Indonesian Journal of International Law

Volume 10
Number 4 *Human Security III*

Article 5

7-1-2013

NON-DISCRIMINATION PRONCIPLE ON THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES WITHIN COAL MINING FOREIGN INVESTMENT COMPANY

Daniel Hendrawan
Faculty of Law, University Maranatha.

Recommended Citation
Hendrawan, Daniel (2013) "NON-DISCRIMINATION PRONCIPLE ON THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES WITHIN COAL MINING FOREIGN INVESTMENT COMPANY," *Indonesian Journal of International Law*: Vol. 10: No. 4, Article 5.
DOI: 10.17304/ijil.vol10.4.378
Available at: https://scholarhub.ui.ac.id/ijil/vol10/iss4/5

NON-DISCRIMINATION PRINCIPLE ON THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES WITHIN COAL MINING FOREIGN INVESTMENT COMPANY

Daniel Hendrawan[1].

Abstract

Indonesia as a part of the international community inactable merely accordance to the government of Indonesia provision without considering to any of the international world provisions. Indonesia is the members of the World Trade Organization (WTO), so that Indonesia shall be subject to the provisions issued by the WTO. One of the provisions in the WTO is the principle of non-discrimination for foreign investment. Indonesia has numerous Natural Resources that can be exploitation for economic reasons. One business that is promising and ravish for foreign investors are exploiting the natural resources in Indonesia that is coal. Indonesia is the country's seventh largest coal producer in the world, even since 2006. Indonesia became the second largest coal exporter in the world after Australia. Mining construction line of business was forbidden to foreign investment companies until Law number 4 Year 2009 regarding Mineral and Coal have been issued. On the Law number 4 Year 2009 regarding Mineral and Coal foreign investment company can enter the coal mining. The provision objective is to obey the principle of non discrimination on the On The Agreement on Trade-Related Investment Measures and also being considered to be capable as a selling point and competitiveness in contemporary trade to invite foreign investors to invest their capital in Indonesia.

Indonesia sebagai sebuah bagian dari masyarakat internasional tidak dapat menggantungkan kegiatannya kepada peraturan perundang-undangan yang dibuat oleh pemerintah Indonesia tanpa mempertimbangkan pengaturan-pengaturan yang berlaku di dunia. Indonesia merupakan anggota dari World Trade Organization (WTO), sehingga Indonesia harus patuh terhadap pengaturan-pengaturan yang dikeluarkan oleh WTO. Salah satu pengaturan dalam WTO adalah prinsip non-diskriminasi bagi investasi asing. Indonesia memiliki berbagai macam kekayaan alam yang dapat diekspolitasi untuk berbagai kegiatan ekonomi. Salah satu kegiatan usaha yang menjanjikan adalah kegiatan eksploitasi sumber daya batu bara. Indonesia merupakan negara ketujuh terbesar penghasil batu bara, bahkan sejak tahun 2006, Indonesia menjadi negara pengekspor batu bara terbesar di dunia setelah Australia. Kegiatan penambangan merupakan jenis usaha yang dilarang bagi perusahaan-perusahaan investasi asing hingga dikeluarkannya Undang-Undang Nomor 4 tahun 2009 tentang Sumber Daya Mineral dan Batu Bara. Dalam Undang-Undang Nomor 4 Tahun 2009 tentang Sumber Daya Mineral dan Batu Bara dikatakan bahwa perusahan investasi asing dapat melakukan kegiatan penambangan di Indonesia. Ketentuan tersebut dimaksudkan untuk mematuhi prinsip non-diskriminasi yang terdapat dalam The Agreement on Trade-Related the Investment Measures dan juga sebagai pertimbangan untuk menjadi titik jual dan persaingan dalam perdagangan kontemporer untuk mengundang investor asing untuk mengivestasikan modalnya di Indonesia.

