Encyclopedia of Public International Law in Asia

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Inha University Law School

Managing Editor

Hee Eun Lee
Handong International Law School

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13 International Economic Law

13.1 International and Regional Trade Treaties and Bodies

The result of Uruguay Round: The Agreement on Establishing the Multilateral Trade Organization (World Trade Organization/"WTO") has become a legal framework that must be adhered among its members in conducting international trade relations, within a multilateral framework and also in the regional frameworks (Article 2 Agremeent Establishing The World Trade Organization/"WTO Agreement"). This agreement consists of four annexes as integral parts of this agreement, namely: the trade in goods and services, intellectual property, dispute settlement understanding, trade policy review mechanism, and plurilateral agreement.

The WTO is considered as an important international body in realizing world trade liberalization effectively reducing tariff and non-tariff barriers. There are two principles of non discrimination that should not be violated by WTO members: (1) most-favored-nation/"MFN" treatment obligation regulated in the rules of trade in goods (Article 1: 1 General Agreement on Trade and Tariff/"GATT 1994") as well as regulated in the rules of trade in services (Article 2: 1 General Agreement on Trade in Services/GATS). (2) National treatment obligation regulated in Article 3 of the GATT 1994 and Article XVII of the GATS.

MFN treatment obligation prohibits a country to practice discrimination towards the like products between other countries, meanwhile, the national treatment obligation prohibits a country to practice discrimination towards like products against other countries. However, there are exceptions to these two principles that allow countries to give more favorable treatment even inconsistent with the WTO Agreement as long as it has been agreed in the regional trade treaties as set out in Article 24 of the GATT 1994 and Article 5 of the GATS. These provisions become the legal basis for regional trade agreements to establish customs unions or free trade areas. It could be more favorable in the sense that the countries establishing a regional trade agreements could create special measures that give different treatment to other countries in the WTO, without violating the principle of non-discrimination.

There are several fundamental criteria that should be adhered by WTO's members who establishing the regional trade agreement/"RTA" in terms of avoiding disrupting multilateral trade as stipulated in the provisions of Article 24 GATT and Article 5 GATS: (1) Transparency (notification to GATT / WTO); (2) Commitment to strengthen trade liberalization within the region; (3) Neutrality when establishing trade relations with third countries.

In total, the number of RTA that have been formed and have been identified in the WTO data from 1948 to 2020 is 698. This data is a cumulative notification of RTA in force and inactive. There are 482 cumulative notifications of RTA in force. Then there only 303 cumulative number of RTA in force. And from all regional trade agreements in force, West Asia has participated in the 23 and East Asia has participated in the 89 notifications RTA in force. (Source: WTO Secretariat-January 18, 2020).

The Republic of Indonesia itself has agreed nine RTAs, which has been notified at the WTO, namely: (1) ASEAN-Australia-New Zealand, (2) ASEAN-China, (3) ASEAN-India, (4) ASEAN-Japan, (5) ASEAN-Republic of Korea, (6) ASEAN Free Trade Area (AFTA), (7) Global System of Trade Preferences among Developing Countries (GSTP), (8) Indonesia-Pakistan, and (9) Japan-Indonesia.

The treaty of ASEAN-Australia-New Zealand: This treaty was signed on 27 February 2009. The dates of entry into force have the differences among the signatories' parties, namely: 1 January 2010 for Australia, Brunei Darussalam, Malaysia, Myanmar,

New Zealand, the Philippines, Singapore, and Viet Nam; 12 March 2010 for Thailand; 1 January 2011 for Lao PDR; 4 January 2011 for Cambodia; 10 January 2012 for Indonesia.

The treaty of ASEAN-China: The coverage of this treaty concerning goods and services. The 'trade in goods' provision was signed on 29 November 2004 while the 'trade in services' provision was signed on 14 January 2007. The goods provision was enacted on 1 January 2005 while the provision of the services was enacted on 1 July 2007.

The treaty of ASEAN-India: The coverage of this treaty concerning goods and services. The 'trade in goods' provision was signed on 13 August 2009 while the 'trade in services' provision was signed on 13 November 20014. Dates of entry into Force: Framework Agreement: 1 July 2004, TIG Agreement: India, Malaysia, Singapore, and Thailand: 1 January 2010 Brunei Darussalam, Myanmar, and Viet Nam: 1 June 2010 Indonesia: 1 October 2010 Lao PDR: 1 January 2011 The Philippines: 17 May 2011 Cambodia: 15 July 2011.

