

ASEAN ECONOMIC COMMUNITY 2015: RESTRICTIONS ON MALAYSIAN FOREIGN INVESTMENT LAW AND POLICY IN REALIZING ASEAN COMPREHENSIVE INVESTMENT AGREEMENT (ACIA)

Saidatul Nadia Abd Aziz
Universiti Kebangsaan Malaysia

Salawati Mat Basir*
Universiti Kebangsaan Malaysia

ABSTRACT

In the mission of realizing the ASEAN Economic Community (AEC), the ASEAN Member States agreed on the importance of investment in ASEAN. Due to the fact that the ASEAN Economic Community 2015 (AEC) came into effect last December 2015, liberalization of investment is one of the important objectives to achieve. This paper will look at the literature and recent reports to understand the current state of foreign investment in Malaysia. In addition to that, this paper aim to analyze the impediments to Foreign Direct Investment (FDI) particularly in the area of law and policies in Malaysia. While Malaysia still maintains restrictions on foreign investment in many area of services of which the most notable restriction are inter alia; on the foreign equity limit, *bumiputera* requirement as well as land ownership, progressive liberalization has begun since 2009 to liberalize rules for foreign investors. Nevertheless, disregarding the fact of the openness, Malaysia still reserves the right to screen and approval upon any acquisition over an aggregate 30% of equity. The Malaysian list of ASEAN Comprehensive Investment Agreement (ACIA) states that national treatment may not apply in the issuance of license or permit. In addition, the absence of a single enacted laws pertaining to the protection of investment is implying that Malaysia is moving backwards in terms of investment. Though liberalization is reported to be progressing, this has resulted in restrictions on the realization of AEC 2015.

Keywords: ASEAN; ASEAN Comprehensive Investment Agreement (ACIA); ASEAN Economic Community 2015; Foreign investment; Restriction.

1. INTRODUCTION

The establishment of ASEAN Economic Community (AEC) was intended to become a transformational investment regime for foreign investors including invested companies investing on ASEAN market, as well as investment among the ASEAN companies themselves. The approach taken on this particular matter is more on a regionally minded and less country centric (David & Martin, 2015). AEC will somehow allow the investors to reach potential consumers of total 600 million on the same time structuring their relevant production and distribution system approach in accessing ASEAN and other markets (AEC Blueprint). Malaysia is among many of the most integrated country in the global economy through trade. In addition to that, Malaysia is also now

* Faculty of Law, Universiti Kebangsaan Malaysia, Bangi, 43600, Selangor E-mail:salawati@ukm.edu.my

the second richest country after Singapore in the ASEAN region. In achieving its aspiration to become a high-income nation, many had been done to achieve this and for the purpose of this paper, focus shall be on the legal provisions and policies for the liberalization of foreign investment. Since 2009, the government had started the move to liberalized law/policies for foreign investors (OECD, 2013). Notwithstanding the drive to move to the era of liberalization, ASEAN member states, including Malaysia lags behind not only among their regional peers, but also towards other emerging economies elsewhere in terms of investment policy (OECD, 2014). This had been a challenge and will give impact towards the implementation and realization of the AEC 2015. In referring to the move towards liberalization, many ASEAN member states still choose to practice protectionism policy in their investment regime to ensure the security of national interest. This is seen as a hindrance towards liberalization. ASEAN aims to enhance its investment regime by establishing a more open, transparent, and predictable investment environment through the implementation of ACIA which provides for progressive liberalization of existing investment restrictions in manufacturing, agriculture, fishery, forestry, and mining as well as the services incidental to these sectors. (ASEAN, 2015) Apart from that, ASEAN member states also choose to list a long list of sensitive industries in the ACIA reservation list without any timetable and formula to eliminate the list. Though liberalization is said to be progressive, ASEAN member states are free of a strict timeline to adhere to the liberalization efforts. Apart from that, the ASEAN member states also have a mindset that remains a challenge to change where national interests are more important compare to the regional interest although they agreed on having a regional economic community. On the other hand, Malaysia still practices bumiputera rights giving the description that Malaysia is fear of global competition and lack of international and world standard skills to be offered regionally.

