INTRODUCTION

Harmonization of the investment laws among the ASEAN countries is assumed to be a prerequisite for implementing the vision of ASEAN Economic Community, where it is believed that a more liberalized trade and investment regime in ASEAN would encourage a more favorable trade and investment climate in the region. It is also believed that if the investment laws can be harmonized, it will also protect each member country’s national interest, and at the same time, ASEAN would be able to develop into a region of more equitable economic development, a region with less poverty and socio-economic disparities, as well as a region with increased free movement of goods, services, skilled labor and investment.¹

Notwithstanding the commitment to create an ASEAN Economic Community by 2015, several ASEAN member countries continue to compete against each other and the harmonization process has faced challenges. This paper discusses the issue of investment law harmonization from an Indonesian perspective and seeks to discuss and analyze the challenges which may be faced by Indonesia in undertaking legal harmonization in investment laws with the ASEAN countries. It also provides recommendations for more effective harmonization in the future. Prior to addressing the main topics, the writer discuss the theories and realities behind legal harmonization processes to put those topics in what she believes to be an appropriate context.

LEGAL HARMONIZATION IN GENERAL

¹ This paper is presented at General Assembly XI ASEAN Law Association, Bali on 17 February 2012.

² Melli Darsa practices as an advocate in Indonesia, specializing in M&A, securities and finance matters and is the founder and managing partner of the Indonesian firm “Melli Darsa & Co.” or MDC.

The notion of legal harmonization is generally based on the premise that “standardization would accelerate the process of legal convergence…reducing transaction costs for transnational investors and increasing the quality of legal institutions in countries whose institutions are less developed”. Standardization is done through various ways, including identifying common principles and denominators, as well as using “model law” forms.

Legal harmonization and transplantation have become the key tools for the Law and Development movement, and have been largely used for many years by international institutions such as the World Bank and IMF on the “best practices and institutions” approach. The legal harmonization efforts of the World Bank and IMF during the New Order era and following the Asian Financial Crisis has been responsible for creating a situation in Indonesia where certain principles of Common Law jurisdiction now live peacefully with a primarily Civil Law tradition. Meanwhile, many of the legal harmonization processes in the past often involved only foreign experts with lack of understanding of Indonesian legal realities or stumbling blocks. More recently, the process of harmonizing particularly economic laws in Indonesia into laws of other well-functioning legal jurisdictions have become a more indigenous process involving key senior Indonesian experts as their leaders. Even though at times, it still lacks sufficient transparency, the process to modernize Indonesian law has seen commendable progress.

Generally, advocates of legal harmonization claim that harmonized legal rules will cut transaction costs and therefore foster international trade and commerce. They further say that legal harmonization leads to not only legal convergence and unification of laws, but also less legal uncertainty, while enhancing legal predictability, and increasing the quality of legal institutions. It is also believed that legal harmonization is useful in resolving “conflict of laws problems and the often difficult application of private

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5Ibid, P.4
international law and foreign substantive law… generating greater legal predictability and security”.  

The opposite of legal harmonization among nations is “regulatory competition”. Advocates of the regulatory competition process take the view that in a regulatory competition process, law and policy makers will try to identify the best and most efficient rule resulting in a high quality legal system, instead of making a mere transplantation involving the choosing among the lowest common denominators. Legal traditions will remain distinct and not affected by the other. Regulatory competition does not threaten the existing legal culture and history of a country. Nor does it involve potentially high social and political adaptation costs.

Furthermore, in a country with a non-unified group of legal experts and practitioners, legal harmonization products may also result in legal uncertainty. These experts may have such different views on how transplanted legal products brought in through the legal harmonization process should be enforced. These may create controversial court decisions in due course. Generally, this is because it is rare that a provision of law can be seen in isolation, and in practice, it should be seen in the context of other laws which may not have been modernized through the process of harmonization or regulatory competition.

Moreover, there are certain prerequisites for effective legal harmonization.

First, a country should already have a fairly developed and well-functioning legal infrastructure before it can effectively undertake legal harmonization. This is because the process of legal harmonization itself does not immediately create the intended results just upon the introduction of a new transplanted law or regulation. Legal practitioners and bureaucrats who are parts of the legal infrastructure of a nation must also have sufficient understanding as to the larger interests sought to be protected through a
transplanted law, as harmonization may possibly result in laws which is “lost in translation”. Further, if the legal infrastructure is not able to support its implementation as intended, then the sought reform may become largely cosmetic.\(^9\)

Second, countries should ideally have similar level of socio-economic development. In a situation where the basic needs between countries are distinctly different, it is only natural that despite the call for harmonization, countries naturally tend to conflict the idea of harmonization. This point will be further illustrated in the context of ASEAN harmonization later in the paper.

