PROCEEDING

of the International Seminar Faculty of Law 2015

"Comparative Law of Various Law Systems in the World"

Organized By :

FACULTY OF LAW
SULTAN AGUNG ISLAMIC UNIVERSITY
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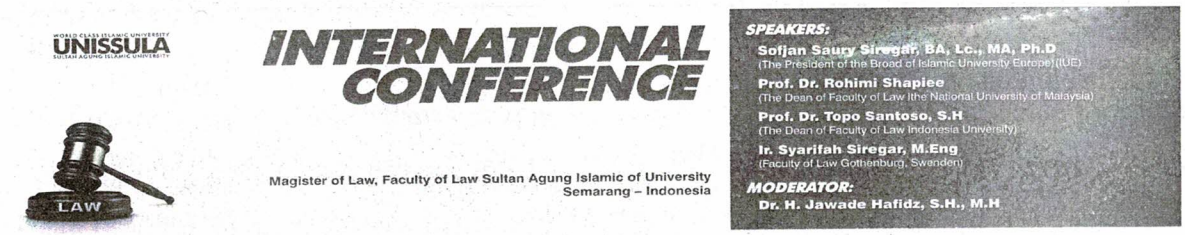

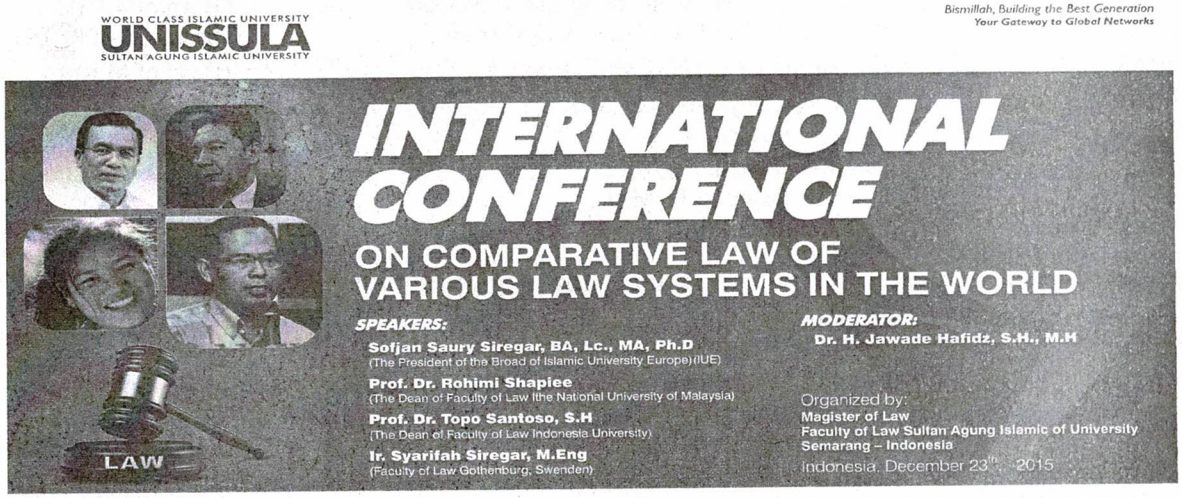

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Day : Wednesday

Date : December 23th 2015

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Place : Imam As Syafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

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CONFLICT RESOLUTION ON INVESTMENT AND INTERNATIONAL TRADE

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In the face of free trade and ASIAN Economic Community (AEC) that starts in a fewndays, we, the people of Indonesia, especially practitioners and academics in the field of law realized the need to make the same standards to the region so that all experts/ law students get instruction and the same standard to compete with them.

