

# **INTER REGIONAL GOVERNMENT COOPERATION: ADMINISTRATIVE LAW PERSPECTIVE**

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## **Abstract**

*As it stated in the considering provision of Law number 32 year 2004 on Local government that “regional administration aimed to accelerate the realization of public welfare through improvement, services, empowerment, and community involvement, as well as enhancing regional competitiveness with underlined to the principles of democracy, equality, justice, privilege and specificity of a region within the system of the Republic of Indonesia”. To realize these goals, cooperation between local governments is needed, it is given that many regional affairs cannot be done by themselves unless in cooperation with other local governments. According to existing legal regulation, the inter-regional government cooperation is stated in various legal forms. Article 195 of Law Number 32 year 2004 choose Joint Decree as the legal form of inter-regional cooperation, while article 5 of the Government Regulation Number 50 year 2007 regarding Local Cooperation establish the cooperation in the form of Agreement. Besides those two legal form of inter-regional cooperation, Ministerial Regulation No. 22 of 2009 on the Technical procedure on inter-regional cooperation stipulate “memorandum of understanding” as form of understanding between two parties before the agreement is signed. Memorandum of understanding and agreement as the legal form of the inter-regional government cooperation is not recognized as legislation product of local government as it promulgated in Article 3 of Ministerial Regulation No. 53 of 2011 on the Establishment of the Regional Legislation Products. This paper aimed to identify the legal form of inter regional cooperation, such legal form is an important to bring legality principle for government action in creating cooperation.*

**Keywords:** *Inter regional cooperation, government, legality principle*

## **I. INTRODUCTION**

In its effort to escalate public welfare, the regional government can undertake cooperation between regional governments or third parties. According to Article 1 point 1 of the Government Regulation number 50 year 2007 regarding Procedure for Inter-regional government cooperation (hereinafter called PP No.50/2007), stated “Regional Cooperation is an agreement between Governor with Governor or Governor with Regent/Mayor or between Regent/Mayor with other Regent/Mayor and/or Governor, Regent/Mayor with third parties, which made in written and contain rights and obligation”. In the inter-regional government cooperation refer to Article 4 of PP No.50/2007 “object

of inter-regional government is government matters<sup>1</sup> that has become its authority as autonomous region and could be related to provision of public service.” This Article inline with Tjahjanulin Domai<sup>2</sup> argment that “regional government matters that can be used as object of inter-regional government cooperation is the authority in managing local asset and potention as well as serves public need. The implementation of such cooperation must uphold efficient, effectivity, synergy, mutually beneficial, mutual agreement, good faith, equality, transparency, justice and legal certainty”. S Pamudji argue that scope of cooperation related with two sides, namely “government matters that includes domestic affairs and madebewind matters”.<sup>3</sup> Moreover explanation of the PP No 50/2007 promulgated that Regional cooperation is an instrument to tighten the relationship between region with others in the framework of Unitary State Republic Indonesia, coordinate local development, harmonizing potention between regions and/or with third parties and increase transfer of knowledge and local capacity. According to S Pamudji, in terms of inter-regional government cooperation there are two main motivation to implement cooperation framework between regional government, as follows:<sup>4</sup>

- a. As an effort to reduce possibility of the fast development in one area with bringing destructive impact for area surrounding, either direct or indirect.
- b. As a way to solve common problem and/or implement common

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Indonesia, Regulation of the Government, number 50 year 2007, Article 1 point 5, “*Urusan pemerintahan adalah fungsi-fungsi pemerintahan yang menjadi hak dan kewajiban setiap tingkatan dan/atau susunan pemerintahan untuk mengatur dan mengurus fungsi-fungsi tersebut yang menjadi kewenangannya dalam rangka melindungi, melayani, memberdayakan, dan mensejahterakan masyarakat. (Government matters are the government functions that becomes rights and obligation in each tier and or level of government to manage and deal with that functions which are their authorities in terms of protect, serves and empower and escalate government prosperiety)*”

<sup>2</sup> Tjahjanulin Domai, “Implikasi Kebijakan Kerjasama antar pemerintah daerah Dalam Pemanfaatan Sumberdaya Daerah. (Study on inter-regional government cooperation in the perspective of Good Governance)”, *Disertation, Faculty of Administration Universitas Brawujaya, Malang*, 2009. p.49.

<sup>3</sup> S Pamudji, *Kerja Sama Antar Daerah Dalam Rangka pembinaan Wilayah, Suatu Tinjauan dari Segi Administrasi Negara*, Bina Aksara, Jakarta 1985. p.3

<sup>4</sup> *Ibid.*, p. 9

purpose on certain things.

The regional government's action in making inter-regional government must leads to the purpose of the management of regional government which is also as purpose of the state as it promulgated in the forth aline of the preamble of Indonesia Constitution 1945, " ...protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice...". Therefore, the regional cooperation cannot be separated with the concept of Unitary State that uphold public need, that become implementation from third article of Pancasila, Unitary Indonesia, for the need of common justice for Indonesia people. In regards to inter-regional government cooperation, it cannot be separated with discussion principle in implementing unity and justice.

The inter-regional government cooperation is stated in the form of an agreement that based on civil law and /or public law. This private action happens if such agreement conducts with other party and contains civil rights as its object. In the light of such cooperation there is "relation between two or more legal subject in the property fiels, in which one party has the rights on certain performance and other party obliges to fulfill such performance"<sup>5</sup> Object of such cooperation, refer to Article 1234 of *Burgelijk Wetboek (BW)* is to give something, do something and not do anything.

