Foreign Investors

4.1 Taxonomy of ASEAN's Institutions and Investment Agreements

Regarding the free flow of investment, ASEAN Blue Print of AEC has pillars including investment protection, facilitation and cooperation, promotion and awareness as well as liberalization. It states that ASEAN Member States should provide enhanced protection to all investors and their investments under the comprehensive agreement. The actions of investment protection are (1) strengthen investor-state dispute settlement mechanism, (2) transfer and repatriation of capital, profits, dividends, (3) transparent coverage on

[27] Surya P Subedi, 2012, *International Investment Law: Reconciling Policy and Principle*, Oxford: Hart Publishing, 2nd Edition, p. 19
[28] *Ibid*, p 23
[29] M. Somarajah, 2010, *The International Law on Foreign Investment*, Cambridge University Press, 3rd Edition, pp. 201-205 (for the description of these principles)
[30] Ibid, p. 56
[31] Seid, n.15., p 195
[32] Paunio, n. 23, p 1470

the expropriation and compensation, (4) full protection and security, (5) treatment of compensation for losses resulting from strife. In short, ASEAN will establish a free and open investment regime that will create sustained inflow of investment and reinvestment in the region and it will ensures dynamic development of the ASEAN economies.

ASEAN has been attributed as an economic grouping 'long on ambitious design but short on accomplishment' and poor on 'normative-institutional' and 'empirical-social'.[33] ASEAN are still in the process on figuring out the prompt institutional arrangement related to the scope of competence and resources as well as the composition of organs and procedures. ASEAN implements cooperative or non-rule directed fora to accommodate the ASEAN organization structure that give more sovereignty to ASEAN members.[34]

Regarding the ASEAN investment integration mandate to form ASEAN Investment Area (AIA) in 2015, ASEAN has established main five agreements, namely:

1. The 1987 Agreement for the Promotion and Protection of Investments (ASEAN Investment Guarantee Agreement/ASEAN IGA)[35];
2. The 1996 Protocol amending the ASEAN IGA
3. The 1998 Framework Agreement on the ASEAN Investment Area[36];
4. The 2007 ASEAN Economic Community Blueprint[37]; and
5. The 2009 ASEAN Comprehensive Investment Agreement.[38]

All of these agreements were concluded in response to the ASEAN's position as a significant region for investment. By providing such agreements, ASEAN intends to offer a higher level of protection to the growing number of investors and investments. The last and comprehensive economic agreement is the ASEAN Economic Community (AEC), which will commence in 2015. The AEC objective is to create a single regional market and production base in the region in December 2015. A key element to achieving the AEC objective, is having a free and open investment regime in the

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[33] Eric Stein, 2001, International Integration and Democracy: No Love at First Sight, American Journal of International Law, Vol.95, No.3; 489-534. See also, Jessica Los Banos, ASEAN Investment Area 2015: An Exploratory Assessment of the ASEAN Investment Integration Mandate, Law Review, Vol.XIII, No.2 Nov 2013

[34] Los Banos, ibid

[35] ASEAN IGA see at http://www.asean.org/news/item/agreement-among-the-government-of-brunei-darussalam-the -republic-of-indonesia-malaysia-the-republic-of-the-philippines-the-republic-of-singapore-and-the-kingdom-of-thailand-for-the-promotion-and-protection-of-investment-manila-15-december-1987-2 (last visited 23/08/2014) ; ASEAN IGA was a state-centric agreement, which albeit providing liberal core investor protections, including MFN treatment, guarantees against expropriation, and free transfers, for a wide coverage of investments, limited its scope of protection to investments that were specifically approved in writing, registered, and subject to the national laws of the host state., see Los Banos, n.30, *ibid*

[36] The 1998 Framework Agreement on the ASEAN Investment Area, see http://www.asean.org/images/2012/Economic/AIA/other_document/Framework%20Agreement%20on%20the%20ASEAN%20Investment%20Area.pdf

[37] For ASEAN Blueprint, see http://www.asean.org/archive/5187-10.pdf

[38] For the ACIA, see http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf The ACIA seeks to combine liberal movement of ASEAN investment within the region with the protection of such investment.

ASEAN region (non-discriminatory treatment to all investors, both ASEAN and non-ASEAN investors). The ACIA is the most recent of regional agreement on investment, its purposes, as stated in the preamble, is 'to increase intra-ASEAN investment and to enhance ASEAN's competitiveness in attracting inward investment into ASEAN'. It seeks to strike a balance between protection of investment and the preservation of regulatory control in the national interest.[39]

4.2. The Institutional Structure of AIA

The institutional structure of the ASEAN investment regime has followed with the expansion of the organization's functional requirements. Unlike the EU, ASEAN's structure has remained centralized, static and rigid over time.[40] Despite ASEANs claim of establishing a collaborative system, ASEAN structure still remains a resource pooling arrangement to govern a widening scope of ASEAN investment cooperation from promotion and protection to liberalization and facilitation of foreign investment.

The ASEAN IGA established the first two pillars, namely promotion and protection of investments among member countries. The ASEAN IGA was a state-centric agreement, which albeit providing liberal core investor protections, including most-favored nation treatment, guarantees against expropriation and free transfers, for a wide coverage of investments and limited its scope of protection to investments that were specifically approved in writing, registered, and subject to the national laws of the host state.