The treaty of ASEAN-Japan: This treaty was signed on 26 March 2008. The dates of entry into force have the differences among the signatories parties, namely: 1 December 2008 for Singapore, Japan, Viet Nam, the Lao People's Democratic Republic, and Myanmar, 1 January 2009 for Brunei Darussalam, 1 February 2009 for Malaysia, 1 June 2009 for Thailand, 1 December 2009 for Cambodia, 1 March 2010 for Indonesia, and 1 July 2010 for the Philippines.

The treaty of ASEAN-Republic of Korea: The coverage of this treaty concerning goods and services. The 'trade in goods' provision was signed on 24 August 2006 while the trade in services provision was signed on 21 November 2008. The goods provision date of entry into force was on 1 January 2010 while the services provision date of entry into force was on 14 October 2010.

The clauses in the ASEAN-Australia-New Zealand, ASEAN-China, ASEAN-India, ASEAN-Japan, and ASEAN-Republic of Korea treaties concerning all tariff eliminated at end of implementation by at least one party, tariff rate quotas, all quantitative import restrictions prohibited, rules of origin, all export restrictions, sanitary and phytosanitary measures, the technical barrier to trade, safeguard mechanisms, the balance of payments measures, subsidies, denial of benefits, services, the evolutionary clause of services, investment liberalization provisions, other investment provisions, provisions on capital transfer, domestic regulation, mutual recognition, movement of natural persons, section or other legal documents in services, general exceptions, security exceptions, dispute settlement, intellectual property rights, competition, environment, labor, e-commerce, as well as small and medium-sized enterprises.

The treaty of the ASEAN Free Trade Area (AFTA) was signed on 28 January 1992 during the Fourth ASEAN Summit in Singapore: The legal text of this treaty consists of ASEAN Trade in Goods Agreement (ATIGA) and ASEAN Free Trade Area-Common Effective Preferential Tariff Scheme (AFTA-CEPT Scheme). The AFTA-CEPT is a scheme to realize AFTA by reducing tariffs to 0–5%, removing quantitative restrictions, and other non-tariff barriers.

The treaty of AFTA covers about all tariff eliminated at end of implementation by at least one Party, Tariff Rate Quotas (TRQ); All quantitative import restrictions prohibitions; Rules of Origin (ROO); Prohibitions on all Export restrictions, including quantitative restrictions; Sanitary and Phytosanitary measures (SPS); Technical regulations, standards, technical barriers to trade (TBT); Safeguard Mechanisms (Goods); balance-of-payments measures (Goods); Anti-Dumping measures; Countervailing measures; MFN Clause/Preferences extended from other RTAs (Goods); Denial of benefits; Services; Rendez-Vous/Review/Evolutionary clause (services); Investment Liberalization Provisions; Other Investment Provisions; Provisions on capital transfers; Mutual Recognition; Movement of Natural Persons; Sector-specific chapter/section or other legal instruments (Services); General

Exceptions; Accession; Dispute Settlement (DS); and Intellectual property rights.

The treaty of global system of trade preferences among Developing Countries was signed on 13 April 1988. The member of this treaty consisted of Algeria, Argentina, Bangladesh, Benin, Plurinational State of Bolivia, Brazil, Cameroon, Chile, Colombia, Cuba, Ecuador, Egypt, Ghana, Guinea, Guyana, India, Indonesia, Iran, Iraq, Democratic People's Republic of Korea, Republic of Korea, Libya, Malaysia, Mexico, Morocco, Mozambique, Myanmar, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Singapore, Sri Lanka, Sudan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Venezuela, Republic of Bolivarian, Viet Nam, and Zimbabwe. This treaty has covered provisions about Rules of Origin/"ROO", safeguards mechanism, the balance of payment measures, security exceptions, accession, and dispute settlement.

The treaty between Japan and Indonesia is a bilateral agreement notified as a regional trade agreement on the WTO. This treaty was signed on 20 August 2007 and entered into force on 1 July 2008. The main topic in this treaty is similar to the ASEAN-Japan treaty. The difference between these two treaties is in the value of reducing tariff and non-tariff barriers on the schedule of commitment.