1. Cases in Investment and Inter national Trade.

In some cases, investment and international trade, Indonesia has almost suffered defeat and loss as in the case:

a. Indonesia against Amco Asia Corporation, where the position of Indonesia as defendant and Amco Asia Corporation becomes the plaintiff. The case was put on trial in 1980 and decided on the 5 September 1983 by the decision of the ICSID Case No. ARB / 81/1. Indonesia was found guilty in the case and are obliged to pay damages caused to investors in the amount of US $ 3.2 million on the first level and the result is always lost in every phase of Revision and Annulment of 4 levels.
b. Churchill Mining cases against Indonesia. Churchill Mining is a British owned company engaged in the mining sector who invests in PT. Ridlatama group as business partners engaged in coal mining in East Kutai. The lawsuit originated from five mining license revocation by the Regent of East Kutai in East Kutai. Where four out of five of the mining concession is owned by PT. Ridlatama Group recognized as subsidiaries. Churchill sued Indonesia to ICSID that Indonesia should compensate US $ 2 billion or equivalent to Rp19 trillion. The reason is because Churchill lawsuit getting unequal treatment between local and foreign investors, causing Churchill suffered another loss.

The loss occurred because of a lack of confidence and a mastery of the material in international trade and investment by expert / law students, it is necessary to address conflict resolution studies center of international trade and investment.

2. The concept of Inter national Trade and Investment Law.

Law has a first function as social control. In this case, the law contains norms that control the behavior of individuals in dealing with the interests of other individuals. Second, the legal system serves as a means of dispute settlement. Third, the legal system serves as social engineering (Darji Darmodihardjo dan Sidharta, 1996).

Generally, in the areas of life that is neutral, then the law can serve as a means to change society because of its emphasis more toward certainty, whereas if it concerns the areas of private life, then the law is functioning as a means of social control because in this case the justice role more mainstream (Darji Darmodihardjo dan Sidharta, 1996).

In its function as a social control, the legal duty to keep the public can still be in the patterns of behavior that have been received by it. In its role, thus, the law retain only what has become something fixed and accepted in society or the law as the guardian of the status quo, but beyond that, the law is still able to be used for the other, is the aim to make changes in the society (Satjipto Rahardjo).

In function of the law as social control, will discuss the settlement of disputes/ conflicts, related to the trade carried on by a resident of a country with a population of other countries on the basis of mutual agreement. Population in question can be either an individual (individual to individual), between the individual and the government of a country, or the government of a country with other governments. In many countries, international trade became one of the main factors for the increase of GDP.

To assist the implementation of the legal theory that accours in the community through the comparison, which resulted in a policy:

a. Comparative law as a tool construction;
b. Comparative law as a contribution to the systematic unification and harmonization of law.

and the type for the comparison is:

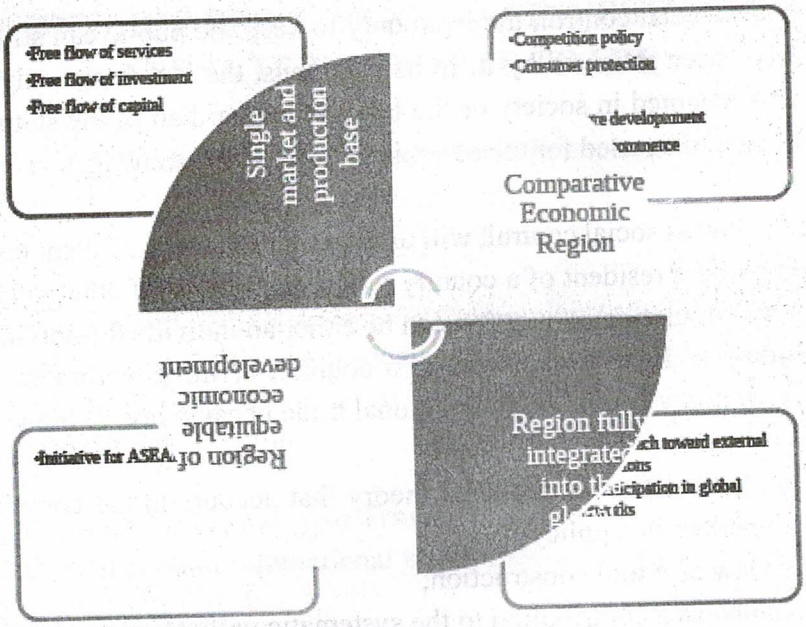
a. A Comparison of foreign system with the domestic system in order to ascertain similarities and differences;
b. Studies wich investigate the causal relationship between different system of law;
c. Studies which compare the several stages of various legal systems;
d. Studies which attempt to discover or examine legal evaluation generally according to periods and systems;

