INDONESIAN BILATERAL INVESTMENT TREATY WITH MALAYSIA*[1]

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ABSTRACT

Investment is one of the financial sectors that are influenced by economic conditions. Before the economic crisis in 1997-1998, ASEAN was the most popular region for foreign investment from developed countries. This is shown by the increase of investment in ASEAN in 1995-1997 which amounted to 32,482 billion US Dollars. However, from 1998-2000, investment in the ASEAN region declined. At the same time due to the impact of economic crisis, demolishing of the stability of economic and industry happened in some ASEAN countries. This situation reduced the investors' interest to invest in ASEAN member countries due to the high risk. In a global economy, the investment does not need to be supported by ASEAN member countries' competitiveness index. Other factors that influence investment in ASEAN are the quality of human resources, the trust of the investor to the economic condition, and the political stability of the country. In 2007, Indonesia had revised the Investment Law, on the other hand, since 1987 Indonesia had signed Bilateral Investment Agreements with Malaysia, Thailand, Philippines, and Singapore. This paper will explore how some ASEAN countries arranged their law on investment to increase the investment of foreign investors, and the Bilateral Investment Treaties of Indonesia with some ASEAN Countries, particularly with Malaysia. Furthermore, how on The Dispute Settlement Mechanism to be arranged in the both countries.

Keywords: Investment, Investment Law, Bilateral Investment Treaty.

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1.0 INTRODUCTION

Investment law is a specialized area of international economic law, and international economic law is a specialized area of international law. Thus, in analyzing international investment law it is appropriate to use the main sources of international law. However, some finer details need to be mentioned to present a more complete picture of the system (K.N. Schefer, 2016).

Today, the main source of international investment law is treaty law. There are thousands of Bilateral Investment Treaties (BITs) and various sectoral, regional, or multilateral agreements containing specific obligations of the party states. In BITs, the obligations that the foreign investor has are usually stipulated in more detail compared to the obligations of the host country. Therefore, there is an unequal standing between the host country and the foreign investor.

BITs are the most prevalent source of host state investment protection obligations. It is important to remember that while BITs contain obligations that the host country has regarding foreign investor and their investment, it is two states that conclude the treaty. Thus, the BITs in general govern state-to-state relations. As international treaties, BITs are subject to general international law rules on interpretation, applicability, conflicts, and withdrawal if the parties do not specifically determine to create their own rules in the agreement (K.N. Schefer, 2016).

BITs are an international agreement made by two countries, which establish the terms and conditions for the investment made by a national or a company from one state in the other state. BITs serve as a legal foundation for foreign investment activities which guarantee protection as well as a means for economic development in the host states. The unique characteristic of many BITs is that they contain a provision on the use of investment arbitration to settle investment disputes between foreign investors and the host states. Most BITs require that after negotiation fails, the dispute should be brought to arbitration instead of the host state's court due to the possibility of bias (K.N. Schefer, 2016).

The Association of South East Asian Nations (ASEAN) as a group has a strong bargaining position against foreign investors. With that in mind, the member countries should be able to negotiate collectively, both regionally and multilaterally when dealing with investors from outside ASEAN. This is especially in negotiating protection clauses such as the Most Favored Nation (MFN); Fair and Equitable Treatment (FET); and National Treatment (NT) clauses. These protections n shall be precisely drafted to limit their applicability. Additionally, in dispute settlement, ASEAN members should use the International Investment Arbitration (IIA) as a complement to local adjudication. Furthermore, during the negotiation of a BIT proposal, it is important to prioritize an arbitration center that is in South East Asia instead of outside the region. To expand and deepen economic and industrial cooperation and to create favorable conditions for investment between countries, several BITs have been made between Indonesia with some ASEAN Countries. One of such BITs is the one that Indonesia has made with Malaysia. With that in mind, there are two research questions in this paper, which are:

1. How were the BITs between Indonesia and some ASEAN member states, and with Malaysia agreed?
2. How does the dispute settlement mechanism apply in the BIT between Indonesia and Malaysia?

This paper will be divided into three sections. The first section is focused on the introduction, the second section will discuss the Indonesian BITs with some ASEAN Countries, and Malaysia and its Dispute Settlement Mechanism, and section 3 will explain the conclusion.

2.0 DISCUSSION

2.1 Indonesian BITs with Some ASEAN Countries

According to The European Commission, a Bilateral Investment Treaty is an agreement establishing the terms and conditions for investment by nationals and companies of one country in another country. It establishes legally binding protection to encourage investment flows between the two countries.

BIT in general aims to give some protection to foreign investors from possible discriminative treatment from the host country, to prevent non-economic barriers, and to deal with the national treatment towards foreign investors. BIT also function in several ways, such as a commitment document from the host country to the other country, to encourage investment flows between the two states, to protect the rights of investors, and as a universal tool for foreign investors as a documented investment relation.