***Keywords**: Non-Discrimination Principle, World Trade Organization, Investment, Coal Mining, Trade Agreement*

[1] Lecturer at Faculty of Law, University Maranatha.

I. INTRODUCTION

Indonesia was implied in the category of a developing country. Consideration to a countries assessed as a developing country based on the Human Development Index released by the International Monetary Index. As a result of Indonesia which is in a position as a developing country is to make Indonesia needs funds or revenues that are used as capital by Indonesia to build. In order for investment into Indonesia is not misused or detrimental to the people of Indonesia, then in accordance with the Constitution of 1945 the government took part in the utilization of natural resources in Indonesia. The Constitution of 1945 set in article 33, namely:

1. "The economy is structured as a joint effort based on the principle of the family.
2. Branches of production which is important for the state and who dominate the life of the people controlled by the state.
3. Earth and water and natural resources contained therein is controlled by the state and used for the greatest prosperity of the people. "

In the Article 33 paragraph 3 of the Constitution of 1945 contained three essential elements, there are:[2]

1. That all natural resources within the territory controlled by the state law of Indonesia. That is, every person, group, institution, and / or any business entity, which are utilize, exploit, and/or make use of the natural resources that contain in Indonesia without permission from the state entered in the unlawful act or criminal act that can be punished in accordance with statutory regulations. With the stipulation that, against the legality of activities that do not get called illegal activities. From that's illegal, then lead the terms called illegal logging, illegal fishing and illegal mining, which is an act and/or actions for the activities that take and utilize natural resources without having the legality of the state. Furthermore, because natural resources are the basis of development potential or capital that can be utilized for the maximum of prosperity of the people, then from the standpoint of the constitution, natural resources referred to, is

[2] http://www.indolawcenter.com/index.php?option=com_content&view=article&id=1513:makna-pasal-33-ayat-3-uud-1945&catid=174:hukum-pertambangan# accessed on 3rd October 2011

the object of state to be used for the sake of nation and state.

2. Departing from the description of the above items, it is known that natural wealth is the object of the state, particularly because of the natural wealth of mineral resources controlled by the state. Thus, the state as a subject. State as a subject that is, the state as the authority. The authority inherent in it the power and authority. Power and authority in a concrete, a symbol of independence and sovereignty, namely the representation of independence of the people. State in carrying out the functions of power and authority is run through state institutions, one of which is the executive / government. Government as a representation of state sovereignty, which means also the representation of popular sovereignty, in discharging its functions shall perform the concrete steps which exploit natural resources within the jurisdiction of Indonesia, for the greatest prosperity of the people.
3. People, in the context of the natural wealth of mineral resources in particular, occupies two positions, namely:
   a. People in his capacity as an object, example the people who first became a major target to receive the benefits and results of natural wealth, living standards in order to achieve peace in the broadest sense, that people obtain social security, educational facilities, health facilities, and others are wrong only be funded from the natural resources existing in the jurisdiction of Indonesia.
   b. People in his capacity as subjects, example people have equal rights with other business organizations, in managing mineral as well use it wisely. Concrete manifestation of the people in the use of minerals in question, is that people are given the opportunity to participate commercialize existing minerals, while watching the technical aspects of good mining and environmental balance or based on the concept of sustainable development.

In terms of capital to meet the needs in Indonesia, the government issued a legal instrument to regulate investment activities in order to meet government capital requirements to implement the development and not conflict with article 33 paragraph 3 of the Constitution of 1945. Law number 25 Year 2007 regarding Capital Investment in lieu of Law number 1 year 1967 regarding the Foreign Investment and Law number 6 year 1968 regarding Domestic Investment were made.

