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HOST STATE CONTROLS VS. FOREIGN INVESTMENT PROTECTION: INDIGENOUS PEOPLE RIGHTS ON REMPANG ISLAND, INDONESIA

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ABSTRACT

The enactment of national Law No. 25 of 2007 on Investment is carried out in the framework of uplift the initiation of a favorable domestic business condition for investment to reinforce the competitiveness of the domestic economy and advance investment; while the right of indigenous has been marginalized. The recent case of conflict between the government investment policy and the Indeginous people under the Rempang Eco City project in Batam is remain contentious. This article utilized the normative approaches to investigate this issue, and Rempang case become a context to investigate. Resolving land tenure conflicts between the local community and BP Batam must begin with tracing the history of the land through history, cultural heritage, natural physical signs, recognition and testimony from residents and traditional institutions. Protecting foreign investors must also take care of indeginous people rights surrounding it.

Keyword: Host State; Foreign Investment; BIT, Indonesia; Rempang Island.

INTRODUCTION

An investment climate is very much influenced by the policies and laws and regulations in a country. As a sovereign country, Indonesia must have the control and security of foreign investment agreements in Indonesia. Security of foreign investment agreements is an effort to maintain the investment climate in Indonesia so that it remains conducive. The easier of the investment bureaucracy in a country, the better and more developed the investment climate.[1]

[1] M. Ya'kub Aiyub Kadir and Alexander Murray, "Resource Nationalism in the Law and Policies of Indonesia: A Contest of State, Foreign Investors, and Indigenous Peoples," *Asian Journal of International Law* 9, no. 2 (July 21, 2019): 298–333, https://doi.org/10.1017/S204425131900002X.

Sources of law relating to investment activities are on a national, international or multilateral scale. On national scale, applicable rules may take the form of specific rules in the manifestation of laws and implementing regulations of investment activities, then related sectoral regulations and agreements. On international scale, arrangements can be found in the form of International Investment Agreements and on a multilateral scale, several WTO Agreement provisions relating to investment activities apply, as well as rules from International Investment Conventions such as ICSID or UNCITRAL.[2]

Regulations in Indonesia concerning investment are set in Law no. 25 of 2007 on Investment which covers all rules relating to investment activities and allows foreign investors or investors to have legal standing to invest their shares safely in Indonesia. Parties to foreign investment activities are foreign investors and Indonesia as the host country[3]. This article discusses in more detail about *controls by the host state* and *protection for international investment agreement* and its application in Indonesia as the host country and also the case of the investment development project on Rempang Island, which marginaised indigenous people[4] in Batam, Indonesia under President Jokowi administration.

RESEARCH METHOD

This study is a normative juridical study by carrying legal studies on secondary data. The typology of this study is analytical prescriptive in nature, namely research that aims to provide suggestions and alternative solutions in dealing with a problem. The qualitative research approach is a approach that utilizes data in the written form or oral sentences, events, knowledge or objects of study.

[2] Kadir and Murray.

[3] Daeng Naufal Firjatullah and M. Putra Iqbal, "Legal Protection For Crypto Assets Investment In Commodity Futures Trading In Indonesia," *Student Journal of International Law* 3, no. 1 (2023): 47–68, https://doi.org/https://doi.org/10.24815/sjil.v3i1.27223.

[4] M. Ya'kub Aiyub Kadir, "Defining 'People' and 'Indigenous People' in International Human Rights Law and Its Application in Indonesia," *International Journal on Minority and Group Rights* 26, no. 3 (May 14, 2019): 373–408, https://doi.org/10.1163/15718115-02602006.

RESEARCH OUTCOME AND DISCUSSION

1. CONTROLS BY THE HOST STATE

The rights of a state to control the appearance of foreign investment is limitless, as it is a right that run through sovereignty. In general, in principle, a state can do and regulate whatever the state needs and wants. Demands about sovereignty in the economic field are currently carried out from the concepts of "economic self-determination" also "permanent sovereignty" onto natural resources owned. The entrace of foreign investment may be shut out by the state, however, a sovereign state may capitulate these rights, even in relation to internal issues, with an agreement.[5] Several regional and bilateral agreements (such as BITs and/or MITs) now regulate the right to enter and establish investment for the parties (countries) that enter into agreements.

