

# Non-Discrimination Principle in Helping ASEAN Economic Communities to Protect National Interest

Daniel Hendrawan<sup>a\*</sup>, Ni Made Ayu Geana<sup>b</sup>, <sup>a,b</sup>Maranatha Christian University, Email: <sup>a</sup>[Daniel.hendrawan@rocketmail.com](mailto:Daniel.hendrawan@rocketmail.com), <sup>b</sup>[geana.cahya@gmail.com](mailto:geana.cahya@gmail.com)

Challenges and dynamics of the global economy in the last decade reinforce the commitment among the ASEAN countries to strengthen economic cooperation based on the ASEAN Economic Community (AEC). AEC is the embodiment of the noble ideals of the leaders of ASEAN countries and since 2003 has worked to make ASEAN a region which is stable, prosperous, and progressive in economic growth. The efforts to integrate the ASEAN countries are not easily realized. One of the challenges faced by Indonesia is the liberalization of the investment sector and to prepare for the AEC 2015 and in the national interest, mapping the Indonesian economy and connection issues at the regional level, as well as the steps that need to be pursued systematically needs to be taken into account. Application of the principle of non-discrimination in the Law number 25 Year 2007 regarding investment is an effort to protect the interests of foreign and domestic investors with regard to national unity, an important element in the preparation of Indonesian economic integration into the AEC.

**Key words:** *Asean Economic Community, Non Discrimination principle, Law number 25 Year 2007 regarding Investment.*

## Introduction

Geopolitically and geo-economically, Southeast Asia has a very strategic value. Prior to ASEAN establishment, conflict of interest had also occurred among Southeast Asian countries such as "confrontation" between Indonesia and Malaysia, the territorial claims between Malaysia and the Philippines concerning Sabah and the separation of Singapore from the Federation of Malaysia. Against this background, Southeast Asian countries recognize the need to establish cooperation to alleviate mutual suspicion and build mutual trust and encourage regional development cooperation (Kim, 2016). Before ASEAN formed in 1967, Southeast Asian countries had made efforts to promote regional cooperation in both internal and external areas such as the Association of Southeast Asia (ASA), Malaya, Philippines, Indonesia (MAPHILINDO), the South East Asian Ministers of Education Organization (SEAMEO), the South East Asia Treaty Organization (SEATO) and the Asia and Pacific Council (ASPAC). However, these organizations have been deemed inadequate to enhance regional integration.

To address the prevalent motivation among the Southeast Asian countries and establish stronger regional cooperation, five Foreign Ministers from Indonesia, Malaysia, the Philippines, Singapore and Thailand held a meeting in Bangkok in August 1967 that resulted in the design of the Joint Declaration which essentially regulates regional cooperation. At the summit of the meeting, on 8 August 1967, the ASEAN Declaration, also known as the Bangkok Declaration, was signed by the Deputy Prime Minister and the Foreign Minister of Malaysia and the Foreign Ministers of Indonesia, the Philippines, Singapore and Thailand. Brunei Darussalam consequently joined on 8 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999 (Prasad, 2017; Saahar, Sualman, Hashim, & Mohamed, 2017).

The main principles in ASEAN cooperation, as contained in the Treaty of Amity and Cooperation in South East Asia (TAC) in 1976 are:

1. mutual respect;
2. domestic sovereignty and freedom without external interference;
3. non interference;
4. settling differences or disputes peacefully;
5. avoiding threats and use of force / weapons; and
6. effective cooperation between members.

Along with the formation of ASEAN, five ASEAN countries: Indonesia, Singapore, Malaysia, Thailand and the Philippines bear the title "Asian Tigers" due to the soaring economic growth rate in those countries. As economic growth emerges, the storms of the financial crisis that started with the Bath Thai currency crisis spill over into a number of other countries and in

Indonesia itself a very severe crisis widened. The crisis made the leaders of ASEAN member countries to be aware of the need for improvement Economic cooperation in the ASEAN region in addition to relations in political affairs and defence of the region (Aizenman & Noy, 2004; Azhar, 2015; Solihah, Djuyandi, & Rahmatunnisa, 2018). In 1997, ASEAN Heads of States agreed on the ASEAN Vision 2020, to realize a stable, prosperous and highly competitive region with equitable economic development characterized by a decrease in poverty and socio-economic differences.<sup>1</sup> Then in 2003, at the meeting of ASEAN Heads 3 (three) pillars were agreed on to realize the ASEAN Vision 2020:<sup>2</sup>

