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TOPIC OF THIS EDITION

DYNAMICS AND DEVELOPMENT OF INVESTMENT LAW IN THE DIGITAL AGE

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MINISTRY OF LAW AND HUMAN RIGHTS OF RI

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EDITORIAL BOARD

Indonesian Law Journal
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FROM EDITOR'S DESK

We thank God Almighty for publishing the Indonesian Law Journal (ILJ) Volume 15, No. 1 of 2022. The ILJ is a peer-reviewed journal published in English and intended to disseminate scientific articles and analyze legal issues from academics, researchers, observers, practitioners, and all patrons in Indonesia. As one of the scientific journals in law published by the National Law Development Agency – Ministry of Law and Human Rights of the Republic of Indonesia, the ILJ provides a forum for legal ideas to respond to legal problems in recent times. The ILJ is in line with the function of the National Law Development Agency, which is to develop and foster national law in Indonesia.

The Indonesian economy now and in the future requires policy breakthroughs and dynamic economic programs to achieve quality and equitable economic growth. The digital era has changed people's lifestyles, including the ease of payment transactions and digital investments. The digital age makes investments easier to access and faster because they do not require many requirements and can constantly be monitored.

Indonesia's economic growth and digital investment momentum are valuable and must be maintained. One way is to build the proper legal framework. The legal framework in question is a legal framework that can substantively follow technological developments and guarantee legal certainty and protection while increasing Indonesia's competitiveness as a digital investment destination.

Therefore, the ILJ Volume 15 No. 1 of 2022 has the theme "The Implication of The Prolonged Uncertainty of Covid-19 to The Contract Performances" and «Dynamics and Development of Investment Law in The Digital Age». In ILJ Volume 15 No. 1 of 2022, 6 (six) writers with various backgrounds discuss this matter. Start with the article of Fahrurozi Muhammad, which raised the title related to "Investment in Digital Age: The Future Role of Notary in Company Establishment". In his article, the author tries to explain the introduction of the Limited Liability Company (LLC) with a single shareholder in Law No. 11 of 2020 on Job Creation omits Notary involvement in LLC establishment.

The following article by Bryan Surya Oktaviandra is "Closing Legal Loopholes on Indonesia Investment Law in Digital Age". This article provides a substantial discussion on the influence of the digital age on investment activity and data localization requirements from the standpoint of Indonesia. This study seeks to understand the existing investment law regulations in this digital era by employing normative juridical methods.

The third article written by Clarissa Nadya Arina is "Logical Consequences in Indonesia's Position in Investment Disputes in Arbitration Forum ICSID." In this article, the author explains the termination of BITs unilaterally by Indonesia, which has implications

for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum, the aspiration of ISDS review in the Regional Comprehensive Economic Partnership (RCEP) has implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum. The counter-claim discourse in the BIT and/or ISDS has implications for Indonesia's position in investment disputes at the ICSID arbitration forum.

The fourth article, "Exploring Software Patent as A Possible Solution to Algorithm's Lack of Transparency," was written by Ikechukwu P. Ugwu. This article examines the possibility of solving the opacity of algorithms through patent law. The opacity of algorithms necessitated attempts to make it more transparent and prevent intentional secrecy, breach of privacy, discriminatory and biased decisions attributed to it, etc. As part of intellectual property rights, patent protection can solve or minimize these issues.

There is also an article related to "Contract Renegotiation Due to The Covid-19 Pandemic from The Hardship Perspective" written by Pardomuan Gultom and Rumainur. The authors examine the existence of the COVID-19 pandemic affects the implementation and fulfillment of obligations in the agreement. Force majeure and hardship are based on different ratios. The hardship clause is needed for the reasons: it can be used as a basis for overcoming in case of problems or failure to contract (frustration), especially long-term contracts with a very high value.

Furthermore, a book review, "Indonesian Private International Law" by Dr. Afifah Kusumadara" was reviewed by Viona Wijaya as the first book review article in ILJ. We primarily focused on compiling fresh ideas generated by both national and foreign experts as a partner for the Government in the developing National Law System. For this reason, it is necessary to add another kind of manuscript in the form of a book review. From her point of view, the author explains that the book comprises six chapters, explaining the topics systematically and thoroughly. It moves from fundamental to contemporary matters of private international law. For non-Indonesian readers, a brief history of Indonesian private international law in the first chapter will help to understand the country's context. The complexity of legal pluralism and the challenging road to reach legal uniformity, especially in this field, are explained concisely. This short but essential topic is crucial for non-Indonesian readers to build further understanding of the application, development, and modernization of the law along with its challenges.