The present system of legal policy of trans-national investment alliance covers a variety of legal rules, which are seated in several sources and vary from one another according to their nature and legal consequences. Particularly, several of these emerge at the international intesity with the decision of multilateral and bilateral agreements between countries, and are thus included in the international legal system. Another is initiated by international society, businesses, and arbitration bodies.[6]

Beneath customary international law, unchanged by agreements, the host country has complete control rights on the appearance and initiation and the entire process of foreign investment as a form of state sovereignty. However, it cannot be denied that agreements on foreign investment can limit the sovereignty of the country to treat foreign investors who violate the standards of agreements that protect them. State sovereignty is subject to the principles of international customary law and treaty-based international law.[7]

On a national scale, there are specific legal regulations *foreign direct investment*, such as the Law of the Republic of Indonesia Number 25 of 2007 on Investment (which has been amended by the Law of the Republic of Indonesia Number 11 of 2020 on Job Creation) and Implementing Regulations (for example, Presidential Regulation Number

[5] M Sornarajah, *The International Law on Foreign Investment* (Cambrige: Cambridge University Press, 2010).

[6] Valeriy Nikolayevich LISITSA, "Responsibility of a Host State in Transnational Investment Disputes," *Journal of Advanced Research in Law and Economics* 9, no. 1 (September 22, 2018): 139–46, https://doi.org/10.14505//jarle.v9.1(31).18.

[7] Sornarajah, *The International Law on Foreign Investment*.

44 of 2016 concerning List of Business Fields that are Closed and Business Fields Open with Conditions in the Investment Sector which was later amended by Presidential Regulation Number 10 of 2021 on Investment Business Sectors. Then there are non-specific investment rules that apply, namely Sectoral Laws (for example, the Limited Liability Company Law, the Environmental Protection and Management Law, etc) and the last rule of law can be a contract or agreement.

To encourage local economic growth and acquire Indonesia's political and economic supremacy, it is required to expand investment to process economic prospective into actual economic power by utilizing capital deriving from both within the country and from oversea. And in the accept of adjustment in the worldwide economy and Indonesia's involvement in numerous international cooperation, it is need to design a conducive, promotive investment climate, providing legal certainty, justice and efficiency while taking into account national economic attract.

The fundamental rule for investment as set in Article 4 of Law no. 25 of 2007 on Investment, the Government stipulates a fundamental investment policy to revitalize the design of a beneficial domestic trade climate for investment to nourish the competitiveness of the domestic economy; and encourage the rise in investment. In establishing these fundamental policies, the Government provides the same behavior both to local and foreign investors at the time stillness considering the local interest; assurance of legal certainty, business certainty, and business security for investors from the process of acquiring authorize for the whole of investment interests accord statutory provisions; and give a chance for the establishment and deliver security to micro, small, medium enterprises and cooperatives. The fundamental law is manifested in the form of a General Investment Plan.

Presidential Decree (Keppres) Number 41 of 1973 grants Management Rights to the Batam Authority. The provisions of Article 6 Paragraph 2 Letter a of the presidential decree state that all areas located on Batam Island are handed over to the Batam Authority with management rights (HPL) status. The Batam Islands are a strategic location. Presidential Decree Number 41 of 1973 is a decision to prevent land locations with potential for investment from being owned by private investors. This means preventing land speculators.

Providing HPL to the Batam Authority means that investors who need land are not permitted to own land but can simply rent it to the Batam Authority. As a legal consequence of this presidential decree, individual rights in designated areas are limited. The areas determined by the presidential decree must have clear boundaries and be free from control, use, or ownership of community land. In accordance with its contents, this presidential decree must be followed up with land registration activities.