Similar to the treaty between Japan-Indonesia, the treaty between Indonesia-Pakistan is also a bilateral agreement signed on 3 February 2012 and enacted since 1 September 2013. But the main topic under this regional trade agreement only regulating about ROO.

A body called the Committee on Regional Trade Agreement/"CRTA" was formed in February 1996, because the regional trade agreement was vulnerable to provisions that deviated from WTO provisions. The CRTA has been charged with implementing the Transparency Mechanism for regional trade agreement falling under Article 24 of the GATT and Article 5 of the GATS. The CRTA's other functions are to consider how the required reporting on the operation of agreements should be carried out and to develop procedures to facilitate and improve the examination process. The CRTA is also mandated to consider the systemic implications of regional trade agreements for the multilateral trading system and the relationship between them.

CRTA does not quite have strong authority in the reason that the committee only has administrative and feasibility studies without being able to make binding decisions. The proposal to strengthen the function of the CRTA was tried in the 2001 Doha Round of negotiations which then failed to reach an agreement. But, the results of the discussion in the fourth Doha Round stated that WTO members have realized the importance of regional trade agreements in promoting trade liberalization and accelerating economic growth and the need to harmonize relations between multilateral and regional processes.

Ariawan Gunadi and
Prisca Oktaviani Samosir

13.2 Foreign (Direct) Investment Law

The rise of foreign investment and technological adoption in Indonesia has prompted the modernization of the country's economic and trade laws to cater to a more demanding and sophisticated economic system. The Indonesian government has historically been open to foreign investment ever since the Suharto regime, which focused on attracting foreign capital to spur the economic development of the archipelagic nation. The Indonesian legal regime has continued to evolve to accommodate its need for greater foreign investment, entering numerous international legal instruments that provide the basis for investment attraction, protection, and dispute settlement. This work aims to provide brief elaboration on the foreign direct investment in Indonesia derived from its primary legislation, i.e. Law No. 25 Year 2007 on Investment ("Investment Law"). The elaboration covers the scope of application, investment institution, entry

and approval of new investment, relationship to other laws, investment incentives, investor rights, dispute settlement, the status of investment treaties, and unique features of the Law.

13.2.1 *Scope of Application*

Initially, Indonesia segmented regulations for both foreign and domestic investment. The existence of separate laws for foreign and domestic investment, which consist of Law No. 1 Year 1967 concerning Foreign Investment and Law No. 3 Year 1968 concerning Domestic Investment, was taken into account by the government, and four decades after the enactment of the law regulating the former, Indonesia promulgated Law No. 25 Year 2007 on Investment ("Investment Law") which presented a unification of both foreign and domestic investment, reflecting the significant changes in the socio-economic in the country.

The Investment Law defines foreign investment as an investing activity to do business in the territory of the state of the Republic of Indonesia that is carried out by a foreign investor both by use of all of the foreign capital and by engagement in a joint venture with a domestic investor; whereas "foreign capital" is defined as capital that is owned by a foreign state, a foreign national, a foreign business entity, a foreign legal entity, and/or an Indonesian legal entity, of which the capital is in part or whole is owned by a foreign party.

The Investment Law only regulates direct investments and does not regulate indirect or portfolio investments. In regard to equal treatment, the Investment Law mandates the government to provide equal treatment to all investors. The Law also removes any time restrictions for all investments.

13.2.2 *Investment Institution*

To facilitate and streamline the process of foreign investment, Indonesia has set up the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal*/ BKPM). BKPM is responsible for approving most of the foreign investment flows in Indonesia. BKPM has the main responsibility to coordinate, analyze, and promote investment. It reviews, assesses, and ultimately approves or rejects any applications by foreign investors to establish a foreign investment company in a particular sector. Therefore, BKPM relies upon the recommendation of the relevant technical or sectoral ministry. Regencies and cities generally organize investment in their respective regions through a regional investment service agency called the Regional Investment Coordinating Board. However, where the investment is associated with foreign investment, then it must be approved by the Indonesian Government, through BKPM. Foreign investors must submit to BKPM periodic investor activity reports summarizing investment progress and any obstacles to their investment activities.

