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"Experiences of Indonesian Domestic Courts in Invoking ASEAN Law Instruments"

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Experiences of Indonesian Domestic Courts in Invoking ASEAN Law Instruments[1]

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Abstract

One of the challenges in promoting deeper ASEAN integration is the lack of the court's involvement in invoking the ASEAN Law instruments. Compared to the European Union (EU), ASEAN does not have a court like the European Court of Justice. Therefore, the role of domestic courts in ASEAN Member States becomes essential to ensure that the countries abide by ASEAN legal instruments. This paper shows how one of the ASEAN Member State's domestic courts, the Indonesian domestic court, invokes ASEAN legal instruments through selective cases. The paper analyses several types of matters related to ASEAN law. Firstly, the enforcement of the ASEAN Trade in Goods Agreement (ATIGA) or other trade agreements in the Indonesian Taxation Court. Secondly, the cases related to judicial review of the laws/regulations on ratification of various ASEAN agreements/treaties in both the Indonesian Supreme Court and the Indonesian Constitutional Court. Thirdly, a seminal case on how the domestic court fined an airline that violated the ASEAN Framework Agreement on Visa Exemption (AFAVE). By analysing such cases, it can be seen how vital ASEAN legal instruments are for Indonesia and how other ASEAN Member States' domestic courts could learn from them.

I. Introduction

The formation of the Association of Southeast Asian Nations (ASEAN) has a close relationship with regional stability. It was conveyed by the Minister of Foreign Affairs of the Republic of Indonesia, HE Adam Malik Batubara, during a joint negotiation with ministers from four other Southeast Asian countries on August 8, 1957, in Bangkok, Thailand. He envisioned that ASEAN would become "[a] region that [could] stand alone as well as strong enough to defend itself against adverse influences from outside the region". [3]

Adam Malik's vision of ASEAN on self-defence should be understood under the context of that era. In that decade, the history of state cooperation formation at the regional level was initially more focused on security and defence matters. Thereafter, there was a shift towards the economic and welfare aspects in the region. A comparative example is how several European countries formed the European Coal and Steel Community (ECSC) in 1951. The ECSC was later transformed into the European Union (EU) as it is known as today, after previously going through the European Economic Community phase. At that time, French

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[3] ASEAN Official Website, "History: The Founding of ASEAN", <https://asean.org/asean/about-asean/history/> visited 20 February 2021.

Foreign Minister Robert Schumann—later known as the father of the European Union—together with French politician Jean Monnet took the initiative to form the ECSC so that steel and coal industries in Europe could be jointly managed by the six major countries of the region. Its main goal was to maintain peace and security between them after the onset of World War.[4]

Times have, of course, changed. Even though security and defence issues in ASEAN are still areas for regional cooperation, economic integration and welfare are currently the main areas of focus. One of the stages of economic integration is establishing a (single) internal market which has four main principles: freedom of movement of goods, people, services and capital. Article 1(5) of the ASEAN Charter, which has been ratified in Indonesia by Law No. 38 of 2008, states that establishing a single market is one of ASEAN's goals.

However, the development of economic integration in ASEAN, especially after implementing the ASEAN Economic Community (AEC) in 2015, is not accompanied by the spirit of ASEAN Member States on upholding the ASEAN legal instrument at the regional level.. One example is the ASEAN member states' lack of interest of in using the ASEAN Enhanced Dispute Settlement Mechanism, which has been provided since 2004, as an instrument for dispute resolution between ASEAN member states. To compare, this is different from EU countries who are very active in using the European Court of Justice as a forum for dispute resolution in its internal market to provide legal certainty for the people and promote integration.