Rempang Island, relies on its strategic location with neighboring countries, namely Singapore, one of the busiest shipping areas in the world. This potential directs Batam to further develop the city into the things industry, ship transfer, logistics, and tourism sectors. Infrastructure development in Batam is also of great concern in maintaining a conducive foreign investment climate. According to Law Number 25 of 2007 concerning Investment, Foreign Investment is defined as investment activities in carrying out business in the territory of the Republic of Indonesia carried out by Foreign Investment. Since it was stipulated in the Law on Foreign Investment in Indonesia, investment activities have begun. [8]

Developed countries intensively carry out initial capital investment and expand investment into Indonesia. This creates opportunities for Indonesia as a developing country to accelerate development. As is known, Foreign Investment (PMA) is one aspect of development. Indonesia is a destination country for foreign investors with great potential to invest their capital. The Riau Islands are a province which is part of Indonesia. The wealth owned by the Riau Islands Province has great potential and offers an extensive range of investment opportunities, domestic and foreign, with the full support of the local government. Prospective business actors are also given special incentives with various facilities, such as tax, customs, immigration, labor, and banking, especially for new investment by prospective foreign business actors in the Batam, Bintan, and Karimun Free Trade Zones. The city of Batam, which was built and developed into an industrial area, makes it an investment target for business actors.

Based on the two forms of investment that Indonesia can make, the investment used in Batam is Foreign Direct Investment (FDI) because it has a more long-term impact and can directly contribute to Batam's development by opening new job opportunities for

[8] Arianto Tjahjo, "Understanding the Rempang Island Case," *Kompas.Id*, 2023, https://www.kompas.id/baca/english/2023/09/13/en-memahami-kasus-pulau-rempang.

the local community. That way, people will get a higher income, meet their daily needs, and make their lives more prosperous. Apart from that, the FDI implemented in Batam has other benefits, such as technology transfer by developed countries. So, workers from Indonesia can operate the technology brought, and slowly, the knowledge gained will help develop industry in country. Remembering that Batam is also known as the Industrial Island in Indonesia.

2. FOREIGN INVESTMENT AGREEMENT PROTECTION

There are various kinds of agreements that give investors the opportunity to explore the market in other countries in the world, which of course is not far from efforts to protect the law against their investments in these countries. Investment agreements are international treaties amid countries that set the behavior by a country of foreign investment from investors who are nationals of another country.[9]

In foreign investment agreements, protection of the agreement is a component that must be considered by the state and foreign investors because of the possibilities that can occur and pose a risk to the investment activity, for example, disputes may arise amid the investor and the host state government. Protection of foreign investment agreements is also a form of security and certainty in carrying out investment activities.

A. Fair and Equitable Treatment

Almost all BITs and another investment agreement give fair and equitable treatment ("FET") for foreign investment. The obligation on the parties to lay out "FET" guarantees is frequently declared as component of the protection of foreign direct investment by host states. Partially of the protection due to foreign direct investment by host countries. It is an “absolute” standard of treatment, (OECD, 2004).[10] This clause is cover in most BITs and domestic investment contracts also in multilateral contracts.[11]

This concept of protection is the concept frequently used in investment disputes until now this concept is a concept that is used as a standard in any dispute that occurs in

[9] Matthew C Bate, Stephen Kho, and Cynthia Liu, “What Every Emerging Market Investor Needs to Know,” EMPEA Legal & Regulatory Bulletin , 2015, https://www.akingump.com/a/web/36232/aoi14/investment-treaties-empea-article_1103061721.pdf.

[10] OECD, “Fair and Equitable Treatment Standard in International Investment Law,” 2004, https://www.oecd-ilibrary.org/finance-and-investment/fair-and-equitable-treatment-standard-in-international-investment-law_675702255435.