One of the natural resources in Indonesia is very important coal. Indonesia is the country's seventh largest coal producer in the world, even since 2006, Indonesia became the second largest coal exporter in the world after Australia. Domestic coal consumption continues to increase from year to year. However, the potential of coal Indonesia is still very high because there are many reserves are there waiting to be exploited. This makes the potential and business opportunities in the coal mining sector in Indonesia is still very promising.[3] Investment in mineral and coal mining sector until the end of December 2010 this is estimated at U.S. $ 1865.30 million.[4]

Director General of Mining Bambang Setiawan said that the investment performance of which involves an investment of mineral coal Contract of Work (COW) U.S. $ 1.479 billion, an investment of U.S. $ 0.764 billion PKP2B, and KP SOE investment of U.S. $ 0.038 billion. So the total investment of U.S. coal minerals $ 2.282 billion. "Entering in December 2010 and by 2011, could be reported that the mining sub-sector investment in general has shown excellent performance. A number of planned investments in the subsector is still on target or exceeding that proclaimed," he said. There are some important notes about the achievements of the investment in this subsector in 2010, namely, general mining investment target by 2010 in the Strategic Plan of Mineral Resources. In the 5-year Strategic Plan for Energy and Mineral Resources, mineral subsector investment plan, coal and geothermal energy amounted to U.S. $ 2.502 billion. "The size of this investment targets include overall targets derived from businessmen Contract of Work (COW), Coal Mining Work Agreement (PKP2B), Mining (KP) KP include SOE (PT Timah Tbk, PT Antam Tbk, and PTBA Tbk), Mining Services Business activities (UJP) and from geothermal investment, ".[5]

Coal is one of many irrenewable natural resources that have no role in it to meet the basic need of the people, and provide significant added value to the national economy in an effort to achieve prosperity and welfare.

---

[3] http://www.indolawcenter.com/index.php?option=com_content&view=article&id=58&Itemid=117, accessed on 3rd October 2011.

[4] http://indocoals.wordpress.com/2011/01/02/investasi-pertambangan-dibawah-target/ accessed on 3rd October 2011.

[5] http://www.pme-indonesia.com/news/?catId=1&newsId=3134 accessed on 3rd October 2011.

Coal mining activities that contain an economic value since the business began to know the position, area, number of reserves, and the geography of the land containing coal. Having found the existence of reserves, the process of exploitation (production), transportation, and other supporting industries will have very high economic value that will open competition in the industry circuit.

With increasing investment in coal, then made a new legal instrument to replace the Law number 11 year 1967 Regarding Basic Provisions of Mining which was about 40 years applies and is not relevant to the current state of Indonesia Law number 4 Year 2009 regarding Mineral and Coal. The result of the enactment of Law number 4 Year 2009 regarding Minerals and Coal on 12 January 2009 is there have been significant changes in the management of mineral and coal natural resources in Indonesia. In the new legislation is the work contract system is deleted and replaced with a mining permit (IUP). Contract work in progress, no later than one year must be adjusted to the new legislation. Furthermore, the results of the raw mine that had been almost entirely exported to foreign countries, at the latest within five years should be treated and purified in the country.[6] In the era of globalization is needed legal rules which guarantee legal certainty to attract investors to come to Indonesia and enliven the investment in Indonesia.

In the last 10 years can be said that the investment in coal mining stagnated. Hopefully with the new Act can change the paradigm of business actors to be able and willing to invest capital in the field of coal mining. In the Law No. 4 Year 2009 on Mineral and Coal to be decentralized in which several activities are the responsibility of local administration is not the responsibility and obligation of the center even though in the process of registration of foreign investment companies is done through the system one way or the roof where the registration of foreign investments made in the Central Capital Investment Coordinating Board. Local governments granted authority to determine the investment policy for the field of construction business of coal mining services.

In law, Law number 4 year 2009 regarding minerals and coal, for-

[6] http://materikuliahfhunibraw.files.wordpress.com/2010/02/menelisik-uu-minerba.pdf, accessed on 3rd October 2011.

eign investment or foreign investors are allowed to carry or set up a company engaged in coal mining as shareholders and holders of permits to conduct mining activities. This is done also by Indonesia as a member and part of the World Trade Organization trade organizations.