13.2.3 *Entry and Approval of New Investments*

The Investment Law formulates the arrangement for the Negative Investment List through the enactment of Presidential Regulations on the criteria, conditions, and shareholder compositions for restricted and open sectors for foreign investment. Currently, the Negative Investment List is governed by Presidential Regulation No. 44 Year 2016 on Restricted and Conditionally Open Sectors in Foreign Investment, as revised by Economic Policy Package XVI. This law relaxed the restrictions to allow foreign investment in 25 sectors. This relaxation trend is predicted to continue with the enactment of a Presidential Regulation that will restrict only six sectors out of the currently 20 sectors being restricted. In addition, the Negative Investment List also gives incentives, in the form of increased maximum capital ownership for the other ASEAN Member States.

The Investment Law regulates the licensing and authorization of a company. In addition, it reflects the significant improvements in regards to the government's ability to provide supplementing facilities to ease the establishment and operation of foreign investment by virtue of facilities that are available to be granted to foreign investment companies in the form of limited liability companies

("PT PMA"). On 21 June 2018, Government Regulation No. 24 Year 2018 on Online Single Submission ("GR OSS") was enacted. Prior to investing in Indonesia, a PT PMA must obtain Registration Permits (*Pendaftaran Penanaman Modal*) through the Online Single Submission ("OSS"). The OSS system serves to verify that the investment is indeed in accordance with the Indonesia Standard Industrial Classification and Negative Investment List. Within the OSS regime, investors will complete registration by providing information regarding the type of investment, the origin of the investment, and the composition of the investment in terms of domestic and foreign funds invested.

GR OSS also allows for prior grandfathering provisions to continue to apply, thereby protecting prior approved investment if there has been a reduction in the permitted level of foreign investment in the New Negative Investment List. However, grandfathering protection does not allow further expansion in sectors where the permitted foreign investment has been reduced.

Under the OSS regime, a foreign investor is required to obtain Business Permits (*Izin Usaha*), Commercial or Operation Permits (*Izin Komersial* or *Izin Operasional*), Location Permits (*Izin Lokasi*), Environmental Permits (*Izin Lingkungan*) and Building Construction Permits (*Izin Mendirikan Bangunan*). As of the time of this writing, all of the permits are still required, except for the Environmental Permit, which is no longer needed and replaced with the new requirement of an Environmental Approval instead by virtue of Law No. 11 Year 2020 on Job Creation. As of 2018, the previously mandated Principal License is no longer needed, with it being replaced by Investment Registration with the promulgation of BKPM Regulation No. 13 Year 2017 concerning Guidelines and Procedure on Licensing and Facilitation of Investment.

Finally, GR OSS imposes certain requirements to be fulfilled to be eligible to conduct foreign investment, which includes the following requirements: requirement to be in a certain location; requirement for maximum capital ownership, the requirement for partnerships; and the requirement for a special license/permit/recommendation/other documents from the relevant ministries and/other government agencies.

13.2.4 *Relationship to Other Laws*

The Investment Law can be considered as an umbrella law that lays out the basic provisions for foreign investment. Foreign investors must also take into account the implementing and technical or sectoral regulations that regulate the requirements needed to commence and operate an investment.

Law No. 40 Year 2007 on Limited Liability Company (*"Company Law"*). Pursuant to the Investment Law, foreign investments must be in the form of a limited liability company under Indonesian law and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by law. Domestic and foreign investors who make an investment in the form of a limited liability company (*Perseroan Terbatas* or PT) shall subscribe for shares at the time the limited liability company is established; purchase shares and take another method in accordance with provisions of laws and regulations.

A *Perseroan Terbatas* or "PT" is a legal entity established based on an agreement, conducting business activities with all of its authorized capital divided into shares, and fulfilling the requirements stipulated in the Limited Liability Company Law and its implementing regulations. Therefore, a PT is a legal person with a legal identity separate from that of its shareholders. Thus, the shareholders of the company are not personally liable for the obligations of the company. The shareholders have limited liability to the extent that their liability for the acts of the company is limited to their capital contribution.