Third, the principles or norms of laws that would become the objects of harmonization should be acceptable from philosophical, practical as well as technical standpoints. From a philosophical standpoint, the question which must be addressed is; to what extent the harmonization of investment laws truly accommodates the national interests as stated in the 1945 Constitution, or to what extent it is believed by the country at large. The practical question would be; to what extent a country should establish the institutions and resources to develop adequate legal harmonization, as it involves ensuring certain administrative processes to be as efficient as those in other countries which may have better bureaucracies. From a technical standpoint, one should compare the existing national laws with those of the countries which are the objects of harmonization, and then identify the items in the national laws which still hinder the harmonization process and the construction of values that should be realized through such harmonization.

It is perhaps worth remembering that harmonization may indeed be difficult because it must please a number of constituents or stakeholders. While the notion of harmonization may have been proposed by parties representing a nation state, to what extent harmonization can succeed in that nation will depend on many other things. In his writing “Quality of Legislation: A Law and Development Project”, Florijin states that ideal legislation cannot be achieved because there are different users of law, each of whom may have different expectations. Good policies must be successful at reconciling those various points of view. According to Florijin, users include the lawmakers; meaning the parliamentarians, politicians, or the executive branch of a (political) party which may

\(^9\) op. cit., P.2
have the law making initiative. They generally set the initial public debates in legislative bodies pertaining to those issues. Law which passes the legislation should become the politician’s further political interests or agenda. The second set of users identified by Florijin comprise of the bureaucrats and policy makers who generally interpret and create further bylaws or subordinate regulations of the legal harmonization products. They create supporting policies and technical regulations to ensure that the interests regulated by a certain law or regulation can be implemented as intended or, otherwise create carve outs which the government may, for some reason, want to create. The third set of users comprise of business communities, the public at large or those who will have to deal with, comply with, and face the effects of the legislation. Finally, I would add a final set of users which includes the law enforcers, court officers, also legal practitioners. Depending on how well-drafted a law or regulation may or may not be, as well as whose interests it is defending, it will have an impact on how such transplanted/harmonized legal product is enforced in practice. Such enforcement will, in the final analysis, determine the effectiveness of any legal harmonization product.

FOREIGN INVESTMENT UNDER ASEAN PERSPECTIVES

The general investment framework for the ASEAN countries can currently be found in the ASEAN Comprehensive Investment Agreement (ACIA). The framework was officially included in the agreement since 26th of February 2009, to intensify economic cooperation between and among the ASEAN member states. ACIA’s objective is to create a free and open investment regime in ASEAN which would be realized through (i) progressive yet protective liberalization for investors of all Member States, (ii) improvement of transparency and predictability of conducive investment laws, which would become more appealing through the establishment of certain favorable conditions for investment, and (iii) joint promotion of the region as an integrated investment area. ACIA also aims to create a liberal, facilitative, transparent and competitive investment environment in ASEAN through its four pillars of broad-based programs for encouraging investment in the ASEAN region; (i) investment protection, (ii) facilitation and cooperation, (iii) promotion and awareness, and (iv) liberalization. In its implementation, certain guiding principles apply, particularly;

10 Art. 1 (Objectives) of the ACIA.
a. Investment liberalization, protection, promotion, and facilitation;\textsuperscript{11}

b. Progressive liberalization of investment with a view towards achieving a free and open investment environment in the region;

c. Benefit to investors and their investments based in ASEAN;

d. Preferential treatment among member states;

e. No back-tracking of commitments made under earlier agreements;

f. Special and differential treatments, and other flexibilities to Member States depending on their levels of development and sensitivities in certain sectors;

g. Reciprocal treatment in the enjoyment of concessions among Member States, where appropriate.

ACIA expects that by protecting investment and improving investors’ confidence to invest in ASEAN, as well as encouraging further development of intra-ASEAN investments through expansion, industrial complementation and specialization, business would thrive. It is also expected that ASEAN-based investors would be able to enjoy the benefits of non-discriminatory treatment when they invest in other ASEAN countries. This would mean that investors would be granted similar treatments as domestic (host country) investors, and also similar treatment vis-à-vis other ASEAN-based investors. They would be granted full protection and security with regard to transfer of funds, capital, profits and dividends to be conducted by investors.\textsuperscript{12}

**GENERAL FRAMEWORK FOR FOREIGN INVESTMENT IN INDONESIA**

\textsuperscript{11} Liberalization is targeted to the following sectors: manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying, and any other sectors, as may be agreed by all Member States (Article 3.3 of the ACIA)

\textsuperscript{12} Art. 13 of the ACIA
**Foreign Investment\textsuperscript{13} Regulations**

Direct foreign investment in manufacturing and non-financial services are governed by Law No. 25 of 2007 ("Law No.25/2007") and its implementing regulations. Except for certain sectors, specifically determined by the Negative List\textsuperscript{14} most business sectors are open for direct, foreign investment with certain limitations.

Moreover, though it has never been specifically clear, once a company becomes publicly listed, foreign ownership restrictions will not be strictly applied. Certain legal structures, such as holding companies, will be allowed to issue shares which are then distributed to the public, who are all or mostly foreigners, notwithstanding the subsidiary companies that should be operated otherwise, as their operations exclude areas of investments. Generally therefore Indonesia has liberalized policies in place.