In The Agreement on Trade-Related Investment Measures as a condition of the countries member of the World Trade Organization, then Indonesia should follow the provision. One of its provisions says that as member states may not implement the practice of discrimination for foreign investors, so that foreign participation in companies engaged in coal mining is possible.

II. NON DISCRIMINATION PRINCIPLE ON FOREIGN DIRECT INVESTMENT

The promotion of "non-discrimination," the treatment of foreign investors like domestic investors under like circumstances, is one of the fundamental goals of any international investment regime. This would suggest that cases of discrimination are well documented and have been shown to produce results that are undesirable from the perspective of public policy. In practice this is not the case. Attempts to document discrimination and to assess the benefits of "non-discrimination" encounter surprising difficulties in both theory and practice.

Presumably a government that is discriminating against a foreign investor has little interest in advertising that fact. Similarly the individual investor is more likely to maintain confidentiality about negotiations with a particular government. The incentives to do so are numerous. Future relations with the government are at stake. Competitors may derive useful information from such disclosure. Measures adopted to overcome discrimination may not bear public scrutiny, for example because of corruption. And in the end the very fact that an investment has been made suggests that it will be profitable, indeed chances are more profitable than investments made in an open market, so the investor is unlikely to have an interest in disclosure and has no grounds for complaint. Documenting investments that have not been made is, however, problematic since disclosure is rare and disclosure that does occur

is partial and partisan in nature.

"Discrimination" is a well-defined concept in relation to trade in goods. It is underpinned by the concept of "comparative advantage," which postulates that the removal of discrimination will tend to benefit all parties concerned. This creates a solid theoretical foundation for the liberalization of trade in goods. Attempts to critique this foundation, in particular from an environmental perspective, have not succeeded in undermining it.[7] Starting from this foundation, the economic consequences of discrimination can becalculated and the economic advantages of non-discrimination unambiguously established.

The theory of comparative advantage does not, however, apply in the same manner with respect to foreign direct investment where capital is committed in exchange for certain rights. Some countries have a surplus of capital and some do not, and there is no reason to assume that the relationship will be reversed by the process of foreign direct investment. The justification for eliminating discrimination with respect to investment lies in the increased efficiency of the allocation of a scarce resource—capital—and in making risk and return more reliably calculable, subject to market forces. This does not provide a reliable guide to the distribution of benefits associated with a liberalized international investment regime. Ideally both parties—the investor and the host country—will benefit, but this outcome can generally only be achieved by a process of negotiation as the specific circumstances of an individual investment are balanced against its potential costs and benefits from the perspective of the public good.

It seems almost self-evident that non-discrimination in foreign investment is a desirable goal of public policy. Nevertheless defining and implementing non-discrimination proves to be a complex task, notably more difficult than ensuring non-discrimination with respect to trade in goods. Extractive investments often involve several interdependent elements, each of which can present significant technology choices. Foreign investors enter into private contracts with host country private actors, whether these are other investors, employees or suppliers. They also ac-

[7] Herman Daly. "The Problems with Free Trade: Neoclassical and Steady-State Perspective" in: Durwood Zaelke, et al., *Trade and the Environment*. Law, Economics, and Policy, 1993, pp. 147 – 158.

quire rights and obligations in the host country, which gives the relationship of the investor to host country public parties a quasi-contractual character. All of these factors must be taken into consideration when constructing a regime to promote non-discrimination in investment.[8]

Non-discriminatory treatment concerns the notion of "national treatment", which provides that a government treat enterprises controlled by the nationals or residents of another country no less favourably than domestic enterprises in like situations. National treatment requires equivalent, not identical, treatment. Equivalent treatment is when a different regime applies to non-residents as compared to residents to place them on an equal footing (e.g. for prudential purposes). Non-discriminatory treatment also means that an investor or investment from one country is treated by the host country no less favourably than an investor or investment from any third country (referred to as Most Favoured Nation or MFN in international agreements) in like situations. Reciprocally, non-discriminatory treatment does not call for providing advantages to foreign investors.