As the biggest Southeast Asian country in almost every aspect, the socio-political development in Indonesia, to a certain extent, are reflected in the development of ASEAN. For Indonesia, the call for ASEAN Transformation mirrored the change in the socio-political landscape that has taken place in Indonesia since 1998. The *Reformation* movement in Indonesia has made human rights, democracy, the rule of law, and good governance an important feature of Indonesia's politics, and it is reflected in its foreign policy. Indonesia has been a strong supporter of the ASEAN Charter believing that such a constituting document can greatly help in advancing these noble ideals (Termsak Chalermpalanupap 2009).

It is important to note that the Indonesian Constitution and the Law Number 24 Year 2000 on International Treaties stipulate that negotiations on international treaties lie under the purview of the Government of Indonesia. During the drafting process of the ASEAN Charter, the then Minister for Foreign Affairs of Indonesia, Hassan Wirajuda, regularly gathered members of civil society through the "Foreign Policy Breakfast" initiative. The Directorate-General for ASEAN Cooperation also regularly convened constituent gatherings attended by representatives from Indonesian universities, Non-Governmental Organizations, youths, and other public organizations including religious organizations. These were done to learn their views and

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concerns to ensure the interests of the Indonesian people are justly reflected in the new ASEAN Charter. It is later proven that these interactions help in smoothing the process of ratification.

Regarding investment, ASEAN investment cooperation is implemented through the Framework Agreement on the ASEAN Investment Area (AIA) made in 1998, while investment protection is accorded under a separate agreement, e.g., the ASEAN Agreement for the promotion and Protection of Investment made in 1987, commonly referred to as ASEAN Investment Guarantee Agreement (IGA).

Since 1970, there are 67 BITs and Multilateral Investment Treaties (MITs) that Indonesia has signed with other countries (Ministry of Foreign Affairs of the Republic of Indonesia n.d.). The oldest BIT that Indonesia has signed was with Belgium in 1970, with the treaty expiring on the 25th of May 2017. Meanwhile, the newest BIT that Indonesia has signed was with Singapore in 2018.

2.2 The BIT between Indonesia and Malaysia

Related to the ASEAN countries, the BIT between Indonesia and Malaysia was signed on the 22nd of January 1994. It entered into force on the 15th of August 1994 and will expire on the 15th of August 2024, with a Survival Clause for 10 years. There are some similarities between the BIT that Indonesia made with Malaysia with the BITs that Indonesia has made with three other ASEAN member countries. At the introduction clause, it stated the following terms, “Bearing in mind the friendly and cooperative relations existing between the two countries and their people”.

The definition of investment varies in every BIT. Most definitions cover “every kind of asset” or “any kind” and are followed by a list of assets. This broad definition often creates difficulties when a dispute arises before arbitral tribunals. Furthermore, protections clauses in the BIT are also numerous and unclear. The MFN, FET, and NT clauses which are meant to attract investors and protect their activities need to be interpreted in the context of economic development in South East Asia. These ambiguities in the BIT explain why the job of resolving the dispute which involves interpretation activities should be done by people who understand the context where the disputes arise.

Furthermore, the introduction clause of the BIT stated that,

“Desiring to expand and depend economic and industrial cooperation on a long term basis, and in particular, to create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investment and individual business initiative with a view to economic prosperity of both Contracting Parties;

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Considering the Agreement amongst the Governments 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 signed on the 15th December 1987."

These introduction clauses are different compared with the BIT that Indonesia has made with Thailand which was signed on the 17th of February 1998, which introduction clauses state,

"Desiring to intensity economic cooperation between both countries.
Bearing in mind the friendly and cooperative relation existing between both Contracting Parties.

Intending to create favorable conditioning for investments by investor of one Contracting Party in the territory of the other Contracting Party.

Recognizing that the encouragement and protection of such investment under this Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both countries.

Considering the Agreement among the Governments 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 Investments done in manila on 15th December 1987, as amended by the Protocol to Amend the 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 done in Jakarta 12th September 1996."

In the BIT between Indonesia and Malaysia, the Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.

For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner that negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement.

Since its conclusion, the Indonesia-Malaysia BIT has greatly benefitted both countries. This can be seen in the value of Foreign Direct Investment (FDI) in Indonesia from Malaysia. Data from the Investment Coordinating Board shows that in 2010, the FDI value reached 500 Million US Dollars in the form of 198 different projects. This continues to grow, peaking at 3.1 Billion US Dollars and 913 different projects in 2015 (Databoks 2017). Malaysia also reaps benefits from this BIT. Data from the Malaysia Investment Development Authority shows that investment from

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Indonesia in 2018 amounted to 9,035.6 Million Ringgits in 8 different projects (Malaysia Investment Development Authority 2019). Not only that, Indonesia and Malaysia have also agreed to increase cooperation in the plantation and fishery sectors to further increase the amount of investment that can be received by both countries from each other (Andi Abdussalam 2016).