[11] Knoll-Tudor Loana, “Fair and Equitable Treatment,” Jus Mundi , 2023, https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment.

investment. After 2000, initial significant issues being metalclad and maffezini, the investment courts have provided a context for the meaning of FET itself and have put in it to a variety of conditions.[12]

Although many multilateral and bilateral agreements in the field of investment regulate this FET issue, there is no one form of fixed clause that has been agreed to regulate the whole of the FET. However, when viewed from the structure and contents of the BIT, it often has a form of equation that can be used as one of the generalizations of the clause. This can be applied in multilateral agreements because in these agreements, generally apply the same pattern as stated in the BITs agreement. [13]

The FET clause as stated above is a standard that is widely used by foreign investors which is also used as a basis for lawsuits in the investment dispute resolution process that arises from the BIT itself. This is similar to what Churchill Mining Plc did to Indonesia as stated in international forums like ICSID. Where in this case, Churchill Mining Plc revoked the Ridlatama Group's Mining License (IUP) which was considered to have violated the guarantee and protection standards that apply in the bilateral investment agreement between the UK and Indonesia, especially in this FET clause. Based on the case above, it shows that Indonesia has not violated the existing provisions and there has been no breach of the FET clause because the revocation of the Ridlatama Group IUP was based on clear reasons and in line with the proper provisions of the law in Indonesia.

B. Full Protection and Security

The following standard in protection against foreign investment that exists is the Full protection and security clause, like a little brother in the circle of international investment law protection compared to the FET clause which is considered to be more controversial and well-known. Sometimes this clause is in the appearance of "full protection and security", nevertheless several other variations in mentioning this standard are also seen as "full protection and security", and "physical protection and security", the difference in the use of the form is considered not different because it contains the same meaning. It can be an accompaniment to fair and equitable treatment and like fair and

[12] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012).
[13] UNCTAD Series on Issues in International Investment Agreement, "International Investment Rulemaking: Stocktaking, Challenges and The Way Forward ," 2008, https://unctad.org/system/files/official-document/iteiit20073_en.pdf.

equitable treatment standard is common in nature and its pliability causes it put in to another circumstances.[14] In providing standard treatment for investment agreement activities, full protection and security is one of the arrangements that apply. The definition of Full Protection and Security itself is doctrinally the protection of Investors in a country from various forms of physical violence which includes civil unrest in investment areas/places.[15] These conditions implicit the belief that the host state is enacted to embrace certain measures aims to secure foreign investors in case of disadvantageous things also damaging acts.[16]

Concerning the definition and scope of this standard in an arbitration award at UNCITRAL, namely Ulysseas, Inc V. Ecuador in 2012 said that the existence of this standard was considered to impose obligations, vigilance and concern by the State based on international law which were considered to be caused by third parties to property in the territory. However, this does not imply that investment losses by investors will be included but only specifies the safety of the physical sincerity of the investment in matter of interference in the host country.

The decision of court arbitration highlights the substance of controlling states' subjection under this standard.[17] in 1990: AAPL v. Sri Lanka. This suit intricates vivid fight amid the Sri Lanka armed forces and anarchists who break up the investor's shrimp breeding and murdered over 20 of its workers, Neither the investor nor the authority can evince either anarchists or armed forces had created the destruction. Therefore, based on this case, the court found Sri Lanka had breached its obligations by not proceeds every feasible measure to mitigate the destruction and killings. Sri Lanka counter-proclaimed that the responsibility was restricted to invoking the standard of due persistence in customary international law. The court decided that an independent agreement standard was relevant and ruled Sri Lanka responsible for its neglect to grasp preventative measures to hinder danger to the investment.[18]

[14] Alireza Ansari Mahyari and Leila Raisi, "International Standards Of Investment In International Arbitration Procedure And Investment Treaties," *Jurídicas* 15, no. 2 (July 1, 2018): 11–35, https://doi.org/10.17151/jurid.2018.15.2.2.

[15] Ansari Mahyari and Raisi.

[16] Ansari Mahyari and Raisi.

