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Investment Arbitration Law: Challenges For Investor–State Arbitration In The ASEAN Community

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Abstract
The ASEAN Comprehensive Investment Agreement (ACIA) gives aggrieved investors the option to refer their disputes to arbitration in resolving their disputes. Many foreign arbitrage decisions is found t be time consuming when it comes to enforcing the decision and cases over the final and legal binding arbitrage decision being overturned by court's decision in Indonesia. ASEAN Countries have to face contractual with the foreign Investors through international investment arbitrations whether the outcome favorable or not those countries have spent significant time, energy, and financial resources from ASEAN countries. The ASEAN Comprehensive Investment Agreement (ACIA), that provides the legal basis for the AEC's liberalized investment regime, establishes an investor-state dispute resolution mechanism (ISDR mechanism). This may influence of the provisions specifically designed to protect foreign investors such as national treatment, fair and equitable treatment: most favored nation; and also in deciding jurisdictional Issues. Bilateral Investment Treaty (BIT) as a legal basis for foreign investment activities aim to provide protection for foreign investor. BITs often contain excessive and limitless protection clauses in order to attract foreign investors. it is necessary to strengthen cooperation among ASEAN members in dealing with foreign investors through BIT The ideal picture will be that SEA is pro-market and pro-arbitration reform. Arbitration proceeding, the arbitrators and counsels more often from and not only do they lead to high cost, but also they lack of familiarity with South East Asia's social, politics, economic culture and customs.

Keywords: *International Arbitration, ASEAN Investment, Bilateral Investment Treaty.*

INTRODUCTION

The increase in trade may very well translate to a corresponding in the number of intra-ASEAN disputes, including investm[1]ent disputes between investors and ASEAN member states. In that regard, the ASEAN Comprehensive Investment Agreement (ACIA) gives aggrieved investors the option to refer their disputes to arbitration if attempts at resolving their disputes. The rise in the quantum of trade and investment, however, is likely to lead to disputes, and with the 10 ASEAN countries' legal systems at various, disparate stages of development, arbitration looks set to be the dispute resolution mechanism of choice going forward.[2]

Foreign Direct Investment (FDI) is an important factor to South East Asian Nations (ASEAN) countries because it facilitates economic growth which is a crucial element to poverty reduction. Countries in this region have liberalized their markets to attract FDI, but there were some im- pediments included relatively ineffective commercial laws as well as high level of state involvement in protecting local companies.[3] This one of the reasons why in early 2000 China and India was more t tive as a destination of FDI than SEA.[4] However, as the production costs and wages in China and increase rapidly, FDI interests in SEA soar.[5]

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Another factor for the of FDI is that SEA countries have taken steps to improve their commercial law, infrastructures and increasingly liberalized their economy as a result, Indonesia, Malaysia, Thailand, Singapore and the Philippines outrun China in FDI flow.[6]

The more FDI activities, the more likely for investment dispute to arise. SEA countries such Indonesia, Malaysia, Thailand, Vietnam, Myanmar, and the Philippines have faced investment arbitration broug by foreign investors. Despite the facts that the number of invester disputes is relatively low compared to the number of investment for in this region, the effect of such arbitration is quite alarming to the states that have been affected.[7] Arbitrations have created much in this area, that The tribunal's expansive interpretation of umbrella clause has resulted in an award against the Philippines.[8] The Philippine disappointed with investment arbitration which led to its refusal include investment arbitration in free trade agreement made between the Philippines and Japan.[9] The excessive awards resulted from the method of calculation of damages rendered against Indonesia has been criticized and led to disobedience towards the decision.[10]

This paper argues that the current practice of Bilateral Investment Treaty (BIT) drafting needs to be remodeled by limiting the scope of investment protection. This includes redressing the use of international investment arbitration. The current practice is heavily western oriented by using English as the main language in the proceeding, and the use of procedural law (lex arbitri) created by international entity based in the United States or Europe. Those carry negative consequences for ASEAN members such as: language barrier; financial burden; and lack of expertise to defend themselves which then lead to unfavorable outcome. Furthermore, the Tribunals in current system are often pre-occupied with the commercial interests and excessive protection of foreign investors without considering the host countries[2]' concerns through policy considerations. Such a pro-investor attitude put ASEAN countries as the host states of investments in the position of unable to defend their economic development agendas.