On ASEAN Economic Community, the policy and legal infrastructure for electronic commerce and enable on-line trade in goods (e-commerce) within ASEAN through the implementation of the e-ASEAN Framework Agreement and based on common reference frameworks with:

a. Adopt best practices in implementing telecommunications competition policies and fostering the preparation of domestic legislation on e-commerce;
a. Harmonise the legal infrastructure for electronic contracting and dispute resolution;
b. Develop and implement better practice guidelines for electronic contracting, guiding principles for online dispute resolution services, and mutual recognition framework for digital signatures in ASEAN;
c. Facilitate mutual recognition of digital signatures in ASEAN;
d. Study and encourage the adoption of the best practices and guidelines of regulation and/or standards based on a common framework; and
e. Establish a networking forum between the businesses in ASEAN and its Dialogue

Partners as a platform for promoting trade and investment. Investment law in international trade can no longer be seen from the legal system adopted by a country rather than unification of legal standards for the entire country, made by academics and practitioners together from different countries for comparison and stipulation.

For the ASEAN Economic Community, it have been explained about international trade on the characteristic (blueprint AEC):



3. Conflicts/Disputes in Inter national Tr ade and Investment.

Efforts were made possible by a sovereign state to maintain product FDI regulations under an international law which is entrenched, and the latest developments concerning the protection of the rights of foreign investors, is a challenge that is contained in a dynamic world FDI. The development of the right of investors to participate in the globalization regime with the sovereign state to protect domestic interests of urgency FDI is a challenge.

An important point is the need for international investment law to resolve conflicts arising from the tension between state sovereignty and investment liberalization in a way that is principled, transparent and enforceable. State accommodates the same treatment to foreign investors; while preserving natural resources and other public interest balancing is done by host.

The conflict between the interests of the state and investors appeared significantly and compatible. Sovereign states are interested not only in regulating foreign investment on the grounds of public policy, but also to avoid investor capital flight from countries, where the regulations not considered clearly by investors, the existence of arbitrariness, or capricious (legal uncertainty).

The nature of the problem of a dispute, in general there are several kinds, among others (Rusmadi Murad):

a. Issues related to the priority issues to be specified as holders of an investment;
b. Refutation of something right base/evidence used as the basis for the acquisition of entitlement (civil);
c. Mistake/error caused granting the application of regulations that are less/not true;

a. Dispute/other issues that contain practical social aspects (strategic).

The dispute relates to civil rights, either by subject or by the rights of other parties interested in the rights object. As an issue of concern with regard to security of rights to an investment in international trade.

Need to build a new paradigm to achieve a settlement of the problem or a legal dispute, from the judging/judicial paradigm to the paradigm of solving problems or legal disputes. This new paradigm includes two (2) principal strategies, namely (Bagir Manan, 2005): ✓

a. Revitaliation function of the court to reconcile the parties are facing legal disputes. This function is mainly related to the legal dispute is not a criminal case, in accordance with the existing provisions, the judge is obliged to bring the two parties to the dispute for talks that resulted in a win-win solution.
b. Revitalization of social institutions to provide the basics stronger for the development of institutions of alternative dispute resolution (ADR).
c. Restructure the procedures for the settlement of a case to be more efficient, effective, productive and reflects the integration of systems between the elements of law enforcement by detailing the roles and responsibilities of the officers of the law. The principle of an integrated justice system in criminal cases (integrated criminal judicial system), do not adequately address the relationship of coordination among law enforcement agencies.
d. Restructure the rights of litigants that caused the settlement of protracted, and contains a variety of potential conflicts "permanent" between the litigants.

Conflict or dispute investments originated from the fault of one party to the agreement. In the event of a dispute between the parties in good agreement between the government and investors, the parties must first finish with deliberation and consensus. If settlement is not reached, the settlement can be made through arbitration or alternative dispute resolution or court in accordance with the statutory provisions. In the event of a dispute in the field of investment between the government and domestic investors, the parties can resolve the dispute through arbitration by agreement of the parties, and if the settlement of disputes through arbitration can not be agreed upon, it will be done through the courts.