[17] Mahnaz Malik, "The Full Protection And Security Standard Comes Of Age: Yet Another Challenge For States In Investment Treaty Arbitration," 2011, https://www.iisd.org/publications/report/full-protection-and-security-standard-comes-age-yet-another-challenge-states.

[18] Malik.

C. *Umbrella Clause*

An umbrella clause (an umbrella agreement or an observation of undertakings clause) is an arrangement in BIT where a state consent to obey with each of its responsibility owed to foreign investors. An umbrella agreement as it may be most fortunate to investors as it allow authorize the investor to contend that matters normally controlled by national laws and jurisdictions (ie a breach by the state of its agreements owed to the investor) can also be characterized as a breach of an investment contract obligation by virtue of the umbrella clause. Thus, the investor assembly capable to raise each of its controversy with the country to the international level beneath the protecting umbrella of the BIT. [19]

Carved in the 1950s for the aims of enhance the protection of investor-State contracts, umbrella clauses provide that host States shall respect obligations or commitments they have entered into with regard to investments.[20] The umbrella clause only covers the ventures of the host state and not those of foreign investors. Each of these clauses need to be elucidate with its special expression, these condition emerge in about 40% of investment protection treaties. Several agreements sometimes also exclude this clause in the scope of the consent to arbitrate.

Umbrella clauses are particularly discuss in arbitral awards due to they permit a chance to foreign investors to raise their breaking of investment agreement claims to the breach of investment agreements in international law. Umbrella agreements are amidst the frequent competed demand elevated in investing controversy due to they permit investors to raise their violation of investment agreement claims to the level of violation of international law. The courts have been evaluated these issue from separate view and make variation in jurisprudence. [21]

In *Noble Ventures v. Romania,* the court consider the scope and application of the umbrella clause of BIT ruled amidst the United States of America and Romania. The

[19] Ben Sanderson, "Umbrella Clauses in Investment Treaty Arbitration," LexisLexis, 2022, https://www.lexisnexis.co.uk/legal/guidance/umbrella-clauses-in-investment-treaty-arbitration.

[20] A. C. Sinclair, "The Origins of the Umbrella Clause in the International Law of Investment Protection," *Arbitration International* 20, no. 4 (December 1, 2004): 411–34, https://doi.org/10.1093/arbitration/20.4.411.

[21] Tilbe Birengel, "Umbrella Clauses In Investment Arbitration.," Erdem & Erdem Law Firm , 2017, http://en/insights/umbrella-clauses-in-investment-arbitration.

phrasing of the agreement is : "*Each party shall observe any obligation it may have entered into with regard to investments*."[22]

The Claimant stated that by fault to observe with its contract to renegotiate the debts of a publicly traded company acquired by the investor.[23] Romania had violated the umbrella agreement. The court ruled that breach of contract at the local level caused breach of the investment treaty between the countries, and gave increase to the international authority of the host country. Thus, umbrella agreements are the most contested claims appeared in investment controversy because they allow investors to raise their breach of investment agreement claims to the level of violation of international law. [24]

D. Access to Justice, Fair Procedure, and Denial of Justice

The principles of access to justice, fair procedure, and denial of justice concern to the three stages of the judicial process: the right to file a lawsuit, the right of both parties to fair treatment throughout the trial process, and the right to an proper ruling at the end of the process. The principles of international law that apply at any stages establish a broad framework that must be respected by national regulations. Fundamentally, these principles operate as expressions of international standards requiring the initiation of an appropriate and civilized justice system as contemplate in received international and national practice. Thus, the conception of a minimal standard of international law has both a substantive and a procedural side. [25]

The development of arbitration and investment in international law has helped consolidate access to justice, fair procedure, and denial of justice as principles that become part of existing human rights and investment law. This development has been considered as advancing the process of individuals and private sectors in the economy which can make it possible to be the first to make claims directly against a country using international dispute resolution mechanisms. [26]

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[22] Birengel.

[23] Dolzer and Schreuer, *Principles of International Investment Law*.

