

February 2022

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Recommended Citation

Delfiyanti, Delfiyanti (2022) "The Dispute Settlement System of Investment in The ASEAN Comprehensive Investment Agreement (ACIA) Framework and The Implications for Indonesia," *Indonesian Journal of International Law*: Vol. 19: No. 1, Article 5.

Available at: <https://scholarhub.ui.ac.id/ijil/vol19/iss1/5>

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THE DISPUTE SETTLEMENT SYSTEM OF INVESTMENTS IN THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT (ACIA) FRAMEWORK AND THE IMPLICATIONS FOR INDONESIA

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Abstract

The delegates of the ASEAN member states signed the ASEAN Comprehensive Investment Agreement (ACIA) on 26 February 2009, in Cha-am, Thailand, in order to implement the single market and facilitate the free flow of capital investment in the region. According to the purpose of establishment in Articles 1(a) and 2 of the Agreement, the adjustment of foreign investment adheres to the free and open investment regime to attain the final purpose of an integrated economy in the ASEAN Community. The Agreement also contains clauses for the settlement of investment disputes peacefully or through trial or arbitration. Consequently, the implication for Indonesia is the harmonization of the investment regulation with the provisions. Law No. 25 of 2005 on Investment stipulates that any prerequisites of the Act are aligned with the ACIA Agreement, though disparities exist and improvement is required in several areas. Hence, the mechanism of dispute settlement in the ACIA Agreement and Act of Indonesian Investment use two paths, namely Alternative Dispute Resolution (ADR) under conciliation or negotiation and trial or arbitration, and the selected mechanism depends on the concerned parties. Both regulations also adjust the legal protection to the investor and national security. Meanwhile, this normative research employed literature investigations and qualitative data analysis through the assessment of international and national legal documents and agreements.

Keywords : *The Dispute Settlement System; Investment; The ASEAN Comprehensive Investment Agreement (ACIA); Implication and Indonesia*

Submitted : 3 August 2021 | Revised : 9 October 2021 | Accepted : 1 December 2021

I. INTRODUCTION

The ASEAN has agreed to create a new legal instrument to replace the Bangkok Declaration, namely the ASEAN Charter. This instrument was established to enable the involved countries to achieve their mutual interests and obtain numerous comparative advantages through cooperation.¹ The desire to integrate ASEAN economies through the agreement is an effort to improve the financial status of the countries in the region. According to Cunan, the

¹ Jagdish Sachdev, "Foreign Investment Policies of Developing Host Nations and Multinationals; Interaction and Accommodation," *Management International Review* 18, No. 2 (1978) : 33.

enhancement of economic cooperation in a region is necessary to improve the welfare of the people in the area and is implemented through a treaty or agreement, such as the *ASEAN Economic Community* (AEC).²

Therefore, the formulated ASEAN Economic Community Blueprint contains the stages of economic integration to be achieved by the concerned nations through 4 (four) frameworks or pillars, namely:³

1. A single market and production base with an element of international free flow of goods, services, investment, skilled labour, and freer flow of capital.
2. High economic competitiveness, with various rules, including consumer protection, intellectual property rights, infrastructure development, taxation, and e-commerce.
3. Equitable economic development with elements of small and medium enterprise development and integration programs for CLMV countries contained in the *Initiative for ASEAN Integration*.
4. Full integration into the global economy with elements of a coherent approach to economies outside of the region and increased participation in production networks.

These countries wish to increase economic cooperation and regional integration through the establishment of the ASEAN Charter. Hence, the ASEAN Economic Community Blueprint is an attempt to bind the member states and enhance commitment to the existing agreement. It was formulated due to the lack of implementations and treaties to regulate enforcement as well as the many social factors affecting the region.⁴ This will eliminate any future challenges affecting the ASEAN Economic Community.

One of the elements of the ASEAN single market is the free flow of investment for involved nations. This corresponds with Article 5 paragraph 1 of the ASEAN Charter:

“To create a single market and production base, which is stable, prosperous, highly competitive, and economically integrated with effective facilitation for trade and investment, facilitated movement of business persons, professionals, talents, and labor, alongside the freer flow of capital.”

² Cunan, *Economic Development and Prosperity*, (Boston: Harvard University Published, 1999), 21.

³ Rizal A. Djaafara and Aida S Budiman, *Masyarakat Ekonomi ASEAN 2015 [ASEAN Economic Community 2015]*, in: Sjamsul Arifrn (eds), *Memperkuat Sinergi ASEAN di Tengah Kompetisi Global [The Strength of ASEAN in Global Competition Middle]*, (Jakarta : PT. Elex Media Komputindo, 2008), 5-16.

⁴ Eric Stein, “International Integration and Democracy: No Love at First Sight,” *American Journal of International Law* 95, No. 3 (2001): 489.