So this is the entire article published in the ILJ Volume 15 No. 1 of 2022. We want to express our gratitude and most profound appreciation to all contributors, Editorial team members, Reviewers, and Mitra Bestari for their progressive contribution and excellence to the ILJ this edition. We hope that this fine collection of articles will be a valuable resource for legal practitioners, readers, and researchers and will stimulate further research into the vibrant area of law and social sciences and contribute to the development of national law in the future.

Editor of Indonesian Law Journal

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INVESTMENT IN DIGITAL AGE: THE FUTURE ROLE OF NOTARY IN COMPANY ESTABLISHMENT

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ABSTRACT

The introduction of the Limited Liability Company (LLC) with a single shareholder in Law No. 11 of 2020 on Job Creation omits Notary involvement in LLC establishment. Previously, Law No. 40 of 2007 on Limited Liability Company regulated that anyone who wants to form an LLC needs a Notarial Deed. One of the reasons for this omission is the advancement of technology, where electronic applications replace many investment-related professions. This paper uses the normative juridical method to assess the future role of the Notary in the investment sector, particularly in LLC incorporation. This paper finds that the Notary may see its role reduced in the future. However, it will be difficult for them to be completely uninvolved as long as the concept of LLC in Indonesia is basically a private partnership as regulated by Civil Code, where there should be at least 2 (two) founders to form a company.

Keywords: Notary, Limited Liability Company, Investment.

A. Introduction

Notary professional faces a dilemma regarding their role in the future. With the ease of conducting any work with technology, there is a notion that any legal profession, including Notary, has to adapt or reform their business model. Lauri (2018) believed that with the rise of 'Artificial-Intelligence' (AI), technology can replace nearly every legal profession.[1] It is believed that within a few years, AI will be taking over or at least affecting a significant amount of work now done by legal practitioners. This phenomenon poses a threat to the future role of legal practitioners.[2]

The concern that technology could be taking over legal practitioners' jobs started back in 1987.[3] This means back then, there was already a common belief among experts that in the future,

1 Lauri Donahue, A Primer on Using Artificial Intelligence in the Legal Profession (Massachusets: Journal of Law and Technology Digest, 2018), p. 11.
2 Ibid.
3 Teng Hu and Huafeng Lu, Study on the influence of Artificial Intelligence on Legal Profession In Proceedings of the 5th International Conference on Economics, Management, Law and Education 2019 (Paris: Atlantis Press, 2020) pp. 964-968.

technology could play a crucial role in the legal field. Even though the technology at that time was not as advanced as today.

Sobowale (2016) suggested that technology plays a key role in transforming legal professions.[4] He believes that technology can help legal professionals to perform their work.[5] For example, to access laws and regulations for legal research, we can simply access the internet to search for the desired law that we are looking for. Back then, we must find the laws manually in certain government offices, bookstores, or libraries. Technology can also be really helpful in supporting every legal professional to manage their work precisely. Currently, the great majority of legal documents are prepared, signed, filed, stored, and delivered to relevant parties electronically.[6] This proves that technology is an effective tool to support the legal profession as well.

The rapid development of technology allows everyone to use it on almost everything. Zhao and Zhang (2021) revealed that for trade and investment purposes use advanced technology universally.[7] For example, we find large numbers of online trading applications that connect the global audience with the stock market.[8] Novice investors can use these applications with ease. What is apparent is that the investors are no longer needed to go to the investment manager or go to bank-run brokerage firms to trade their money.[9]

As online investment is having a surge, Norrestad (2022) announced that there were around 9.15 United States Dollars (USD) billion market sizes in the global online trading market.[10] He forecasted that it will rise at the rate of 5.1% per year, and he also expected it to increase up to 12.16 billion USD in 2028.[11]

4 Julie Sobowale, "How Artificial Intelligence Is Transforming the Legal Profession", ABA Journal, https://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession (accessed 5 May 2022).
5 Ibid.
6 Sandra Day O'Connor, "The Role of Technology in the Legal Profession". Law Prac. Mgmt. 20 (1994): 24.
7 Dawei Zhao and Wenting Zhang, Robo-advisor and Expert Advisor: Artificial Financial Intelligence in China (Singapore: Springer, 2021) p. 117-127.
8 Shama Hyder, "How A New Generation of Investors is Changing Online Trading," Forbes, https://www.forbes.com/sites/shamahyder/2021/03/05/how-a-new-generation-of-investors-is-changing-online-trading/?sh=5567b6061652 (accessed 15 May 2022).
9 Ibid.
10 Fanny Norrestad, "Global Online Trading Market in 2020, with Forecasts from 2021 to 2028," Statista https://www.statista.com/statistics/1260026/forecast-global-online-trading-platform-market/ (accessed 12 May 2022)
11 Ibid.