Law No. 25/2007 which replaces earlier laws on investments as contained in Law No. 1 of 1967 on Foreign Capital Investment and Law No. 8 of 1968 on Domestic Capital Investment, can be said to already adhere to the guiding principles of the ACIA agreement. For example, the guiding principle of liberalization can be found in Article 12 of the law stating that all business sectors are open for investment unless they are stated as closed or open with conditions. This is generally found in Government Regulation No. 76 of 2007 regarding The Criteria and Establishment of Closed Business Line and Open Business with Conditions in respect of Capital Investment, as further implemented under Presidential Regulation No. 36 of 2010 regarding List of Business Fields Closed to Investment and Business Fields Open With Conditions to Investment (Negative List). However, in order to obtain certainty as to whether a business line is

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\textsuperscript{13}Foreign investments in Indonesia are classified into banking, financial services, securities investments, and non-financial sector investments. Generally, foreign investment in manufacturing and non-financial service activities are under the coordination of the Investment Coordinating Board (BKPM). Industries, which are subject to more stringent regulations, such as banking, securities, insurance, multi-finance, and other non-banking financial services, are regulated currently under Bapepam-LK (the Capital Market and Financial Institution Supervisory Agency), while banks are regulated under the Central Bank (BI). By January 2013, a new body called the Financial Services Authority (OJK) will be operating to take over certain functions of the Central Bank and of Bapepam-LK.

\textsuperscript{14}Presidential Regulation No. 77 of 2007 as last amended by Presidential Regulation No. 36 of 2010.
open to foreign investors, clarification and confirmation with BKPM or the technical ministry may be needed.

The principle of protection is reflected through Article 10 which requires investment companies to prioritize the employment of Indonesian citizens as the manpower, though they are still allowed to employ foreigners for certain expertise or positions. The principle of facilitating or giving incentives to investors that requires expansions or new investors is granted with certain conditions under Article 18. This facility/incentive can be granted in the form of reduction on various types of taxes or customs. These matters are generally regulated in a number of Minister of Finance decrees. Further, the facilitation for obtaining foreign manpower licenses and permits is also granted under Article 23, which is similar with the one contained in Article 22 of the ACIA agreement.

Article 25-26 of the Investment Law also introduces the one-stop service system known as PTSP, which is aimed at helping investors to open easier access to services, fiscal facilities and information regarding investment in Indonesia. This is then further regulated under the Presidential Regulation No. 27 of 2009 regarding One Stop Services in Capital Investment. The Investment Coordinating Board (BKPM) has also announced that the PTSP is facilitated through a National Single Window for Investment (NSWI, with the pilot project in Batam). This is an electronic platform for investments that enables investors to apply for license and non-license services online.

The purpose of the PTSP is to facilitate investors in obtaining services, fiscal facility and information related to investment. For instance, in the licensing process, BKPM will cooperate and coordinate with the relevant government or department institutions for the issuance of business license. This process is intended to make the issuance process of business licenses for the investment companies more effective and efficient.

Another important feature of the Investment Law is the Central Government’s guarantee that it will not nationalise a foreign investment or revoke rights to control a foreign investment, except where it is declared by law. If the Central Government nationalises or revokes the foreign investment, it must pay compensation in an amount determined in accordance with the market price of the investment. This guarantee is accompanied by assurances under Article 8 that a foreign investor will have the right to transfer and
repatriate the investment in foreign currency, profit, bank interest, dividend and other incomes, provided the legal obligations of the concerned investor have been settled.

Article 32 regulates that the dispute settlement related to any investment shall be firstly settled through the deliberation to reach consensus, otherwise, such dispute may be settled through international arbitration or court as determined by the concerned parties.

A number of regulations were also issued by the Head of BKPM, notably Head of BKPM issued a number of key regulations, particularly Head of BKPM Regulation No. 12 of 2009 on Guidance and Procedure for Investment Applications, Head of BKPM Regulation No. 13 of 2009 on Guidelines and Procedures for Surveillance of Capital Investment Performance as amended by Regulation No. 7 Of 2010, and Head of BKPM Regulation No. 14 of 2009 on Informations Service System and Electronic Investment Applications.

**Processes for Foreign Investment**

**In Non-Listed/Private Companies**

For foreign investment in non-banking/financial services of non-publicly listed companies, the process will involve BKPM. Two types of investment companies under the auspices of BKPM include (i) Domestic Investment Companies (*Perusahaan Penanaman Modal Dalam Negeri* or “PMDN Companies”), and (ii) Foreign Investment Companies (*Perusahaan Penanaman Modal Asing* or “PMA Companies”). A PMDN Company is wholly owned by Indonesian citizens or Indonesian legal entity and a PMA Company is wholly or partially owned by foreign citizens or foreign legal entity.

To directly invest in the non-financial sectors in Indonesia, a foreign party must establish a PMA Company. If the foreign party only intends to promotional activities or be able to represent itself in entering into any agreements with customers in Indonesia, then the foreign party may establish a foreign representative office.