Consequently, the ASEAN delegates signed the ASEAN Comprehensive Investment Agreement (ACIA) on 26 February 2009, in Cha-am, Thailand, to implement the single market and facilitate the free flow of investment. Based on the decisions of the 39th ASEAN Economic Ministers Meeting (“AEM”) held in Makati City, Philippines, on 23 August 2007, the revision of the Framework Agreement on the ASEAN Investment Area (AIA Agreement) was approved on 7 October 1998. This became a comprehensive forward-looking investment agreement prepared by amended forms and terms, comparable to the best international practice for increasing investment among countries and improving competitiveness in ASEAN. The ACIA is a revision and combination of the two existing investment agreements - the Framework Agreement on AIA of 1998 and the ASEAN Agreement for the Promotion and Protection of Investment of 1987, known as the ASEAN Investment Guarantee Agreements (ASEAN IGA).⁵

The Agreement is an investment approval that aims to create a regime of free and open investment to achieve the ultimate goal of economic integration within the ASEAN Economic Community (AEC). This agreement is compliant with the Blueprint of the ASEAN Economic Community through “progressive liberalization” of investment regimes in the Member States.⁶ As a result, the concerned countries will be able to implement liberalization in investment extensively based on the concept contained in the ASEAN Comprehensive Investment Agreement (ACIA).

However, the immediate enforcement of the ACIA Agreement has been unachievable. It requires an enforcement ratification instrument in accordance with Article 48 paragraph (1) of the ACIA as well as an approval by the ASEAN member states, as explained below:

“This Agreement shall enter into force after all the Member States have notified or, where necessary, deposited instruments of ratification with the Secretary-General of ASEAN, which shall not take more than 180 days after the signing of this Agreement.”

All ASEAN member states, including Indonesia, have ratified the ACIA, which entered into force on March 29th, 2012,⁷ and the previous ASEAN investment agreement (AIA and ASEAN IGA) become invalid.⁸ The ACIA

⁵ Thailand Board of Investment, “Highlights of The ASEAN Comprehensive Investment Agreement”, accessed 28 July 2021, <http://www.boi.go.th>.

⁶ Article 1, The ASEAN Comprehensive Investment Agreement / ACIA (2009), signed 26 February 2009 (entered into force 29 March 2012).

⁷ Introduction to the ASEAN Comprehensive Investment Agreement, by ASEAN Briefing, accessed 04 July 2021, <http://www.aseanbriefing.com>.

⁸ Article 47 Paragraph (1) ACIA states : “ Upon the entry into force of this Agreement, the ASEAN IGA and the AIA Agreement shall be terminated”.

consists of 49 articles and is part of the blueprint to realize ASEAN as a single market and production base furnished with free flow of investment. This agreement is one of the supporting elements in the formation of the ASEAN Economic Community (AEC). It intends to improve investment activities among member states and increase their competitiveness to create global investor destinations.⁹ According to M. Sornarajah, ACIA is a combination of the liberalization movement and protection of investment in ASEAN. Therefore, the main objective of this agreement is to provide a balance between the protection of investment and safeguarding investment regulation under the national interest control.¹⁰

The ACIA contains legal arrangements for Foreign Direct Investment (FDI), particularly related to investment liberalization in the ASEAN Economic Community. This will integrate the flow of investment among member states, as a positive and synergistic relationship exists between regional integration and direct investment.¹¹ The blueprint for the ASEAN Economic Community on the free flow of investment describes “free and open investment regulations” as the key to increasing the competitiveness of the ASEAN community in attracting Foreign Direct Investment (FDI). New, as well as enhanced existing investments (reinvestments), will promote and secure dynamic economic development.

The ACIA intends to improve investment among the ASEAN member states and enhance competitiveness to ensure the region becomes one of the destinations for global investors.¹² This agreement applies to the existing or established investments during and after its validation period.¹³ This is highlighted in ACIA Article 1:

“The objective of this agreement 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 blueprint, through the following:

- (a) progressive liberalization of the investment regimes of Member States,*
- (b) provision of enhanced protection to investors and investments of all Member States,*

⁹ Priskila Pratita Penasthika, “The Issues on Personal Status of Investor in the ASEAN Comprehensive Investment Agreement from the Perspective of Private International Law”, *Indonesian Law Journal* 6, (2013) : 67.

¹⁰ M. Sornarajah, *The International Law on Foreign Investment*, (United Kingdom : Cambridge University Press, 2010), 255.

¹¹ Te Velde, Dirk Willem and Bezemer, “Regional Integration and Foreign Direct Investment in Developing Countries,” *Transnational Corporations Journal* 15, (2006) : 41.

¹² Penasthika, “The Issues on Personal Status,” 67.

¹³ Article 3 Paragraph (2) : “*This Agreement shall apply to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement*”.

- (c) *improvement of transparency and predictability of investment rules, regulations, and procedures conducive to increased investment among the Member States,*
- (d) *joint promotion of the region as an integrated investment area, and*
- (e) *cooperation to create favourable conditions for investment by investors of a Member State in the territory of another Member State.”*

The ACIA implementation allows for disputes between the parties involved in investment activities. Some existing conflicts are the different perceptions in interpreting the contents of the agreement, the negligence of certain parties, and the violation of the contract. Therefore, a dispute settlement mechanism is needed to provide legal certainty and protection to the concerned parties.

Indonesia approved the ACIA Agreement through Presidential Decree No. 49 of 2011 on the ratification of the ASEAN Comprehensive Investment Agreement on 8 August 2011. This was to fulfil Article 48 paragraph (1) of ACIA:

“This Agreement shall enter into force after all Member States have notified or, where necessary, deposited instruments of ratification with the Secretary-General of ASEAN, which shall not take more than 180 days after the signing of this Agreement.”

