

RINGKASAN HASIL PENELITIAN

**PERDAGANGAN DAN PENANAMAN MODAL :**  
Tinjauan Terhadap Kesiapan Hukum di Indonesia Menghadapi Persetujuan  
Perdagangan Multilateral yang Terkait dengan Peraturan Penanaman Modal

Trade and Investment:  
The Study on Indonesian Legal Preparedness in Responding Multilateral  
Trade Agreements Related to Investment Regulations

DISERTASI

Oleh :

MAHMUL SIREGAR  
018101023



PROGRAM PASCASARJANA  
UNIVERSITAS SUMATERA UTARA  
MEDAN  
2005

## INTISARI

Dewasa ini hak untuk meregulasi investasi asing tidak lagi seluruhnya tunduk pada kedaulatan negara tuan rumah (*host country*). Sejumlah peraturan WTO telah membatasi ruang bagi pemerintah *host country* untuk menetapkan sejumlah persyaratan dan pembatasan bagi investasi asing. *Agreement on TRIMs* melarang persyaratan-persyaratan kandungan lokal (*local content requirement*), kebijakan keseimbangan perdagangan (*trade balancing policy*), pembatasan akses valuta asing (*foreign exchange limitation*), dan pembatasan ekspor (*export limitation*) dalam peraturan investasi asing. Selanjutnya *General Agreement on Trade in Services* (GATS) menetapkan sejumlah larangan atas persyaratan-persyaratan tertentu terhadap investasi asing yang dilakukan melalui kehadiran komersial (*commercial presence*) di sektor jasa. Larangan ini meskipun dilakukan dengan sistem liberalisasi bertahap, dan didasarkan pada komitmen khusus (*specific commitment*) dengan pendekatan daftar positif investasi (*positive list*), namun sudah mengarah pada larangan pembatasan kepemilikan saham, pembatasan bidang usaha, pembatasan jumlah tenaga kerja asing, dan perlakuan lain yang berbeda antara investor asing dan domestik. Belakangan ini WTO bermaksud untuk melengkapi rejim investasi melalui perundingan *trade and investment* yang diharapkan akan menghasilkan sebuah perjanjian investasi multilateral. Dengan demikian, jika tiba saatnya, maka seluruh aspek kebijakan investasi asing akan diatur sesuai ketentuan WTO.

Sejak berlangsungnya Uruguay Round (1986-1994), negara-negara berkembang sudah melakukan penolakan terhadap perluasan cakupan WTO di luar perdagangan, khususnya investasi asing. Pertimbangan yang dipergunakan menyangkut masalah kedaulatan dan kompetensi WTO, dan pertimbangan kebutuhan pembangunan ekonomi. Pengaturan masalah investasi dalam rejim WTO dipandang akan menghilangkan ruang bagi pilihan kebijakan pemerintah *host country* untuk menyesuaikan kebijakan investasi asing dengan kebutuhan pembangunan ekonomi dan untuk mengimbangi perilaku merugikan dari perusahaan investasi asing. Namun usaha-usaha negara berkembang tidak cukup untuk menghambat masuknya liberalisasi investasi dalam persetujuan-persetujuan WTO. Bagaimana negara-negara berkembang, khususnya Indonesia menghadapi perkembangan tersebut. Bagaimana hukum di Indonesia merespon perkembangan tersebut merupakan permasalahan yang akan coba dijawab oleh penelitian ini.

Untuk menjawab permasalahan-permasalahan tersebut Penelitian ini menggunakan metode penelitian hukum normatif dengan metode analisis data kualitatif. Data utama terdiri persetujuan-persetujuan WTO, peraturan nasional, dokumen-dokumen negosiasi WTO dan putusan-putusan Badan Penyelesaian Sengketa WTO yang dikumpulkan dengan menggunakan teknik studi pustaka/ dokumen. Data kemudian dilengkapi dengan wawancara mendalam (*in-depth interview*) yang dilakukan terhadap pihak-pihak yang memiliki kompetensi sesuai permasalahan yang diteliti. Penentuan narasumber dilakukan dengan menggunakan teknik *purposive sampling*.