ASEAN as a group has a strong bargaining position against foreign investors. The member countries should be able to negotiate as a collective, both regionally and multilaterally when dealing with investors from outside ASEAN. This is especially in negotiating protection clauses such as Most Favored Nation (MFN); Fair and Equitable Treatment (FET); and National Treatment (NT).Those kind of protection shall be precisely drafted to limit their applicability. Additionally, in dispute settlement area, ASEAN members should use IIA as a complement to local adjudication not vice versa. Further, in negotiating BITS proposal to employ arbitration center in SEA should be in the priority instead of directing dispute to center located outside region.

This paper is significant because while investment arbitration been researched widely, less is done in ASEAN. SEA has not rec adequate attention from current literature despite the

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[1]Lecturer postgraduate programs in law studies, University Mpu Tantular, Chairperson - Association of Intellectual Property Attorneyss (AKHKI), Secretary General - Arbitration and Mediation Board of Intellectual Property Rights (BAMHKI). Lecturer at several universities graduate programs in law studies, Professional Trainers in several training providers both national and multinational training centers in the field of corporate & commercial law, Certified Mediator- Chartered Arbitrator.

[2]Sondre Ulvund Solstad ., Introduction to the ASEAN Comprehensive Investment Agreement, ASEAN Briefing, April 12, 2013), p. 1 . See http://www.aseanbriefing.com/news/2013/04/12/introduction-to-the-asean- comprehensive-investment-agreement.html. The ACIA is seen as a key part of the ASEAN Economic Community blueprint set down by the regional grouping's member states in 2007, which aims to establish an integrated regional economy with the free flow of both investment and services.

[3]Vivienne Bath and Luke Nottage, Foreign Investment and Dispute Resolution Law and Practice in Asia, Routledge, 2011, page. 7.

[4]Ibid

[5]"Asia Pacific Investment Climate Index" available at: http://www.vriensparmes com/wp- content/uploads/2013/07/VP-Asia-Pacific-Investment-Climate-Indes-2013 pdf.

[6] The FDI flow into those SEA countries rose by 7% in 2012, while in China it fell by 2.9%.. See Sophie Song, South East Asia received more FDI than China, Which is now Wor third largest foreign investors, available at http://www.ibtimes.com south receives-more-foreign-direct-investment-fdi-china-which-now-worlds- third- larges.

[7]M Sommarajah, Asian Views of Foreign Investment Law, in Nottage, Foreign me ment and Dispute Resolution Law and Practice in Asia, Routledge, 2011, and see Vivienne Baths and Luke Nottage (eds) page. 248

[8]SGS v Philippines.

fact that SEA a region of growing importance in global affairs, which attract great number of FDI. The road map of this paper is a introduction, provides overview of developments of international investment worldwide and in South East Asia. It begins by arguing the despite the need to foster economy through protecting foreign investment activities, balance approach towards protecting the host states of investment is necessary.

This article acknowledges the importance of state-investor arbitration and at the same time shows vulnerability of SEA countries towards investment arbitration. It further emphasizes that in respond to such vulnerable position, ASEAN as a group should take action together. It is unavoidable that in order to protect themselves from harsh investors as well as intricate arbitration, ASEAN would be better off having its own investment arbitration center run by its experts. Thus, the short-term challenge is to equip legal practitioners, business players and academicians with more knowledge, skills and experiences in dealing with investment disputes. The long-term step will be to negotiate model of investment treaties applicable in the region and to harmonize national investment laws. These efforts are strategic opportunities for ASEAN as single market to keep balance between promoting investment, protecting investors and the host states at the same time.