(Source: Statista, Global online trading market in 2020, with forecasts from 2021 to 2028 in billion U.S. dollars, https://www.statista.com/statistics/1260026/forecast-global-online-trading-platform-market/ accessed 12 May 2022)

This staggering number urges trading services to engage technology to provide better services. That means the online applications will gradually replace the traditional broker. In the long run, another investment-related profession may also be affected. Since Notary is one of the professions that play a fundamental role in company establishment, its involvement in that matter can and may be replaced.

In Indonesia, Notary holds a very decisive role in company establishment, especially in a Limited Liability Company (LLC).[12] The Notary is also involved in the establishment of a Private Partnership, a Firm Partnership, a Limited Partnership,[13] and a Cooperative.[14] This highlights the importance of the Notary role in starting multiple business entities in Indonesia. However, with the introduction of LLC with a single shareholder as regulated on Law No. 11 of 2020 on Job Creation (hereinafter called Law on Job Creation), their role is now partially diminished. It is now possible for everyone to start an LLC without the involvement of the Notary.[15] This paper examines this recent event that shifts the Notary's role in investment, particularly in company establishment.

B. Research Method

This paper uses the normative juridical method, which focuses on secondary data.[16] The primary data sources in this paper are regulations and other scientific research. The type of research in this paper is qualitative research with a descriptive approach.[17] The use of library research in this article is based on the fact that the Dutch Civil Code inherited the Notary function in the Indonesian legal system, and in its development is

12 Fauzan Salim, "Peran Notaris Dalam Pengesahan Pendirian Perseroan Terbatas Melalui Sistem Administrasi Badan Hukum (SABH)." Recital Review 2, No. 2 (2020), p. 140-156.
13 Krisnadi Nasution and Alvin Kurniawan, "Pendaftaran Commanditaire Vennotschap (CV) Setelah Terbitnya Permenkumham No 17 Tahun 2018." JHP17: Jurnal Hasil Penelitian 4, No. 01 (2019), p. 13.
14 I Gede Angga Permana and Lalu Wira Pria Suhartana. "Peranan Notaris Dalam Pendirian Koperasi Sebagai Badan Hukum," Jurnal Education and Development 9, No. 3 (2021), p. 586-590.
15 Biro Humas, Hukum dan Kerjasama, "UU Cipta Kerja Mungkinkan PT Didirikan Tanpa Akta Notaris, Menkumham: Ini Komitmen Pemerintah Wujudkan Kemudahan Berusaha," https://www.kemenkumham.go.id/publikasi/siaran-pers/uu-cipta-kerja-mungkinkan-pt-didirikan-tanpa-akta-notaris-menkumham-ini-komitmen-pemerintah-wujudkan-kemudahan-berusaha (accessed 12 May 2022).
16 Sri Mamudji et al., Metode Penelitian dan Penulisan Hukum, (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), p. 6.
17 Ibid, p. 4.

regulated by various legal instruments. Therefore, to understand the changing role of the Notary in investment, this paper uses regulations as primary legal materials. This paper also uses books, journals, news articles, and other official statements as secondary legal materials.

C. Discussion

1. The Role of the Notary

The Notary is one of the oldest legal professions.[18] Junyu (2020) revealed that Notary can be classified as a legal expert (jurist).[19] Although Notary is closely related to the civil law system, there are notaries in common law system countries as well. In the United States (U.S.), for example, advocates can be appointed by the Secretary of State as the Notary public without any special education required.[20] The authority of the Notary public in the U.S. is nothing more than the creation of a limited certificate. In New York, Notary duty is only limited to legalization or determination of the certainty of the date and the signature of the person who affixed it as regulated under New York Executive Law on Notary Public License Law (May 2020).[21]