The form of inter-regional government cooperation which based on public law is categorized as public legal action with various parties (*publiekrechtelijke overeenkomst*). "This public legal action with various parties charater based on the purpose of holding this agreement to perform the governments duty, meanwhile other expert argue that the agreement which based on public law exist if such matter is regulate under public law"<sup>6</sup> "The inter-regional government cooperation either

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<sup>5</sup> Compare with, Mariam Darus Badruzaman, Kerangka Dasar Hukum Perjanjian (kontrak), in *Hukum Kontrak Indonesia*, cet. 1, ELIPs Project and Law Faculty of Universitas Indonesia, Jakarta, 1998, p. 3.

<sup>6</sup> Philipus M Hadjon, *Pengertian-Pengertian Dasar Tindak Pemerintahan*, Jumali, Surabaya, 1983, p.42

based on civil law or public law is an agreement, which cannot released from legal charater of private law, though on this agreement *projectontwikkelingsovereenkomst* almost all of it conduct by government agency or authorized person”.<sup>7</sup>

## II. TYPES OF INTER-REGIONAL GOVERNMENT COOPERATION

In terms of effort to improve the regional government works, the inter-regional government cooperation hold essential position in order to escalate the work of local government. This argument stated by Tjahjanulin Domai<sup>8</sup> that cooperation has been known as the perfect way to take benefit from economis of scale. Joint purchasing for example has proven such benefi, in which on purchase in large scale or exceed “*Threshold points*”, will be more beneficial the conduct it in small scale. The inter-regional government cooperation shows there is common effort which conducts by two or more region or can take several form of it. Pamudji, differenciate types of inter-regional government into bilateral and multilateral cooperations.<sup>9</sup>

According to Henry<sup>10</sup> as it quote by Tjahjanulin Domai, form and method of inter-regional government cooperation, covers (1) *intergovernmental Service Contrat* (2) *Joint Service Agrrement*, and (3) *Intergovernmental Service Transfer*. First type of cooperation is conducted if one region pays to other region to do certain type of service such as garbage processing. Second type of cooperation usually hold to serves planning, budgeting and certain type of service to related region, for instance fire brigade, garbage processing. Meanwhile thrid type of cooperation related to permanent transfer of particular responsibility from one region to other region, for example in the field of public work and instrument, health and welfare as well as financial. Furthermore Tjahjanulin Domai also quote Rosen’s<sup>11</sup> argument that inter-regional government cooperation can be done in several form, namely in ther form

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<sup>7</sup> H.M. Laica Marzuki, *Op cit.* p. 151

<sup>8</sup> Tjajanhulin Domai. *Op.Cit* p. 38

<sup>9</sup> Pamudji, *Op.Cit.* p. 20

<sup>10</sup> *Ibid.* p. 36

<sup>11</sup> *Ibid.*p. 40

of agreement and regulation. In detail, form of agreement distinguished into several types as follows:

- a. *Hanshake Agreement*, is work regulation which not based on written agreement;
- b. *Written Agreement*, is cooperation based on written agreement.

Moreover Rosen<sup>12</sup> explain that in the forms of cooperation agreement consist of several types, namely:

- a. *Constantia*, is cooperation in the form of resources sharing, because it will be more expensive if the financial cost burden personally by themselves.
- b. *Joint Purchasing*, is cooperation in the forms of conduct goods purchasing so it can reduce cost due to buying with bigger scale;
- c. *Equiment Sharing*, is cooperation in the form of sharing expensive equipments or things that is not used daily;
- d. *Cooperative Construction*, is cooperation in the form of buiding construction;
- e. *Joint Services*, is cooperation in the form of serving public service, such as center of public service that is owned together by the regional governments;
- f. *Contract Services*, is cooperation in which one party gives duty to other party, by contract, to give certain service.

Form of inter-regional government cooperation also stated in annex II of Interior Minister Regulation Number 22 year 2009 regarding Technical procedure on inter-regional cooperation is stipulated form/model of inter-regional government cooperation, as follows:

- a. Cooperation in Joint Service;
- b. Cooperation in inter-region government service;
- c. Cooperation in human resources development;
- d. Cooperation in services and levies settlement;
- e. Cooperation in planning and management;
- f. Cooperation of service provider purchasing;
- g. Cooperation in transfer of service
- h. Cooperation in the used of tools

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<sup>12</sup> *Ibid.* p. 40 - 41

- i. Cooperation in policy and regulation.

### **III. LEGAL FORM OF INTER-REGIONAL GOVERNMENT COOPERATION**

#### **A. JOINT DECREE OF THE HEAD OF THE REGIONAL GOVERNMENT AS THE LEGAL FORM OF INTER-REGIONAL GOVERNMENT COOPERATION**

Joint decree is known as one of legal instrument in Indonesia. Its born by the development of Administrative Law (State Administrative law) which contained in the implementation of development planning within 5 year, that required more of the interdepartmental cooperation.<sup>13</sup> Inline with the arguments above, Indroharto stated that the existence of joint decree in terms cooperation between agency or official administration, is to support implementation of particular field or government matter, it is form of development that leads to improvement of decentralization system (in particular autonomy and *medebewind*), as it is promulgated by the regulations.<sup>14</sup>

Point to Article 24 of PP No 50/2007, joint decree as legal instrument to creates cooperation agency between regional governments. The creation of this agency which not be part of regional government's structure, cause legal problem related with authority and financing. Such problem occur because the cooperation agency will conduct government function based on Article 25 of PP No 50/2007.