In the current practice, arbitral tribunals have been relatively too flexible in giving protection to foreign investors through excessive wide interpretation on treaty provisions. Partly, this reflects bias in trial proceedings as a pro-investor approach. The reluctance by tribunais to address host state's interests appears to be driven largely by their approach on treaty interpretation. The tribunals misstate the purposed BIT as only to protect investors and neglect the reality that host state also intend to develop their economy when signing the treaty.

II. ASEAN for Investment Arbitration and Bilateral Investment Treaty (BIT)

II. 1. ASEAN for Investment Arbitration

The number of arbitration under the investment treaties increases significantly during the last two decades. On the contrary, the perception of legitimacy of arbitral decisions decreases as consequences of conflicting decisions, excessive awards, and lack of transparency. In responding to this dilemma, ASEAN members can respond in three ways. Those ways can be used to prevent possibility of unfair and bias arbitral award which expanding the meaning and scope of the provision of the investment treaties beyond what has been intended b[3]y the host states. In short, the law of protection needs to be rethought. ASEAN members shall be cautious about vague protection clauses such as FET, MFN, NT and umbrella clause by avoiding or limiting the scope of their application. This is for example:

- Fair and equitable treatment shall not deny justice in legal or administrative proceedings. FET.
- Most-Favored Nation not to encroach upon procedural issues but merely apply to substantive issues. MFN is a condition where the state recipient must receive equal advantages as the "most favored nation" by the country granting such treatment.
- National treatment which obliges the host states to treat foreign investors and local investors equally should be limited for example it is not applicable for infant industry.
- Umbrella clause should be avoided because it is too broad and can be widely interpreted. Umbrella clause imposes an international treaty obligation on host countries that requires them to respect obligations they have entered into with respect to investment.

[9]M Somarajah, See note [6.]
[10] Amco vs Republic of Indonesia.

Further change that needs to be made is signing treaty with limited or no arbitration right in it. In respect to investment arbitration, there has been some suggestion that dispute resolution provisions are one of the strongest investor protections in investment treaties.[11] However, there is still debatable whether decision to invest is significantly influenced by the existence of investment arbitration.[12] Foreign investors may be more concerned with obtaining profit and maintaining good relationship with the government for future projects.

II. 2. Bilateral Investment Treaty (BIT) Basis and Investment Challenge

Bilateral Investment Treaty (BIT) is an international agreement made by two countries, which establish the terms and conditions for investment made by national or company of one state in another state.[13] BITS serve as a legal foundation for foreign investment activities, which guarantee of protection as well as a mean for economic development in the host states. The unique characteristic of many BITs is that they contain provision on the use of investment arbitration as a mean to settle in- vestment disputes between FDI and the host states.[14] Most BIT requires that after negotiation fail, the disputes should be brought to arbitration instead of host state's court due to possibility of bias.

There is no agreement among scholars on whether BITS increase FDI as shown by Swenson in her chapter. The divergent views rise from: Tobin-Rose Ackerman; and Hallward-Driemer claiming that BITs do not increase FDI. On the contrary, Salacuse-Sullivan and Neu- mayer-Spess using larger sets of countries contends that BITs increased FDI.[15] As the legal basis for entering host states, most of provisions in BITs contain clause of protected interests given to foreign investments.[16]14 It is perceived that foreign investors are in a weak position due to the possibility of abuse by the host government. However, despite such a protection, BITs actually carry another objective to enhance economic cooperation between the contracting parties. By signing the BIT, host states expect to gain more economic growth.