II. ASEAN Way vs Rule of Law

ASEAN, of course, is not the same as the EU. One thing that distinguishes the two is the 'ASEAN Way', which has been promoted (and exalted) by ASEAN leaders. The ASEAN Way (which is now also the title of the ASEAN Hymn) promotes consensus and upholds the principle of non-intervention among the ASEAN Member States. Singapore Senior Diplomat and one of the drafters of the ASEAN Charter, Tommy Koh, said at the welcoming dinner of the ASEAN Law Academy in Singapore in mid-August 2019, that the ASEAN Way concept was adopted from the values and traditions of the Indonesian people, namely "*gotong royong*" (Mutual Cooperation) and "*musyawarah*" (Consensus). However, it actually raises much criticism that the ASEAN Way is often only used as a cover for ASEAN not to act when its

[4] K.D. Borchardt, "The ABC of European Union Law", Publication Office of the European Union, 2010.

Member States face a dispute.[5] In fact, many people argue that "going to court to settle disputes is not part of the ASEAN Way".[6]

Indonesia indeed upholds the principles of *gotong royong* and *musyawarah*, as expressed by Tommy Koh, as an inspiration for the ASEAN Way. However, Indonesia also has other principles that cannot be negotiated, namely the rule of law as emphasized in Article 1(3) of the 1945 Constitution. The debate between the two approaches—consensus versus enforcement of the law through the concept of the rule of law—can been found from the discussion between Indonesia's founding fathers. When creating the Constitution, two influential groups had different views. There were the Soekarno and Soepomo groups that prioritized the principle of kinship or *musyawarah*. However, on the other hand, the Mohammad Hatta and Mohammad Yamin groups insisted on ensuring people's rights are in line with the concept of the rule of law.

As a result, the meeting point of these two different approaches was to accommodate several general principles related to human rights, even though they were not mentioned in detail in the 1945 Constitution. However, after the collapse of the New Order government led by President Soeharto in an authoritarian way, the nation began to realize the need to include human rights and the rule of law in the amendments to the 1945 Constitution.

When referring to some literature taught in many law faculties in Indonesia, the concept of the rule of law often refers to Albert Vein Dicey's opinion in his book, “Introduction to the Study of Law of Constitution in 1885.” The British law scholar mentioned it is necessary to have three components that form the rule of law: the supremacy of law, equality before the law, and a Constitution based on human rights. Of course, these components—especially supremacy of law and equality before the law—cannot be enforced if there is no adequate judiciary to handle the disputes.

Meanwhile, from the continental or civil law perspective, the rule of law is associated with “Rechtstaat”, which Julius Stahl introduced. According to him, there are four principles in the concept of “Rechtstaat”:

- The protection of human rights;
- Distribution of power;

[5] Awe Tsamma and Atin Prabandari, “Konsep ASEAN Way pada Sistem Penyelesaian Sengketa di ASEAN: Studi Kasus Sengketa Candi Preah Vihear antara Kamboja dengan Thailand”, bachelor thesis at University of Gajah Mada, Indonesia, 2016.
[6] JHH Weiler, “ASEAN Law, the ASEAN Way and the Role of Domestic Court”, in the ASEAN Law Conference 2018: A compendium of Speeches, Papers, Presentations and Reports 43 (Justin Yeo, ed., ASEAN Law Association, 2019).

- Governance based on law; and
- The existence of state administrative court.

The last principle becomes relevant when related to the enforcement of ASEAN legal instruments in Indonesia. Most of them resolved by the taxation court under the state administrative judiciary in the Indonesian legal system.

III. Indonesian Domestic Courts' Selective Cases on ASEAN Law

Using the concept of the ASEAN Way and the principle of non-intervention, it is almost impossible to expect an 'ASEAN Court of Justice' to be established like the European Court of Justice in the EU. Even so, it is not likely that the ASEAN Member States will use such a legal forum. However, it does not mean that ASEAN legal instruments cannot be enforced at all through judicial mechanisms. Professor Joseph Weiler encouraged enforcing ASEAN law through the domestic courts of each member states. On various occasions, such as in the ASEAN Law Association (ALA) and the ASEAN Law Academy, Weiler has argued that legal practitioners in ASEAN Member States need to be involved in the development of ASEAN law. One way to be involved is to raise issues related to the implementation of ASEAN legal instruments through domestic court channels in each of the ASEAN countries.