The inter-regional government cooperation which is stated in the from of Joint Decree shows in the case of Joint Decree of Central Java Governor and East Java Governor number: 1 year 2002 – number 42 year 2002, date June, 7, 2002 regarding the Inter regional cooperation between the Central Java province and East Java Province. This cooperation will follow by promulgation of Local Laws. Similar types

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<sup>13</sup> Sunaryati Hartono, 1976, *Beberapa Fikiran Mengenai Suatu Peradilan Tata Usaha Negara di Indonesia*, Paperwork in the Simposium of Peradilan Tata Usaha Negara, held by Badan Pembinaan Hukum Nasional on 5-7 Pebruari 1976 in Jakarta.

<sup>14</sup> Indroharto, *Usaha Untuk Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara, Buku I Beberapa pengertian Dasar Hukum Tata Usaha Negara*, Pustaka Sinar Harapan, Jakarta, 2004, p. 218-219.

of cooperation also be found in Pacitan, Wonogiri and Gunungkidul regencies, which made in the form of Joint Decree of the Regents, object of the cooperation not only focus on one or two object, but covers almost all the regional authority. This cooperation is followed by the Joint Decree of Cooperation Agency between Regional Government PAWONSARI, it is regulated through the Joint decree of the regents in area PAWONSARI (Pacitan, Wonogiri and Gunungkidul) Number 188.45/334.A/408.21/2008 Year 2008, Number 17 Year 2008 and Number 415.4/KB/05/2008, which signed on June 28, 2008. Scope of cooperation covers resources, public service and infrastructure aspects.

Different with PAWONSARI, the District Government of Gianyar, Badung, Tabanan and City of Denpasar, as it promulgated in the Joint Decree of the Regent of Gianyar, Badung, Tabanan and Mayor of Denpasar number 180/2867/Skret – number 839 year 2000 – number 658.1/3366/Ek – number 390.C. year 2000. The cooperation between these four areas in South Bali, focus more on garbage processing. Nonetheless in the example above, (PAWONSARI and Bali), come into sight independent authority (discretion) that is owned by the Regional Government to decide object of cooperation.

Based on several Joint Decree as it is explained above, Regional Government has independent wisdom and free interpretation on the *vage normen* on the substance of inter-regional government cooperation as it is stated in the Law number 32 year 2004.

Joint decree as the legal form of inter-regional government cooperation, treated as implementation of free power of the government which in administrative law perspective called as *beliedsregel*. *Beleidsregel* is not categorized as regulation. Bagir Manan underlined that in practice there are several form of beliedregel, namely decision, instruction, form letter, announcement and other, and even this can found in the form of regulation.<sup>15</sup> Meanwhile Laica Marzuki highlighted that *beleidsrege* is not administrative decision.<sup>16</sup> A *beleidregel* basically in product of administrative action with the purpose to reveal a written policy, but without be followed by the authority to make regulation for those gov-

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<sup>15</sup> Bagir Manan, *Peraturan Kebijaksanaan*, Paper, Jakarta, p. 17.

<sup>16</sup> Laica Marzuk H.M., “Perjanjian Kebijaksanaan (beleidsorvereenkomst)”, *Yuridika*, No. 2-3 year VI, Maret – Juni 1991, p. 21.

ernment officials who are made such *beleidsregel*<sup>17</sup>. Moreover Philipus M Hadjon. et. al<sup>18</sup>, identify essential differences between regulation and *beleidsregel*, that *beleidsregel* contain unwritten standard of knowledge (*angeschreven hardheidsclausule*). *Beleidsregel* also called *pseudo wetgeving*, and it doesnot have direct bounding, therefore it cannot be forced to the society.

## B. JOINT REGULATION OF THE HEAD OF REGIONAL GOVERNMENT AS THE LEGAL FORM OF COOPERATION BETWEEN REGIONAL GOVERNMENTS PERATURAN

The lawmaking of Joint Regulation is intended as authority division related to territory.<sup>19</sup> However Law Number 32 year 2003, does not recognized legal product in the form of Joint Regulation. Types of legal product according to Law number 32 year 2004 are Local laws, Regulation of the Head of Regional Government and Decree of the Head of Regional Government. Refer to Article 146 paragraph (1) Law number 32 year 2004, Regulation of the Head of Regional Government and/ or Decree of the Head of Regional Government are sets to implement Local Laws. Besides Law number 32 year 2004, there is Law number 12 year 2011 regarding Establishment of Legislation products, Article 7 paragraph (1) stated: Type and hierarchy of Law are as follows:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. The People's Consultative Assembly's decree;
- c. Law/ the Government Regulation substitute of Law;
- d. The Government Regulation;
- e. The President Regulation;
- f. Regulation of Provincial region; dan
- g. Regulation of district/cities region.