[24] Kevin Muhammad Haikal, "Foreign Investment Protection Post-Indonesia's Bilateral Investment Treaties Regime" (Tilburg University, 2017), https://scholar.google.com/scholar?hl=id&as_sdt=0%2C5&q=Foreign+Investment+Protection+Post-indonesia's+Bilateral+Investment+Treaties+Regime"&btnG=#d=gs_qabs&t=1713283058572&u=%23p%3DhJLFCPITKq0J.

[25] Haikal.

[26] Franscesco Francioni, "Access to Justice, Denial of Justice and International Investment Law," *European Journal of International Law* 20, no. 3 (August 1, 2009): 729–47, https://doi.org/10.1093/ejil/chp057.

On Azinian v. In Mexico[27], the courts summarized this criterion in terms such as: denial of justice may be filed if the suitable courts deny to accept a claim, if they delay unduly, or if they administer justice in a grossly deficient manner.

The principles of international law that set at any stages establish a wide scheme that must be respected by national regulations. In essence, these principles operate as expressions of international standards requiring the initiation of an appropriate and civilized justice system as contemplate in received international and national practice. Thus, the conception of a minimal standard of international law[28] has both a substantive and a procedural side. Heretofore, frequent of the issues of procedural readiness have in practice been evaluated under fair and equitable treatment standards.[29]

E. Emergency, Necessity, Armed Conflicts, and Force Majeure

The rule of law relevant to difficult times of economic and social turmoil is in the straight interest of both the host country and foreign investors. The host country's duty is to maintain adequate legal adaptability as respects difficult circumstances without provoking any liability to foreign investors. Investors and their countries of origin conscious that throughout longer investment projects, difficult periods can emerge and that one of the aims of the legal framework established by investment treaties is to protect investments throughout such tough times. [30]

Beneath customary international law, the themes of feasible or unavoidable harm to foreigners throughout times of serious disorder and possible coverage of security by the host country have extensive occupied arbitral tribunal. Vary of these disputes were ruled before 1930 and involved the effects of rioting in Central and Latin American states. Following the conception of force majeure, the fundamental results that emerge from these cases are encapsulated in the principle that the host country is not responsible for exceptional events of social discord and disorder. Nevertheless, this basis is permitted by the host country's obligation to examine due diligence, i.e. to use police and military forces to protect the interests of foreigners to the range possible and practical under the situation, both before the event and when it open out. It is presumed that the plaintiff has the responsibility of demonstrating that the host was neglectful,[31] no claim will be

[27] ICSID, Azinian v Mexico Case No. ARB(AF)/97/2 (November 1, 1999).
[28] Dolzer and Schreuer, *Principles of International Investment Law*.
[29] Dolzer and Schreuer.
[30] Dolzer and Schreuer.
[31] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1980).

received if the host country can show that the foreigner has accepted the equal behavior as subjects of the host country.

In the proceeding of AAPL vs Sri lanka, Sri Lanka was declared responsible for attacks carried out by its military forces against investor staff and equipment in the context of anti-terrorist activities. In the court's perspective, government authorities should have taken precautions to settle the circumstances serenely before initiate an armed strike on the investor's equipment.

In the implementation of the non-responsibility principle and its restriction, many things will be based on the condition of every case. Important disruptions in the host country's economy, the usual necessity principle in cramped circumstances allows the host country to fail to fulfill its obligations during such times without liability consequences arising for breach of its international obligations.[32]

F. Preservation of rights

The purpose and objective of the investment agreement is to enhance the investment conditions and not reduce the rights of investors allowed in other agreements or in the domestic laws of the host country. The OECD Draft Convention 1967 sets out: "Where a matter is covered both by the provisions of this Convention and any other international agreement nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party from benefiting by the provisions that are most favourable to him: The classic formulation of the BIT is found in the treaty between Germany and Poland:

> If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contains a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty. This clause reflects the general rule that investment agreements are intended to improve the investment climate and not to diminish the rights and privileges enjoyed by investors. [33]