1. ASEAN Economic Community;
2. ASEAN Political-Security Community; and
3. ASEAN Socio-Cultural Community.

In 2004, ASEAN began to work with countries outside ASEAN in the economic field, the first being China (ASEAN-China FTA) and the context, the goods sector. In 2005, ASEAN's economic integration spirit was further enhanced by the Priority Integration Sector (PIS) focus which was liberalized in 2010 and logistics services began in 2013. One year later in 2006, the ASEAN-Korea FTA agreed. The preparation of ASEAN to face economic competition and prevent a further crisis was made by agreeing on several important ASEAN meetings at the level of the Central Bank Leader, Minister and Governor (Winantyo, Arifin, Djaafara, & Budiman, 2008). From the final negotiations in January 2007, the Heads of State agreed to accelerate the achievement of the AEC from 2020 to 2015. In the same year, the ASEAN Charter and AEC Blueprint, ASEAN-China FTA (Services) and ASEAN-Korea FTA (Services) were signed.

Subsequently in 2008, the AEC Blueprint began to be implemented and at the same time, the ASEAN Charter and ASEAN-Japan CEP came into being on 16 December 2008. In 2009 the ASEAN Trade in Goods Agreement (ATIGA), ASEAN Comprehensive Investment Agreement (ACIA), ASEAN-Australia-New Zealand FTA, ASEAN-India FTA (Goods), ASEAN-Korea FTA (Investment), ASEAN-China FTA (Investment) and AEC Scorecard were signed. The agreements were then manifested into the technical committee (work committee) to generate commitment in setting standards and harmonization of binding policies. Efforts to integrate this were not easy. Differences in economic structure and progress, political will, as well as policies and strategies (national interest) in each ASEAN country challenge in the effort of acceleration.

"Joint Step Shake Enhances Competitiveness Facing the ASEAN Economic Community (MEA)" is a commitment known as the ASEAN Economic Community (AEC) Vision 2015

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<sup>1</sup> ASEAN Summit, Kuala Lumpur, December 1997

<sup>2</sup> ASEAN Summit, Bali, October 2003

(Syahmin, 2006). MEA is an ASEAN strategy to achieve "key player" status in global chain production and strengthen ASEAN's voice in the international forum so that the stability of the region is maintained and it is able to reap the benefits of any global economic cooperation (Siregar, 2005). Realizing the importance of participation in the global political and economic arena, the Government of Indonesia decided to implement the results of the agreement in the negotiation of the MEA in 2015. The realization of the MEA as a pillar of the ASEAN economy brought many beneficial impacts to ASEAN member countries as well challenges in the implementation.

One of the biggest challenges of the 2015 MEA is the need to liberalize the investment sector. The principle of liberalization implies the need for domestic economic readiness, infrastructure, legal system and business practices and the capacity of the state to accommodate changes related to capital flows liberalization (Winantyo et al., 2008). One of the steps is the principle of non-discrimination that protects both foreign and domestic investors but still holds sovereignty at a National level. In the next section MEA 2015 will be further examined for its liberalization impact in the investment sector and non-discrimination principle in UUPM as protection for the interest of domestic and foreign investors by paying attention to Indonesian interests.

## Literature Review

AEC will greatly affect the capital flows in a country and have both a positive and negative impact on the country's economy. Capital flows are formed because of the sale and purchase transactions of international financial assets which are subsequently recorded in the balance of payments of each country (Astiyah & Santoso, 2005). This is important as the flow of capital can be likened to the flow of blood in that it can revive and facilitate investment and international trade. The smoothness of payment of export transactions on imports of goods and services for example can only occur if there is ease of cross-border financial transactions in the region.

From a macro perspective, the smooth flow of capital is believed to facilitate international trade, enabling the creation of better allocation of capital resources in the region, encouraging the development of the production sector and ultimately supporting the growth of economic law. In general, liberalization of the investment sector will attract foreign investors to invest in Indonesia. It will then help position the balance of payments, reduce borrowing costs and ultimately support economic growth. Meanwhile, from the micro side, high capital flow will encourage increased efficiency and strengthen the financial market in Indonesia. As a result, Indonesia is expected to achieve a higher level of financial integration with the global economy (Winantyo et al., 2008).