All the ASEAN member states ratified the ACIA Agreement, which entered into force on March 29, 2012, and as a result, previous treaties, such as AIA Agreement and ASEAN Investment Guarantee Agreement (ASEAN IGA), expired. The implementation has been a challenge to Indonesia, as the country was regulated by Law No. 25 of 2007 on investments, which combines regulations on domestic and foreign investments. Indonesia’s participation in ACIA signifies a correlation to the alignment of investment regulation in ASEAN. The country’s law on investment comprises related concerns, such as investment principle, foreign investment regulation, and dispute settlement. This has led to disagreements between investors in ASEAN member states and Indonesia as well as necessitated preparedness of law to handle the disputes. Consequently, this research explored the problem using a normative method, literature investigations, and qualitative data analysis through the assessment of national and international legal documents and agreements.

II. REGULATION OF INVESTMENT THROUGH THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT (ACIA)

As a manual for all ASEAN member states, ACIA contains several legal arrangements for foreign direct investment in performing its cooperation and investment activities. According to Article 4 (a) of the agreement, “covered investment” means an investment in the territory of a Member State by an investor of any other Member State from the date of enforcement of this Agreement. This includes any investment that was established, acquired, or expanded and has been admitted according to its laws, regulations, and national policies, and, where applicable, specifically approved in writing by the competent authority of a concerned nation. Meanwhile, investor means a natural or juridical person of a Member State that is or has invested in any other Member State.¹⁴ Investment implies every kind of asset owned or controlled by an investor, including, but not limited to the following:¹⁵

- “(a) Movable and immovable property and other property rights such as mortgages, liens or pledges;*
- (b) Shares, stocks, bonds, debentures, and any other forms of participation of a juridical person as well rights or interests derived therefrom;*
- (c) Intellectual property rights, which are conferred pursuant to the laws and regulations of each Member State;*
- (d) Claims to money or any contractual performance with financial value related to a business;*
- (e) Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and*
- (f) Business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract, or exploit natural resources. The term also includes amounts yielded by investments, such as profits, interests, capital gains, dividends, royalties, and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification.”*

Any provisions concerning the foreign direct investment law are regulated by the scope of the Agreement application based on ACIA Article 3 paragraphs (1) and (2) described below:

“1. This agreement shall apply to measures adopted or maintained by a Member State relating to:

¹⁴ Article 4 (d), The ASEAN Comprehensive Investment Agreement, signed 26 February 2009 (entered into force 29 March 2012).

¹⁵ Article 4 (c), ASEAN Comprehensive Investment Agreement.

- (a) investors from any other Member State; and*
- (b) investments in its territory by investors of any other Member State.*

2. This agreement shall apply to new as well as existing investments as at the date of entry into force of this agreement.”

Hence, the ACIA applies only to the foreign direct investment established by the ASEAN Member States as well as new or already transactions made after the entry into force of this Agreement. Based on Article 3 paragraph (3) of the ACIA, agreements for liberalization and subject to Article 9 (Reservations) shall apply to several sectors. These are manufacturing, agriculture, fishery, forestry, mining, quarrying, and any other sectors as well as services incidental to these activities, as may be agreed upon by all Member States.

ACIA is also supported by several principles widely used and recognized in international agreements to promote free and open liberalization of foreign direct investment in ASEAN. This agreement shall create a liberal, facilitative, transparent, and competitive investment environment in ASEAN by adhering to the following principles:¹⁶

- “(a) provide for investment liberalization, protection, promotion, and facilitation,*
- (b) progressive liberalization of investment to achieve a free and open investment environment,*
- (c) benefit investors and investments based in ASEAN,*
- (d) maintain and accord preferential treatment to the Member States,*
- (e) no back-tracking of commitments made under the AIA Agreement and the ASEAN IGA,*
- (f) grant special and differential treatment as well as other flexibilities to the Member States, depending on their level of development and sectoral sensitivities,*
- (g) reciprocal treatment in the enjoyment of concessions among the Member States, where appropriate, and*
- (h) accommodate the expansion of this Agreement’s scope to cover other future sectors.”*

The “free and open” system in the ASEAN Member States is implemented by various actions. These include “progressive liberalization of investment,” provisions for enhancing and protecting investors and investments, alongside increased transparency and predictability of investment rules, regulations, and

¹⁶ Article 2, ASEAN Comprehensive Investment Agreement.

procedures to improve investment. It also comprises joint promotion of the region as an integrated investment area and cooperation to create favorable investment conditions in a nation by investors from another Member State.

Additionally, the legal arrangements for foreign direct investment in ACIA are supported by other principles that are recognized and widely used by the international community to support the liberalization process. These include the principles of National Treatment and Most Favored Nation (MFN) Treatment. The National Treatment Principle contains the following provisions:¹⁷

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

Meanwhile, the MFN Treatment principle contains the following provisions:¹⁸

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

MFN is a fundamental principle in the International Economic Law Agreement. According to Schwarzenberger, the MFN clause is the principle of non-discrimination between countries and requires that the same rights given to a nation must be accorded to third parties.¹⁹ The National Treatment and Most Favored Nation Treatment contained in ACIA prohibits discrimination against foreign investors or investments from the ASEAN member states. Therefore, each Member State shall provide fair and balanced treatment as well as full protection and security to investments from fellow members (Article

¹⁷ Article 5, ASEAN Comprehensive Investment Agreement.

