ASEAN COMPREHENSIVE INVESTMENT AGREEMENT AND INDONESIAN INVESTMENT LAW

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Abstract

The regulation on investment within the ASEAN Countries has gained a exceptional attention. There has been 3 (three) instruments signed and the last instrument, the ASEAN Comprehensive Investment Agreement (ACIA) needs a more attention in the light of its significance. The analysis of the article is confined to three principles embodied in the ACIA, namely the principles of protection, compensation and settlement of dispute. In the last part of the paper, a brief look on Indonesian investment law is made to seek to what extent the law is similar or at least reflecting the ACIA principles.

Key words: *ASEAN, Investment Law, Indonesian law.*

A. Introduction

ASEAN Comprehensive Investment Agreement (ACIA) is the main provision regulating investment in the region. The main objective of the Agreement as stipulated in Article 1 of ACIA is "to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the ASEAN Economic Community."

To reach the objective, first of all, one has to ask whether the provisions under the ACIA are in the right direction. In that, whether the provisions of the ACIA have been to a greater extent in harmony with the international investment law principles. It is as well worth examining whether Republic of Indonesia (RoI) Investment Law in particular Law No 25 of 2007 on Investment is in the same track with the ACIA.

This approach is relevant. A recent study by 2 German commentators is quite interesting. As far as the RoI's Investment Law, they argued that Indonesia as a developing country '... over the past decades often adopted international investment agreements (IIAs) without sufficiently considering their national legal system for investment."[2]

Principally, the principles protecting the investment which gains support from the foreign investors are three elements. Firstly is the principle of protection. The protection that I have in mind is whether the ACIA lays down the legal protection to the investors. This includes among others the application of the non-discriminatory principle.

Secondly is the compensation formula when the nationalisation happens. The standard for this principle is whether the compensation to be paid is the formula accepted in the IIAs in general.

Thirdly, the principle of the settlement of investment dispute.

The yardstick for this principle as recognized by many instruments in the IIAs is the settlement by (international) arbitration.[3]

Before examining these principles, a brief outlook on the provisions of the ACIA will be made. 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 Agreement as a comparison companion to the ACIA is relevant. As one of the important and leading regional trade and investment organization, NAFTA Agreement contains a set of comprehensive regulations on investment, including the provisions on dispute settlement. This agreement has been recurrently used by the parties in the resolution of their investment disputes.[4]

By doing so, it is expected that the lesson learnt from NAFTA would give a valuable contribution for ACIA in the future. Surely, additional study or research on this issue is highly needed.

B. Substantive Provisions[5]

ACIA contains a rather short legal instrument. ACIA has 3 sections. Section A, B and C altogether has 49 articles and 2 annexes. Section A (Articles 1 – 27) embodies the main provisions concerning the protection and promotion of investment within ASEAN members. Section B (Articles 28 - 42) contains the provisions concerning the settlement of dispute. And section C is on the house keeping provisions of the Agreement. Annex I is under the title Approval in writing which contains the conditions when the parties shall make in writing the requirements in the investment undertakings. These include the name of the contact details of the competent authority and the status of the application of investment. Annex II lays down further requirement concerning expropriation and compensation.

It is stipulated that "Upon the entry into force of this ACIA ("Agreement"), the two previous ASEAN Instruments on investment, namely the ASEAN Investment Guarantee Agreement (IGA) and the Framework Agreement on the ASEAN Investment Area (AIA Agreement) will end. ACIA is then seen as an integral step of the ASEAN to make a single instrument on investment in the region.[6]

The main principle on investment embodied in the ACIA is to create a liberal, facilitative, transparent and competitive investment environment in ASEAN.[7] The principles enshrined in the ACIA include:[8]

(a) liberalisation, protection, promotion and facilitation of investment;
(b) progressive liberalisation of investment;
(c) benefit investors and their investments based in ASEAN;
(d) maintain and accord preferential treatment among Member States;
(e) no back-tracking of commitments made under the AIA Agreement and the ASEAN IGA;
(f) grant special and differential treatment and other flexibilities to Member States depending

on their level of development and sectoral sensitivities;

(g) reciprocal treatment in the enjoyment of concessions among Member States, where appropriate; and

(h) accommodate expansion of scope of this Agreement to cover other sectors in the future.

Another important provision under the ACIA is the meaning of investment. The meaning of investment under ICIA includes:[9]

"... every kind of asset, owned or controlled, by an investor, including but not limited to the following:

2 Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk."

The sectors covered in the ACIA are limited to the following sectors:[10]

(a) manufacturing;
(b) agriculture;
(c) fishery;
(d) forestry;
(e) mining and quarrying;
(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and
(g) any other sectors, as may be agreed upon by all Member States.

ACIA also provides a guarantee (under Article 11) that each member will "accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security."

Article 11 Para 2, also further explains the following principles:

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
(b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

C. Principle of Protection

Surprisingly, ACIA has incorporated the principle of non-discriminatory and the prohibition of investment measures in its provisions. The principle of non-discriminatory is reflected in Article 5 under the heading of national treatment and Article6 on Most-favoured-nation treatment.

Article 5 embodies a standard provision which states as follows:

"1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Member State shall accord to investments of investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the

admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

Similarly Article 6 on most-favoured-nation also demonstrates the non-discriminatory treatment against the investors of member countries. Article 6 provides, in part:

"1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Member State shall accord to investments of investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

The inclusion of trade-related investment measures (TRIMs) into ACIA adds a unique provision of ACIA. As the TRIMs are not directly related to investment. It relates mostly with trade. It regulates measures of a member county that, to a certain degree, might affect the free-flow of investment. The TRIMs consists of 2 measures, firstly the entry requirements and secondly the performance requirement.[11]

D. Principle of Compensation

ACIA has clearly stated that member states shall not, under article 14, "expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation")."