The practice has occurred and is carried out in Indonesia, evidenced by the hundreds of cases relating to ratified ASEAN legal Instruments in the Indonesian court database. Relevant court decisions include the following, among others:

- ASEAN-China Free Trade Area (ACFTA) was ratified by Presidential Decree No. 48 of 2004.
- ASEAN Trade in Goods Agreement (ATIGA) was ratified by Presidential Regulation No, 2 of 2010.
- ASEAN Comprehensive Investment Agreement (ACIA) was ratified by Presidential Regulation No. 49 of 2011.
- ASEAN Framework Agreement on Services (AFAS) was ratified by Law No. 4 of 2018.
- The ASEAN Framework Agreement on Visa Exemption (AFAVE) was ratified by Presidential Regulation No. 19 of 2009.

In detail, there are at least 30 court decisions relating to ATIGA and 60 court decisions about ACFTA in Indonesian domestic courts. Of the various decisions covering ACFTA or

ATIGA, there are many cases where the court ruled in favour of the importers. Where there is a concern that domestic court judges will tend to win over the country based on the existing decisions, this is not entirely correct. Some of these particular cases are:

a. Case of Authenticity of Form D (ATIGA)[7]

The case relates to a dispute over Form D's authenticity regarding a certificate of origin from an ASEAN Member State. Indonesian Taxation Court in Decision No. PUT.57357/ PP/M.IXB/19/2014 corrected the customs decision, which stipulated an import duty rate of 10% for goods in the Form of "Propylene Copolymers PP AP03B" from Singapore to 0% tariff, after confirming that the Form D submitted by the importer was authentic.

The case originated from the importer's appeal against the Director-General of Customs and Excise imposition of an import duty on the type of goods in the Form of "Propylene Copolymers PP AP03B," which stipulates an import duty rate of 10% as the general product. The importer objected to the stipulation, arguing that the goods originated from Singapore and should be subject to a 0% tariff based on ATIGA.

The Court granted the importer's objection after checking the certificate of origin's authenticity, as stated in Form D based on ATIGA.

ATIGA-related cases were widespread in Indonesia in the period of 2013 and 2014. However, after implementing the ASEAN Single Window in 2018, such cases are rarely seen. Through the ASEAN Single Window, the checking process of a certificate of origin (form D) can be done through an online system.

b. *Judicial Review of Negative List Investment Regulation (AFAS and AEC)[8]*

In the case of judicial review of Presidential Regulation No. 44 of 2016 concerning Lists of Business Fields that are Closed To and Business Fields that are Open with Conditions to Investment (Negative Investment List), the Indonesian Supreme Court ruled in favour of ASEAN integration by giving precedence to the AEC and AFAS.

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[7] The case has been reviewed by the author in "ASEAN Law Observers", Sept 4, 2020, <https://aseanlawobservers.wixsite.com/mysite/post/indonesian-atiga-case-a-dispute-on-authenticity-of-form-d>. visited Feb 15, 2021.

[8] The case has been reviewed by the author in "ASEAN Law Observers", Aug 30, 2020, < https://aseanlawobservers.wixsite.com/mysite/post/nil-judicial-review-indonesia-supreme-court-rules-in-favor-of-afas-and-asean-economic-community> visited Feb 15, 2021.

An Indonesian citizen brought the case by request for judicial review of the Negative Investment List Presidential Regulation, which he claimed was against the Law No. 17/2008 on Shipping. He argued that the Regulation, which opens foreign ownership of sea transportation (both for goods and people) in Indonesia up to a maximum of 70% if investors originate from the ASEAN Member States, was detrimental to him and other local business actors maritime sector.