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Minister of Law and Human Rights ("MOLHR") for the company’s deed of establishment. The process to set up a PMA Company starting from the establishment licensing until it operates effectively takes approximately four months. The Investment Registration is valid until such time that the company obtain a In-Principle License (for PMA Company which requires facilities) or the company is ready to commence commercial operations or production at which time it should apply for the Business License.¹⁶

Due to the length of time for the establishment of a new PMA Company and considering the commercial aspect, a foreign party may opt to acquire a non-operating PT Company and convert it to a PMA Company. This process saves time and costs because the legal entity is already in the form of PT Company. Therefore, the only remaining step is to obtain the relevant permits from BKPM. Pursuant to BKPM regulations, the issuance of such permits should take seven working days at the latest, after the application requirements has been completed and submitted to BKPM. However, in practice, the business license issuance process may take approximately two weeks.

**In Publicly Listed Company**

If the investment is made for a publicly listed company, there are generally no regulated process (except for clearly regulated industries such as banking, financial, and Foreign Investment/ PMA mining), as all transactions will be construed to be done transparently through the stock exchange, and subject to disclosure or reporting as applicable.

The most important provision to be borne in mind is; when an investor seeks to obtain more than 50% of the ownership shares of a publicly listed company, such action will be construed as a takeover under the regulations of the Indonesian Capital Markets and Financial Institutions Supervisory Agency (Bapapem-LK), triggering the obligations to conduct a mandatory tender offer for all the public shares. Furthermore, to the extent of either the initial takeover or the mandatory tender offer resulting in more than 80% of the publicly listed shares being owned by the new controller(s), then they should, in a period of two years, divest their shares to the public so that they will only hold the maximum 80% shares of the company. This is because the regulation assumes that the minority shareholders have the right to be bought out at the same price as the former controller

¹⁶ Head of BKPM Regulation No. 12 of 2009.
does, but that the new controller should not end up making the company’s public float become so insignificant as to render the company’s illiquidity. While the regulation does provide mechanisms for extending the two-year, sell-down period, it still constitutes an anomaly in the midst of other ASEAN countries’ securities regulation.

Once a public investor becomes the controller, he can obviously nominate and ensure the appointment of the nominees in the company Board of Directors and Board of Commissioners. Generally, directors or commissioners are nominated by certain shareholders but their duty of loyalty still remain with the company. As principles of good corporate governance require shareholders to be treated equally, it is possible, even for shareholders of public companies (though Bapepam LK agency never likes such practices) to regulate matters in the contracts, such as organizing voting in favor or against certain decisions, so that they may together have better influence on the items which require shareholders’ approval.

Publicly listed companies require at least, 30% independent members of the Board of Commissioners. Furthermore, one director must be an “independent director”. There are also audit committees, such as the Audit and Remuneration Committees under the Board of Commissioners to further ensure the company is managed in a responsible manner. Independent board members and committees should ensure that, notwithstanding that a certain party may have the shareholding majority, the running of the public company would be done in a manner to protect the public shareholders’ interests. The notion of protection of public shareholders interest is further found in other regulations pertaining to affiliated and material transactions which require disclosure. Fair opinions should be stated before such transactions take place.

17 The Indonesian Company Law recognizes a two-tier Board system whereby the daily management and operations of the Company is entrusted to the directors, and the supervision of the Company is entrusted to the Board of Commissioners.
ISSUES PERTAINING TO INDOONESIAN FOREIGN INVESTMENT LAWS AND PRACTICE

Despite the existence of a comprehensive law on investment which is in line with the ACIA agreement, its effectiveness may be affected by certain factors, on both a regional and national level.

**Regional Challenges**

At the regional level, there are a number of evidences indicating that the investment laws of ASEAN are not yet in a stage of harmonization or liberalization as they should be. For example, not all member states have comprehensive, up-dated foreign investment laws in place. Most ASEAN countries still rely on some sort of negative list of investments or other restrictive policies to generally protect certain business sectors from being totally opened up to foreigners.

Indeed, one cannot totally ignore the reality of the slow process of true legal harmonization in ASEAN. This was discussed at length by Darryl Jarvis who generally stated that empirically, ASEAN countries tend to prioritize the preservation of nationalism versus regionalism, particularly in investment policies, which then results in segmented/sectional sheltering and investment protectionism. The ASEAN countries may not be perceived as really pushing liberalization, but instead perhaps only trying to protect their own regional-based enterprises against threats of the western ones. Other challenges of regional law harmonization have been identified as among others, the inequality of market capture capabilities of the member states due to differences in financial market development, infrastructure and labor skills. There are clear disparities among the ASEAN countries in this respect.