¹⁸ Article 6 Paragraph (1), ASEAN Comprehensive Investment Agreement.

¹⁹ Schwarzenberger, *Frontier of International Law*, (London : Steven & Sons Publishing, 1962), 230.

11 paragraph 1 of ACIA).²⁰ In addition, discriminatory acts to the investment liberalization regime as described in ACIA or that impede the freedom of flow of investment traffic in the ASEAN region are considered contrary.

The exceptions in the implementation of the ACIA Agreement are:²¹

- “(a) Any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation),*
- (b) Subsidies of grants provided by a Member State,*
- (c) Government procurement, and*
- (d) Services supplied in the exercise of governmental authority by the relevant body or authority of a Member State. This means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers.”*

Furthermore, Member States shall cooperate in increasing awareness of the ASEAN community as an integrated investment area to increase foreign investments through, among others:²²

- “(a) encouraging the growth and development of small and medium enterprises and multinational enterprises,*
- (b) industrial complementation and production networks among multinational enterprises,*
- (c) organizing investment missions that focus on developing regional clusters and production networks,*
- (d) organizing and supporting various briefings and seminars on investment opportunities, laws, regulations and policies, and*
- (e) conducting exchanges on other issues of mutual concern relating to investment promotion.”*

Member States shall endeavour to cooperate in facilitating investments into and within ASEAN through:²³

- “(a) creating the necessary environment for all forms of investments;*
- (b) streamlining and simplifying procedures for investment applications and approvals;*
- (c) promoting the dissemination of investment information, including rules, regulations, policies and procedures; and*

²⁰ Article 11 Paragraph (1) ASEAN Comprehensive Investment Agreement (ACIA) : “Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security”.

²¹ Article 3 Paragraph (4), ASEAN Comprehensive Investment Agreement.

²² Article 24, ASEAN Comprehensive Investment Agreement.

²³ Article 25, ASEAN Comprehensive Investment Agreement.

(d) establishing one-stop investment centres;”

III. THE ACIA DISPUTE SETTLEMENT SYSTEM OF INVESTMENT

The ACIA Agreement is also ASEAN’s effort to improve the economic development of its member states. Moreover, the trade and investment liberalization policy is considered a method to increase economic competitiveness, which can be implemented by various systems. Many ideas argue that increasing competitiveness is a primary challenge to companies and should be made at the organizational level. An approach currently being implemented between companies in developed countries is international cooperation through the establishment of a strategic alliance. Various methods of international cooperation can be arranged at the State level (economic) to improve competitiveness or increase the ability to penetrate the market. The establishment of a free trade area (VIA) is also considered an effort to improve the market access among participants.”²⁴

However, the implementation of ACIA will bring dissimilar perceptions among the ASEAN member states. This is because each member has different investment laws and mechanisms, which can lead to disputes. According to Article 28 of the ACIA, “disputing investor” means an investor of a Member State that makes a claim on its behalf or on behalf of a juridical person of the other Member State that the investor owns or controls. A disputing Member State is the country against which a claim is made. Meanwhile, the juridical person means any legal entity duly constituted or otherwise under the applicable law of a Member State for profit or otherwise, privately-owned or government-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organization.²⁵

Therefore, the ACIA has defined investment disputes among ASEAN member states as follows:²⁶

“(a) This Section shall apply to an investment dispute between a Member State and an investor of another Member State that has incurred loss or damage because of an alleged breach of any rights conferred by this Agreement with respect to the investment.

(b) A person possessing the nationality or citizenship of a Member State shall not pursue a claim against that State under this Section.

(c) This Section shall not apply to claims arising out of events which

²⁴ Hadi Susastro, Competition Policy, Competitiveness, Liberalization, Globalization, Regionalization and All of them, (Jakarta : CSIS Working Papers Series, 2004), 2.

²⁵ Article 4, ASEAN Comprehensive Investment Agreement.

²⁶ Article 29, ASEAN Comprehensive Investment Agreement.

occurred or were raised before the enforcement of this Agreement.

(d) No aspect of this Section shall be construed to prevent a disputing investor from seeking administrative or judicial settlement available within the country of a disputing Member State.”

Meanwhile, the mechanism of capital investment dispute settlement regulated in ACIA includes legal and non-legal channels, where the first comprises conciliation and consultation.²⁷

The transnational system abounds with variations in conciliation as a method for dispute settlement arising from international economic and business relationships. Conciliation has been adopted for resolving disputes between contracting inter-state parties within an international organization or multilateral treaty framework. It has also been inserted in bilateral agreements, particularly those relating to trade or investment by one party in the territory of the other. On the national level, conciliation has been incorporated into domestic statutes regulating international commercial dispute settlement. Finally, private organizations parties entering into international business contracts can draft conciliation clauses into their agreements, utilizing institutional rules when desired. This signifies that conciliation serves as a preliminary or intermediate step in a layered dispute resolution structure for multilateral or bilateral treaties, as well as domestic statutes or private ordering.²⁸