Though in Law number 12 year 2011 and Law number 32 year 2004 does not recognized Joint Regulation as a form of Legal products, the Minister of Interior regulation Number 53 of 2011 regarding Establish-

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<sup>17</sup> Philipus M. Hadjon et al, *Pengantar Hukum Administrasi Indonesia*, *Op.Cit.* p. 152

<sup>18</sup> *Ibid.*, p. 153 -154

<sup>19</sup> Padmo Wahjono, *Op.Cit.* p. 31

ment of Regional Legislation Product, however, is recognized Joint Regulation of the Head of the Regional Government as one type of Legal products. It is regulated in Article 2 of Minister Regulation number 53 of 2011 that Type of Regional Legislation Product consist of:

- a. Regional regulation;
- b. The Head of Regional Government regulation;
- c. The Joint Regulation of the Head of the Regional Government;
- d. The Head of Regional Governmet decree; and
- e. Instruction of the Head of Regional Government.

Joint Regulation which was formed in terms of implementation of authority between related region, for example the Joint Regulation of Mayor of Surakarta, Regent of Boyolali, Regent of Sukoharjo, Regent of Karanganyar, Regent of Wonogiri, Regent of Sragen and Regent of Klaten. Such Joint Regulation has been noted as Joint Regulation of the Head of Regional Governments Number 5 year 2008. The cooperation was intended to meke area of SUBOSUKOWOSRATEN (Surakarta, Boyolali, Sukoharjo, Karanganyar, Wonogiri, Sragen and Klaten) as areas with strong economic competition, and positioning them in terms of other areas sourrounding, therefore special identification was needed as identity of the area as well as a tool for marketing. Such Joint Regulation was made as further action of inter-regional government regulation as was stated in Joint Regulation of Regent/Mayor in SUBOSUKA-WONOSRATEN areas (Surakarta, Boyolali, Sukoharjo, Karanganyar, Wonogiri, Sragen dan Klaten) Number 11D year 2006, Number 7847 year 2006, Number 36 year 2006, Number 26 year 2006, Number 8 year 2006, Number 26.a year 2006 and Number 1 year 2006, which has been signed on October 30, 2006. Scope of the cooperation covers economic, social, culture, infrastructure, development and Sains research and other areas which has been agreed.

Joint Regulation as the form to regulate inter-regional government cooperation is a free power and has the characteristic of public (common) and abstract. Public character of Joint Regulation, according ten Berge contains several elements as follows:<sup>20</sup> *wanneer gesproken wordt*

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<sup>20</sup> J.B.J.M. ten Berge, *Besturen Door de Overheid*, W.E.J. Tjeenk Willink, Deventer, 1996, p. 150.

van een algemene regel, dan slat dit op algemeenheid naar

- *Tijd (een regel geldt niet slechts op een moment)*, is Time (not only applicable in certain times);
- *Plaats (een regel geldt niet slechts op een plaats)*, is Place (not only applies in certain place);
- *Persoon (een regel geldt niet slechts voor bepaalde persoon)*, is Person (not only applies to certain person); and
- *Rechtsfeit (een regel geldt niet slechts een enkel rechtsfeit, maar voor rechtsfeiten die herhaalbaar zijn, dat wil zeggen zich telkens voor kunnen doen)*, is Legal Fact (not only is intended to certain legal factm but for various legal fact that can occur repeatable, with other word for repeat actions).

Maria Farida Indrati S argue that a norm can be called as abstract legal norms means legal norms that look at somebody's action that has no limitation in terms of unconcrete, meanwhile abstract public legal norms is legal norms that has intended to and for abstract action (unconcrete)<sup>21</sup>. Joint Regulation as an administrative action besides public and abstract also implies of public legal action two parties. This matter due to Joint Regulation born from the free authority of state bodies (usually called *freies ermessen*) and as demand to escale public service (*bestuurszorg*) that must be serves by states to the social and economic life of the citizen which become more complex now.<sup>22</sup> Joint Regulation as legal figure in the inter-regional government cooperation is resulted from the similar need of the regions in terms of performing their authority.

Good inter-regional government cooperation either in the form of Joint Decree or Joint Regulation can be followed with provision that cause burden for the society. It is regulated in Article 195 paragraph (4) Law number 32 year 2004, that the inter-regional government cooperation can bring burden for the society, it means that as implementation of cooperation, society has the duty to pay certain amount of money or obligation in other form.<sup>23</sup>

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<sup>21</sup> Maria Farida Indrati, *Op.Cit.* p. 27 - 28

<sup>22</sup> Laica Marzuki, *Hukum Administrasi Dan Good Governance*, *Op.Cit.* p. 59

<sup>23</sup> Explanation of Article 9 of PP No.50/ 2007

#### **IV. THE INTER-REGIONAL GOVERNMENT COOPERATION AGREEMENT**

As it has been explained above, inter-regional government cooperation is an action of various parties and in the perspective of administrative law this cooperation is a public legal action various parties (*meerzijdig publiekrechtelijke handelingen*), or private legal action that resulted in a private agreement. This public legal action of various parties is a form of agreement of parties which is based on public law (*publiekrechtelijke overeenkomst*)

Article 1313 BW<sup>24</sup> stated that “An agreement is an action in which a person or more agrees to bound himself to one person or more”. KRMT Tirtodiningrat<sup>25</sup> defines agreement as a legal action based on agreement between two or more people in order to cause legal consequences that can be enforced by the Law”. Based on several definitions above, then agreement is a legal action refers that each agreement is always intended to cause legal consequences. Agreement treated as a legal action also inline with *Setiawan's*<sup>26</sup> argument, He gives some revision on the definition of an agreement, as follows:

- a. An action must be translated as legal action, means an action which leads to legal consequences;
- b. Adding the word of “or bounding themselves” in Article 1313 BW;
- c. Therefore Article 1313 BW sounds as “Agreement is a legal action in which one person or more agrees bound themselves to one person or more”. Such agreement results engagement, according to Agus Yudha Hernoko<sup>27</sup> there are 4 (four) factors of engagement, namely:
- d. Legal relationship, means that engagement in this case is form of legal relationship that is resulted in legal consequences;
- e. Has property characteristic, means that according to BW, in which engagement matter regulates in chapter III of BW which classify as Property Law (*vermogensrecht*), then such relationship has property orientation;

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<sup>24</sup> BW Translation from Subekti and Tjotrosudibio, *Kitab Undang-Undang Hukum Perdata, Padnya Paramita*, Jakarta 1980.