> Article 135 New York Executive Law on Notary Public License Law 2020
>
> Every Notary public duly qualified is hereby authorized and empowered within and throughout the State to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages, and powers of attorney and other instruments in writing; to demand acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and to protest the same for non-acceptance or non-payment, as the case may require, and, for use in another jurisdiction, to exercise such other powers and duties as by the laws of nations and according to commercial usage, or by the laws of any other government or country may be exercised and performed by notaries public, provided that when exercising such powers he shall set forth the name of such other jurisdiction.
>
> A Notary public who is an attorney at law regularly admitted to practice in this State may, in his discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his client in respect of any matter, claim, action or proceeding.
> For any misconduct by a Notary public in the performance of any of his powers such Notary public shall be liable to the parties injured for all damages sustained by them. A Notary public shall not, directly or indirectly, demand or receive for the protest for the non-payment of any note or for the non-acceptance or non-payment of any bill of exchange, check or draft and giving the requisite notices and certificates of such protest, including his notarial seal, if affixed thereto, any greater fee or reward than 75 cents for such protest, and 10 cents for each notice, not exceeding five, on any bill or note. Every Notary public having a seal shall, except as otherwise provided, and when requested, affix his seal to such protest free of expense.

The changing role of the Notary is nothing new. In the ancient Roman era, Notary evolved from transcribing senate speeches (Cato de Oudere) into the private writers for the Caesars.[22] Subsequently, the Notary started to conduct various jobs in the ruler's circle.[23] However, the documents they produced were not classified as official documents

18 Simeon Gelevski and Darko Golić, "Notary," Pravo-Teorija I Praksa 25.3-4 (2008), p. 20-30.
19 Ma Junyu, "Notary According to Civil Law and Common Law Closely Related to International Transactions," Jurnal Akta Vol. 7 No.3 (2020), p. 285-291.
20 Ibid.
21 Ibid.
22 Anand Ghansham, Karakteristik Jabatan Notaris di Indonesia. (Jakarta: Prenada Media, 2018), p. 5.
23 Ibid.

or authentic deeds.[24] Anand (2018) claimed that the concept of the Notary was slightly different in Paris, France. The monarch appointed the Notary and was classified as a public official (ambtenaar).[25] This very concept was adopted by the Netherlands when France occupied them. Hence, Indonesia started to introduce it during the Netherlands' colonialism spell in Indonesia.

The Notary was introduced in Indonesia as a double job for the Secretary of Shipping (College van Schepenen) in 1624, and in 1625, it became an independent profession that was separated from the secretary role.[26] The evolution shows that Notary is a profession which familiar with various areas of work and it keeps evolving until today.

In Indonesia, the Notary holds a strategic role thanks to its title as 'general official' (pejabat umum).[27] The title is derived from the Dutch language 'Openbare Ambteneran' in Article 1868 Civil Code (Burgerlijk Wetboek).[28] This Openbare Ambteneran' title is also mentioned in article 1 Law No. 30 of 2004 on Notary Profession which was partially amended by Law No. 2 of 2014 (hereinafter called Law on Notary Profession), which says a Notary is a general officer who is responsible for creating authentic deed and other authority. This means that the term 'general official' in this case is limited to the creation of authentic deeds and other responsibilities inborn with this specific law only.[29] From the examples above, we can assume that Notary in Indonesia (Civil Law) and U.S. (Common Law) hold a similar fundamental principle role, that is creating authentic documents.

Interestingly, there is a recent development where the Notary is responsible for more than just a civil issue. One of the examples is its mandatory task to report a suspicious transaction concerning money laundering.[30] According to Article 41 Law No. 8 of 2010 on Prevention and Eradication of Money Laundering jo. Article 3 Law No. 43 of 2015 on Reporting Party on Prevention and Eradication of Money Laundering, Notary is one of the certain professionals as reporting party which should report any indication of money laundering

24 Ibid.
25 Ibid, p. 6.
26 Ibid.
27 Syafran Sofyan, "Notaris Openbare Ambtenaren" Syafran Sofyan, https://www.jimlyschool.com/baca/9/notaris-openbare-amtbtenaren-syafran-sofyan (accessed 9 May 2022).
28 Syahrul Borman, "Kedudukan Notaris Sebagai Pejabat Umum Dalam Perspektf Undang-Undang Jabatan Notaris." Jurnal Hukum dan Kenotariatan 3.1 (2019), p. 74-83.
29 Edwar Edwar, Faisal A. Rani, and Dahlan Ali. "Kedudukan Notaris sebagai Pejabat Umum Ditinjau dari Konsep Equality Before the Law," Jurnal Hukum & Pembangunan 49, No. 1 (2019), p. 180-201.
30 Nurananda Budi Muliani, "Tanggung Jawab Notaris Sebagai Pelapor Transaksi Keuangan Mencurigakan Dalam Aplikasi Gathering Reports & Information Processing System (GRIPS)," Indonesian Notary Vol. 1. No. 03 (2019), p. 13.

by its clients to Indonesian Financial Intelligence Unit (PPATK). The Notary must provide any data and information required by PPATK if necessary to help their financial analysis or investigation.