For example, Singapore is acknowledged as a country with modern, world class infrastructure which has also successfully transformed itself into a strong financial center with, many people believe, efficient institutions and legal certainty. This has, in part, made Singapore an obvious choice for investments, listing of companies, as well as a place for alternative dispute resolution (arbitration). In legal practice, people also have noted that the Singapore laws have been increasingly chosen to regulate Indonesia-
based transactions. The fact that a number of the ASEAN countries have similar natural strengths and potentials may later result in regulatory competition among them. The lack of common institutions among the member states further encourages investors to create natural preferences on where to invest. The perception that there are no sufficient dialogues in exchange rate and fiscal policies also puts into question to what extent ASEAN can truly achieve economic integration.18

Those issues are important items of coordination to protect each of the member states against global shocks or contaminating each other. The modern infrastructures of Singapore, Malaysia and now Thailand, make these three countries attractive venues for regional hubs, notwithstanding the actual market (especially in the case of consumer products) may exist, let us say, in Indonesia. The discrepancy in labor skills also means that labor force in certain countries may only be used for lower-skilled jobs, while other jurisdictions may have their citizens actively become global employees in biotechnology or manufacturing.

Finally, the last challenge ASEAN harmonization has to face is; to what extent the principles of regionalism are as relevant in a world of increasing globalization. Regional communities are proven to affect countries outside their territories, thus there has been more calls on globalization. Certain governments of ASEAN countries have put their priorities on ensuring coordination at more global, rather than regional levels. In brief, the priority to implement the ASEAN agenda may not be, in the opinions of some as high as it should, in this increasingly globalized world.

National Challenges

At the national level, there are areas of concern which must first be addressed if Indonesia is expected to achieve its true potential and be able to fully embark on ASEAN investment harmonization. Many of these problems are legacies of the past, or a result of many reforms that occurred following the Asian Financial Crisis, and the transformation of Indonesia into a true democracy. Whatever is its history, until

Indonesia can solve these problems, it may be some time before the country can fully open itself up to true harmonization.

*Decentralization Lack of Clear Divisions*

In 1999, the Government adopted Law No. 22 of 1999 concerning Regional Governments which delegated certain authorizations to the regional governments that had previously been exercised \(^{19}\). Thereafter, the local governments have been authorized to impose taxes and levies within certain limits as well as approve certain investments. The authorized divisions of the central and regional governments, however, remain unclear.

Licensing procedures are costly, time consuming and often uncertain. The ambiguous distribution of authorizations between the central and regional governments has also created overlapping infrastructure development, as well as conflicting licensing requirements.

In the context of foreign investment, the problems created by decentralization are also apparent when discussing the lack of consistency between policies or decisions taken at a regional level versus those at the provinces.

While BKPM plays the primary role, the regional BKPMD is responsible for the issuance of some licenses such as location or anti-nuisance permits. The creation of one-stop service or national single window to support foreign investment does not completely eliminate these problems. Certain matters will still need to be dealt with at the regional level, or may often times continue to involve other technical ministries. There may also be insufficient manpower and capacity to support the activities in the regions.

*Legal (Un)Certainty*

There are often legal uncertainties pertaining to certain key legal concepts which are commonly used in economic transactions, e.g. pertaining to certain security interests and concepts (such as the enforceability of assignment of rights for security purposes or

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\(^{19}\) The Law of The Republic of Indonesia No. 22 of 1999 concerning Regional Governments
The Civil Law tradition which Indonesia adheres to is one which assumes judges can be mere administrators who upon reading the law will be able to give good decisions. The reality is that there are often unclear drafting, or communication of policies. These result in uncertainties of laws.

In the context of foreign investment, there is often lack of clarity on business open to foreign investment. The Negative List may often not be a reliable basis for determining whether a business sector is truly closed, as technical ministries and agencies may have different views than BKPM officers on the matter. Certain principles of foreign investment will be upheld notwithstanding that the Negative List may imply the business is open for foreign investment.20

In particular, certain legal uncertainty in foreign investment currently exists in Indonesia in certain key sectors such as the banking sector, telecommunications and media.

1. **Banking**

   In 1999, banks were opened up to liberalization and 99% shares of a bank may be owned by foreigners. As a result, the leading private banks of the pre Asian Financial Crisis era have now been controlled by various foreign banks and strategic investors or private equities. Such banks are now too expensive to be reacquired by Indonesian parties. Meanwhile, certain Indonesian banks have faced difficulties trying to open offshore branches claiming there have been no reciprocity of facilitation in the other countries. This, in addition to nationalistic sentiments, have led to the Central Bank announcing that it would not entertain applications for bank acquisitions as it was analyzing the foreign investment policies pertaining to banks. Prior to this, there were already rumours in the market that the Central Bank would be pushing for drastic changes to the foreign ownership rules pertaining to banks by sometime in 2011. Although the Governor of the Central Bank later denied that there would be a limitation of majority foreign ownership in banks, he did admit that the Central Bank was reviewing the issue from a good corporate governance perspective. Generally foreign investors

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20 For example, a PMA company may never sell directly to end users thus any scheme which effectively enables this would not be permitted even if the Negative List may imply the business is open for majority control by foreign investor.
currently believe that Indonesian laws will be made to change to make the foreign ownership rules for banks more restrictive and may even possibly apply these rules retroactively.

This has caused great concern that other industries to be regulated under the OJK (eg. insurance, securities and multifinance) would also be subject to the same restriction.