In addition to the potential benefits, challenges and risks of the liberalization of the investment sector in Indonesia emerge. The immediate negative impact of investment sector liberalization is the possibility of a sudden reversal of capital flows, while the indirect impact is to encourage rising domestic demand that leads to rising inflationary pressures. Further, the open capital flows from investment sector liberalization can also impact on the complexity of monetary policy. Taking into account the benefits and risks of liberalizing the investment sector, the IMF itself allows member states to regulate the mobility of international capital flows but prohibits restrictions on transactions on the current account and is contained in the IMF Articles Agreement, Article VI paragraph 3 as follows:

"Members may exercise such controls as to whether or not they will restrict payments to transfers. VII, Section 3 (b) and in Article XIV, Section 2 "

Recognizing the benefits and risks that accompany it, all ASEAN member countries agree to realize a gradual free flow of capital in accordance with the stage of economic development and readiness of the financial system of each country. In this case, the liberalization process in ASEAN will pay attention to three important things. First is the liberalization of capital flow which should take account the different levels of economic development among member countries. Second these must be accompanied by adequate safeguard measures to reduce macroeconomic and systemic risks. Finally, the benefits of further liberalization processes must be felt by all member countries.

## **Methodology**

The method used for this study is the juridical-normative research method. Normative juridical research method is used to find the truth in legal research and is carried out by way of deductive reasoning and coherent criteria of truth. Truth in a study reveals reliability without necessitating the process of testing or verification. Verification at the normative juridical method is achieved by testing ways of thinking (logic) from the results of research by peer group parcels or group of peers (Tanwir, Mayana, & Daniel, 2016).

## **Results and Discussion**

In the case of investment protection, UUPM guarantees the implementation of all investment activities, including transparency in terms of expropriation (nationalization) and compensation. UUPM allows the government to provide attractive facilities for foreign investment that support government programs for priority industry development, infrastructure development, pioneer industry technology transfer and remote area development, job creation and research. Through UUPM, the government opens the business sector by considering the balance between the readiness of national industry and the national need for foreign capital to ensure the welfare

of the general public. The rules related to business sector disclosure are regulated in the Presidential Regulation of the Republic of Indonesia. Law No. 36 of 2010 concerning the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment. In Indonesia the provisions regulating FDI are Law Number 25 Year 2007 regarding Investment (UUPM). The assessment indicates that this provision has guaranteed the right of both domestic and foreign investors to transfer transfers, exchange rate conversions, and repatriation (Table 1.2). The guarantees of such activity are applied both to foreign and domestic investors. In line with the spirit of MEA in the framework of liberalizing the investment sector to attract foreign investment, this law also guarantees the protection of the national interest by ensuring equal treatment between domestic investors and foreign investors through the principle of non-discrimination stipulated in the provisions of Article 3 paragraph (1).

Letter D states that one of the principles in the implementation of investment in Indonesia is the principle of equal treatment which is described in this research as a condition that does not distinguish the origin of the country (non-discrimination), with whom the investment is made. The treatment of non-discriminatory services under the provisions of laws and regulations exists whether between domestic investors and foreign investors or between investors of a foreign country and investors from other foreign countries. With the Indonesian principle of non-discrimination, the nation is opens to the entry of foreign capital or the liberalization of the investment sector, however as a sovereign unitary state, Indonesia will continue to prioritize the protection of national interests and the potential to realize national goals and achieve economic growth.

In order to support the achievement of the ASEAN single market initiative, generally the provisions relating to FDI capital flows in Indonesia are in line with the three principles of FDI. These three principles are freedom of payment, convention and repatriation which is recognized as International Best Practice and is complemented by monitoring activities by authorized personnel. Meanwhile, related to capital flows, the prevailing regulations in Indonesia have also been very open, but with some prudent restrictions. The openness of Indonesian capital flow regulation has been complemented by provisions that protect the national interest (Winantyo et al., 2008). The principle of non-discrimination stipulated in the provisions of Article 3 paragraph (1) sub-paragraph d of Law Number 25 Year 2007 regarding investment is one of the forms of protection of the Indonesian nation against the national interest.