This paper examines the impact of statutory restriction on foreign investment law and policy in Malaysia towards the implementation of the ACIA in the AEC 2015 according to the two of the most sensitive issue relating to investment, as well as a review in accordance with the ASEAN Economic Community Blueprint 2025 Forging Ahead Together. This paper will begin with the most restrictive issue in foreign investment; foreign equity limit in Malaysia under section 2. In addition to that, section 3 will then discuss more on the issue of land ownership for foreign investors in Malaysia. Moving on, section 4 will give an ample and clear view on the national legislation for the protection of Investment. Moreover, section 5 of the paper will review the path towards the realization of ACIA in the purview of ASEAN Economic Community Blueprint 2025 Forging Ahead Together in accordance to the impediments discussed beforehand. Then, section 6 will give some recommendations for ASEAN member states as well as Malaysia to take into consideration in order for the realization of AEC. And the last part of the paper will conclude the discussion.

2. FOREIGN EQUITY LIMIT IN MALAYSIA

While restrictions of foreign investment may apply and vary towards all sectors, the most common restriction on foreign involvement worldwide are generally on the limit of foreign equity ownership. Many of the countries seemed to restrict the foreign equity ownership on the board, nevertheless countries such as Vietnam and Lao PDR only limit their restrictions on equity ownership towards certain listed companies (OECD, 2014). Ever since the 1969 ethnic riots, the base of policy making in Malaysia is the New Economic Policy (NEP). The main objective of NEP

was to achieve national unity by way of reducing poverty and reconstructing society in order to obtain the correct economy balances, and this includes eliminating identification of race with economic function. (Edmund & Johan, 2013). This scenario had given the opportunity for the government intervention in terms of provisions, productions, and trade. For a start, the government took over foreign companies by way of mergers and purchase of market shares particularly the ones operated in the trade and mining sectors. It was claimed that this step was taken in order to transfer the ownership of the foreign companies to the bumiputera (ethnic Malay, indigenous people, as well as ethnic groups in Sabah and Sarawak). In the meantime, a Foreign Investment Committee (FIC) was established to control the investment and ownership of foreign equity to 30% for domestic market projects. This FIC was later abolished due to an unexpected turnout. Though the abolishment of FIC may seem to open doors for liberalization, restrictions still do exist (OECD, 2013). The government still maintain their commitment to support the bumiputera, particularly in the access of education, housing, jobs, business licenses, public sector contracts, government grants, bank credit and share capital (WTO, 2009). As for instance, a foreign investor needs to encounter restrictions in terms of mergers with local firms as well as operational restrictions. Equity ownership apparently was not the only single restriction to the foreign affiliates. The restriction was further applied in terms of numbers of branches of foreign banks operating in Malaysia. Apart from that, foreign investors were also required to obey the minimum amount of capital in the distribution sector and they are also required to incorporate locally. Though liberalization was always in progress, Malaysia had decided to abolish these restrictions but always not holistically. This was proven under the implementation of ASEAN Comprehensive Investment Agreement (ACIA), under the Malaysian reservation list states that national treatment may not apply in the issuance of a license or permit (OECD, 2013). While full liberalization is impossible to achieve, in realizing the dream to become an integrated economy, a standard of liberalization at least must be set and achieve by the member states.

In addition to that, there are certain business sectors that are closed completely for the foreign investors especially in relation to the issue of sustainability. Malaysia had closed the opportunity in the forestry sector and services for the foreign investors. To be specific, Malaysia had closed the opportunity for foreign investment in the extraction and harvesting of timber (Nurridzki, 2015).

Apart from that, Malaysia also practices restriction towards certain sectors which are managed by certain parties as provided under the ACIA reservation list, it is provided that only certain institutions are able to handle certain industries, such as Petronas which is allowed to explore, exploit, win, and obtain Petroleum, either onshore or offshore especially for oil and gas upstream industries (Nurridzki, 2015).

Although this situation is a clear prejudice towards achieving liberalization in the era of AEC, clearly Malaysia has their own practice in protecting their sources from being controlled by a foreign entity. Institutions such as Petronas were established to ensure that national interest are well protected. Liberalization in this area is still seen as a far reaching goal for Malaysia.