Thus, not only for the investment, but adequate protection should also be given to the host states since they also bear certain costs. Salacuse points out that host country of investment bear four costs associated with their policy to open door to FDI: inability of the local industries to compete with FDI. FDI intervention towards political process, security risks, and possibility of introduction of dangerous technologies which may damage the local environmental, cultures and health.[17]

Definition of investment varies in every BIT. Most definition covers "every kind of asset" or "any kind" and followed by lists of assets.18 This broad definition often creates difficulties when dispute arises before arbitral tribunals. Furthermore, protection clauses in BIT are also numero[4]us and unclear. MFN, FET and NT which meant to attract investors and protect their activities need to be interpreted in line with economic development in the SEA context. Those ambiguities in BIT explain why the job of resolving dispute which involve interpretation activities should be done by people who understand the context where the disputes arise.

BITS are also the basis on which dispute settlement through arbitration is resorted. The International Center for the Settlement of Investment Disputes (ICSID) is often referred to facilitate investment dispute. Because it does not have permanent arbitral tribunals, the ICSID allows independent arbitral tribunals and arbitration mechanisms to hold proceedings under its rules, and all contracting member states agree to enforce and uphold arbitral awards in accordance with the ICSID Convention.[19]

In the current practice, arbitral tribunals have been relatively too flexible in giving protection to foreign investors through excessive wide interpretation on treaty provisions.

[11]Susan D. Frank, Foreign Direct Investment, Investment Treaty Arbitration and The Rule of Law., Global Business & Development Law Journal. Vol. 19, page 356.
[12]Susan D. Frank, Ibid.
[13]Susan Rose-Ackerman and Jennifer L. Tobin, "Do BITS Benefit Developing Countries?" in Chaterine A. Rogers and Roger P.Alford, The Future of Investment Arbitration, Oxford University Press. page 131.

Partly, this reflects bias in trial proceedings as a pro-investor approach. The reluctance by tribunals to address host state's interests appears to be driven largely by their approach on treaty interpretation. The tribunals misstate the purposed BIT as only to protect investors and neglect the reality that host state also intend to develop their economy when signing the treaty.

ICSID Convention is designed to promote the settlement of disputes between state and private foreign investors. It aims to contribute to the promotion of economic development.[20] Investment dispute arbitration administered by the ICSID is accounted for the largest number of investment disputes.[21] Article 25 of ICSID Convention stipulates the jurisdiction of the ICSID tribunal as for legal dispute arising directly out of an investment between a contracting State and the national of another contracting State which the parties to the dispute consent in writing to submit the dispute to the ICSID.

ICSID has several unique aspects for example its proceedings are free from the interference of local courts where the proceeding is conducted. Unlike other international arbitration which requires other instrument in recognition and enforcement, ICSID provides for automatic recognition of its awards in member countries upon the presentation of a copy of the award certified by the Secretary General.[22] Roles of arbitral tribunal in determining the outcome of cases pro- vides argument why it is necessary to have tribunals members who understand not only investment law, but also the local cultures treaty un-interpretation does matter in deciding legal issues of the disputes and how the applicable law of interpretation, Vienna Convention on the Law of Treaty (VCLT), regulates this issue. Tribunals should employ the Vienna Convention as a mean to provide sound, convincing decisions in order to support international investment law through balancing investor's rights with responsibility and developing a more neutral approach toward host states and inve[5]stors. This indicates the challenges facing the ICSID arbitral tribunals when applying the la to the facts. In the last few years, ICSID has been criticized for being costly. Inconsistent, lack of transparency and bias against developing countries. This has caused some developing countries like Bolivia, Ecuador, and Venezuela to withdraw from ICSID. In Indonesia, there is a growing concerns on whether to withdraw from ICSID.[23]

III. The Investor–State Arbitration (ISDR) Mechanism Works

Scope of Claims

An investor can make a claim under the ISDR mechanism if a host state breaches its ACIA obligations and the investor incurred loss or damage arising from the breach.[24] The ACIA's host country obligations are those commonly found in conventional bilateral investment agreements. These include the following:

- **National treatment:** Other ASEAN-based investors must be given the same treatment as domestic investors.