<sup>25</sup> See Agus Yudha Hernoko, *Op, Cit.* p. 14

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid*, p. 18

- f. Parties, means that in such legal relationship involves parties as legal subject;
- g. Prestatie, means that such legal relationship results in obligations (prestatie) to related parties (prestatie-contra prestatie), that in certain condition can be forced, and if needed it can be forced by the state.”

Hence, explanation above related to agreement in the perspective of civil law, due to agreement on civil law always leads to property as its object.

In the light of inter-regional government cooperation, is used the words of Agreement, as it stated in Article 5 of PP No. 50/2007. Agreement as legal instrument for the government is used by many government either in its relationship with a person or civil cooperation, or as instrument to build relationship with other governments.

The inter-regional government cooperation which is made in the form of agreement can be distinguished in terms of its nature, it can be subordination or coordination. It is inline with Tatiek Sri Djatmiati, who agree that: “Cooperation can be done between government with business party and/or among government, either in same level of government or different level such as Provincial with district/cities.”<sup>28</sup> This separation need to be done regarding that provisions on legality and time frame of contract is different in those two types of contract. A contract classifies as coordination if is been made by administrative authorities which has same or similar level or status or is made between person-person who relates with rights or public duties. The inter-regional government cooperation which tend to coordination, for instance Joint Decree of Central Java Governor with East Java Governor Number: 1 year 2002 – Number: 42 year 2002 regarding Cooperation between Central Java provincial government with East Java provincial government. This cooperation intens to escalates and develop of both provincial area’s potention and solves many problems relates to areas in harmony and is coordinated technically between related government agencies. Coordinative cooperation also has conducted by District of Pacitan, district of Wonogiri and district of Gunung Kidul which lays in area of three difference provinces and often called as Pawonsari.

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<sup>28</sup> Tatiek Sri Djatmiati, “Kerjasama Antar Daerah dalam Bidang Perizinan”, *Legal Magazine YURIDIKA*, Vol. 20, No. 4, 2005, p. 256.

Meanwhile a contract has subordination character if its be made between parties that each of them in the supervisor and staf. Example of this type of cooperation is the Joint Decree of East Java Governor and Ministry of Agriculture of Republic of Indonesia year 2003 - Nomor 81/Kpts/Tp. 310/1/2003 regarding the Management of Strengthening Capital Funds Institute of Rural Economy Business for purchase of Paddy/Rice Farmers.

Based on explanation above, the inter-regional government cooperation can be based on civil law or public law. In terms that such cooperation in the form of private agreement, then subject of the agreement is cooperation. It is highlited by F.A.M. Stroink dan J.G. Steenbeek that:

*Wanneer openbare lichaam-rechtspersonen aan het privaatrechtelijk rechtsverkeer deelnemen doen zij dat niet als overheid, als gezagsorganisatie, maar nemen zij rechtens op gelijke voet met de burger deel aan dat verkeer. Deze openbare lichaam-rechtspersonen zijn, deelnemende aan het privaatrechtelijke rechtsverkeer, in principe op dezelfde wijze onderworpen aan de rechtsmacht van de gewone rechter als de burger.*<sup>29</sup>

J.B.J.M. ten Berge added that, “*Dat het civielrechtelijk handelen van de overheid niet geschiedt door “bestuursorgaan”, maar door “rechtspersonen”.*”<sup>30</sup> (private law action of the government not only is conducted by the government, but also by its cooperation).

Furthermore, Y Sogar Simamora<sup>31</sup>, stated that public law matter in government contract placing the government in two roles. On one side, as contractan government act as private law subject, on the other side in its position as public cooperation, government serves public service. Public law norms related to procedure, authority, making and implementing of a contract as well as disputes settlement with based on protection principle for the public need and state budgeting. Due to the existence of two type of law, private law and public law on the government contract, Y Sogar Simamora highlighted that certain contract characterized as *hybrida* (campuran).

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<sup>29</sup> F.A.M. Stroink en J.G. Steenbeek, *Inleiding in het Staats-en Administratief Recht*, Samsom H.D. Tjeenk Willink, Alphen aan den Rijn, 1985, p. 28.

<sup>30</sup> J.B.J.M. ten Bergee, *Bestuuren Door de Overheid*, W.E.J. Tjeenk Willink, Deventer, 1994, p. 194.

<sup>31</sup> Yohanes Sogar Simamora, *Op. cit*, p. 85

## V. CONCLUSION

The inter-regional government cooperation is the need of the region in its effort to escalate the public prosperity. It is underlined that many regional matters only can be implemented by inter-regional government cooperation. In terms of legal form of inter-regional government cooperation, it is more appropriate to be carried out the form of agreement. It is based upon that cooperation is an agreement between two parties or more and both of them stays as legal subject and in equal position.