As seen in the discussion above, though Malaysia are moving towards liberalization it is undeniable that certain restrictions remains especially when they are regarded as sensitive. While these restrictions may seem as an impediment towards the realization of the AEC 2015, the protection of the national interest remains as the main point for Malaysia as well as among the other ASEAN Member States. National treatment is not yet ready to be provided holistically. While not having a

proper legislation (which will be discussed further later), Malaysia is facing a big challenge in terms of achieving liberalization and is not making it any easier towards the realization of AEC 2015.

3. LAND OWNERSHIP FOR FOREIGN INVESTORS IN MALAYSIA

The next issue viewed as a restriction on foreign investment is the matter of land ownership. Almost all of the ASEAN member states have some form of restrictions towards foreign ownership of land. This matter normally concerns on the ownership of residential land. Most of the foreign investors are usually on long lease, which yet to vary in accordance to the practice of a particular state (OECD, 2014). On top of that, in discussing this matter particularly in Malaysia, land issues are generally very sensitive and political bound. Basically land matters are within the jurisdiction of State governments (Federal Constitution). However, land matters are also concurrently handled by the Federal legislation to ensure the uniformity of law and policy in various aspects of land matters. Over time the state government have shown restrictive manners in terms of foreign ownership. In addition to that, the authorities have all the encompassing powers to acquire land for the purpose of public and economic needs. (Rajenthiran, 2002). According to the National Land Code, it is clearly stated on the restriction of ownership for industrial land by a foreign entity. Nevertheless, Malaysia is seen very open nowadays in permitting foreign entity in acquiring land or building for the purpose of residency. On top of that, foreign entities are also allowed to own industrial lands. Normally, foreign entity are given lease for the term of 30 to 99 years (Nikomborirak & Jitdumrong, 2013).

Malaysia had asserted that national treatment may not apply to any measures affecting land, property, and natural resources in relation to acquisition, ownership, and lease of land and property. Nevertheless, Malaysia as one of the many ASEAN member states had not decided that on a particular restriction or provision, but it cannot be claimed whether the sector is totally open or that restriction is 'none' (Nurridzki, 2015).

Indeed, the openness of Malaysia had given the opportunity for the nation to attract more investment. True enough that there will be more opportunities for developments, but nevertheless, it is important also to note on the impact towards the Malaysians themselves. Having the possibility to sell a piece of land to a foreign entity will not come with a low price. Price hike will certainly occur. The impact is towards the locals, while having their native lands sold to foreigners, what will be left then? The locals certainly could not afford to buy a piece of land which may probably cost them a whole life salary. Malaysian government needs to tackle this issue in preparing Malaysia for the realization of AEC 2015. Yes, we are running towards liberalization, but as mentioned before national interest still needs to be considered. Malaysia needs to ensure that their locals are protected enough, not pampered though, to be ready for the implementation of AEC 2015. Sensitive matters such as land ownership are important to tackle beforehand so that the locals will not suffer come to full liberalization later.

4. THE ABSENCE OF NATIONAL LEGISLATION FOR THE PROTECTION AND NATIONAL TREATMENT TOWARDS FOREIGN INVESTORS

Since the 1980s, the ASEAN member states had progressively amended their laws to create a unified legal framework for investment that includes the creation of a single, non-discriminatory regime governing both domestic and foreign investment. On the other hand, Malaysia is one of the ASEAN member states that does not have two separate laws for the treatment of domestic and foreign investment, or even introduced a single piece of legislation (OECD, 2014). In accordance with the Malaysian FDI regime, it is tightly regulated that every foreign manufacturing activity regardless of the nature of the business shall be licensed. Interestingly, as mentioned above, Malaysia still does not have any comprehensive laws in relation to FDI that is supposed to be governing the general principal and rules for foreign participation in local business. Due to this, the government has full policy and regulatory power to screen and control FDI in ensuring that the economic and industrial needs are in line at that particular time (IISD, 2004). In accordance to the absence of encompassing foreign investment statute, FDI in Malaysia is then regulated according to sector- specific legislation. With the absence of a single legislation, the protection of investors is then regulated in the Federal Constitution as well as the many bilateral investment treaties signed. While the act to attract FDI were included in the Promotion of Investment Act (PIA) 1986, the issue of protection of investment and/or investor are still silent (OECD, 2014).