Premature announcements of potentially “unpopular” policies (at least among foreign investors) only create confusion and uncertainty. Clear communication of policies is of utmost importance for creating a conducive foreign investment environment.

2. **Telecommunications**

Under the Negative List, the telecommunication sector is generally subject to foreign ownership limitations varying from 49% up to 95%. The telecommunication tower industry is specifically closed for foreign investment. However, the publicly listed company structure has been successfully utilized to overcome this restriction.

There are also some levels of uncertainty as to whether or not online transaction and portal services should be considered as multimedia services based on Negative List Regulation, whereby the foreign ownerships are restricted to the maximum of 49%. On the one hand, the Negative List does not regulate explicitly whether or not the online transaction and portal services are closed for foreign investment since they are not specifically listed in the Negative List Regulation. Under the 2001 Decree of the Minister of Communication and Technology, No. KM.21 on Telecommunication Services Operation, online transaction and portal services are included as other multimedia services. In the third amendment of MOCIT Decree No. 21/2000 issued in September 2008, the online transaction and portal services were no longer regarded as multimedia services. Currently, there is a conflict of opinion between the MOCIT and Investment Coordinating
Board BKPM pertaining to whether or not this matter should be a subject to the 49% restrictions.

3. **Private Television Broadcasting**

Pursuant to Article 24 paragraph (1) of Government Regulation No. 50 Year 2005 on Private Broadcasting Companies (PBC) Services, a private television broadcasting company may only be established by an Indonesian citizen or Indonesian legal entity, in which all of its shares are owned by the Indonesian. Foreign citizens or foreign legal entities may directly or indirectly hold only 20% of the total issued and paid up capital of the company. The company should have at least, two foreign citizens or foreign legal entities as its shareholders. The remaining 80% of the total issued and paid up capital must be owned by an Indonesian citizen and/or an Indonesian legal entity which is 100% owned by an Indonesian. Every transaction that causes the foreign ownership shares of a PBC to exceed the 20% threshold, must be adjusted to be in compliance with the foreign ownership threshold (i.e. 20%).

Furthermore, Article 27 paragraph 1 of GR 50/2005, provides that such a company may only list 20% of its total issued and paid-up capital at the stock exchange. Article 27 paragraph 3 further stipulates that in the event where the 20% of the PBC shares are listed at the stock exchange, foreign citizens and legal entities may only own PBC shares through purchasing the listed shares.

In practice, it is common for the market players to make a PBC owned by a publicly listed company, which is not restricted under the foreign shareholding regulation. The Minister of Communication and Information has conducted discussions with Bapepam-LK on the approach that will be taken by the ministry in connection to the 20% foreign shareholding restriction in a PBC by Public HoldCo but the results have not been made public as yet.
4. **Plantation Business**

In plantation businesses, foreigners may own up to 95%\(^{21}\) of the shares of a plantation business with an area of at least, 25 hectare or more, with or without a processing unit, or it can be operated solely as a product processing plantation business. Plantations with area less than 25 hectares, or low-scaled processing units are reserved for micro, small, and medium enterprises and cooperatives. The foreign legal entity or citizen conducting plantation business in Indonesia must establish a joint cooperation with Indonesian business actors by establishing a legal entity domiciled in Indonesia. This requirement is to prevent plantation companies that have received facilities from the government, from transferring their profit to a foreign entity with no intention or plan to improve the community income.

Notwithstanding the above, in practice, there are plantation companies which can be owned up to 100% by a foreign entity. This is because the minimum 5% Indonesia ownership obligation only started to take effect in 2007. Accordingly, plantation companies with 100% the shares have been owned by foreign investors prior to the issuance of the Negative List in 2007 can continue to do so. However, if the foreign ownerships in such companies prior to or after the enactment of the Negative List 2007 are below the maximum foreign ownership threshold as stipulated in the 2007 Negative List (95%), investors in such plantation companies will not be able to increase their aggregate shareholding above the maximum foreign ownership threshold.

Other uncertainty may be created by the law’s express provisions themselves. The most recent occurrence was by virtue of Law No. 7 of 2011 (the “Currency Law”) which came into effect on 28 June 2011.

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\(^{21}\)Provided that Recommendation from Minister of Agriculture cq Director General of Plantation is obtained
The Currency Law requires the use of and prohibits the rejection of the Rupiah in certain transactions occurring within the jurisdiction of Indonesia. Article 21 of the Currency Law requires the use of the Rupiah in payment transactions, monetary settlements of obligations and other financial transactions (among others, the deposit of money) within Indonesia. However, there are a number of exceptions to this rule, including certain transactions related to the state budget, income and grants from and to foreign countries, international trade transactions, foreign currency savings deposited in a bank and international financing transactions. Article 23 of the Currency Law prohibits the rejection of the Rupiah offered as a means of payment, to settle obligations or in other financial transactions within Indonesia unless there is uncertainty regarding the authenticity of the Rupiah bills offered. The prohibition does not apply to transactions in which the payment or settlement of obligations in a foreign currency has been agreed in writing. The Currency Law was considered to create uncertainty because whilst Article 21 forbids settlement in a currency other than the Rupiah, while Article 23 provides a very broad exception to the prohibition of the rejection of Rupiah.