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# THE URGENCY FOR REGIONAL INTEGRATION IN ACCORDANCE TO INVESTMENT RISK MANAGEMENT

Yuniarti\*

## Abstract

*Investment is an activity which is needed by every country, especially in development country. However, the investment activity itself also brings in some risk which is called as investment risk. These investment risks usually recognized to be covered by an investment agency to protect the investor. Multilateral investment guarantee agency (MIGA) is usually used to maintained and cover the loose of investor. But, actually among the investment risks which are identified by MIGA will only responsible for the market risk, meanwhile the biggest lost for investor also came from political and financial risks which have to be recognized in advanced. This is where the export credit agency will take place. Nevertheless, there are still many loops to be identified to determine the characteristic of export credit agency itself. To deal with those kinds of risks, a regional integration is needed to avoid an overlapping regulation among ASEAN Economic Community. Thus, will lead to a common perception on how to treat those risks and who will be responsible to cover it.*

**Keywords :** *Investment, regional integration, Investment risk, Export Credit Agency.*

## I. INTRODUCTION

Foreign direct investment in Asian started to had its crisis in 1997 and started to raised afterwards. The raising progress in each country experienced different level of improvement from the condition before the crisis existed. China, Thailand and India are some example of the most fast revealing country and even get better than before the crisis, they become the most powerful country in foreign direct investment. The regulations governing foreign investment are commonly set out in “investment laws”. The purpose of these laws is the creation of legal frame work that will attract and put to work foreign capital. The form that regulate foreign investment are varies from country to country, but the underlying purposes of the regulations are generally the same worldwide. These include (a) promoting local productivity and technological development, (b) encouraging local participation and (c) minimizing foreign competition in economic areas that already well served

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by local businesses.

The variety of investment laws are depends on a country's economic and political policy which is arranged by a certain legal product. The highest legal product arranged these policies are a constitution. Through its constitution, the economic policies set out in those countries could be known. Indonesian constitution declared its political view on economic sector. It is mention that the citizens of Indonesia held the highest sovereign of political and economical will. However, we can still find some contradiction in several regulations against thus principles. The other problems are to manage the environmental damage and people around the investment area who had been lost their rights because of the investment activity. Despite of that, Investment is a significant sector to increase a national income, which made it impossible to ignored or banned.

The concern in handling Investment demands a balance concern between public, state and foreign interest. Thus, the challenge's today are how to maintain the balance between public, state and foreign interest which could be derived from economical constitution as the basic principles for all economic sectors and to what extent it influence as a basic principle to economic activity especially investment law in host country's domestic law. Furthermore, the risk in investment activity is the main concern for investors to make a decision to do an investment in host country. However, transparency of law and regulations in host country become an important role to attract Investor interest.

If the economic policy, especially Investment and regulations concerning investment policy is stable, the national income through investment sector will be significantly improved. The labour and financial sector will also improve. Thus, reflected that one tools to improve the national development is by managing the Investment sector through its law.

These issues become crucial in ASEAN, regarding ASEAN Economic Community. Regionalism in ASEAN economic community is an urgent matter to formulized in order to materialized a stable investment policy order in the region. This paper selectively reviews the role of foreign direct investment (FDI) in the present state of economy, especially its risks and the urgency to regional integration. Multinational com-

panies are normally the vehicles for FDI and are central to the current globalization process. The key analytical and policy question examined is whether regional integration is needed to overcome and minimize the investment risk.

## **II. FOREIGN DIRECT INVESTMENT**

Investors underscore that motivation for investing in Emerging Market Countries (EMCs) and determinants of investment location differ among countries and across the economic sectors. They concur, however, that certain general factors consistently determine which countries attract the most foreign direct investment (FDI). Investors cite, in particular the following:

- A. Market size and growth prospects of the host country play an important role in affecting investment location since FDI in EMCs is increasingly being undertaken to service domestic demand rather than to tap cheap labor.
- B. Wage-adjusted productivity of labor, rather than the cost of local labor *per se*, will increasingly drive efficiency-seeking investments of “footloose” firms that use EMCs as export platforms.
- C. The availability of infrastructure is critical. EMCs that are best prepared to address infrastructure bottlenecks will secure greater amounts of FDI.

The regulations governing foreign investment are commonly set out in “investment laws”. The purpose of these laws is the creation of legal frame work that will attract and put to work foreign capital. The form that regulate foreign investment are varies from country to country, but the underlying purposes of the regulations are generally the same worldwide. These include (a) promoting local productivity and technological development, (b) encouraging local participation and (c) minimizing foreign competition in economic areas that already well served by local businesses.

The variety of investment laws are depends on a country’s economic and political policy which is arranged by a certain legal product. The highest legal product arranged these policies called constitution.

Through its constitution, the economic policies set out in those country could be known. Indonesia's constitution declared its political view on economic sector. It is mention that the citizens of Indonesia held the highest sovereign of political and economical will. However, we can still find some contradiction in several regulations against thus principles. The other problems are to manage the environmental damage and people around the investment area who had been lost their rights because of the investment activity. Meanwhile, Investment is a significant sector to increase a national income, which made it impossible to ignored or banned.

The concern in handling Investment demands a balance concern between public, state and foreign interest. Thus, the challenge's today are how to maintain the balance between public, state and foreign interest which could be derived from economical constitution as the basic principles for all economic sectors and to what extent it influence as a basic principle to economic activity especially investment law?