In addition to that, in accordance to the provision in ACIA, national treatment is apparently the main principle. According to ACIA, it provides that “Each member state shall accord to investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. Each Member State shall accord to investments of investors of any other Member State Treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion management, conduct, operation and sale or other disposition of investment” (ASEAN, 2013).

The national treatment intended to impose a standard of equality between foreign and domestic investors, though may not be automatic, it is included in investment laws. In relation to the inclusion to the investment laws, it is often subject to certain exceptions namely, for reasons of national security, developmental purposes, public health or protection of the environment. The impact of national treatment is to create a level-playing-field between foreign and domestic investors. Among the ASEAN member states, Malaysia besides Thailand and Myanmar is among the countries of which does not accept the practice of providing national treatment towards foreign investors. Malaysia does not provide any clear principle on national treatment. As mentioned above, Malaysia has not enacted even a piece of specific investment law, and only regulates investment through sector specific legislation, thus the principle of non-discriminatory treatment towards the foreign investors was not included in the laws (OECD, 2014).

It is undeniable that various factors influence the attractiveness of the host country for FDI inflows. Political and economic stability is found to play a major role in attracting FDI. Despite that, political and economic instability discourages MNCs from undertaking FDI as it increases the risk of losing invested assets. Moreover, large market size, favorable future economic prospects, availability of educated, well-disciplined, low-wage labor, well-developed soft and hard

infrastructure are also attractive features of the host country in attracting FDI. While listing the important elements in attracting FDI, one of the most important factors is actually the country's FDI policy regime. A country with many attractive features will fail to attract FDI if the country imposes restrictions on FDI inflows. Even if the FDI regime is open, a country has difficulty in attracting FDI if the FDI regime of the country lacks transparency or stability. This indicates the importance of the FDI policy regime as well as the FDI policy environment in determining the attractiveness of a country for FDI inflows (Urata & Okabe, 2010).

Restriction on market access is regarded as the most important policy in relation to inward FDI, and regulations are rather relaxed in the manufacturing sector compared to the high levels of restriction found in the public and service sectors. Although variations among countries are found, tight restrictions are often imposed in service sectors such as information and communication (Urata & Okabe, 2010).

While heading towards the realization of AEC 2015, there is undeniably slow and steady evolution among ASEAN member states in terms of the national legislation for the protection of investment. In achieving the objective to become a single market and production base, the situation in Malaysia by not even having a single enacted act on the protection of investment is rather frustrating. Perhaps by having a regulation by way of sectoral divide will make AEC a hard target to achieve. Besides that, ACIA claimed on the national treatment towards foreign investors, nevertheless by the response of Malaysia, we can see that progressive liberalization is still progressing and do not have a clear time frame to achieve it. True enough that national interest is a focal point, but regionally speaking this practice may not bring any positive impact towards the development of AEC. Malaysia should focus on having a proper legislation on the protection of investment and/or investors. Other ASEAN member states had gone beyond this stage, in order to achieve and successfully become a high-income nation, Malaysia should tackle this urgently as this too is considered as a statutory restriction in the foreign investment law and policies.

5. TOWARDS ASEAN ECONOMIC COMMUNITY 2015; THE IMPLEMENTATION OF ACIA

While discussing on investment law and policies throughout the whole paper, it is important to note on the general framework of ASEAN member states; ASEAN Comprehensive Investment Agreement (ACIA) which came into force since 2012. ACIA is actually the merger of the previous agreements; ASEAN Investment Guarantee Agreement and ASEAN Investment Area (AIA) which respectively provided investment protection guarantees and progressive liberalization in terms of investment into a single comprehensive investment agreement. Previously, both of the agreements works separately, ACIA then simplifies and it provides a clearer picture of ASEAN investment regime. ACIA is applicable towards the manufacturing, agriculture, fishery, forestry, mining and quarrying sectors, as well as matters related to manufacturing. With that, ACIA replaced the two above agreements and is binding upon AMS (OECD, 2014). Apart from that, through ACIA it is aimed to create a free and open investment regime through progressive liberalization of intra-ASEAN investment. Moreover, ACIA is also expected to make investment law more transparent and predictable. ACIA comprises of four pillars including liberalization, promotion, facilitation, and protection. The dimension of legal protection is a building block of the collective effort towards the achievement of AEC (Aldaba, 2013). ACIA also provide an enhanced version of protection to

investors. It also reaffirms the previous ASEAN agreements as well as further improvements on the dispute settlement provision (ASEAN, 2013).