Seeing the benefits and mutual economic growth that is experienced by both countries, we can see the impact that the Indonesia-Malaysia BIT has on increasing the amount of investment that flows to each other from both countries. This is in line with research that shows the huge impact that FDI has on economic growth in Indonesia and Malaysia (Cahyadin M. & Sarmidi T. 2019). With the growing economic interdependency between the two countries and the ASEAN region, the total value of investment from each country to each other will surely go up as well. This will result in a continuous economic growth for both countries, which will be further increased if Indonesia and Malaysia can create more economic treaties together with ASEAN.

2.3. Dispute Settlement Mechanism

There are two kinds of Dispute Settlement on the BIT, which are Dispute Settlement Between States and Dispute Settlement Between Investor and State. One of the important international conventions related to investment dispute settlement is The Washington Convention 1965, also known as the ICSID Convention. Through the provisions in this convention, the International Centre for the Settlement of Investment Disputes (ICSID) is established.

BITs are also the legal basis under which the dispute settlement will be brought through arbitration. ICSID is often referred to facilitate the resolving investment dispute. Because it does not have a permanent arbitral tribunal, the ICSID allows independent arbitral tribunals and arbitrations mechanism.

ICSID is one of the main fora for resolving disputes between foreign investors and host states. ICSID Convention is designed to promote the settlement of dispute between state and private foreign investors. It aims to contribute to the promotion of economic development. For arbitral tribunals established within it, jurisdiction depends on the existence of a dispute arising out of 'an investment'. Article 25(1) of the ICSID Convention states, "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

ICSID is one of the International Investment Arbitration institutions and located in Washington D.C., besides the United Nations Commission on International Trade Law in New York and the Permanent Court of Arbitration in Den Haag. Investor-State Dispute Settlement can be solved by the National Court of the Host State or by Investment Court System

(bilateral/regional/multilateral) (but the system is still being proposed by European Union). Indonesia and Malaysia are a member of the ICSID Convention. Indonesia joined the Washington Convention with the Law No. 5 year 1968. With Malaysia joining the Convention on the 22nd of October 1965. However, the two countries have different regulations regarding the settlement of Investor-State Dispute Settlement. For Indonesia, in article 32 points (1) – (4), Chapter 15 on Dispute Settlement of Law Number 25 Year 2007 on Investment there are provisions concerning how to settle the dispute between states and investors. On the other hand, the Malaysian Promotion of Investments Act 1986 does not have any provisions regarding State-Investor Dispute Settlement. This is the same case for other ASEAN member countries such as the Philippines and Thailand. This can be seen in the Law on Investment of Philippines, Act No. 70241 year 1991, as well as the Foreign Business Act of Thailand, No. 2542 year 1999.

The Indonesia-Malaysia BIT itself has several provisions regarding State-Investor Dispute Settlement on Article VII clause 1-3. In particular, clause 2 states that,

"In event that such a dispute cannot be settled amicably within six (6) months from the date of the written notification of such dispute, the investor may refer the dispute to either: (a) the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is a party to the dispute; or (b) the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965."

To enhance regional integration as well as to maintain a competitive investment area, both the Framework Agreement on the AIA and the IGA needs to be reviewed. The objective is to realize a more comprehensive investment agreement which should be forward-looking, with improved features, provisions, and obligations by considering international best practices that would increase investor confidence in ASEAN.[3]

3.0 CONCLUSIONS

From the previous explanation, it can be concluded that Indonesia had made several BITs with other ASEAN member countries. The Indonesia-Malaysia BIT was signed on the 22nd of January 1994, entered into force on the 15th of August 1994, and will expire on the 15th of August 2024 with a Survival Clause for 10 years.

There are two kinds of Dispute Settlement in the BIT, which are Dispute Settlement Between States and Dispute Settlement Between Investor and State. One of the important international conventions related to investment dispute settlement is The Washington Convention 1965, also known as the ICSID Convention which established ICSID.

[3] ASEAN Secretariat, *ASEAN Economic Community Blueprint*, Jakarta: ASEAN Secretariat, 2008, page 13.

Most of ASEAN countries are a member of ICSID Convention, including Indonesia and Malaysia. Malaysia joined the Convention was on the 22nd of October 1965. For Indonesia, article 32 points (1) – (4), Chapter 15 on Dispute Settlement of Law Number 25 Year 2007 on Investment there are provisions concerning how to settle the dispute between states and investor. However, other ASEAN countries such as Malaysia, the Philippines, and Thailand do not have such measures.

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