The involvement of the Notary as reporting party in money laundering indicates that Notary has more responsibilities than just what is regulated under Civil Code and Law No. 30 of 2004 on the Notary Profession. Despite the conflicting issue that Notary is a general officer who should only focus on private and administrative matters, there is no denying that Notary has another responsibility by the law, which it has to comply too. This is another example of how the Notary role evolves again.

The emergence of the digital era also gives the challenge to the Notary. Sesung & Mayasari (2022) argues that the Notary should have skills, knowledge, and attitude to understand digital technology.[31] They urge the Notary to master technology not only to help their work but also to maintain their professional ethics as well. The Notary is also facing a challenge with the yearning for e-Notary or Cyber Notary, in which such practice is already available in several developed countries such as Italy and Belgium.[32] The rapid development of technology causes this transformation, and it is the case where the Notary business model is affected.

2. Notary in Investment

In Indonesia, Notary also plays a crucial role in the investment sector. Nearly every commercial enterprise/ business entity in the form of Partnerships is established through notarial deeds such as Private Partnership, Firm Partnership, Limited Partnership,[33] Cooperative,[34] and LLC. A Notarial deed is needed because these enterprises have similarities in that they must be established with at least 2 (two) people under a certain agreement.

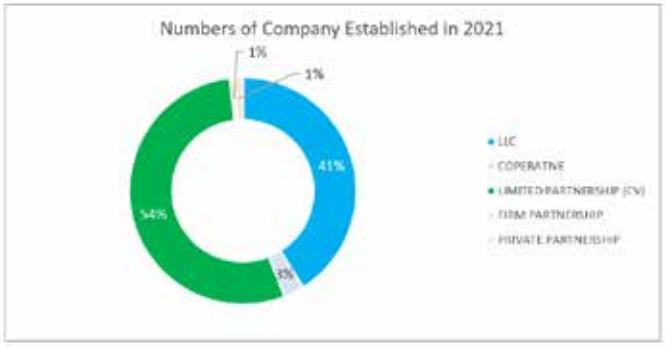
In terms of the Investment Law regime in Indonesia under Law No. 25 of 2007 on Investment, foreign investment can only be established under the LLC form. This made LLC the second most popular enterprise form in Indonesia in 2021. As there were 93.454 LLCs established or took 41% during that year, as suggested below.

31 Rusdianto Sesung and Citra Mayasari, "Ethics of the Notary Profession and Challenges in the Digital Era." Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences 5.1 (2022), p. 4176-4184.

32 Wanda Ayu, "E-Notary dalam Era Industri 4.0 dan Sosial 5.0: Kebutuhan atau Ancaman," Faculty of Law Universitas Indonesia, https://www.ui.ac.id/fhui-gelar-seminar-melihat-peluang-dan-ancaman-notaris-siber-di-era-digital/ accessed 14 May 2022.

33 Ministerial Law and Human Rights Regulation No. 17 of 2018 on Registration of Limited Partnership, Firm Partnership, and Partnership.

34 Ministerial Law and Human Rights Regulation No. 14 of 2019 on Coperative Incorporation.



(Source: Directorate General for Legal Administrative Affairs, The Ministry of Law and Human Rights, data as of 12 May 2022)

Historically, LLC in Indonesia is based on Private Partnership (Van Maatschap). This can be seen in its establishment, where both need to be agreed upon by at least 2 (two) people as regulated under Civil Code. Article 1653 Civil Code says that LLC is another form of partnership with legal entity characteristics (Van Zedelijke Ligchamen). This characteristic can be concluded from the original text of Article 1653 Civil Code:

> Article 1653 Indonesian Civil Code
>
> Other than the pure private partnership, the association of people as the legal entity is also acknowledged by the law.