In accordance with the ACIA Agreement, ACIA aims the following: (i) progressive liberalization of the investment regimes of member states; (ii) provision of enhanced protection to investors of all member states and their investments; (iii) improvement in transparency and predictability of investment rules, regulations; and procedures conducive to increased investment among member states; (iv) joint promotion of the region as an integrated investment area; and (v) cooperation to create favorable conditions for investment by investors of a member state in the territory of the other member states (ACIA, 2009).

It is relevant to note that though liberalization had been promoted in the AEC, it is not clearly defined in ACIA. however, in accordance to Article 30 of the ASEAN Economic Community Blueprint, member states are required to incorporate the following actions, (1) Extend non-discriminatory treatment, including national treatment, to investors in ASEAN with limited exceptions,; minimize and where possible, eliminate such exceptions. (2) Reduce and, where possible, eliminate restrictions to entry for investments in the Priority Integration Sectors covering goods. (3) Reduce and, where possible, eliminate restrictive measures and other impediments, including performance requirements (Martin & David, 2014).

The most important feature of ACIA is the principle of national treatment as well as to provide full protection and security, fair and equitable treatment, and other protection relevant to investment. Apart from that, the core underlying principle is the non-discrimination which comprised of the principle of national treatment as discussed above and most favored nation treatment as well as the freedom to appoint senior management and boards of directors clearly shows that ACIA contains no local requirement and no conditions in making investment. In addition to that, ASEAN member states are supposed to notify the ACIA council whether when introducing new laws or amend the existing ones which could give significant impact towards the treatment of investment. Moreover, ASEAN member states are required to make their laws particularly in relation to investment publicly available. Domestic law must come in line with the provisions of ASEAN agreement (OECD, 2014).

In relation to policy on foreign investment, developing economies such as Cambodia and Vietnam tend to have a more open policy towards foreign investments as compared to economies of more developed and mature industries such as Malaysia, Indonesia and Thailand. This suggests that economies with developed industries tend to adopt FDI policies with the intention to protect their domestic industries. This had somehow indicates that member states with developing economies have adopted key FDI policies in order to maintain their momentum of economic liberalization and integration in the region while member states with developed economies such as Malaysia have not progressed further form their relatively higher investment base and this had clearly create a crucial challenge for their competitiveness (Thangavelu, 2015)

To achieve the liberalization of FDI policy, ASEAN countries should use various existing frameworks, such as WTO/GATT's Trade Related Investment Measures (TRIMs) agreement, bilateral investment treaties (BITs), free trade agreements (FTAs), and other legal frameworks. In particular, ASEAN member states should use the ASEAN Comprehensive Investment Agreement (ACIA) in order to achieve liberalization. Next, to overcome obstacles concerning FDI facilitation,

ASEAN countries should actively draw on various cooperation programs with developed countries to improve human resources engaged in the implementation and enforcement of FDI policies (Urata & Okabe, 2010).

According to the long Malaysia's ACIA Reservation list, there were barely any improvement in terms of investment liberalization. Malaysia had eased up on foreign equity restrictions in key services sectors to attract FDI, but apparently sensitive sectors remain to be protected. Among the remaining protected industries in accordance to Malaysia's Reservation List are wood-based industry, sugar refining, automotive industry, and oil and gas industry including petroleum refining. Apart from that, foreign equity participation is allowed only if it is needed financially, technologically, and/or for international linkages and exports (MIER, 2014).

Malaysia is among the most active ASEAN member states in using trade protection for strategic industrial purposes, where in this particular case it is relevant to refer to the automotive industry. Automotive industry which historically has been shielded from foreign competition is a national project to develop local automotive brands such as Proton and Perodua (MIER, 2014). Though Malaysia appears to be easing up on the automotive sector in order to become a regional hub, foreign cars are believed to be taxed much higher than local produced cars (Takashi, 2014). In relation to this issue, the writer believes that in terms of the automotive industry, Malaysia is still not ready to compete with the world at large. Foreign companies are still regarded as a threat towards the national car industries as they fear that their market value will not be at par as the world class imported vehicles. This is obviously a protectionist measure to ensure that the national's car industry will not be prejudiced by the liberalization project under the AEC. Malaysia is clearly not ready to compete with foreign companies which supposedly they should to gear up and try to spend more on research and development and find initiatives to produced cars which are able to compete regionally or globally.