Ensuring equal treatment of services for domestic capital and foreign investors as well as between investors of a foreign country, and investors of other foreign countries, will ensure the creation of a conducive and healthy investment condition for the Indonesian nation to develop investment in Indonesia. Protection that ensures justice for domestic investors and foreign

investors is attraction to investors considering investment in Indonesia. The large investment in Indonesia by domestic investors and foreign investors will accelerate the pace of economic growth and sustainable development and widen job opportunities for the Indonesia people. The implementation of this principle of non-discrimination remains in the legal corridor and its main purpose is to protect the national interest as a form of realization of the objectives of the Republic of Indonesia as stated in the preamble of the 1945 Constitution of the State of the Republic of Indonesia.

Liberalization in the freer investment sector has consequences that must be taken into account, especially for Indonesia which is now in a relatively freer and more open position compared to other ASEAN countries. The greatest challenge due to the liberalization of capital flows is closely linked to exchange rate stability. Freer capital flows can only benefit the country with an advanced domestic market. Therefore, as per the 2015 MEA, Indonesia is required to work to create a conducive investment climate in a more concrete manner. These concrete steps should be made both at the central and regional levels. Conducive investment climate among other factors includes:

1. Law Enforcement;
2. Availability of Infrastructure;
3. Bureaucratic Smoothness and Speed; and
4. Clear Direction of National Economic Policy.

Furthermore, in order for the Indonesian financial market to compete with other ASEAN countries amid liberalization process towards AEC, it is necessary to have a planned and integrated effort to develop domestic financial market to be more efficient and solid. These efforts should also be accompanied by the preparation of trade-specific regulations to ensure the benefits of Indonesian liberalization by minimizing its negative impact on the stability of the national economy. To that end, the government has enacted Law No. 7 of 2014 on Trade (UUP). This Trade Law (UUP) is formed based on economic development directed and implemented to promote general welfare through the implementation of economic democracy with the principle of togetherness, fair efficiency, sustainable development, environmental insight and independence. It is achieved by maintaining the balance of progress and national economic unity mandated by the Shrimp Constitution of the State of the Republic of Indonesia Year 1945 in order to welcome AEC.

The UUP provisions always protect all national interests, meaning that the UUP is formed as a fence restricting the flow of liberalization into Indonesia. Protection of national interest is reflected in the provisions of article 2, letter A, of Law Number 7, Year 2014 on Trade which states the principle of Trade in Indonesia is of national interest. The definition of national interest is that any trade policy must prioritize the interests of the nation, state and society above

others. Thus, in order to meet AEC, the government has prepared trade rules that protect the national interests of the Indonesian people above other interests.

## **Conclusion**

Commencing in 2015, the ASEAN Economic Community (AEC) was established to strengthen the region's economy and face global ASEAN issues. Indonesia as part of ASEAN, also agreed to realize the implementation of the AEC as the benefits to be gained would also bring great risks for the unity of the Indonesian nation. One of the challenges is liberalization in the investment sector and the inflow of free foreign capital in Indonesia. However, as a unitary state that has a populist economic principle, a free Indonesia is not without barriers. Facing the liberalization of the investment sector, Indonesia has firmly fenced off the sovereignty of the nation with the existence of Law Number 24 of 1999 on Foreign Exchange Traffic and Exchange Rate System which provides prudential measures as a precaution against the flow of foreign capital into Indonesia. Anti FDI is regulated in Law Number 25 Year 2007 regarding investment through the application of the principle of non-discrimination whose main substance is the equality of rights and obligations for both domestic and foreign investment in Indonesia as a form of protection of national interest.

Through the existing regulations, resulting from the 2015 MEA, Indonesia is required to work to create a conducive investment climate in a more concrete manner and these steps must be made at the central and regional levels. A conducive investment climate includes:

1. Law Enforcement;
2. Availability of Infrastructure;
3. Bureaucratic Smoothness and Speed; and
4. Clear Direction of National Economic Policy.

These efforts should also be accompanied by the preparation of specific regulations in the field of Indonesian trade that are adequate to ensure the benefits of liberalization by minimizing the negative impact on national economic stability. To that end, the government has enacted Law Number 7 Year 2014 on Trade (UUP) which is the principle of national interest. In this context national interest is any trade policy that prioritizes the interests of the nation, state and society in general, above other interests. Thus, in order to meet AEC, the government has prepared trade rules that protect the national interests of the Indonesian people above all other interests.





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