The transparency of law and regulations in host country become an important role to attract Investor interest. If the economic policy, especially Investment and regulations related with it stable, the national income through investment sector will be significantly improve. The labour and financial sector will also improve. Thus, reflected that one tools to improve the national development is by managing the Investment sector through its law. There is no specific investment law principles, but the principles in international trade law is implement in international investment law, because as long as the trade is moving then there is always investment activity, those principles are :

#### A. NON DISCRIMINATORY PRINCIPLE

This is one of the WTO principles related with the investment activity. This principle stated that there is no discrimination allowed to be implemented in investment activity, in order to minimise the distortion the problems in foreign direct investment activity.

Non Discriminatory Principle is break into two further principles, they are: *The Most Favoured Nation (MFN) Treatment Principle* dan *National Treatment Principle*.

### 1. *The Most Favoured Nation (MFN) Treatment Principle*

This principle means that all host country have to implement the same treatment to the investor. The benefits from this is this principle implement generally to all country, without looking the further political relationship among the states.

However, there is an exception, for instance in regional integration practices in a region of countries. Indonesia have been implement this principle in Law number 25 in 2007 concerning Investment, especially in article 3.

### 2. National Treatment Principle.

Based on this principle investee are obliged to do the same treatment between foreign investor and domestic investor.

## B. TRANSPARENCY PRINCIPLE

This principle is the development from *non discriminatory principle* substantiation, which give the priority to the protection on foreign investor, especially from the very beginning step, which are the pre contract, contract and post contract. The government obligation is to show all the regulation involved in this activities. Those regulation concerning investment law in Indonesia include :

1. Law Number 25/2007 concerning Investment law
2. Law Number 40/2007 concerning Limited Liability Company
3. Law Number 32/2009 concerning Environment
4. Law Number 13/2003 concerning Employment

Indonesia Investment act this principle has been stated in article 3 about the basic fondation of Investment in Indonesia.

## C. THE PRINCIPLE OF HUMAN RIGHT AND ENVIRONMENT

The Principle Of Human Right And Environment is the most controversial issues in investment activity. This principle were sued and asked by Non Governmental organisation and international society to the abusing human rights done by *non-states entities by having MNC's*

*in their country.* adanya MNCs yang beroperasi di dalam negaranya.

International trade law regim initiate by the open market commitment of the respect to the human rights can be seen in GATT XX (a) which legalised trading activity to protect *human moral*. In Indonesian regulation, the 1945 constitution through article 28 have regulate more about the human rights in Indonesia.

Investment is a risky business and foreign investment particularly the same. It brings benefits not only for the investors, but also to host countries and home countries. As a result, investment protection becomes an essential issue. Thus, one of the principal purposes of the global investment protection regime is to reduce investor insecurity.<sup>1</sup> Setting an investment dispute resolution to settle an investment dispute is one of the existing investor protections. Furthermore, the attraction of the international arbitral award is the possibility of voluntary compliance, either to enforce the award or to abandonment of the dispute. Moreover, challenge of investment arbitration awards appears to be more prevalent than in commercial disputes.<sup>2</sup> In investment disputes, commonly the parties agree in advance to resolve their disputes using existing guidelines set up by several international arbitration organizations.<sup>3</sup> Each of them established set of arbitration rules and maintain a panel.

Based on the statute of International Court of Justice (ICJ) article 38, decisions of international courts and tribunals are a subsidiary source of international law. Therefore, they have to pay attention to all competing principles of international law and interest when making an award. Furthermore, international courts and tribunals also have a duty to uphold the fundamental principles of international law, such as the universal principles of human rights and the principle of sustainable development, fair and equal treatment, etc.<sup>4</sup> Investment tribunals also have to apply the same thing in resolving investment dispute to adhere

<sup>1</sup> Christopher F. Dugan, Don Wallace Jr, Noah D. Rubins, Borzu Zabahi, *Investor-state Arbitration*, Oxford University Press. 2008.

<sup>2</sup> Ibid 182.

<sup>3</sup> Ray August, Don Mayer, Michael Bixby, *International business law : Text, cases and reading*, 6<sup>th</sup> eds Pearson. 2013

<sup>4</sup> Surya P. Subedi, *International Investment Law : Reconciling Policy and Principle*. Hart .2008

rule of law in investment dispute settlement. Further, once the proceedings are closed, the tribunal deliberates and issues an award. The finality of awards considers being one of primary advantages of arbitration. The losing party sometimes dissatisfied with the award, in this case they will try to adjust it. The challenges of investment arbitration award will be more common, which sometime because of political pressure from the government.

### **III. FACTS CONCERNING MULTINATIONALS AND FOREIGN DIRECT INVESTMENT**

Substantial changes have occurred in the amounts and pattern of capital flows from industrial countries to emerging economies in the 1980s and the 1990s compared with the 1960s and 1970s. At the time, there has also been a sea change in developing countries perspectives on, and attitude towards, FDI. In the earlier periods developing countries were often hostile towards multinational investment and sought to control the activities of multinational companies through domestic and international regulations. During the last two decades, however, emerging countries have been falling over themselves to attract as much multinational investment as they can.

The following stylized facts concerning international capital flow to developing countries have been documented during the last two decades.