- **Senior management:** A host country cannot require its nationals to be appointed as senior management in an investment vehicle (but can require that locals comprise the majority of the board of directors).

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[14]M. Sornarajah., The International Law on Foreign Investment, 3rd edition. Cam- bridge, 2010, page 187.
[15]Deborah L. Swensen, "Why Developing Countries Sign BITS" in Karl P Sauvant and Lisa E Sachs. Eds. The effect of treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, 2009. page 437.
[16] Surya P Subedi, International Investment Law: Reconciling Policy and Principle, 2nd edition, Hart Publishing, 2012, page 82.
[17] Jeswald W Salacuse, The Law of Investment Treaty, Oxford, 2010, page 37.
[18] Kenneth J. Vandelde, Bilateral Investment Treaties: History, Policy, and Interpretation, Oxford, 2010, page. 122.
[19] K.V.S.K. Nathan, The ICSID Convention: the Law of the International Center for Settlement of Investment Disputes, Juris Publishing, 2000, page 51
[20] http://www.univie.ac.at/intlaw/wordpress/pdf/100 icsid spil.pdf. Accesed at 15 January 2014
[21] Ucheora Onwuamaegbu, International Dispute Settlement Mechanisms-Choos-ing Between Institutionally Supported and Ad Hoc: and Between Institutions, in Arbitration Under International Investment Agreements: A Guide to the Key Issues, Katia Yannaca-Small, ed. Oxford 2010, page 63

- **Fair and equitable treatment:** Other ASEAN-based investors must receive equitable treatment by the host state (eg, due process, security, etc).

- **Compensation:** A host country cannot discriminate against ASEAN-based investors with respect to compensation arising from losses due to armed conflict or civil strife.

- **Free flow of capital:** A host country cannot restrict the free flow of capital in relation to an investment project.

- **No expropriation:** An investment cannot be expropriated or nationalized (except under limited circumstances).

Despite being called "comprehensive," the ACIA in fact applies to a limited number of industries. The ACIA's signatories have also submitted extensive reservations that further limit the scope of the treaty's coverage Additionally, only certain types of investors are eligible to receive the ACIA's benefits. Judicial persons are considered investors; natural persons are not. Further, investors that are owned or controlled by a non-ASEAN national and do not have substantive business in their "home" ASEAN state are ineligible.[25]

Pre-Claim Conciliation

The ACIA requires disputing parties to first seek conciliation. The investor must serve the host state with a written notice. The burden is on the investor to present the legal and factual basis for the dispute. The investor can then submit its claim for arbitration if the dispute cannot be resolved within 180 days of the host state's receipt of the notice.

Choice of Arbitration and Governing Law

Investors can choose where to submit their claims. The first option is a host state court or administrative tribunal. ASEAN countries are, however, at varying levels of development regarding judicial independence and the rule of law. Local courts may be biased toward the state and susceptible to influence, corruption, or lobbying. The second option is to arbitrate under the International Centre for Settlement of Investment Disputes (ICSID), or the ICSID Additional Facility Rules (Additional Facility Rules). This is a favorable option for investors, as the ICSID was created for investor–state arbitration. Established in 1965, it has significant experience handling investor-state disputes. Moreover, the ICSID's awards have "final judgment" status in the courts of countries that are members of the Washington Convention, the multilateral agreement that created the ICSID.

To arbitrate under the ICSID, ACIA requires that both the host state and investor's home country are parties to the Washington Convention. However, Laos, Myanmar, Thailand, and Vietnam have not yet acced[6]ed to the Washington Convention. For cases involving these countries, arbitration under the Additional Facility Rules may be possible. The ACIA allows arbitration under the Additional Facility Rules when either the host country or the investor's home country are members of the Washington Convention. As such, a dispute between a Thai investor and the government of Myanmar, for example, would not be eligible for arbitration under the ICSID or the Additional Facility Rules.