The corporate structure of a company in Indonesia adopts a two-tiered approach. The senior officers responsible for the actual management of the company in an operational sense are the *Direksi* (Director). The *Direksi* may comprise

just one member but usually comprises more than one to oversee the different functions of the company. Each member of the *Direksi* has full power to represent the company (unless it is stipulated otherwise in the company's article of association). The second tier of corporate governance is the *Dewan Komisaris* (Board of Commissioner) who supervise and advise the *Direksi*. The Board of Commissioner has a number of rights and duties including the right to suspend the *Direksi* in certain circumstances. Under the Company Law, both the *Direksi* and the Board of Commissioner must act for the best interest of the company.

In regard to capital requirement, BKPM Regulation No. 1 Year 2020 and Government Regulation No. 5 Year 2021 require that a minimum of IDR10 billion be invested in a new PT PMA or its equivalent in US$ (around US$ 693,310.60), excluding the cost from the land and buildings. In addition to the minimum investment requirement, the regulation also requires the value of issued capital to be the same as the paid-up capital, at least Rp. 2,500,000,000.00 (two billion and five hundred million Rupiah); and for the percentage of share ownership calculated based on the nominal value of the shares.

Law No. 13 Year 2003 concerning Labor(*"Labor Law"*). One of the concerns for investing in a host country is the law regulates labor. The Labor Law provides that every employer that employs foreign workers must obtain written approval for such employees from the Minister of Manpower or the designated officials, along with the requirement to prepare a foreign worker manpower utilization plan detailing the relevant information of the employment. It is to be noted in accordance with Government Regulation No. 34 Year 2021, that foreign workers can only be employed in Indonesia for certain positions and for a certain time.

Technical or Sectoral Laws. As previously stated, the Investment Law serves as an umbrella law. Thus, it has to relate to other laws and their implementing regulations. For example, if a foreign investor wishes to invest in a coal mining project in East Kalimantan, they would take into account the Investment Law, GR OSS, the Minerals and Coal Mining Law, Ministry of Energy and Mineral Resources Regulations, and the local government's regulations. Various sectoral laws exist under the various ministries overseeing their respective functions. For an illustration, the five most popular sectors for foreign investment in the first quarter of 2020 are the following:

1. Metal industries, which are subject to the Minerals and Coal Law;
2. Electricity, gas, and water sectors, which are subject to the Electricity Law, the Oil and Gas Law, and the Water Resource Law;
3. Transportation, warehouse, and telecommunication sectors, which are subject to the various transportation laws, the Warehousing Law, and the Telecommunication Law;
4. The industrial estate and offices sectors, which are subject to the Housing and Residential Area Law and the Building Law; and
5. The chemical and pharmaceuticals sector, which are subject to the Pharmaceuticals Law.

13.2.5 *Investment Incentives*

The Investment Law provides incentives in the form of tax and financial incentives, employment/immigration matters, and longer duration of land title.

Tax and Financial Incentives. The eligible investors may enjoy tax and financial incentives in the form of, amongst others, a reduction of income tax through the reduction of net earnings up to a certain level within a certain time; a waiver or reduction of import duty in respect of imported capital goods, machinery or other equipment used for production activities where such capital goods, machinery/equipment are not yet produced in Indonesia; land and building tax facilities, especially in certain business sectors located within certain areas; etc. To qualify for tax incentives an investor must invest in a pioneer industry and should provide value-added, introduce new technology, and be strategic to the national economy.

Immigration. The Investment Law provides for limited stay permits for foreign personnel of 2 years (rather than 1 year); the conversion of a limited stay permit to a permanent stay permit after 2 consecutive years; a multiple re-entry permit for limited stay permit holders valid for 1 year and issued for 1 year following the issuance of a limited stay permit; a multiple re-entry permit for limited stay permit holders valid for 2 years and issued for 2 years following the issuance of a limited stay permit; and a multiple re-entry permit for permanent stay permit holders issued for 2 years following the issuance of a permanent stay permit.

Longer Duration of Land Title. Initially, the Investment Law provides a different provision regarding the duration of land title and its extension with the Law No. 5 Year 1960 on Agrarian ("Agrarian Law"). The Investment Law provides an acceleration for land title extensions which states that an eligible investor may have a Hak Guna Usaha (HGU) or Right to Cultivate title for 95 years (the initial land title will be given for 35 years) and is further extendable upon its elapsing; or a Hak Guna Bangunan (HGB) or Right to Build title for 80 years (the initial land title will be given for 30 years) and is further extendable upon its elapsing; or a Hak Pakai (HP) or Right to Use a title for 70 years (the initial land title will be given for 25 years) and is further extendable upon its elapsing. This provision is considered as violating the Agrarian Law and was brought before the Constitutional Court for a judicial review. The Constitutional Court ruling that this provision is invalid and that foreign investors may only extend the land title period after the initial period given by the Government has expired.