To address public concerns, in December of 2011, the Directorate General of Treasury at the Ministry of Finance issued a booklet of guidelines concerning the implementation of the Currency Law (the “MOF Interpretation”). The MOF Interpretation explains that the Currency Law only applies for cash transactions (coins and bank notes) while excluding payments involving demands deposits (checks and letters of credit) and electronic payments. The MOF Interpretation also explains that the obligation to accept the Rupiah as a payment for transactions, as settlement for an obligation or for any other financial transaction as mentioned in Article 23 of the Currency Law, can be avoided by contractual arrangement existing or entered into either before or after the enactment of the Currency Law. This is actually different from the express wording of the Currency Law itself.

While the MOF Interpretation may have been able to provide some practical clarity, because the MOF Interpretation does not constitute legislation, it may be subject to challenge. This also makes for a bad precedent being that those issues should have been made clear under the Currency Law itself, as the MOF Interpretation when tested in the court may be subject to challenges.
Labor Related Issues

The Indonesian Labor Law is considered to be very protective on employees and is considered to be less favorable compared to those of other countries such as Thailand, Vietnam, Bangladesh and PRC. This is because the labor law regulates detailed lay-off procedures, significant retrenchment costs, and limits temporary hiring (outsourcing). The skills of workers in Indonesia are also considered not appropriate for higher technical productions or processes.

To make investments in Indonesia more attractive, there must be improvement in the legal framework as well as training and education of the people so that workers of Indonesia can be more competitive with those of other countries in the region.

Infrastructure

Modern airports and ports continue to be non-existent in Indonesia, and Indonesia still suffers from power outages, transport failures and inadequate clean water supplies. The Government has provided significant funding for the development of energy and infrastructure projects throughout Indonesia. However, the ability for these projects to be successfully completed and successful completion of the expansion programs will depend on numerous factors, including the ability to find the financing and expertise supports for such projects. In addition, some of the lethargies are due to legal uncertainty and restrictions occurring in reaction to the state finance law overhaul in 2003 onwards, resulting in the Government being forced to create what may be deemed as innovative, but “nonPlain vanilla” project finance alternatives which may not be as attractive to sponsors and financiers. The practical problem of clearing lands for public use has been cited as one of the long standing blocks. Under the new Land Procurement Law which recently came into effect, the smooth execution of development activities on areas required for public purposes²² can be better ensured. The Land

²² The Land Procurement Law specifically stipulates that the following development projects are classified as being done in the public interest: (1) national defense and security; (2) public road, toll road, tunnel, railway, train station, and train operating facilities; (3) water embankment, reservoir, irrigation, drinking water channel, water disposal channel and sanitation and other water resource management building; (4) seaport, airport, and terminal; (5) oil, gas, and geothermal infrastructure; (6) power plant, power transmission, switch yard, power network and distribution; (7) government telecommunication and information network; (8) waste disposal and processing place; (9) hospitals
Procurement Law introduces clear and expedited steps for the procurement of land for public interest.  

For so long as the infrastructure of Indonesia is lagging behind its neighbors, then notwithstanding the existence of a strong market, foreign investors may not be persuaded to locate their factories or operations in Indonesia.

Corruption

Corruption has been a long standing problem in Indonesia. Decentralization and the shift of the governmental system from a purely Presidential system to a parliamentary-like one, has made corruption appear to be more widespread than before. In addition to that, generally, investors continue not to believe that the court system in Indonesia practices fairness and impartiality, and there is skepticism that the judicial system will enforce their contractual property rights. For this reason, many business contracts choose arbitration (including foreign arbitration) for settlement of disputes.

HOW TO IMPROVE INVESTMENT LAWS HARMONIZATION IN ASEAN

owned by the Central Government or Regional Government; (10) public safety facilities; (11) cemetery owned by the Central Government or Regional Government; (12) social facilities, public facilities and open public green space; (13) wild life and culture preservation areas; (14) office area for the Central Government, Regional Government or sub-districts/villages; (15) structuring of urban slum area and/or land consolidation, and rented residential for low-income communities; (16) education facilities or schools under the Central Government or Regional Government; (17) sport facilities owned by the Central Government or Regional Government; and (18) public market and public car park.