The application of these principles towards investment varies considerably across countries, partly because a state's right to regulate sometimes involves discriminating against foreign investors. Policies that favour some firms over others (i.e. any policies that derogate from national treatment or MFN) involve a cost, however. They may result in less competition (see also the chapter on Competition Policy), distort resource allocation, impede linkages between MNEs and local suppliers and slow the diffusion of technological innovations. These effects discourage all investors and give a negative perception about a country's receptiveness towards investment. This is why exceptions to non-discrimination, especially in sectors that play a central role in the development of an economy (e.g. financial and telecommunication sectors), need to be periodically re-evaluated to determine whether the original motivation and national benefits behind an exception remain valid and outweigh the costs borne by consumers, suppliers and investors.

[8] Konrad von Moltke "Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues" (paper presented to OECD Global Forum On International Investment Conference on Foreign Direct Investment and the environment Lessons to be Learned from the Mining Sector, Shanghai, 7 - 8 February 2002).

The ability to transfer investment-related capital, including repatriating earnings and liquidated capital, is important for any firm to be able to make, operate, and maintain investments in another country. At the same time, governments sometimes need to limit these economic freedoms in order to address serious balance of payment difficulties. Since measures that restrict the free transfer of capital may adversely affect inflows of international investment, deter domestic companies from accessing international capital markets to fund investment and encourage inefficient and non-transparent practices such as transfer pricing, restrictions on the transfer of funds also need to be reviewed periodically. Governments have authority to take any measure required to prevent evasion of their laws and regulations.[9]

The main point of non-discrimination principle are teh local goverment will not make any different including issusing the permit, taxation or any other expense that the foreign investment have to isuue in order to have the investment in this matter in Indonesia to the foreign investment based on the citizenship. The discrimination will contains violation to the International Commercial law.

III.AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES AS WORLD TRADE ORGANIZATION PROVISION

Trade-Related Investment Measures is an agreement on investment rules concerning or related to trade. Trade-Related Investment Measures is intended to reduce or eliminate trade activities and increase the freedom of investment activities. Trade-Related Investment Measures are a new issue in the WTO. Trade-Related Investment Measures negotiations loaded with the interests of developed countries and get the opposition from developing countries, so it becomes a sensitive issue. Since the beginning of the discussion agenda of the Uruguay Round, the United States supported by Japan's push to be included in the Uruguay Round Trade-Related Investment Measures. Desire United States is a ban on most Trade-Related Investment Measures distort trade and a framework for the issuance of other Trade-Related Investment Measures. For developed countries is directed to eliminate Trade-Related

[9] OECD, Policy Framework for investment.

Investment Measures rules in the areas of investment that can lead to distortions in international trade. Basic demands of developed countries that developing countries have not accepted include 2 things. First, developing countries do not implement policies that determine foreign investors to export most of its production as a condition to permit investment (export performance requirements). Second, implement policies that determine foreign investors to use a portion of their production inputs from domestic sources (Domestic Content Requirements).[10][11]

There are three main areas of work in the World Trade Organization on trade and investment:

1. A Working Group established in 1996 conducts analytical work on the relationship between trade and investment.
2. The Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994.
3. The General Agreement on Trade in Services addresses foreign investment in services as one of four modes of supply of services.

This Agreement, negotiated during the Uruguay Round, applies only to measures that affect trade in goods. Recognizing that certain investment measures can have trade-restrictive and distorting effects, it states that no Member shall apply a measure that is prohibited by the provisions of General Agreement on Tariffs and Trade Article III (national treatment) or Article XI (quantitative restrictions). Examples of inconsistent measures, as spelled out in the Annex's Illustrative List, include local content or trade balancing requirements. The Agreement contains transitional arrangements allowing Members to maintain notified Trade-Related Investment Measures for a limited time following the entry into force of the World Trade Organization (two years in the case of developed country Members, five years for developing country Members, and seven years for least-developed country Members). The Agreement

[10] Siti Anisah. "Implementasi TRIMs dalam Hukum Investasi di Indonesia", *Hukum Bisnis*, vol. 22, No. 34, 2005.