G. Arbitrary or discriminatory measures

Forbidding of arbitrary treatment is included in the classic standards found in investment agreements. By definition, any rule-of-law-oriented country will prohibit

[32] Brownlie.
[33] Brownlie.

arbitrary acts, and foreign investors rightly expect that the host country will adhere to this standard. in practice agreements, rules against arbitrariness are often combined with prohibitions on discrimination (must not interfere with investment by arbitrary or discriminatory measures), it is sometimes assumed that the two standards are largely identical, and that they will indeed overlap in many respects. Nevertheless, different lists of the two standards, usually distinguish by the term 'or', indicate that every should be assigned its own designation and scope.[34]

Regarding the sense of 'arbitrary' and its application to particular cases, different approaches have been used. One clause reading refers only to the usual meaning and tries to extrapolate this meaning from the common law dictionary. For example, the courts in Lauder v Czech Republic and subsequent decisions have consulted the Black's Law Dictionary according to which the 'i' means 'depending on individual discretion' or refers to an action 'based on prejudice or preference rather than reason on fact.[35]

Given the nature and extent of the concept of arbitrariness, it is not surprising to say that any arbitrary action will also violate fair and equitable treatment standards.[36] the issue has come to the fore especially under NAFTA, which contains a fair and equitable treatment clause (Article 1105), [37](Dolzer, 2008) however, there is no explicit prohibition of arbitrary treatment. the courts established under NAFTA have considered that arbitrary treatment also violates the terms of fair and equitable treatment. The tendency to combine the two standards can also be found in the implementation of bilateral agreements.

Discrimination can occur in various forms. This could be hinge on race, belief, political affiliation, disability and a number of other criteria. In the sense of foreign investment treatment, the most common issue is unfairness on the basis of nationality. In reality, discrimination on the basis of nationality is dealt with in investment agreements through two specific standards: national treatment and most favorable treatment by nation. [38]

Discrimination findings are independent of domestic law violations. In fact, domestic laws can be the cause of violations of international standards. In Lauder v The

[34] ICSID, Azurix Corp. v The Argentine Republic Case No. ARB/01/12 (July 14, 2006).
[35] UNCITRAL, Lauder v Czech Republic (September 3, 2001).
[36] S. Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice,” *British Yearbook of International Law* 70, no. 1 (January 1, 2000): 99–164, https://doi.org/10.1093/bybil/70.1.99.
[37] Dolzer and Schreuer, *Principles of International Investment Law*.
[38] Dolzer and Schreuer.

Czech Republic, the applicable BIT offers protection against 'Arbitrary and discriminatory measures'. The court held :

In order for an act to be discriminatory, it is not necessary to violate domestic laws, because domestic laws may contain provisions discriminatory against foreign investment, or may lack provisions prohibiting discrimination against foreign investment. The practice of addressing discrimination concentrates on two main issues. one concerns the basis of comparison for the alleged discrimination. the other concerns the question whether the fact of unequal treatment is sufficient. [39]

H. National Treatment

The clause on national treatment is included in the standard list of bilateral investment agreements. in the typical version in European BITs, the clause states that foreign investors and their investments are 'treated with a treatment no less favorable than that which the host country agrees to give its own investors'. The purpose of the clause is therefore to oblige the host country not to make negative distinctions between foreign and national investors when enacting and implementing rules and regulations and thereby to promote the position of foreign investors to a level befitting that of nationals.

This objective fundamentally differs from the concept of 'National treatment' as it was known decades ago, especially as part of the proposed 'New International Economic Order'. The concept is meant to limit, as far as possible, any limitations that foreign investors can derive from international law. The possibility that national laws may be less protective for foreign investors than the general rules of international law is anticipated in the current BIT with the wording 'no less favorable', thereby acknowledging that other rules may be more favorable. Therefore, a positive distinction is possible and even becomes mandatory where the general standard of international law is higher than that of the national one.[40]