The concept of conciliation stemmed from and resembles mediation, as both methods use a third party to facilitate a non-binding result through communication with the disputants. Therefore, the two terms are occasionally used interchangeably. In the transnational system, a distinction can be made in the degree of formality and level of initiative imposed on the third party. Mediation is more informal and expected to be constructed purely based on the information provided by the parties during the formulation of proposals. Comparatively, a conciliation is more formal in structure and procedure but retains a non-adversarial environment. The central objective of the conciliator is to facilitate an amicable conflict settlement by communicating with the parties, typically through structured proceedings and submitting written proposals for a resolution. However, the actual process utilized may be occasionally more akin to mediation than conciliation. Surveying the use of the process throughout the transnational system, in reality, indicates variations on the theme of conciliation flourish. Resorts to conciliation can be

²⁷ Article 30 and 31, ASEAN Comprehensive Investment Agreement.

²⁸ Linda C. Reif, “Conciliation as A Mechanism For The Resolution of International Economic and Business Disputes,” *Fordham International Law Journal* 14, (1990) : 587.

accomplished in two ways. First, the parties can insert a conciliation clause into a treaty or contract to ensure future resolutions address disputes arising out of that particular relationship. Alternatively, they may consent to a discrete conciliation agreement, which will address a specific dispute.²⁹

ACIA stipulates that the disputing parties may at any time agree to conciliation, which may begin and be terminated at the request of the disputing investor whenever. Proceedings involving conciliation and positions taken by the disputing parties shall be without prejudice to the rights of either group in any further proceedings under this Section.³⁰

Furthermore, the disputing parties can use a consultation or negotiation method, which may include the use of non-binding, third-party procedures. Such consultations shall be initiated by a written request delivered by the disputing investor to the disputing Member State. Consultations shall commence within 30 days of receipt of the request by the disputing Member State unless the parties otherwise agree. Consequently, a disputing investor shall make all reasonable efforts to provide the disputing Member State with information regarding the legal and factual basis for the investment dispute prior to the commencement of consultations to facilitate resolution.³¹

Supposing resolution cannot be found, the parties can take legal action through “arbitration.” This is a non-judicial legal technique for resolving disputes through referral to a neutral party for a binding decision or “award.” An arbitrator may consist of a single person or a board, usually consisting of three members. Arbitration is most commonly used in resolving commercial disputes and is distinct from mediation and conciliation, both of which are common in settling disputes between labor managements and unions. In mediation, the parties resort to a third party to offer a settlement recommendation or assist in reaching a compromise. Such interventions, which also occur in international disputes between states through diplomatic interventions and good offices, have no binding force upon the disputants, unlike the arbitrator’s ruling.³²

Meanwhile, arbitration has been used for the settlement of disputes between members of trade associations or different security and commodity trade exchanges. Contract forms often contain a standard arbitration clause referring to specific rules. Also, numerous arrangements between parties in industry and commerce provide for the arbitration of controversies arising from contracts for the sale of manufactured goods, service of employment

²⁹ Reif, “Conciliation as A Mechanism,” 584.

³⁰ Article 30, ASEAN Comprehensive Investment Agreement.

³¹ Article 31, ASEAN Comprehensive Investment Agreement.

³² Marten Domke, “Arbitration Law”, accessed 4 October 2021, <https://www.britannica.com/topic/arbitration>.

terms, construction and engineering projects, financial operations, agency and distribution arrangements, as well as many other undertakings. The usefulness and significance of arbitration are demonstrated by its increasing use by the business and legal communities in many countries. An advantage of arbitration can be the speed of resolution, compared with the long delays of ordinary court procedures. The expert knowledge of the customs and usages of a specific trade by arbitrators renders testimonies and excessive documentation unnecessary and eliminates some expenses associated with court procedures. In addition, the privacy of the arbitration procedure is much valued compared to controversy, as situations unfavorable to both parties' credit or deficiencies in manufactured goods revealed in arbitration proceedings do not become known to outsiders. However, there are several disadvantages, first, the inability to develop business guidelines, as Anglo-American arbitrators are not obligated to explain their decisions. This uncertainty renders the arbitral decision less predictable. Obstacles to the extensive use of commercial arbitration are also divergences in municipal laws and court decisions that result in different interpretations of similar questions and the non-publication of awards.³³

Arbitration proceedings are based on a written agreement between parties involving the submission of a given dispute to arbitration instead of the state courts. Arbitration agreements can be found in the majority of commercial contracts, particularly relating to international transactions.

In terms of procedure, arbitration provides significant freedom and flexibility, as the parties may choose their arbitrators, location of settlement, structure, timing, and/or the language of the proceedings. However, their freedom is still somewhat restricted, as they cannot deviate from the principles of fairness and equality, as well as the right to be heard and legally represented. Two types of arbitration are available, namely institutional and ad-hoc. In the first type, the institution assumes specific administrative functions, such as servicing briefs, etc. Although the degree of involvement may vary, the dispute will always be solely decided by the arbitral tribunal. In ad-hoc proceedings, these administrative functions are either assumed by the tribunal or delegated to third parties.³⁴

Based on article 32 of ACIA, an investment dispute that has not been resolved within 180 days of the receipt by a disputing Member State of a request for consultations permits the disputing investor to submit a claim for

³³ Domke, "Arbitration Law."