Having ACIA as a main header in terms of investment matter is definitely a development. Having clearly mentioned on the functions and features of ACIA, it should be noted that all ASEAN member states are liable to abide by its core principle in order to achieve the objective as well as realizing the AEC 2015. Unfortunately, Malaysia being one of the notable member states in terms of development failed to even have a single piece of legislation and is relying on laws based on sectors when it comes to investment. This can be regarded as unsystematic. Apart from that, the core principle of non-discrimination and national treatment is nowhere in the picture. Perhaps, the protection of the bumiputera have something to do with this. Indeed, as discussed above there are certain area where sensitivity and national interest still prevails, but, initially an enacted provision should have been there. Progress should be speed up for Malaysia in terms of laws and policy of investment. This is to ensure that Malaysia will not be left out from the development of AEC 2015.

6. RECOMMENDATIONS

In making AEC a reality, it is important to ensure that ASEAN member states are working towards it and focusing at both national and regional stage. On top of everything, it is undeniable in ASEAN that there are tendencies of making new policies and frameworks, without emphasizing on the implementation of the many frameworks drafted beforehand. First and foremost, it is important to ensure of a better adherence to existing frameworks before jumping to draft new ones. Member

states should make use of existing agreements and framework rather than adding new ones to the list. In particular, ACIA must be fully utilized and disciplinary mechanisms should be implemented to punish any disobedient parties (Bhaskaran, 2013).

Apart from that, ASEAN member states should also consider having an agreed upon timetable and possible formula to further the investment liberalization under ACIA (Intal, 2015). The problem with ASEAN member states is they are too quick into jumping on agreements without even looking closely at the sensitive areas that they have to face and constraints in terms of cultural, political, security, or constitution concerning foreign equity control in certain sectors. Each ASEAN member states should declare the problem or the practice they are having in their nation before agreeing in achieving any sort of agreement to go towards liberalization. Each and every issue should be seen closely and seriously to ensure that the liberalization initiative is not just on paper. The list provided under ACIA should be exhausted and be given relevant time and schedule. ASEAN member states should consider applying the AFAS formula with a proper timetable and liberalization formula to ensure a steering power in order to make liberalization a success.

In addition to this, further investment liberalization in the ASEAN region relies on the willingness of the ASEAN member states to pursue with greater investment liberalization especially in the sensitive industries. ASEAN and concerned ASEAN member states would need to conduct more concerted socialization to concerned stakeholders on the benefits of investment liberalization (Damuri et al., 2014). This will be quite a challenge to work out in ASEAN as most ASEAN member states tends to be so protective with their sensitive industries. Nevertheless, in order to achieve a regional cooperation as well as liberalization, ASEAN member states need to find a focus point for ASEAN region to achieve in investment regime. Factors such as market size, economic openness, quality of infrastructure, business environment, including regulatory quality, labour cost, taxation and bureaucracy and investment facilitation (Intal, 2015).

Moreover, in the context of Malaysia, the role of Malaysian Investment Development Authority's (MIDA) should be enhanced as the government interface with the private sector (OECD, 2013). MIDA is an authority recognized as an effective investment promotion industry. In the context of investment, MIDA should be responsible in providing investment in Malaysia to a whole new level. MIDA should be the platform for investors to give feedbacks and complaints so that Malaysian investment remains relevant globally and improve business climate. By doing this, Malaysia will be in a more intact position with the private sectors.

In order for Malaysia to relieve the fear of competing globally, it is relevant for the nation to improve the quality of the labour market as well as tackle the issue of skills shortage (Hassan, 2015; 2012a; 2012b). Skills programs in Malaysia should be added especially in the higher education institutions in order to produce more reliant and international standard graduates (Hassan, 2016). Malaysia should invest on more research and development programs as well as enhancing curriculum in the education institutions. Malaysia should aim at replicating some of its world class models in this regard, such as Penang Skills Development Centre and apply it to the other parts of the country (OECD, 2013). By having a more industry approach curriculum, Malaysia should be ready to produced world class graduates and ready to compete globally. With this, perhaps the issue of protectionism could be resolved.