The second sentence of article 14 para. 1 however provides the exception to the first sentence. If the nationalisation or expropriation takes place, it may only be undertaken:

(a) for a 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.

The a to c requirement above are the common requirements recognized in most international investment agreements. The d requirement however, which states "in accordance with the process of law," is similar with the wordings found in the NAFTA Agreement.

The c requirement is further elaborated in paragraph 2. paragraph 2 states:

"The compensation referred to in sub-paragraph 1(c) shall:
(a) be paid without delay;
(b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable;

(c) not reflect any change in value because the intended expropriation had become known earlier; and
(d) be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States."

The reference to the fair market value standard for the payment of compensation is reflecting the provision commonly found in the IIA. The NAFTA Agreement, for example, also contains this principle in Article 1110 para. 2 which in part states:

"2. *Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place* ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value." (Emphasis added).

E. Principle of Settlement of Dispute

The provisions with regard to the dispute settlement dominate most of the ACIA. It has 14 (Articles 27 -41), put under Section of the ACIA.

ACIA recognizes two broad kinds of disputes. Firstly, dispute between or among Member states (Article 27). Secondly, which occupies most of the provisions, is the disputes between an investor and Member states.

On the first mentioned dispute, disputes between or among Member states, Article 27 clearly has given the direction as to how this dispute may be settled. Article 27 refers to the mechanism in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Lao PDR on 29 November 2004, as amended.

The rest of the provisions under Section B contain a rather complicated mechanism regulating the settlement of dispute between investor and the State. This section regulates in a greater detail on the settlement between investor and a state is reflecting the seriousness or the importance of the dispute and therefore, a greater detail provision is required.

Under Section B. there are 3 mechanisms for the settlement of dispute. They are:
(1) Conciliation (Article 30);
(2) Consultation (Article 31); and
(3) Arbitration (Article 33 para. 2).

Conciliation under article 30 above is similar to the negotiated settlement. It does not refer to the mechanism through conciliation as found in Article 33 of the United Nations Charter or the provisions on conciliation in ICSID Convention.[12]

Article 30 para. 1 states that conciliation may begin at any time and be terminated at the request of the disputing investor at any time.

The consultation under Article 31 is the first procedure taken by the parties when a dispute on investment appears. Article 31 requires that consultation may be initiated by a written request delivered by the disputing party

investor to the disputing member State (Article 31 para. 1). The consultation must be resolved within 180 days of the receipt by a disputing member State of a request for consultations.

When consultation fails, the disputing member may submit the dispute to arbitration (Article 32).

The 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 importance is the provision concerning the governing law. Article 40 contains the provision which in my personal opinion, is rather reflecting or adopting the interest of member countries or host countries. This article in principle is rather difference with rest of the IIAs. Article 40 states:

> "1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 33 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State."

The provisions may be found in NAFTA Agreement. The governing law according to Article 1131 NAFTA Agreement is limited to two laws, the NAFTA Agreement and international law. This article stipulates: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

F. RoI Investment Law

The discussion on Republic of Indonesian (RoI) investment law will be confined to and follow the three sub-headings above, namely the principles of protection, compensation and settlement of investment dispute. Accordingly this part will not provide a comprehensive description with regard to the RoI Law on Investment. The term RoI Indonesian Investment Law may cover all laws, jurisprudence and other sources of law. This article will be confined to the RoI Law on Investment, namely the Law No 25 of 2007 on Investment.

The Law No 25 of 2007 (The Law) is the Investment Law which replaces the previous laws, namely the Law No. 1 of 1967 on Foreign Investment and the Law No 6 of 1968 on Domestic Investment Law. Before the Law was promulgated, there are two laws regulating investment which provided different treatment to domestic and foreign investors. This discriminatory treatment was scrapped with the enactment of the Law.[13]

1. Principle of Protection

The basic principle of protection under the Law 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 the government accord equal treatment to the domestic and foreign investors, by taking into account the national interests.[14]

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

2. Principle of Compensation

On compensation in case of the nationalisation takes place, the Law contains a standard provision on this issue. Article 7 provides that the government will not take any nationalization measures or taking over the ownership of investment, except by the Law.

In the event the nationalization takes place, the government will give compensation according to the market value.

3. Principle of Settlement of Dispute

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

Para. 2 states, when the negotiation fails (without mentioning conditions, for example, the time for consultation or negotiation required), then the parties may submit the dispute to arbitration, to the ADR or the Court in accordance with the Laws.

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

G. Closing Remarks

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

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

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[2] 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.

[3] See in general: 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).

[4] See for example. Gustavo Vega Cánocas, The Experience of NAFTA Dispute Settlement Mechanisms: Lessons for the FTAA, March 20, 2003, p. 2. (In 2003, the disputes solved by the NAFTA was 23 cases. Since then, the number has increased (*Ibid*., p. 3).

[5] 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.

[6] Article 47 ACIA.

[7] Article 2 ACIA.

[8] Article 2 ACIA.

[9] Article 4 ACIA.

[10] Article 3 ACIA.

[11] For further discussion of TRIMs, see the author's work: *Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO)*, Jakarta: Rajawali Pers, 2004.

[12] 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 to the other party.

[13] One commentator however argued that Indonesian law on investment has been going toward liberalisation. (See: Tim Wilson, *Innovating Indonesia Investment Regulation: The Need for Further Reform*, Institute of Public Affairs, May 2011, p. 2.

[14] This non-discriminatory treatment is further stated in Article 6 of the Law.