³⁴ "Arbitration", Hamburg International Arbitration Center (HIAC), accessed 5 October 2021, <https://www.dispute-resolution-hamburg.com>.

arbitration, stating that:³⁵

- a) *the disputing Member State has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favored-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), and 14 (Expropriation and Compensation) relating to the management, conduct, operation, or sale or other disposition of covered investment, and*
- b) *the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising from that breach.*

Furthermore, the selection of dispute settlement location assigned to the concerned parties can be arranged through:³⁶

- “(a) The courts or administrative tribunals of the disputing Member State, provided they have jurisdiction over such claims,*
- (b) The ICSID Convention and Rules of Procedure for Arbitration Proceedings, provided both the disputing and non-disputing Member States are parties to the Convention,*
- (c) The ICSID Additional Facility Rules, provided either the disputing or non-disputing Member State is a party to the ICSID Convention or*
- (d) The UNCITRAL Arbitration Rules,*
- (e) The Regional Centre for Arbitration at Kuala Lumpur or in ASEAN, or*
- (f) The disputing parties agree to any other arbitration institution.”*

A claim shall be deemed submitted under this Section when the disputing investor’s notice or request for arbitration is received under the applicable rules. The arbitration rules applicable under paragraph 1, as in effect from the date the claim or claims were submitted to arbitration, shall govern the arbitration, except to the extent modified by this Agreement. Furthermore, the applicable arbitration rules may be waived, varied, or modified by written agreement between the disputing parties in relation to a specific class of investment disputes. Such rules shall be binding on the relevant tribunals established under this Section as well as the affected individual arbitrators. The disputing investor shall provide with the notice of arbitration (a) the name of the appointed arbitrator or (b) a written consent for the Appointing Authority to employ that arbitrator.

³⁵ Article 32, ASEAN Comprehensive Investment Agreement.

³⁶ Article 33, ASEAN Comprehensive Investment Agreement.

Afterwards, the dispute shall be submitted to arbitration under Article 33(1) (b) to (f) in accordance with this Section and shall be conditional upon:³⁷

- “(a) the submission of the investment dispute to such arbitration within 3 years of the time the disputing investor became aware or should reasonably have become aware of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or a covered investment,*
- (b) the provision of a written notice by the disputing investor, which shall be tendered at least 90 days before the claim is submitted, to the disputing Member State of its intent to submit the investment dispute to such arbitration, alongside briefly summarizing the alleged breach of the disputing Member State under this Agreement (including the alleged breached provisions) and the alleged loss or damage, and*
- (c) the notice of arbitration under Article 33(2) being accompanied by the disputing investor’s written waiver of the right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Member State or other settlement procedures with respect to any measure alleged to constitute a breach as referred to in Article 32 (Claim by an Investor of a Member State).”*

Notwithstanding subparagraph 1(c), the disputing investor shall not be prevented from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving his rights and interests. Also, such measures must not involve the payment of damages or resolution of the disputed substance before the courts or administrative tribunals of the disputing Member State. A Member State shall not provide diplomatic protection or bring an international claim for a dispute in which one of its investors and the other Member State have consented to submit or have submitted to arbitration under this Section unless the other Member State has failed to abide by and comply with the award rendered. Here, diplomatic protection shall not include informal exchanges for the sole purpose of facilitating a settlement. Additionally, a disputing Member State shall not assert, as a defence, counter-claim, right of set-off, or otherwise, that the disputing investor in relation to the covered investment has received or will receive, pursuant to insurance, guarantee contract, indemnification, or other compensation for all or part of any alleged loss.³⁸

According to article 35 of ACIA, unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:

- (a) one arbitrator appointed by each of the disputing parties; and

³⁷ Article 34, ASEAN Comprehensive Investment Agreement.

³⁸ Article 34, ASEAN Comprehensive Investment Agreement.

- (b) the third arbitrator, who shall be the presiding, appointed by an agreement between the disputing parties. The third arbitrator shall be a national of a non-Member State, which has diplomatic relations with the disputing and non-disputing Member State and shall not have permanent residence in either country.

Any person appointed arbitrator shall have expertise or experience in public international law, trade, or investment rules. An arbitrator shall be selected strictly based on objectivity, reliability, sound judgment, and independence and shall maintain similar conduct throughout the arbitral proceedings. Subject to Article 36 (Conduct of the Arbitration), a tribunal that has not been constituted within 75 days from the date a claim was submitted to arbitration under this Section permits the appointment of another arbitrator(s) by the Appointing Authority on the request of a disputing party. The tribunal shall reach its decisions, which shall be binding, by a majority of votes and the disputing parties shall bear the cost of their respective arbitrators as well as share the cost of the presiding arbitrator and other relevant charges equally. In all other respects, the tribunal shall determine its procedures. The disputing parties may establish rules relating to expenses incurred by the tribunal, including remuneration of the arbitrators. Supposing any appointed arbitrator, as provided for in this Article, resigns or becomes unable to act, a successor shall be employed in the same manner and have all the powers and duties as prescribed for the original arbitrator.³⁹

During events where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits. A disputing Member State may, no later than 30 days after the tribunal constitution, file an objection that a claim is manifest without merit. Also, it may propose an objection that a claim is outside the jurisdiction or competence of the tribunal. The disputing Member State shall specify the basis for the objection as precisely as possible. Subsequently, the tribunal shall address any objection as a preliminary question apart from the merits of the claim, and the disputing parties shall be given a reasonable opportunity to present their views and observations.