In contrast to investment disputes that occur in the country, to the international trade disputes resolved through the World Trade Organization (WTO), which is an International Trade Organization. WTO has a system for resolving disputes between its members in many ways to be successful and the system is contained in the WTO agreement on dispute resolution / WTO Dispute Settlement Understanding (DSU). According to Article 3.7 DSU, major goals and objectives of the WTO dispute settlement system is to ensure a positive solution to a dispute and the system is very likely to resolve disputes through consultation rather than litigation.

The legal basis for a forum or a dispute resolution body that will handle the dispute is agreement between the parties. This is the legal agreement. The agreement was made either at the time the contract is signed or after the dispute arises. Typically, the negligence of the parties to decide the forum will result in the emergence of difficulties in resolving disputes. Because, with the vacuum option of the forum will be a strong reason for every forum to declare himself the authority to examine a dispute. Normally in the legal system (Common Law) is known as the concept of 'long arm' jurisdiction. With this concept, the court may declare its authority to receive any dispute brought before him eventhough the relationship between the court with such disputes are not tight.

Pursuant to Article 3.2 DSU, the WTO dispute settlement system aims to preserve the rights and obligations of Member States under the provisions contained in the annexes to the WTO Agreement (covered agreement) and simultaneously explain these provisions. WTO dispute settlement system plays an important role in clarifying and enforcing the obligations of WTO members. This important role because of the interests in each member state, so as to protect the interests which will be detrimental to each member country.

Free trade today requires all parties to understand international trade agreements with all its implications on the development of the national economy as a whole. Agreements that exist within the WTO framework aims to create a world trading system that regulates trade issues in order to better compete in an open, fair, and healthy. It is evident in the principles espoused by the WTO principle of non-discrimination, transparency, stability and predictability of trade regulations, use of tariffs as instruments of protection, and elimination of unfair competition. Associated with the principle of predictability of trade, the principle

was stated that the government of a country which is a member of the WTO can make arrangements that would restrict or regulate the field of trade itself if there are specific things (special circumstances).

In international trade dispute settlement, Indonesia has become the main plaintiff in the case with South Korea on paper products. In this case South Korea set of Anti Dumping Duty (BMAD) on paper products from Indonesia. Indonesia as a country that conduct international trade and also a member of the WTO, is accused of dumping practices in paper products are exported to South Korea. The case began when the South Korean paper industry filed anti-dumping petitions against Indonesian paper products to the Korean Trade Commission (KTC) on 30 September 2002. The company charged with dumping was PT. Indah Kiat Pulp & Paper Tbk, PT. Pindo Deli Pulp & Mills, PT. Paper mill Tjiwi Kimia Tbk and April Pine Paper Trading Pte Ltd. Indonesian paper products were charged with dumping covers 16 types of products, belonging to the group of uncoated paper and paper board used for writing, printing or other graphic purpose and carbon paper, self-copy paper and other copying or transfer paper.

An initial mechanism of Indonesia in this case is to conduct consultations. Consultation took place between South Korea and Indonesia, in the end a stalemate and no agreement, so that on 16 August 2004, Indonesia requested the establishment of a panel. On October 28, 2005, DBS officially announced results of the panel's report, which shows that DBS cremate and approved the lawsuit plaintiff (Indonesia) and claimed that South Korea has violated the provisions of the ADA and still wearing BMAD against imported paper products from Indonesia.

In handling cases of investment and trade Indonesia which is currently still minimal curriculum studied in the Faculty of Law, it is necessary to set up a study center that aims:

a. To develop legal analysis activities in the area of legal jurisdiction conflicts (Conflict of Law), international trade, arbitration, and conflict resolution and trade investment.
b. To have a professional training and human resource development in the strategic investment and trade conflicts.
c. To design and implement a planning study of all international trade and investment agreements signed Indonesia.
d. To develop expertise in the field of conflict resolution and investment international trade.

4. Conclusion.

Entering the ASEAN Economic Community era, which is coming in a few days, experts and law students in Indonesia does not have a strong confidence to compete with legal experts from other countries because of the absence of the same standard in the legal material to investment and international trade. In this regard, we need to set up a study center for conflict resolution on investment and international trade.

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