This clause means that the Civil Code sees LLC as another acceptable form of Private Partnership as it is basically an association of people established by 2 (two) people or more in principle. Although LLC and Private Partnerships have different characteristics, especially in their responsibility and liability, their basic principles are the same according to Civil Code. LLC then was regulated more comprehensively under Law No. 40 of 2007 on Limited Liability Company (hereinafter called Law on LLC as amended by Law on Job Creation). Article 1 Section (1) defines LLC as an association of capital, established by agreement, and conducting business with authorized capital in the form of shares.

> Article 1 Section (1) Law on LLC
>
> Limited Liability Company, hereinafter referred to as the Company, means a legal entity constitutes the association of capital, established based on an agreement, to conduct business activities with the Company's Authorized Capital divided into shares or an individual legal entity that complies with Small and Micro Enterprise criteria and which satisfies the requirements as stipulated in this Law, and its implementing regulations.

From the phrase "…established based on an agreement…" above, which can be defined as establishing an LLC, the founders have to create an agreement before submitting it to the Ministry of Law and Human Rights online application.[35] Article 1320 Civil Code regulates that this agreement must also comply with the basic principle of civil law agreement.

> Article 1320 Indonesia Civil Code
>
> In order to be valid, an agreement must satisfy the following four conditions:
> 1. there must be the consent of the individuals who are bound thereby;
> 2. there must be a capacity to conclude an agreement;
> 3. there must be a specific subject;
> 4. there must be an admissible cause.

Furthermore, Article 7 Section (1) of Law on LLC, as amended by Law on Job Creation, states that such agreement referring to Article 1 must be formed in Notarial Deed.

35 Agus Sardjono, et al., Pengantar Hukum Dagang, (Jakarta: Raja Grafindo Persada, 2014), p. 4.

> Article 7 Section (1) Law on LLC as amended Law on Job Creation
>
> The Company shall be established by 2 (two) or more persons based on a notarial deed drawn up in the Indonesian language.

This article highlights the mandatory of forming it with the Notarial Deed. In short, the agreement to form an LLC is specified and distinctive from the common agreement recognized by Article 1320 Civil Code. Article 7 Section (4) Law on LLC as amended by Law on Job Creation also mentions that LLC legal entity status is obtained after it is registered to the Minister of Law and Human Rights.

> Article 7 Section (4) Law on LLC as amended by Law on Job Creation
>
> The Company obtains legal entity status after being registered to the Minister and acquires proof of registration.

This is another significant difference between a Private Partnership and an LLC. A private partnership is legally formed after the parties agree to create a private partnership as per Article 1624 Civil Code. While we understand that LLC is a Private Partnership, it bears legal entity status after being registered with the Minister of Law and Human Rights. This means that legally, as long as it is not registered in the Ministry, it is not an LLC.

Notary plays a considerable part in LLC establishment as its deed is the mandatory requirement before it can be registered and obtains its legal entity status. As previously mentioned, LLC is the only acceptable enterprise form for domestic and foreign investors to invest in Indonesia according to Law No. 25 of 2007 on Investment.

> Article 5 Law No. 25 of 2007 on Investment
>
> (1) Domestic capital investment may be conducted in the form of an enterprise, which is in the form of a legal entity, non-legalized entity, or sole proprietorship, in accordance with the provisions of laws and regulations.
> (2) Foreign capital investment shall be in the form of a limited liability company under the laws of the Republic of Indonesia and domiciled in the territory of the Republic of Indonesia unless stipulated otherwise by prevailing laws and regulations.
> (3) Domestic and foreign investors which are undertaking capital investment in the form of a limited liability company undertake this by:
> a. subscribing to shares at the time of the establishment of the limited liability company;
> b. purchasing shares; and
> c. other ways under prevailing laws and regulations.

LLC as a prominent form of investment is not just a phenomenon in the Indonesian economy. As an association of capital, LLC is known worldwide for its ease of obtaining funds through the stock market.[36] In conclusion, LLC is clearly above other forms of partnership in terms of gaining funds.[37] Hence, we can conclude that Notary has a significant role in investment. Particularly as an entrance for the investors in establishing the LLC before acquiring other permits.