I. Most-favoured-Nation Treatment

The Most Favored Nation clause is one of the oldest standards in international economic relations or international investment. These are the principles of the WTO and are essential instruments in economic liberalization in the investment sector by spreading more favorable treatment from one investment agreement to another. These standards

[39] Dolzer and Schreuer.
[40] Rudolf Benhardt, *Encyclopedia of Public International Law* (North-Holland, 1992).

require interpretation and their application requires careful analysis and on a case by case basis. [41]Most Favored Nation which is then referred to as MFN has two concepts, namely:

a. *UnConditional MFN*: If country A is obliged not to discriminate against country B, then everything that country A does to country C must also be the same as country B's unconditional obligations.[42]
b. Conditional MFN: Where two countries have an agreement using conditional MFN. If country A provides favorable treatment to country C based on an agreement, then country A must also provide the same treatment to country B but on condition that country B fulfills the terms in the intended agreement specifically asking country B to offer country A treatment country C offers to country A. Thus, country B's MFN rights are conditional. Country B gets special treatment only if it is willing to obey the terms set out in the agreement. [43]

J. Transfer of funds

Transfer funds is one part of the standard in the security of foreign investment agreements, this has to do with the development and benefits of the investment itself. "By establishing a host country 's obligation to permit the payment, conversion and repatriation of amounts relating to an investment, a transfer provision ensures that, at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment".[44]

The types of transfers protected under an agreement largely depend on the type of investments covered, Concerning the different types of investments, first Inward Investment (i.e. investment made in the host country by investors of foreign countries), "the transfers covered typically include funds that are needed to make the initial investment by the foreign investor and the proceeds of any such investments, including profits and the proceeds of any sale or transfer. These are the types of transfers that are of primary importance in most bilateral and regional investment agreements".[45] Second,

[41] Malik, "The Full Protection And Security Standard Comes Of Age: Yet Another Challenge For States In Investment Treaty Arbitration."

[42] FX Joko Priyono, "Prinsip Most Favored Nations Dan Pengecualiannya Dalam World Trade Organization," Masalah-Masalah Hukum 42, no. 4 (2013): 593–600, https://ejournal.undip.ac.id/index.php/mmh/article/view/13141.

[43] Priyono.

[44] UNCTAD Series on Issues in International Investment Agreement, "Transfer of Funds" (United Nations, 2000).

[45] UNCTAD Series on Issues in International Investment Agreement.

"Outward Investment (i.e., investment made in other countries by the nationals or residents of the home country) typically also covers funds needed by such nationals to make such outward investment." [46]

CONCLUSION

The rights of a country to control the entry of foreign investment ("*controls by the host state*") is inexhaustible because it is a rights that run through sovereignty. The present system of legal regulation of transnational investment relations covers various legal rules, which are contained in various sources and differ from one another according to their nature and legal consequences. Arrangements regarding the form of controls by the host state can take the form of requirements and guarantees appointed to investors. *Foreign investment treaties* are made with the presumption that the guarantees provided to foreign investors by the host state's national legal system may not be sufficient to cover all objectives, the main objective of which is to create an "investment-friendly" atmosphere designed to attract the desired foreign investment of the host state. In creating an "Investment-friendly" atmosphere there are Standards of Protection regulated in treaties as mentioned by Rudolf Dolzer and Christoph Schreuer in the book Principles of International Investment Law, which can be in the form of: (1) Fair and equitable treatment; (2) *Full protection and security*; (3) The *umbrella clause*; (4) *Access to justice, fair procedure, and denial of justice*; (5) *Emergency, necessity, armed conflicts, and force majeure*; (6) *Preservation of rights*; (7) *Arbitrary or discriminatory measures*; (8) *National treatment*; (9) *Most-favoured-nation treatment*; dan (10) *Transfer of funds*. However in the application such as in Rempang Island, Batam, such protection of investor has been marginalized the indegious people right. So balancing investor rights and indegnious people right is a necessary, otherwise the investment is only benefit foreign investor no the local people surrounding it.

[46] UNCTAD Series on Issues in International Investment Agreement.

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