Special Economic Zones. Under Government Regulation No. 40 Year 2021 concerning Facilities and Convenience in Special Economic Zones (KEKs), foreign investors enjoy an added number of benefits and incentives. Convenience is given in regard to taxation and customs, land and spatial laws, business licensing, and other facilities. Investors that are eligible to enjoy these facilities include investors that are involved in the development and operation of KEKs, KEK infrastructure providers, certain commodity processing industries, and certain product manufacturing industries. Moreover, energy development industries, logistics centers, tourism, health, education, financial services, creative, research and development, and other industries that are determined by the National Council are also eligible for such benefits.

13.2.6 *Investor Rights*

The Investment Law governs certain rights for an investor, among others:

Right to be compensated for Nationalization. The Investment Law states that, in the event of nationalization, the Indonesian Government will compensate foreign investors for the investment based on the "market price" of the nationalized assets. Unfortunately, the process for determining the market price is not definitively set out in the Investment Law. If the parties cannot reach an agreement on the amount of compensation, the Investment Law provides for arbitration to settle the matter.

Right to Repatriate. The Investment Law allows definitive categories for repatriation of monies from an investment made in Indonesia. The categories that can be repatriated include capital; profits, bank interest, dividends, and other income; additional funds which are required to finance capital investment; funds for repayment of loans; royalties; personal income of expatriates who work in capital investment companies; the proceeds of sale or liquidation of the capital investment company; compensation for damages; payments which are made within the framework of technical assistance and technical and management service fees, payments which are made under project contracts, and payments for intellectual property; and proceeds from the sale of assets of capital investment companies.

13.2.7 *Dispute Settlement*

The Investment Law states that, if there is a dispute between the Government and a foreign investor

that cannot be settled amicably, then such parties shall settle the dispute through international arbitration that must be agreed on by the parties. More concrete examples of dispute settlement provisions can be found in Indonesia's more recently concluded international investment agreements (IIAs).

13.2.8 *Status of Investment Treaties and Involvement in Investor-States Dispute Settlement* (*ISDS*)

Bilateral Investment Treaties (BITs). From 1968 to 2021 Indonesia signed Agreements for the Promotion and Protection of Investments (BITs) with 65 states. With a series of investment arbitrations commenced against Indonesia up to the year 2014, there has been vocal support for Indonesia to at the very least consider terminating the BITs and FTAs containing investment chapters that form the basis of its offer of consent to arbitrate with foreign investors. After conducting a series of reviewing the existing BITs since 2013–2014, on 30 June 2015, Indonesia terminated its BIT with the Netherlands. In the past few years, Indonesia has terminated its BITs with 25 other states, including three of her major investors: the Netherlands, China, and Singapore,[2] as well as those with France, Germany, Norway, India, Switzerland, Malaysia, Pakistan, Viet Nam, Egypt, Argentina, and a dozen other countries. Currently, only 26 remain in force.

Since Indonesia has signed the Convention of ICSID in 1968 up until this moment, Indonesia had been a disputing party in a process of dispute settlement in ICSID for at least six times. The most recent disputes, for instance, are the case of Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13), Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case No. ARB/12/40), and Indian Metals & Ferro Alloys Ltd (IMFA) v. Republic of Indonesia.

Indonesia was the Respondent in those disputes. The first case being brought against it in 1982 concerning the alleged expropriation of a hotel in Jakarta, Indonesia through revocation of the license of the foreign investor. One of the most notable cases involved a fraudulently obtained mining license, which proceeded to a Decision on the Merits before the arbitral tribunal ruled in favor of Indonesia. The issuance of the invalid mining licenses at the time of the rendering of the investment was the authority of the East Kutai Regency government, whose Regent's signature was falsified by the Claimants.