- A. There has been an enormous increase in financial resources flows to developing countries during the last three decades as the world economy has liberalized and become financially more integrated
- B. Net resources flows to developing countries recorded a quantum leap between 1990 and 1995, rising to nearly US\$ 240 billion in the latter year. There was a further sharp increase in the next two years until the Asian Crisis. There have been reduced net resources flows since then.<sup>5</sup>
- C. Foreign Direct Investment flows to developing countries are highly concentrated. Ten countries accounted for nearly three-quarters of

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<sup>5</sup> Kern Alexander and Rahul Dumale, *Research handbook on international financial regulation*, Oxford University Press . 2012

the total foreign direct investment inflows in 2000.

This pattern of capital flows, including that Foreign Direct Investment, has important substantive implications for developing countries, this is due to the liberalization of trade and capital flows in the international economy.

#### **IV. THE CURRENT INVESTMENT REGIME**

The Hallmark of the WTO agreement in 1995 under the Uruguay Round has been that, apart from trade liberalization, they have also extended multilateral rules and disciplines to a number of domestic policy areas affecting national industrial development and the country's international competitiveness with regards to both goods and services. Such policy generally define as industrial policies and has been extensively used for decades, notably by fast growing countries. However, since 1995 under the Uruguay Round Agreements, the use of these policies has been greatly restricted, although developing and least developed countries have been given relatively more time to adjust to new regime. The relevant agreement include the following :

- A. Agreement on subsidies and countervailing measures
- B. Agreement on Trade Related Investment Measures (TRIMs)
- C. Understanding the balance of payments
- D. Agreement on Trade Related Aspects of Intellectual Property Rights
- E. General Agreement on Trade in Services
- F. Decision on Measures in Favour of Least Developed Countries
- G. Subsidies and Countervailing Measures

Moreover, the current trading and investment regime for multinational corporations has significant drawbacks for developing countries in that it forecloses important industrial policy options which the highly successful East Asian Countries used during their success of industrial policies in this countries.

#### **V. INVESTMENT RISK**

Four large-scale that has been identified as the following risks as the principal hazards that affect the spatial and sectoral allocation of FDI: (1) economic risk, (2) legal risks, (3) political risks, and (4) infrastructure risks. Economic risks center around host-countries' economic performance, especially inflation; access to international credit; and participation in international agreements for resolving FDI disputes. Legal risks stem from vague legal environments in which FDI laws are erratically enforced and the limits to enforcement are not clearly defined. Political risks are primarily the expropriation of assets and the reversal of government policies. Infrastructure risks result from incomplete and inferior transportation and communications networks.

In general, foreign investors reduce their exposure to risks by limiting the volume and direction of FDI. Typically, firms respond to risk by reducing their exposure through so-called "hedging strategies" and/or "internalization strategies." In hedging strategies, firms minimize risk either by diversifying holdings across products and places or by apportioning investments in capacity across places. In internalization strategies, investors absorb would be foreign production into existing facilities in the face of exchange rate and price uncertainty. Thus, higher risks lead to lower foreign investment. For example, legal risks such as quantitative restrictions on foreign firms' investment produce a "suboptimal" pace of entry and investment. Legal risks stemming from vague tax schedules produce inefficient allocations of capital Political instability reduces both the volume and rate of investment, although to different degrees for different industries. Foreign investors are also sensitive to price and cost uncertainties, especially as a consequence of inflation and exchange rate fluctuations. Increases in a country's relative costs of production through inflation decrease the probability that investment will occur in that country. When facing these risks, firms will delay their investment decisions and wait for more favorable conditions.

## **VI. EXPORT CREDIT AGENCY**

The risk for the investor inherent in major investment projects has lead to evolution of a market for investment insurance scheme. Private

companies entered the investment insurance market on the assumption of higher efficiency and an acceptable margin of profit. In its original context and design, the private programmes emerged as extensions of traditional forms of marine insurance.

There are two kind of insurance in investment law, private insurers and public insurer. Private insurer does not practice cover the risk of currency devaluation or depreciation. An export credit agency or investment insurance agency is a private or quasi-governmental institution that acts as an intermediary between national governments and exporters to issue export financing. The financing can take the form of credit (financial support) or credit insurance and guarantees (pure cover) or both, depending on the mandate the ECA has been given by its government. ECAs can also offer credit or cover on their own account. This does not differ from normal banking activities. Some agencies are government-sponsored, others private, and others a combination of the two.

Export credit agencies (ECAs) provide three basic functions. First, they help exporters meet officially supported foreign credit competition. (When foreign governments subsidize their companies' exports by offering buyers below-market, fixed-rate financings, exporters often find it difficult to offer financing that matches those subsidized rates.) Secondly, ECAs provide financing to foreign buyers when private lenders cannot or will not finance those export sales, even with the risks removed. Third, and perhaps their most important function, ECAs assume risks beyond those that can be assumed by private lenders. ECAs do not compete with private financial institutions. To the contrary, they enhance the ability of their country's lenders to compete internationally. It should also be noted that they do not offer development assistance to other countries; other agencies typically fulfill this role.

Generally ECAs are accessed through a country's banking institutions, where the international divisions of larger financial institutions typically have a person or staff that specializes in their use. Essentially banks extend this type of export based on the support being provided to them by their governments. Increasingly, ECAs work directly with the exporters, consultants, attorneys, and advisors. This is particularly the case in the United States where financial intermediation tends to be more fragmented and no longer the exclusive role of banking institu-