The third option is to arbitrate at a tribunal under the Rules of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL tribunals have presided over many investor–state arbitrations, including in Southeast Asia. Moreover, UNCITRAL tribunals have awarded significant damages to investors in a number of cases, making it another viable choice for investors. The investor's final option is to arbitrate at

[19]K.V.S.K. Nathan, The ICSID Convention: the Law of the International Center for Settlement of Investment Disputes, Juris Publishing, 2000, page 51
[20]http://www.univie.ac.at/intlaw/wordpress/pdf/100 icsid spil.pdf. Accesed at 15 January 2014
[21]Ucheora Onwuamaegbu, International Dispute Settlement Mechanisms-Choos-ing Between Institutionally Supported and Ad Hoc: and Between Institutions, in Arbitration Under International Investment Agreements: A Guide to the Key Issues, Katia Yannaca-Small, ed. Oxford 2010, page 63

an ASEAN regional arbitration center. The default center is the regional center for arbitration at Kuala Lumpur. Most ASEAN countries have commercial arbitration centers. However, their experience in handling investor– state arbitration is limited. Despite this, regional proximity could keep costs reasonably low. Parties may also be more familiar with local centers.[26]

Arbitrators

The arbitration tribunal comprises three arbitrators, though the parties may agree on a different number. Each party appoints one arbitrator. The third arbitrator must be mutually agreed on by the parties. Importantly, the third arbitrator, who is also the chairperson of the tribunal, must be from a non-ASEAN country. The third arbitrator also cannot have permanent residence in either the host country or the investor's home country. Decisions are reached by majority vote and are binding.

Awards

Awards for damages are comprised of monetary compensation with interest or restitution of property. Punitive damages are prohibited. A party can enforce the award after it is apparent that the losing side will not seek revision or annulment proceedings. Enforcement can also take place after such proceedings are complete. Each ASEAN state is required to allow for the enforcement of an award in its territory.

Limitations

A major limitation of the ISDR mechanism is that it is "tied at the hip" to the ACIA. Since the ACIA covers a limited number of industries, so does its dispute resolution mechanism. And when the reservations are included, the actual areas of investment that can be brought to arbitration are even more restricted. This begs the question of whether coverage is so narrow that the ISDR mechanism is rendered impractical. The ISDR mechanism is also untested. The ACIA came into effect in 2012, but to date no claims have been brought. It is therefore uncertain how the mechanism would be practically applied. There are no precedents to assist future cases,[27] ᵗhe fact that they were brought shows that an ASEAN-based investor–state arbitration mechanism can work.[28]

At present, the arbitration agreement has become a necessity that can not be avoided in traffic in the world of business and trade[7] association, both of which occurred in the form of joint venture (investment) or in the form of technology transfer (transfer of technology). Almost all transactions and joint venture agreements and trade-scale trans-national, is always accompanied by an additional agreement in the form of the arbitration clause. [29] With the arbitration clause contained in a standard contract that confirms all disputes that arise be settled by arbitration, has been publishing direct the arbitration agreement of a standard contract. The standard contract in the arbitration agreement is the arbitration clause which forms part of the general requirements contained in the agreement. In other words, in the standard contract, the arbitration agreement is already as one of the requirements of the common terms in standard contracts concerned.

The Weakness contained in the standard contractual agreements, for their power and position of one party to unilaterally determine the first content and the terms of the agreement. Position and power it is usually in the more powerful party position. In this case the entrepreneur dealing with customers or consumers. Being on the other hand, the position of the relatively weaker position not involved in the manufacture of the