Supposing the tribunal decides that the claim is manifest without merit or not within its jurisdiction or competence, an award shall be rendered to that effect. The tribunal may award the prevailing party reasonable costs and fees incurred from submitting or opposing the objection. In determining the warrant of such an award, the potential of frivolity or manifestation without merit shall be considered, and the disputing parties will be afforded

³⁹ Article 35, ASEAN Comprehensive Investment Agreement.

a reasonable opportunity to comment. Unless the parties oppose, the tribunal shall determine the place of arbitration in accordance with the applicable rules, provided the place is within the territory of a State that is a party to the New York Convention. In situations where an investment dispute relates to a taxation measure, both Member States, as well as representatives of their tax administrations, shall hold consultations to determine the actuality of the dispute as a taxation measure. Assuming a disputing investor claims that the disputing Member State breached Article 14 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing and non-disputing States shall, upon request from the disputing Member, hold consultations to determine the equivalence of the taxation measure to expropriation or nationalisation.

Any tribunal established under this Section shall accord serious consideration to the decision of both Member States under paragraphs 6 and 7. In situations where both Member States fail to initiate the consultations referred to in paragraphs 6 and 7 or make such joint decisions within 180 days from the date of the receipt of the consultation request referred to in Article 31 (Consultations), the disputing investor shall not be prevented from submitting his claim to arbitration.⁴⁰

For cases where two or more claims have been submitted separately to arbitration under Article 32 (Claim by an Investor of a Member State) and the claims have a question of law or fact in common and arise from the same or similar events or circumstances, all concerned disputing parties may agree to consolidation in any manner deemed appropriate.⁴¹ Furthermore, without prejudice to the appointment of other kinds of experts authorised by the applicable arbitration rules, the tribunal may appoint one or more experts to report to it in writing on any factual issue at the request of the disputing parties. These issues may comprise environmental, public health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to agreed terms and conditions.⁴² The transparency of the arbitral proceedings is very important as:⁴³

- “1. Subject to paragraphs 2 and 3, the disputing Member State may make publicly available all awards and decisions produced by the tribunal.*
- 2. Any of the disputing parties that intend to use information designated as confidential in a hearing must advise the tribunal, which shall*

⁴⁰ Article 36, ASEAN Comprehensive Investment Agreement.

⁴¹ Article 37, ASEAN Comprehensive Investment Agreement.

⁴² Article 38, ASEAN Comprehensive Investment Agreement.

⁴³ Article 39, ASEAN Comprehensive Investment Agreement.

make appropriate arrangements to protect the information from disclosure.

3. *Any designated confidential information that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.*
4. *A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case but shall require the protection of that confidential information.*
5. *The tribunal shall not require a Member State to furnish or allow access to information, which, if disclosed, would impede law enforcement or be contrary to the law protecting Cabinet confidences, personal privacy, financial affairs and accounts of individual customers, or is determined contrary to its essential security.*
6. *The non-disputing Member State shall be entitled, at its cost, to receive from the disputing Member State a copy of the arbitration notice no later than 30 days after the date that such document was delivered. The disputing Member State shall notify all other Member States of the receipt of the notice within 30 days thereof.”*

However, there are restrictions on filing a claim to arbitration. A claim is filed following the submission of the investment dispute to arbitration occurring within 3 years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement, causing loss or damage to the disputing investor or a covered investment. Another reason is the provision of a written notice by the disputing investor, submitted at least 90 days before the claim to the disputing Member State informing of its intent to submit the investment dispute to arbitration and briefly summarizing the alleged breach of the disputing Member State under this Agreement (including the allegedly breached provisions) and the loss or damage allegedly caused to the investor or a covered investment.

Objections from the concerned parties shall be addressed by the tribunal as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. Supposing the tribunal decides the claim is manifest without merit or is not within the jurisdiction or competence of the tribunal, an award shall be rendered.

Finally, the disputing parties may agree on a dispute resolution at any time before the tribunal issues its final award. In circumstances where a tribunal makes a final award against either disputing parties, the tribunal may award, separately or in combination, only monetary damages and any applicable

interest, alongside restitution of property, in which case the disputing Member State may be expected to pay monetary damages and any applicable interest in lieu of restitution. The attorney's costs and fees may also be granted in accordance with the Agreement and the applicable arbitration rules. A tribunal may not proffer punitive damages, and an award shall have no binding force except between the disputing parties and in respect of the particular case. Subject to paragraph 7 and the applicable review procedure for an interim award, the disputing party shall immediately abide by and comply with an award. The disputing party may not seek enforcement of a final award until.⁴⁴

“(a) in the case of a final award under the ICSID Convention: (i) 120 days have elapsed from the date the award was rendered, and no disputing party has requested revision or annulment or (ii) revision or annulment proceedings have been completed;

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 33(1)(e): (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award, or (ii) a court has dismissed or allowed an application to revision, rejection, or annulment and there is no further appeal.”