[11] http://hukuminvestasi.wordpress.com/2010/09/16/trade-related-investment-measures-trims (Accessible on October 3rd, 2011)

also establishes a Committee on Trade-Related Investment Measures to monitor the operation and implementation of these commitments.[12]

The Importance of Trade-Related Investment Measures can be seen from the results of the Uruguay negotiations. Namely: [13]

1. Investment in the World Trade Organization agreement is a new and fundamental because previously there has been no agreement that includes investments that are linked to trade. Thereby strengthening the assumption and the fact that there is a close relationship between trade and investment.
2. Negotiations regarding capital investment to create new institutions with the body especially the World Trade Organization Committee on Trade-Related Investment Measures in charge of overseeing and ensuring the liberalization of foreign Foreign Direct Investment/ FDI serves as the World Trade Organization has a dispute resolution procedure if one of its members violate the Trade-Related Investment Measures agreement or commitment in the field of capital investment.
3. Trade-Related Investment Measures Agreement provides an important contribution to the development of international law, especially field of investment.
4. Trade-Related Investment Measures Agreement will make the World Trade Organization member to be more transparency in the legal policy of capital investment.
5. Given the transition period to demonstrate that the World Trade Organization consider the position of developing countries and poor in the implementation of the Trade-Related Investment Measures agreement
6. inclusion of dispute settlement procedures in the Trade-Related Investment Measures agreement is a new development in international commercial law.

Regulation of Trade-Related Investment (Trade Related Investment Measures - Trade-Related Investment Measures) are discussed in the

[12] http://www.wto.org/english/tratop_e/invest_e/invest_e.htm, accessed on 3rd October, 2011.

[13] http://www.scribd.com/doc/27693020/Trade-Related-Investment-Measures-TRIMs, accessed on 3rd October 2011.

Uruguay round which aims to join policies of member countries in relation to an investment and prevent foreign trade protection in accordance with the principles of General Agreement on Tariffs and Trade, like "National treatment" (national treatment). As we know, foreign investment as well as other forms of international trade, can cause a different interest between the countries investors (investors) and the receiving country capital (HOS country). Foreign investment will not become an instrument of international commercial, if the investor will not receive any competitive or comparative advantage to the investment made abroad. At the same time, when the Foreign investment also will not be accepted by the receiving country capital, when the country does not get the benefit as a direct result of foreign investment. Considerations are the basis for negotiations pointing the recipient countries regulate foreign investment capital in the country. General Agreement on Tariffs and Trade prohibit investment arrangements that are not in accordance with the principle principles of General Agreement on Tariffs and Trade 1994, as instruments to limit foreign investment But there are certain exemptions from meeting the certain requirements.[14]

IV. NON DISCRIMINATION PRINCIPLE ON LAW NUMBER 4 YEAR 2009 REGARDING MINERAL AND COAL

Law Number 4 Year 2009 regarding Mineral and Coal Mining has been set on his subject in general. As in Article 112 states that after 5 (five) years of production, business entity IUP (Mining License) and IUPK (Special Mining Permit), which shares are owned by foreigners are obliged to divest stake in government, local government, state owned enterprises , local state-owned or private enterprises nationwide. Further in paragraph (2) stated further provisions regarding the divestment of shares is set by government regulation.