[22]ICSID Convention, Article 54
[23]Hikmahanto Juwana stated that Indonesia should withdraw from ICSID due to various reasons available at http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html
[24]These are a limited number of industries, as follows: manufacturing, agriculture, fishery, forestry, mining, and services related to these sectors.
[25]John Frangos, Investor–State Arbitration in the ASEAN Economic Community, International Bar Association January 27, 2015, published by Tilleke & Gibbins. See http://www.tilleke.com/resources/investor-state- arbitration-asean-economic-community

formulation of the content of the agreement. Umtuk only asked him to approve or not. Therefore the weaker party in dire need inevitably forced him manandatangani standard contract, even though it was done under pressure of circumstances forced disguise. Therefore, in terms of theoretical approaches, sufficient reason to declare the agreement in the form of standards, is flawed, because it can be canceled.[30]

IV. ASEAN Necessary for Investment Arbitration

The works on this issue has been on the rise, relevant to the growth of trade in the region and deal with the development on the interesting issues of the enforcement of international arbitration awards and levels of investment between ASEAN member states will increase disputes arising between private investors and governments. On the basis of these facts, its may concluded that contract between Investor– member State, does embodied foreign law element in it. Its also right to concluded international contract which is including the meaning of private international law dispute.[31] Private international law according to legal doctrine in Indonesia is the national law which regulated the legal issues which are international in nature (or the existence of foreign element).[32] Another problem arising form private (investor) – state relationship under contract should be short in highlight as conception and based on state unilateral permission (unilateral act of state) or at least shall be named as an “administrative contract”.[33].

The arrival of the AEC will therefore bring attention to and raise awareness of existing arbitration provisions in the ACIA. These investor-state arbitrations are likely to increase as treaties are in place throughout the region aimed at protecting foreign investors in what are often construction industry disputes, creating a greater need for arbitration counsel with experience in these sorts of disputes. Recently announced increases in investment into ASEAN- region infrastructure led by China and Japan with a deep understanding of local construction sector dispute resolution.

With the increase in arbitration, the region’s arbitration centers are also growing in prominence. One of the most positive trends has been that Asian arbitral centers are no longer just viable alternatives for ‘traditional’ seats[8] in the West, but are becoming the first choice for parties. Institutional arbitration in Asia is also becoming quickly popular; there has been a steady increase in the number of cases that involve parties from the ASEAN territory. There also seems to be a trend in adopting multi-tiered dispute resolution clauses keeping in mind the increasing complexities and international legal issues involved in cross border transactions. In order to be able to make modifications and to use the opportunities effectively, there are certain conditions to be met, among others:

a. Established Dispute Resolution System

ASEAN members can agree not to refer to international arbitration or to give limited rights to redress investment dispute to international arbitration. This is such as:

• Requiring parties to engage in negotiation, mediation or conciliation administered by local dispute settlement body

• Determining what dispute can go to international arbitration and what disputes must go through local courts or local dispute settlement body

• Designate arbitration center within the region as institution designated to settle investment dispute: Singapore International Arbitration Center (SIAC), Kuala Lumpur Regional Arbitration Center (KLRAC) or Indonesian Arbitration Board (BANI) can be empowered

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[26]Suyud Margono, Harmonization Arbitration Law ASEAN Countries: A Discourse For Investor–State Arbitration In The ASEAN Economic Community (AEC)., Era Hukum Journal No.1/Th.16/June 2016, p.70-72.
[27]Two ASEAN-related cases were brought under ACIA’s 1987 precursor, the Agreement for the Promotion and Protection of Investment Protection: Yaung Chi Oo Trading Pte Ltd v Myanmar and Cemex Asia Holdings Ltd v Indonesia. While no damages were awarded in these cases (Yaung Chi Oo was decided on jurisdictional grounds and Cemex Asia Holdings Ltd was settled),
[28]Suyud Margono., Loc Cit. p. 74.
[29]Suyud Margono, Business Dispute Resolution: Arbitration and Mediation, (Bogor: Ghalia Indonesia, 2010)., p. 131.

to carry out the jobs.