IV. THE IMPLICATION OF THE ACIA AGREEMENT IN INVESTMENT DISPUTE SETTLEMENTS IN INDONESIA

Indonesia's participation in international agreements is inevitable to the present global economy due to its tendency to increase cooperation and dependence between countries. For instance, the country participated in regional international agreements by signing the ASEAN Comprehensive Investment Agreement on February 26, 2009, in Cha-am, Thailand. The ACIA intends to establish a “free and open investment regime” to achieve the ultimate purpose of economic integration in the ASEAN Economic Community. Indonesia approved the ACIA Agreement through Presidential Decree No. 49 of 2011 on the Ratification of the ASEAN Comprehensive Investments Agreement on August 8, 2011.

Another implication of ratification is the obligation to comply with the provisions depicted on the ACIA. This includes the necessity to align the ACIA investment provisions and the domestic investment law as described in Article 26 of ACIA:

⁴⁴ Article 41, ASEAN Comprehensive Investment Agreement.

“Member States recognize the importance of fostering ASEAN economic integration through various mechanisms, including the Initiative for ASEAN Integration, Priority Integration Sectors, and AEC, which all include cooperation on investment. Member States can enhance economic integration by harmonizing investment policies and measures, where possible, to achieve industrial complementation.”

The meaning of harmonization for Indonesia refers to Law No. 25 of 2007 on Investment (hereinafter referred to as the Investment Law), where a regulatory framework and manual for foreign direct investments is provided, as depicted in Article 2, which applies to investment in all sectors of the nation.

Meanwhile, the Indonesian Investment Law is similar to ACIA by adopting liberalization, as described in Article 4 paragraph (2a) of the Indonesian Investment Law, to regulate equal treatment for domestic and foreign investors by considering national interests. Based on this article, foreign and domestic investors must be given similar treatment without discrimination. This is related to Article 6 paragraph (1) of the Investment Law, which requires the government to treat all foreign investors in Indonesia equally, in accordance with the provisions of laws and regulations.

Additionally, the government established policies to encourage the creation of a national business climate for investment, strengthen competitiveness, and accelerate investment.⁴⁵ The foreign direct investment must be established in limited companies, comply with Indonesian law and must be domiciled in the Indonesia, unless contrarily stipulated by law.⁴⁶

The implementation of investment activities by foreigners, the government, or domestic agencies occasionally results in disputes related to the interpretation of the agreement, negligence, or other violations. Hence, a dispute settlement mechanism is required. The Indonesian Investment Law uses two channels similar to the ACIA Agreement, namely legal and non-legal.

Article 32 of the Investment Law described that in the event of a dispute between the government and investor, the concerned parties must resolve the dispute first through deliberation and consensus. However, the failure of a settlement will lead to an arrangement by arbitration or alternatives as well as courts in accordance with the laws and regulations. A dispute between the government and a domestic investor can be resolved through arbitration based on an agreement between the parties or in a trial, in the absence of a

⁴⁵ Indonesia. Pasal 4 ayat (1) Undang-Undang tentang Penanaman Modal. UU No. 25 Tahun 2007. (Law on the Investment. Law No. 25 Year 2007).

⁴⁶ Law on the Investment, art. 5 Paragraph (2).

resolution. In the event of a dispute between the government and a foreign investor, settlement is conducted through international arbitration, which must be agreed upon by the parties.

Additionally, the Investment Law stipulates that domestic and foreign investors of a limited liability company are prohibited from establishing agreements and/or statements confirming that share ownership is for and on behalf of other people. It involves investors in agreements or contracts with the government, who commit corporate taxation crimes, inflate recovery costs, or minimize profits, resulting in state losses, based on findings or examinations of officials authorized. It is controlled by a court ruling with permanent legal force and entails the termination of the agreement or contract with the concerned investor.

The corporate body or individual may also be subject to administrative sanctions, including written warnings, restrictions on activities, freezing of business and/or investment facilities, or revocation of activities and/or investment facilities. Besides being bound by administrative consequence, the entities or individual businesses may be subject to other sanctions in accordance with the provisions of laws and regulations.⁴⁷

V. CONCLUSION

The ACIA Agreement comprises investment regulations and principles that serve as the manual for all ASEAN member states to implement cooperation and investment activities. It is intended to liberalize investment in ASEAN regions and open investment among the members to support economic development. However, there are potential disputes in investment activities, including the interpretation of the agreement content or differential legal system among the different nations. According to the ACIA Agreement, there are two dispute settlement paths, namely ADR settlement involving conciliation or negotiation (Article 30 and 31) and trial or arbitration (Article 32 and 33 of the ACIA Agreement). Both dispute settlement methods may be selected by concerned parties. Meanwhile, Indonesia already ratified the ACIA Agreement and is obligated to conform to the contained investment rule. The regulation established by Article 32 of Law No. 25 of 2007 on investment uses similar mechanisms as described in the ACIA Agreement under two paths, the trial and alternative dispute resolution (ADR). Therefore, both instruments attempt to protect the concerned parties in implementing investment and legal certainty.

⁴⁷ Law on the Investment, art.34 Paragraph (1) and (3).

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