The ASEAN institutional structure for the cooperation was loose, with no distinct or specialized organ to administrate or monitor compliance of the member states. The Heads of the ASEAN Investment Agencies (AHIA) with the support of the ASEAN Secretariat implemented the agreement where the Secretariat is a coordinating body responsible for day-to-day operation. The Secretariat is also designated as the monitoring body responsible for keeping track of the progress of any arrangements from the agreement. The dispute of interpretation or application of the agreement shall be settled amicably between the parties, or submitted to the ASEAN Economic Ministers (AEM) for resolution, while investor-host state disputes are resolved through amicable settlement, conciliation, or arbitration (Article 10 ASEAN IGA). The AHIA established the Senior Official Meeting on Investments (SOM-I) in 1997 with the task to assist the AHIA in developing practical investment cooperation and promotion measures.

This structure was replaced by the AIA Council when ASEAN adopted the Framework Agreement on the ASEAN Investment Area (ASEAN AIA) in 1998. The AIA Council task is to supervise, coordinate, and review the implementation of AIA and report regularly to AEM. It is also charged with the periodically review of all action plans and investment program of the member states. In doing its tasks, the AIA Council is supported by the Coordinating Committee on Investment (CCI), which comprised of SOM-I members, government officials and the Secretariat.

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[39] Sonarajah, n. 23, p. 255

[40] Cremona, Marise, David Kleimann, Joris Lee Lark, Rena, and Pascal Venneson, 2013, *Collectively ASEAN: An Inventory and Typology of ASEAN External Instruments*, ASEAN Integration Through Law, Plenary 2, ASEAN Governance, Management and External Relations, Record of Program, Profiles, Executive Summaries, (unpublished), Jakarta

The integrated regional economy, as proposed by AEC, will form a single regional market and production base[41] in the ASEAN region in 2015. This proposal should boost the economic development in the region. It will lead to an intensive number of commercial contracts among business people within the ASEAN region. Free flow of Investment is one of five points of the ASEAN economic regional integration through AEC. A key element for establishing ASEAN as a single market and production base is having a free and open investment regime. This regime should have non-discriminatory treatment that extended to ASEAN and ASEAN-based investors. Contract law in ASEAN has not developed yet. ASEAN may look at its counterpart European Union (hereinafter EU) that has already established principles of European Contract law.

5. Conclusion

Law 25/2007 (Investment Law) marked a legal basis for broader investment liberalization in Indonesia. Indonesia's legal reform by establishing an Investment law has opened up some industries for foreign investors. It shows the government's efforts to make the investment climate more transparent. Thus, Indonesia welcomes foreign investors on its own terms. Government policies aim at ensuring that foreigners' working in Indonesia assist in the development of the country's economy and skill-base. Indonesia needs the development capital, technical and management skills of foreigners. On the other side, the multinational enterprises need legal certainty when they invest in Indonesia as predictability of outcome and legal certainties as well as fairness become priority of their investment considerations. These investment-related regulations will increase accountability and transparency of the investment climate in Indonesia and lead to the increase of legal certainty. In the ASEAN level, the main factors hindering economic development in the region are lack of legal certainty and non-functioning judiciary contracts due to unavailability of uniform contract law. It leads in turn to less confidence and reliability in society, which are preconditions for investment and economic development. What Indonesia and ASEAN need are transparent rules and regulations that foreign investors can enjoy protection. In addition, the role of courts is of particular importance in guaranteeing substantive legal certainty, especially in maintaining the balance of certainty and acceptability in adjudication. This is the factor that Indonesia and ASEAN do not currently have.

[41] Purpose of AEC are see http://www.asean.org/communities/asean-economic-community

The Legal Impact Of The Formation Of The 2015 Asean Economic Community On Investment In Indonesia: Opportunities And Challenges

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Abstract: The ASEAN economic cooperation was born with the Bangkok Declaration of 1967. The Declaration purports to accelerate economic growth, social progress and cultural development in the ASEAN region. During its development, the ASEAN economic cooperation moved towards the establishment of the ASEAN Economic Community (AEC). The desire to carry out the economic integration of the ASEAN region was launched at the ASEAN Summit in January 2007. The Summit, among others issues, agreed to accelerate the economic integration to 2015. Its main purpose includes making ASEAN a region where goods, services, investment, and labor may freely move among the ASEAN economies. One important aspect in the framework for the realization of the AEC is mainly laws related to capital investment. This paper argues that the formation of the AEC, by 2015, will have a major impact on the competitiveness of Indonesia's economic growth through investment and trade. Capital investment is a very important field in economic growth. The establishment of the AEC 2015 is a challenge and opportunity for the people of Indonesia. It is also further argued that in implementing the AEC 2015, there is a need for a legal system that can protect the small and medium sized business in Indonesia in connection with the influx of foreign investment.

1. Introduction

The Association of South East Asia Nations (ASEAN) was established in 1967 with the signing of The Bangkok Declaration by the five founding countries namely: Indonesia, Malaysia, Philippines, Singapore and Thailand. A few years later Brunai Darusalam, Vietnam, Lao PDR, Myanmar and Cambodia joined ASEAN.[1] The ASEAN establishment was mainly driven by a political and security motivation with the intent of advancing the cooperation economically, socially etc. The ASEAN Leaders, at the Summit in Kuala Lumpur in December 1997, decided to transform ASEAN into a stable, prosperous and highly competitive region with equitable economic development and a reduction in poverty and socio-economic disparities.[2]

[1] T May Rudy, *Administrasi Dan Organisasi International*, Rafika Aditama, Bandung, 2009, p. 96
[2] Sanchita Nasa Das, *Achieving the ASEAN Economic Community 2015. Challenge for Member Countres And Business*, Pustaka Perdana, Institute of Southeast Asia Studie, Singapore 2012, p. xiii