The Indonesian government has indeed terminated a series of bilateral investment treaties, with the purpose being for the renegotiation of new treaties with more favorable terms that are aimed to correct the shortcomings of the BIT models that it had previously entered upon. During the process of terminating and renegotiating a new model of its BIT, in October 2018, Indonesia signed the new BIT with Singapore which still provides the ISDS mechanism, which has subsequently been ratified through Presidential Regulation 97 Year 2020.

ASEAN Comprehensive Investment Agreement (ACIA). ASEAN Comprehensive Investment Agreement (ACIA), which entered into force on 29 March 2012, was drafted to achieve the goal of regional economic integration. ACIA aims to create a liberal, facilitative, transparent, and competitive investment environment in ASEAN. The objective 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 AEC in accordance with the AEC Blueprint.

The ACIA covers the following sectors: (a) manufacturing; (b) agriculture; (c) fishery; (d) forestry; (e) mining and quarrying; (f) services incidental to manufacturing, agriculture, fishery, forestry, mining, and quarrying. ACIA also provides investors with the following features: Investment Liberalization; Non-Discrimination; Transparency; Investment Protection such as fair and equitable treatment, Full protection and security, No unlawful expropriation, and Free transfer of funds.

The ISDS mechanism provided by ACIA consists of: arbitration, other methods of alternative dispute resolution, and domestic courts.

Indonesia-Australia Comprehensive Economic Partnership Agreement (*IA-CEPA*). 2020 marks a year of immense progress for Indonesian-Australian economic relations as both nations took the necessary steps to recommit to future partnerships in trade and investment. The fate of the Indonesia-Australia BIT was decided in February 2020 when the two parties decided to terminate the BIT and its sunset clause through an Exchange of Letters. Exactly five months after such termination, the IA-CEPA officially came into force and with it new provisions that represent the reform that Indonesia seeks in its investment agreements. IA-CEPA was created based on the ASEAN-Australia-New Zealand Free Trade Agreement ("AANZFTA"), it covers goods, services, and investments. Therefore, the two agreements will co-exist after IA-CEPA enters into force, and businesses have the option of selecting which agreement is best suited to them.

The IA-CEPA also provides rules governing the treatment of investors and their investments, such as protection against discriminatory treatment; require payment of fair compensation where investment is expropriated; ensure investment-related capital transfers can occur freely and without delay; and guarantee that investors and their investments will be accorded a minimum standard; of treatment in accordance with the accepted international law standard.

It is important to note that while IA-CEPA provides for investment arbitration claims, an ISDS claim concerning IA-CEPA may only be brought in relation to commitments in the Investment Chapter.

There are also exceptions for Government's right to regulate in the public interest that cannot be brought upon a claim, which includes: public health measures; Australia's foreign investment network; Australia's right to maintain existing and introduce new measures in key policy areas; Australia's right to maintain existing and introduce new measures in key policy areas; and general exceptions to the Investment Chapter.

In addition, IA-CEPA also provides procedural provisions in order to balance the right of an investor to file a claim with the right of the Governments to regulate in the public interest, including an expedited review of claims that are insubstantial or manifestly without legal merit; mechanisms to deter unmeritorious claims, including through the award of costs against a claimant; on request, the Parties may issue interpretations of the Agreement, which must be followed by ISDS tribunals; time limits on bringing a claim, and q requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests.

IA-CEPA also provides for parties to first engage in consultations and in the event such consultations do not result in a settlement, it provides for the utilization of ICSID Conciliation before the dispute can be submitted.

13.2.9 *Unique Features*

Divestment Requirements. Currently, a wholly-owned PMA company is required to ensure that a certain portion of its shares is divested within 15 years after the company commences its commercial operations (either through a direct sale or through a listing on a stock exchange). Although there is no specific minimum percentage of share ownership that should be divested, BKPM has taken the view that at least 5% of the total issued shares should be divested. This is consistent with Government Regulation No. 20 of 1994 as amended by Government Regulation No. 83 Year 2001 that requires at least 5% of the shares in PMA companies should be held by Indonesian individuals or entities in certain industrial sectors. The divestment requirement for a wholly-owned PMA company is formally stated in its foreign investment approval.

Nominee Structures Prohibited. The Investment Law prohibits any investors that undertake capital investment in the form of an Indonesian limited liability company on behalf of another party.

Yetty Komalasari Dewi