Hasil penelitian menunjukkan bahwa liberalisasi kebijakan perdagangan memiliki hubungan yang erat dengan peningkatan investasi asing. Namun, hal ini tidak sepenuhnya dapat dipergunakan sebagai alasan untuk menghapuskan seluruh pembatasan penanaman modal yang banyak diterapkan oleh negara-negara berkembang. Perbedaan tingkat kebutuhan pembangunan ekonomi dan

kemampuan antara negara maju dan negara berkembang membutuhkan ruang yang lebih luas bagi pilihan kebijakan pemerintah negara berkembang untuk menerapkan persyaratan penanaman modal guna diseleraskan dengan kebutuhan pembangunan ekonomi negara berkembang. Liberalisasi agresif dengan melarang seluruh pembatasan-pembatasan penanaman modal akan menghilangkan hak pembangunan bagi negara berkembang yang diakui dalam Part IV GATT mengenai *trade and development*. Di samping itu sampai saat ini WTO masih mengakui bahwa tidak setiap pembatasan penanaman modal memiliki dampak yang mengganggu perdagangan internasional.

Hukum penanaman modal asing di Indonesia sejak tahun 1994 telah mengantisipasi arah perkembangan liberalisasi investasi asing. Hal ini terlihat dari PP No. 20 Tahun 1994 yang cukup liberal dan semakin berkurangnya pembatasan-pembatasan penanaman modal dalam daftar negative investasi dan peraturan-peraturan sektoral. Meskipun demikian beberapa persyaratan penanaman modal di sektor jasa dalam hukum investasi di Indonesia suatu saat yang dapat dijadikan sebagai alasan memperlakukan Indonesia di forum WTO, seperti perbedaan antara UUPMA dan UUPMDN, pembatasan jumlah tenaga asing, pembatasan daerah berusaha, dan masalah perijinan. Sampai saat ini pembatasan tersebut belum menimbulkan persoalan, karena masih diperkenankan berdasarkan *specific of commitment* yang diberikan oleh Pemerintah Indonesia. Namun hal ini tidak akan bertahan lama, mengingat bahwa pada saatnya Pemerintah wajib memberikan *full commitment* untuk liberalisasi investasi sektor jasa. Menanggapi hal tersebut terlihat bahwa negara berkembang termasuk Indonesia lebih memilih untuk tetap pada status quo dan menunda pemberian komitmen sambil mempersiapkan pelaku usaha domestik.

Sehubungan dengan perkembangan kearah pembentukan multilateral *framework on investment* disarankan agar pemerintah Indonesia dan negara-negara berkembang lainnya memanfaatkan perundingan tersebut di tingkat multilateral. Dengan pertimbangan bahwa perundingan secara multilateral akan lebih memberikan posisi yang kuat bagi negara berkembang dari pada menghadapi desakan negara maju di tingkat bilateral. Beberapa konsep tentang liberalisasi investasi yang harus diperhatikan negara berkembang, termasuk Indonesia, antara lain : sistem liberalisasi tetap mempergunakan pendekatan liberalisasi bertahap, menggunakan pendekatan daftar positif, komitmen yang lebih rendah bagi negara berkembang, penerapan perlakuan sama pada tahap setelah pendirian usaha (*post establishment stage*), pengakuan terhadap fleksibilitas bagi *host country* untuk mengejar kebutuhan pembangunan ekonomi melalui penanaman modal asing, mengatur tentang kesulitan neraca pembayaran, tetap mengecualikan sektor pengadaan pemerintah dan menetapkan secara berimbang hak dan kewajiban antara *home country*, *host country* dan *multinational corporations*.