Then as the implementation of the Mining Law, the government issued Government Regulation Number 23 Year 2010 on Implementation of Business Activities Mineral and Coal Mining. In the PP setting divestment of shares set forth in a separate chapter, namely chapter IX of

[14] http://www.ermanhukum.com/Kuliah/TRIMs%20&%20Hukum%20Investasi%20-%20Pendahuluan.pdf, accessed on 3rd October 2011

the divestment of shares the holder of the mining license and a special mining license is owned by foreigners. In Article 97 through Article 99 is set on foreign capital holders of IUP and IUPK after 5 (five) years from the production are required to divest its shares, so that shares at least 20% (twenty percent) of participants owned Indonesia. Further divestment of shares as referred to in paragraph (1) are made directly to the participants of Indonesia comprising the Government, provincial governments, or local government district / city, state, enterprises, or private entities nationwide. Offer made to the Government, provincial governments, or local government district / city, state, enterprises, or private entities nationwide in stages, meaning that if the central government is not interested then it will be offered to provincial governments, and so on. government ordinance number 23 year 2010 just to set things just so, then further provisions concerning procedures for divestiture of shares and stock pricing mechanism regulated by Minister of Energy and Mineral Resources, after coordination with relevant agencies.

Arrangements are not clear, not comprehensive, and tend to create legal uncertainty regarding the divestment of shares has not emerged due to the regulation of matters that should be regulated at the level of legislation or government regulation that makes mining divestment issue became clear, comprehensive, and create legal certainty . The settings are not likely to lead to conflict, both between central and local governments, mining companies are burdened with the divestment obligation with the government, even among government, corporations, and communities around the mining permit area. Unfortunately, in Article 169 paragraph (2) Law Number 4 Year 2009 regarding Mineral and Coal Mining regulates the conditions set forth in section KK and coal mining business works agreements (PKP2B) adjusted no later than 1 (one) year from the Law Number 4 Year 2009 regarding Mineral and Coal Mining was enacted unless the state revenue . Thus, the juridical normative, all firms in Indonesia in KK and must include provisions PKP2B divestment obligations to participants at least 20% of Indonesia. In fact, with the makeshift arrangements and implementation of high tension. forward the divestment issue in Indonesia will be more complex and draining a lot of energy both state officials and foreign investors. Legal uncertainty and large demands from local governments and communities for socio-economic benefits of any mining operations that are its

territory, even more a divestment issue as if into a time bomb for the harmonization of national government relations with local governments.

Divestment of foreign stocks is simply defined as the number of foreign shares to be offered for sale to participants Indonesia. Provisions regarding the divestment of foreign stocks is a juridical normative been regulated in Article 112 paragraph (1) of Law Number 4 Year 2009 regarding Mineral and Coal Mining which stipulates that holders of IUP and IUPK whose shares are owned by foreigners are obliged to divest stake in government, local government-owned enterprises state owned enterprises or private entities nationwide. Furthermore, in paragraph (2) states that further provisions regarding the divestment of shares is set by government regulation.

Obligations as set forth in Article 112 of Law Number 4 Year 2009 regarding Mineral and Coal Mining in practice can not be enforced effectively because of lead resistance from various mining companies. This is based on constraints such as commodity prices soar if done because of the influence the issue of divestment of the stock market responded as well difficulty borrowing constraint for mining companies from the banking system if the combination of a relatively small share. The divested shares tend to be worth four times more expensive than the real price. This happens because the assessment of the stock price already includes the projected profits (discount rate), investment costs, and long-term commodity prices.

With this pattern of government as simply replacing the investment costs (replacement cost) and take over the shares. On the one hand, the Government or the buyer will be difficult to buy shares divestment if relying on banking funds. The reason, the banks as lenders will think long and in providing loans for a relatively small portion of shares.[15]

V. CONCLUSION

The Indonesian goverment that was part of the World Trade Organization have to make the provision in accordance to the provision that have been encated by the Worl Trade Organozation. One provision that have to be obey by Indonesia is the agreement on Trade-Related Invest-

[15] http://www.ahmadredi2003.blogspot.com/, accessed on 3rd October 2011.

ment Measures. The agreement was based on the investment treatment for all the member of The World Trade Organization. There were one point on the Trade-Related Investment Measures is national treaty that local government must apply non-discrimination principle on the Foreign Direct Investment. There must no discrimination or different to all the investor. Either foreign or domestic investment must to be treat equally. Therefore the Indonesian government enacted the law number 4 year 2009 regarding mineral and coal. The law is based on non discrimination principle that foreign direct investment can build a limited liability company based on the mining business fields and obtain the permit to established and operate the company.