7. CONCLUSION

In general, despite the fact that Malaysia has relatively closed FDI policy as well as the absence of a law that supposed to offer minimum protection for investors, Malaysia has been successful in attracting FDI (IISD, 2004). Nevertheless, being on the road to achieve an economic community and being a part of the ASEAN member states, Malaysia position is seen as giving the ‘work in progress’ a very hard time. Serious challenges such as the failure to provide non-discrimination towards the foreign investors as well as to provide national treatment are clearly pulling back the progress of realizing AEC. Indeed, by not having a proper single enacted investment protection act will be a major problem when talking regionally. Even Vietnam has very positive progress in their Investment law since 2005. The authorities have made drastic adjustment in achieving further transparency as well as providing more protection towards the foreign investors. The most notable change done by Vietnam was the regulation of both domestic and foreign investors under the same legal purview. Vietnam had clearly shown that they abide the principle under ACIA; principle of non-discrimination (Chien & Zhang, 2012). Having clearly stated before that Malaysia is apparently the second richest country after Singapore in the region of ASEAN, the rank would be meaningless if Malaysia keeps on delaying in enacting an investment protection provision.

In addition, there may be legal and procedural issues that may be seen as local challenges within ASEAN member states and this may include obtaining suitable skilled or unskilled labor, access to essential infrastructure, supply and distributions logistics, resources, or even local political or market issues that an investor need to consider. Apart from that, local due diligence will likely be a significant concern depending on the nature of the investment, and this may be complicated if there are local partners or shareholders (Martin & David, 2014).

ASEAN member states should have a proper agreement on how liberalization of investment should be achieved. By having a main integration agreement on Investment will never be enough looking at the challenges of local circumstances discussed above, most of the ASEAN member states still remain the protectionism agenda in their nation. A proper and holistic approach should be taken instead of simply listing down the sensitive industries that does not have a due date on being sensitive. ASEAN member state should really work out on their national interest issue if they are serious in achieving a liberalized market.

Apart from that, Malaysia should also take serious consideration of providing extra development program to eliminate the fear of competing regionally and globally. By having professionals and skilled entities, Malaysia should not fear of going international and should also produce more world standard piece of work rather than reserving on being protected. Malaysia should ‘move out of the box’ and seek opportunity to grow and move out of the middle income trap dilemma. Besides that, having been said all of the above, it will not happen without a change of mindset from all of the ASEAN member states themselves. Protectionism is a well-known factor of delaying liberalization as every country will still choose their national interest over the regional interest. Due to that, all of the above recommendations and dreams of having a single market and production base as well as having a liberalized market will never be achieved if the mindset of all of the ASEAN member states remains at the same state. It is useful for the ASEAN region to look at the practice of other region that had made liberalization a success.

To be fair, liberalization of investment could never be achieved overnight. ASEAN member states should seriously consider having a proper timetable and formula to make this work. While it is unfair to set the time frame too early due to the newly implemented AEC, it should not be a reason for delay too though. In considering the development gaps, culture, business environment as well as other contributing factors, ASEAN member states should decide on how liberalization should be achieved. By having the practice they are having now, it is quite impossible to get it realized in near time.

In the era of liberalization and integration and achieving the multi objectives for the region, the current position of Malaysia in terms of Investment Law and Policy would surely contribute to the impediments and legal hurdles in realizing AEC. Malaysia should really get serious in enacting a piece of legislation, as well as preparing to accept liberalization holistically. In making AEC a success, this is a serious challenge to both the nation as well as the region. While AEC is still regarded as a work in progress, impediments such as this will surely leave an impact of delay in liberalization and integration process particularly in the success of AEC 2015.

ASEAN is well known for being diverse in many areas, it is up to the ASEAN member states to make the dream to have an economic community a reality. It may be a long journey to go through, but ASEAN member states had made an agreement to achieve a common economic community. Therefore, ASEAN member states should really focus on having their gaps narrowed and find alternatives as well as solutions to tackle all issues discussed above to make AEC a reality. ASEAN member states should really focus on moving regionally rather than staying national to ensure the success of the economic community in the ASEAN region. AEC is not the final destination for liberalization of investment, but it should be the first stepping stone to achieve more in the future. Thus, Malaysia should not waste this opportunity to grow and develop the nation of becoming a high income nation.