23 Initially, government entities which wish to procure land for public interest must engage the Entitled Party in a public consultation on the proposed development plan until a consensus is reached. In the event no consensus can be reached, the Governor will set up a team to examine the reasons for the Entitled Party’s objections, and, based on such reasons, will make a decision as to whether the targeted land is approved to be procured for public interest. To the extent the Entitled Party still has objections, it may file a legal claim to the State Administrative Court, whose decision is subject to final appeal at the Supreme Court. If the land has been approved to be procured for public interest by virtue of a legally binding court decision, the National Land Agency shall appoint an independent appraisal team to determine the compensation value to be paid to the Entitled Party. The Entitled Party may file a legal claim to a District Court to challenge the compensation value, and the decision of the District Court is subject to final appeal at the Supreme Court.
Given the above, it is clear that the goal of harmonization is not a simple one and is affected by many factors and conditions. Generally however, certain steps and measures can be taken to ensure the achievement of harmonization:

1. Create a “level playing field” so that at the minimum infrastructure, financial institutions, and courts in each ASEAN member state can meet on a level of parity with the most developed ones.\(^\text{24}\)

   *This is a process which will take time but is critical to be done, especially Indonesia which is an archipelago of over 17,000 islands.*

2. Ensure there is political support and unified view on matters of law to be harmonized in each ASEAN member state.

   *Translating principles of harmonization into a law can be challenging for countries where politically, they may not have a unified view on the matter. If there is a national political support in each country, then a Model Law format can be used to harmonize investment laws and regulations.*

3. Improve and empower relevant government bureaucracy and agencies to deliver efficient processes:

   *To what extent investment procedures can be harmonized, simplified and facilitated, would be depended on the readiness of each country’s bureaucracy to handle such procedures. It also depends on whether the agency overseeing foreign investment has been given adequate authorization in all areas of law, or just in certain business sectors. Furthermore, agencies that handle investments must be modern, responsive, and logical. To the extent certain authorities remain vested in the technical ministries, it is possible, there may be differences*  

\(^{24}\) In the case of Indonesia, there is a significant catch up to be made. The Indonesian government must be firm in providing key infrastructures particularly modern airports in key cities. However, if the other ASEAN countries which have similar problems fail to also address them, then this disparity will continue to be a challenge to effective legal harmonization.
in policies/opinions between the investment board and the technical ministries leading to uncertain and slow process.

4. Strengthen the one-stop service and ASEAN Single Window system.

The one-stop investment center is essential to attract and support the potential investment. One-stop service is a concept that relates to the decentralization of authorities from the central government with respect to any investment decisions. To ensure this works, then concerns pertaining to decentralization issues in general must first be addressed by the respective countries. The One-Stop Service among the ASEAN countries must be linked so there is sufficient clear and adequate of information between the investment coordinating boards in each ASEAN countries.

5. Improve coordination in supervising areas of investment which may fall under the temporary exclusion list (TEL) or may be considered sensitive list (SL).

By having the TEL and SL lists harmonized, it may further emphasize the liberalization of ASEAN's foreign investment regime, as each ASEAN countries will likely have the TEL and SL lists that are substantially similar.

6. Enhance harmonization of incentive policies between ASEAN countries.

Research has shown that several ASEAN member countries compete with each other in competitive bidding wars relating to costly incentive systems for attracting and maintaining foreign investment.

7. Ensure that double taxation arrangements between ASEAN countries are fully completed between all member states.

8. Create a mutual surveillance system among ASEAN countries to ensure all ASEAN country will be in an equal status and position.
9. Establish a common ASEAN institution having the duty to receive performance report from all ASEAN countries with respect to their respective achievements or obstacles in fulfilling the action plans determined under the ACIA agreement, AEC Blueprint.

10. Involve private sector participation in harmonization efforts.

Harmonization cannot be effective if the process does not sufficiently involve private sector participation and comments. While not all private sectors’ feedbacks are relevant or appropriate, getting practitioners involved in resolving various issues faced by foreign investors may give the government officials more accurate perspectives to push harmonization.

11. Communicate the policies so there is no ambiguity or uncertainty and discrepancy between what is regulated and what is enforced.

Harmonization implies liberalization. Each Government needs to better appreciate the market, that it will only be confused if in the name of national interest, the Government implies that they may apply certain restrictive policies retroactively. When the Government later ends up not applying it, it would not mean that some declining investment had not already occurred due to the uncertainty.

12. Implement zero tolerance policy to corrupt practices in licensing processes and judicial administration.

Corruption in licensing processes must be reduced as it adds up transaction costs and generally create uncertainty particularly where different authorities to issue permits or approvals based their actions not merely on what is permitted by the law, but due to corruption. There must be zero tolerance to such practices, especially when they relate to licensing processes and judicial administration.
13. Specifically for Indonesia, amend the Mandatory Tender Offer rules on forcing 20% sell-down after acquiring more than 80% as this regulation does not exist in any other jurisdiction.

*If the intention is to ensure there is sufficient number of quality listed companies whose shares are liquid, then the obligation to undertake the mandatory tender offer should be adjusted accordingly, instead of requiring a mandatory purchase from all public but then requiring the investors to sell again within 2 years.*

While there is no quick solution to achieving harmonization, the writer believes that if the above were implemented, there would be a more successful harmonization process of the investment laws among the ASEAN countries.

To what extent it can be implemented depends on the political will of each member state and to what extent there is national political support to adopt those laws and policies.

Jakarta, 31 January 2012
REFERENCES


Various laws and regulations of Indonesia and materials pertaining to ASEAN