This effort is important to foster the development of the rule of law in national court or ADR center in the region. Besides developing local judicial institutions, this is also benefiting in promote confidence in the overall process of resolving investment disputes.[34] Using ADR center outside the host states will ensure the neutrality and fairness of the dispute settlement process due to independent adjudicators.

b. Economic and Political Stability

Political instability is regarded as a hinder for economic growth due to the possibility of frequent policy changes.[35] A study by Alesina and Perotti shows that the less stable the social- politics situation, the riskier the investment activity is. As a consequence, the number of investment may lower.[36] Having said that, ASEAN countries need to address any political instability by mitigating its effect on the sustainability of economic policies.

c. Market Liberalization Model

Market liberalization can remove barriers to FDI that may create difficulties to access the countries. The economic liberalization process begins by relaxing these barriers and relinquishing some control over the direction of the economy to the private sector. This iden is i line with the ASEAN Comprehensive Investment Agreement (ACIA) to facilitate the free flow of investment in the ASEAN region as an integrated investment area.[37] Liberalization policy in ACIA is designed to attract foreign investment from States outside ASEAN region, not merely to facilitate investment among ASEAN States.[38]

V. CONCLUSION

ASEAN as a group with more than 650 million populations of a single market, abundant natural resources and comparatively inexpensive labor will surely an attractive destination for FDI. The high number of FDI le[9]vel in the region has proved that SEA has been very attractive to invest. Considering its strategic position ASEAN has wide opportunity to work as a group in creating a state-investor dispute resolution center. There are many ways for ASEAN countries to draft provisions in investment treaties to balance the need of FDI protection and its interest to develop the economy. ASEAN may

review, Therefore, investment arbitration administered by international in- stitution is not a must. Rather than being a substitute, investment arbitration is merely a complement of domestic court or domestic ADR Instead, ASEAN members can refer to dispute settlement center in the region with legal practitioners from the area. This is not only to keep the cost reasonable but also to maintain that people involve in the dispute understand the context of the dispute socially, politically and therefore the outcome would be fairer.

There is no need to provide unnecessary extensive and limitless protection to FDI. The focus for now should be how to create a sus- tainable economic development in the region with the assistance of FDI without having to sacrifice member's interests. Therefore, modification of the existing treaties and changing the model of future treaties are worthy

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[30]M. Yahya Harahap, Arbitration, (Jakarta: Pustaka Kartini, 1991), p. 109.
[31]Huala Adolf, The Meaning of International Arbitration according to UNCITRAL Arbitration Model Law and Indonesian Arbitration Law., Indonesian Law Journal., National Law Development Agency, Ministry of Law and Human Rights RI, Vol. 5 December 2012., p. 10
[32]Sudargo Gautama, Internasional Business Contract , (Bandung: Alumni, 1986),p. 18.
[33]Sudargo Gautama, Indonesia and International Arbitration., (Bandung: Alumni, 1992), p. 61
[34]Susan D. Frank, Ibid. page 368.
[35]Ari Aisen and Francisco Jose Veiga, How Does Economic Instability Affect Economics Growth?, available at https://www.imf.org/extemal pubs/ft/wp/2011/ wp1112.pdf.
[36]Alesina, A. and Perotti, R. "Income distribution, political instability, and investment."
[37]Article 1 of ACIA
[38]ASEAN Investment Report as quoted from Vivienne Bath and Luke Nottage, The ASEAN Comprehensive Investment Agreement and ASEAN Plus'-The Australia- New Zealand Free Trade Area (AANZFTA) and the PRC- ASEAN Investment Agreement, Sydney Law School Legal Studies Research Paper No. 13/69, September 2013, http://ssrn.com/abstract=2331714.

of note. The goals of SEA countries to develop their economies should be taken into account when negotiating treaty terms or provisions. ASEAN members should work together to focus upon minimizing risk in investment by maintaining political and social stability and improve the capacity of dispute resolution mechanisms and regional cooperation to provide incentives for foreign investors is also necessary.

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