REFERENCES

- Aldaba R. M. (2013). Getting ready for the ASEAN Economic Community (AEC) 2015: Philippine Investment Liberalisation and Facilitation. *Discussion Paper Series*, No 2013-03, Philippine Institute for Development Studies.
- ASEAN. (2013). ASEAN Comprehensive Investment Agreement. A Guidebook for Business & Investors.
- ASEAN Comprehensive Investment Agreement (2009)
ASEAN Economic Blueprint.
- Bhaskaran.M, (2013). *The ASEAN Economic Community: The Investment Climate*. Singapore: ISEAS, Yusof Ishak Institute.
- Chien, N. D., & Zhang, K. (2012). FDI of Vietnam; Two-Way Linkages between FDI and GDP, Competition among Provinces and Effects of Laws. *iBusiness*, 4(02), 157.
- Damuri, Y. R., Setiadi, I., Christian. D., & Sasmito. E. (2014). ASEAN Economic Community Scorecard Phase IV: Indonesia (Unpublished). Jakarta: Centre For Strategic Studies.
- David, F. & Martin, D. (2015). *2015 ASEAN FDI framework*. Retrieved from <http://www.chinagoabroad.com/en/article/2015-asean-fdi-framework>.
- Nikomborirak, D., & Jitdumrong, S. (2013). ASEAN Trade in Services. The Economic Community: A Work in Progress.

- Edmund, T. & Johan, S. (2013). *The New Economic Policy in Malaysia*. Singapore: ISEAS.
Federal Constitution.
- Hassan, K. H. (2012a). Data protection in employment: new legal challenges for Malaysia, *Computer Law and Security Review*, 28, 696-703.
- Hassan, K. H. (2012b). Contractualism in employment relationship. *Arab Law Quarterly*, 26, 175-192.
- Hassan, K. H. (2015). *Buruh dan Migrasi Isu Perundangan*. Bangi: Penerbit Universiti Kebangsaan Malaysia.
- Hassan, K. H. (2016). *Entrepreneurship: Law and Practice*. Bangi: Penerbit Universiti Kebangsaan Malaysia.
- IISD. (2004). Investment Regime: Malaysia.
- Intal, Jr. P. (2015). AEC Blueprint Implementation Performance and Challenges: Investment Liberalization. *ERIA Discussion Paper Series*, No 32.
- Martin, D. & David F. (2014). 2015 Asean Fdi Framework, The Key Aspects Investors Need To Know, From A Practitioners's Viewpoint.
- MIER. (2014). ASEAN Economic Scorecard Phase IV: Malaysia (unpublished), *Malaysia Institute of Economic Research*, No. 19.
- National Land Code of Malaysia.
- Nurridzki, N. (2015). Learning from the ASEAN +1 Model and the ACIA, *ERIA Discussion paper series*.
- OECD. (2013, November 6). OECD Investment Policy Reviews: Malaysia 2013. Retrieved from <http://www.oecd.org/investment/malaysia-investment-policy.htm>
- OECD. (2014). Southeast Asia Investment Policy Perspectives. Retrieved from <http://www.oecd.org/development/se-asia-investment-policy-perspectives.htm>
- Promotion of Investment Act 1986
- Rajenthiran, A. (2002). *Malaysia: An Overview of the Legal Framework for Foreign Direct Investment*. Singapore: Institute of Southeast Asian Studies (ISEAS).
- Thangavelu, S. M. (2015). FDI Restrictiveness Index for ASEAN: Implementation of AEC Blueprint Measures, *ERIA Discussion paper Series*, Background paper of ERIA's ASEAN Economic Community Scorecard Phase IV Project.
- Urata, S & Okabe, M. (2010). Investment Climate Study on ASEAN Member Countries' *Tracing the Progress towards the ASEAN Economic Community*, ERIA, Research Project Report 2009, No.3.
- WTO. (2009). *Trade Policy Review: Malaysia*. Geneva: World Trade Organization. Retrieved from https://www.wto.org/english/tratop_e/tpr_e/tp466_e.htm.