---

Kata Kunci : - penanaman modal asing langsung  
- kerangka investasi multilateral  
- pembatasan penanaman modal  
- WTO (World Trade Organization)

## ABSTRACT

Presently, the right to regulate foreign direct investment has ceased to exclusively belong to the sovereignty of the host country. A number of WTO regulations have limited the room for the host country administration to impose certain regulations and limitations for foreign direct investments. Agreement on Trade-Related Investment Measures (TRIMs) proscribes against the local content requirement, trade balancing policy, foreign exchange limitation and export restriction in the regulations of foreign direct investment. Furthermore, the *General Agreement on Trade in Services* (GATS) has imposed several proscriptions in regards with certain requirements on foreign direct investment conducted by commercial presence in services. Despite the enforcement of these prohibitions by means of progressive liberalization system, and is based on specific commitments, employing the approach of positive list of investment, these prohibitions have led to the outlawing of restriction of shares ownership, restriction of accessible business sectors, restriction of the number of foreign employment, and discriminative treatment concerning foreign investors and domestic investors. Currently, WTO endeavors to complement the law of investment through negotiations of trade and investment expected to yield a multilateral agreement on investment. Accordingly, in due course, all aspects of the policy concerning foreign direct investment will be standardized to comply with WTO regulations.

Since the Uruguay Round (1986-1994), developing countries have refused the extension of WTO regulations in non-trade fields, particularly, in foreign direct investment. The considerations concern the question of sovereignty and WTO competence, and the need of economic development. The WTO regulations on investment will be viewed to diminish the scope of policies issued by host country administration to adjust the regulations with the need of economic development and to level adverse behavior of companies established by foreign direct investment. Nevertheless, the attempts made by developing countries are far from being significant to inhibit the prevalence of investment liberalization in WTO agreements. Hence, it is in regards with the manner of developing countries, especially Indonesia, in coping with the prevalence of investment liberalization, together with the manner of the law in Indonesia in responding the issue, forms the scope of discussion in this research.

In the discussion of the issue, this research employs the method of normative-legal research and the method of qualitative data analysis. The primary data consist of WTO agreements, national regulations, and documents of WTO negotiations and the decisions of WTO Dispute Settlement Bodies collected by means of library research. The data are then equipped with in-depth interview conducted with sources having the authorities according to the particular issue being discussed. Determination of sources is conducted through purposive sampling method.

The results of the research demonstrate that the liberalization of trade policies is closely related with the increase of foreign investment. However, this cannot be employed as the reason to revoke the restrictions of investment imposed by developing countries. The different need of economic development and competitiveness between developed and developing countries require more leeway for choices of policies adopted by developing countries to impose

requirements on investment to comply with the need of their respective economic development. Aggressive liberalization attained through prohibition of limitations in investment will undermine the right of developing countries enshrined in Part IV of GATT in regards with trade and development. Moreover, WTO is in the position of acknowledging that not all limitations in investment distort international trade.

The law of foreign direct investment in Indonesia since 1994 has anticipated the development of liberalization of foreign direct investment. As shown by the more liberal Government Regulation, Number 20 in the year 1994 (Peraturan Pemerintah Republik Indonesia No.20 Tahun 1994) containing fewer limitations in the negative list investment and other regulations in respective sectors. However, several requirements in regards with investment in services in Indonesian investment law might pose a significant potential problem for Indonesia in WTO forums, for instance, the differentiation between The Law of Foreign Direct Investment (UUPMA) from The Law of Domestic Investment (UPMDN), limitation of the number of foreign employment, limitation of business area, and the question of license/approval. Up to the present, these limitations have not posed a problem, as they are still allowed by the WTO in accordance with the specific commitment made by Indonesian government. Even so, taking into account that in due course Indonesian government will make full commitment to liberalize investment in services: the current condition will not last long. In response with this issue, apparently, developing countries, including Indonesia, opt to remain in the status quo and to delay the giving of commitment while preparing domestic business players.

In light of the development towards the establishment of multilateral framework on investment, it is advisable that Indonesian government as well as other developing countries take the benefit of multilateral negotiations with the consideration that multilateral negotiations will give better bargaining power rather than having to deal with the demands made by developed countries in bilateral agreements. There are several concepts concerning investment liberalization viable for developing countries: liberalization system employing progressive liberalization approach, adopting positive list approach, using lower required commitment for developing countries, imposing equal treatment at the post establishment stage, acknowledging the flexibility enabling host countries to meet the need of economic development through foreign direct investment\_ coping with the difficulty of meet the balance of payments, while excluding the government procurement sector, and setting the equality between rights and duties among home countries, host countries and multinational corporations.

Keyword: - foreign direct investment  
- Multilateral framework on investment  
- Restriction of investment  
- WTO (World Trade Organization)