The panel of judges rejected the request for judicial review and delivered legal considerations in favour of AEC and AFAS as follows:

> *Whereas through the AFAS and AEC, every ASEAN member state national should be able to take advantage of market opportunities in 10 ASEAN member states with more than 600 million people. Indonesia, as one of the ASEAN member countries, has ratified the AFAS international agreement. The consequence is, it should both open up and not be allowed to discriminate, including protection and barrier to entry for the particular shipping business industry for ASEAN member states;*
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> *Whereas with the AEC's existence, there is a reciprocal and mutually beneficial relationship between ASEAN member countries. It is hoped that there will be a transfer of knowledge and technology from foreign investors to national sea transportation players. So that, it becomes a modern industry and can compete in international shipping, thus enlarge regional and global market opportunities for goods and services products from Indonesia, especially in the field of Indonesian sea transportation, the business sector of Foreign Sea Transportation for Passengers and Overseas Sea Mode for Goods, so that they can compete in ASEAN countries with capital ownership which is the same, namely 70%. Competition in the business world is an absolute requirement to create a market mechanism. If there is business competition, market players are required to continue to improve the products and services produced and continue to innovate, strive to provide products or services efficiently…*"

c. Lion Air vs Passenger (AFAVE)[9]

In this seminal case, a Lion Air passenger successfully challenged the airline in three stages of trial—in the first level, appeal and cassation—by relying on Presidential Regulation No. 19/2009 concerning the Ratification of the ASEAN Framework Agreement on Visa Exemption (AFAVE). Mr Sutan Erwin Sihombing, a prospective Lion Air passenger with flight JT 1286, Medan (Indonesia) to Penang (Malaysia) on June 24, 2010, brought the case because he was rejected by a Lion Air officer when he wanted to check-in for the flight. The officer refused to give him a boarding pass and cancelled his flight. The reason for the cancellation, as mentioned by Lion Air Chief Officer in Counter Ms Kurniawati (as the second defendant in this case), was because Mr Sihombing did not have an entry visa to Malaysia, could not show a return ticket from Penang to Indonesia, and was not willing to provide some amount of money as collateral to buy a return ticket in case of deportation from Malaysia.

Mr Sihombing did not accept the reason for the cancellation of his departure. He then sued Lion Air and Ms Kurniawati at the Medan District Court and won his lawsuit. Later, Lion Air filed an appeal to the North Sumatra High Court, which was rejected by the High Court. This case finally brought by Lion Air to the Supreme Court.

In the cassation decision 2130K/Pdt/2013, the Supreme Court panel of judges consisting of Abdul Ghani Abdullah (chairman of the panel), Mukhtar Zamzami and I Gusti Agung Sumanatha (members of the panel) rejected the appeal from Lion Air. One of the panel's considerations is:

> *The reason of the Defendants (Lion Air and its officer/Ms Kurniawati) refused and cancelled the Plaintiff's departure was that the Plaintiff did not have a visa and could not show a return ticket from Penang to Medan or could not show a 1500 ringgit "point money", could not be justified because of the agreement on the ASEAN cooperation framework (Framework Agreement on Visa Exemption) which waives the visa obligation.*

IV. Conclusion

The cases described above prove that the Indonesian domestic courts play a huge role in upholding its obligations under ASEAN legal instruments within the country. It

[9] The case has been reviewed by the author in "ASEAN Law Observers", Jan 6, 2021 < https://aseanlawobservers.wixsite.com/mysite/post/passenger-vs-lion-air-no-you-don-t-need-visa>, visited Feb 16, 2021.

should be followed by other ASEAN Member States. The role of the national court needs to be appreciated or even supported and maximized. The domestic court's huge role is one of the pillars of upholding legal certainty in ASEAN, which is often considered non-existent due to the nature of the ASEAN Way.

Therefore, the support of many stakeholders for the ASEAN national court in invoking legal certainty is essential so that the decisions issued become more developed. Supports can come from academics and the media (especially those who focus on legal developments) to analyze, examine and disseminate information to the public so that ASEAN law, which has been implemented into national law, can be upheld and enforced.

Last but not least, the involvement of ASEAN domestic courts in invoking the law and supporting regional integration is still in line with ASEAN's core principle of non-intervention because each ASEAN Member States' domestic court has its own independence when deciding a case. The role can also be considered another form of the ASEAN Way, and separate from the EU, which involves a regional court invoking the EU law.