Yet there are problem on the Law number 4 year 2004 regarding mineral and coal in terms of foreign divestment efforts to Government agencies, local governments, state enterprises / enterprises, and national private sector. So addressing these polemics should be pursued a legal formulation that is able to overcome this divestment issue. Law Number 4 Year 2009 regarding minral and coal has not been set explicitly solving the problems that arise as a result of the divestment activities. Act mandates that this issue be further in the Government regulations. To pursue the divestment of shares, the Government and / or local government must have strong power and high potition bargaining agreements in every mining contract in Indonesia, especially in terms of preparedness funding.

Divestment of shares in the of the mining license to the Government, local government, SOEs, or dab / or public enterprises as a form of sovereignty in the country in terms of mining activities in an effort to realize the prosperity of the people as much as possible needs to be created in order to divest the legal formulations can run and the Government is able encourage investors to comply with any existing regulations, in the absence of legal affirmative impossible Indonesia will benefit greatly in business cooperation. This is important so that Indonesian people do not feel apathetic towards the entrance of foreign investors so that the social carrying capacity of the investment / divestment will experience growth and investors more comfort guaranteed.

VI. BIBLIOGRAPHY

Book Chapters

Daly, Herman. "The Problems with Free Trade: Neoclassical and Steady-State Perspective" in: Durwood Zaelke, et al., *Trade and the Environment*. Law, Economics, and Policy, 1993.

Journal Articles

Anisah, Siti. "Implementasi TRIMs dalam Hukum Investasi di Indonesia", *Hukum Bisnis*, vol. 22, No. 34, 2005.

Report and Conference

Konrad von Moltke "Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues" (paper presented to OECD Global Forum On International Investment Conference on Foreign Direct Investment and the environment Lessons to be Learned from the Mining Sector, Shanghai, 7 - 8 February 2002).

OECD "Policy Framework for Investment".

Internet References

[...]http://www.ahmadredi2003.blogspot.com/, accessed on 3rd October 2011.

[...]http://www.indolawcenter.com/index.php?option=com_content&view=article&id=1513:makna-pasal-33-ayat-3-uud-1945&catid=174:hukum-pertambangan#, accessed on 3rd October, 2011.

[...]http://www.ermanhukum.com/Kuliah/TRIMs%20&%20Hukum%20Investasi%20-%20Pendahuluan.pdf, Accessed on 3rd October 2011.

[...]http://www.indolawcenter.com/index.php?option=com_content&view=article&id=58&Itemid=117, accessed on 3rd October 2011.

[...]http://indocoals.wordpress.com/2011/01/02/investasi-pertambangan-dibawah-target/, accessed on 3rd October, 2011.

[...]http://hukuminvestasi.wordpress.com/2010/09/16/trade-related-investment-measures-trims/, accessed on 3rd October, 2011.

[...]http://materikuliahthunibraw.files.wordpress.com/2010/02/menelisik-uu-minerba.pdf, accessed on 3rd October, 2011.

[...]http://www.pme-indonesia.com/news/?catId=1&newsId=3134, accessed on 3rd October, 2011.

[...]http://www.scribd.com/doc/27693020/Trade-Related-Investment-Measures-TRIMs, accessed on 3rd October, 2011.

[...]http://www.wto.org/english/tratop_e/invest_e/invest_e.htm, accessed on 3rd October, 2011.