3. LLC with Single Shareholder

As a universally known type of enterprise, LLC transforms to adjust itself

36 Fahrurozi Muhammad, "Enforcing Omnibus Law: Formalizing Micro, Small, And Medium Enterprises In Indonesia Using Behavioural Science." Indonesian Law Journal 14.2 (2021), p. 95-118.
37 Agus Sardjono, Op. Cit., p. 73.

to the dynamic business environment. One of the LLC's most important and globally acknowledged transformations is the single shareholder concept. Buxbaum (1990) believed that a single person is sufficient to incorporate a company, and it also suffices for every company only to have a single shareholder.[38] Single shareholder for LLC is relatively a new concept. It was first introduced in European Union (E.U.) through the 1989 Company Law Directive (89/667/EEC) on Single-Member Private Limited Liability Companies.[39] This directive was aimed to encourage SMEs and entrepreneurship in E.U. countries. The single shareholder model then was adopted by E.U. Countries, the United Kingdom, Malaysia, and Singapore.[40] Just recently, Indonesia also followed the trend by adopting the single shareholder concept into its corporate legal system.

Since Law on Job Creation came into force, LLC has a new definition to accommodate the single shareholder concept. Other than it must be established with an agreement, it opens up the opportunity for a single person to establish a company.[41] What is more interesting is that the LLC can be formed through a statement letter from the founder, which gives an alternative to a Notarial deed for its establishment. It is regulated under Article 153A Section (1) and Section (2) Law on Job Creation.

> Article 153A
>
> (1) Limited liability company that complies with Micro and Small Enterprise criteria can be incorporated by 1 (one) person.
> (2) The establishment of a Limited liability company for Micro and Small Enterprise as stated in section (1) conducted by establishment statement letter created in the Indonesian language.

Article 153A section (2) is revolutionary because this means that Notarial Deed is no longer needed as previously regulated in Article 7 Section (1) Law on LLC before the amendment. This article marks a progressive measure in the Indonesian legal system in unprecedented Covid-19 times.[42] This was also the first legal framework of what is known today as an LLC with a single shareholder in Indonesia. To optimize its implementation, the government responded by enacting Government Regulation No. 8 of 2021 on Authorized Capital, Establishment Registration, Amendment, and Dissolution of Limited Liability Company which Satisfies Micro

38 Richard M. Buxbaum, "Commercial Law-Single Shareholder Company." The American Journal of Comparative Law (1990), p. 251-269.
39 Muhammad Faiz Aziz and Nunuk Febriananingsih, "Mewujudkan Perseroan Terbatas (PT) Perseorangan Bagi Usaha Mikro Kecil (UMK) Melalui Rancangan Undang-Undang Tentang Cipta Kerja," Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional 9.1 (2020), p. 91.
40 Ibid.
41 Shinta Pangesti, "Penguatan Regulasi Perseroan Terbatas Perorangan Usaha Mikro Dan Kecil Dalam Mendukung Pemulihan Ekonomi Masa Pandemi Covid-19," Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional 10.1 (2021), p. 117.
42 Ibid.

and Small Enterprise Criteria. In addition, The Ministry of Law and Human Rights also enacted Ministerial Law No. 21 of 2021 on Requirements and Procedure of Establishment Registration, Amendment, and Dissolution of Limited Liability Company. These regulations strengthen the Law on Job Creation clause that the Notarial Deed is not needed for the LLC with a single shareholder.

There are mixed receptions to this concept. Some of the critics suggest that the absence of the notarial deed may cause uncertainty for any parties involved.[43] Without Notary involvement, the authenticity of the information submitted will be questionable.[44] Some others question the standing position between a notarial deed and a statement letter.[45] However, there are also positive reactions too which suggest that this concept is widely known in developed countries.[46] Another reaction believes that this will boost the Indonesian economy in general, particularly for micro and small enterprises which suffer a lot during the pandemic.[47]

Despite the arguments, LLC with a single shareholder received plaudit and was waited by many.[48] The number of LLCs shows it was established after its launching which reached 9.112 LLCs established as of 7 April 2022.[49] Although it is still too early to judge, the numbers are quite promising. One of the determinant factors of these numbers is the absence of a notarial deed in its establishment. According to the world bank, Notary service in starting a business was deemed costly, complex, and time-consuming.[50] It is also considered a strong reason why the lawmakers agreed to reduce the Notary role in LLC establishment or to provide an alternative to its service.[51] Previously, the government tried to force the Notary to reduce their fee for

43 Cahyani Aisyah, "Implications of The Absence of Notary Act on The Establishment, Amendment, And Discontinuation of Single Owner Corporation," Majalah Hukum Nasional 51 (1) (2021), p. 41-58.
44 Siti Fauziah Dian Novita Sari, "Peran Notaris Dalam Proses Pembuatan Akta Pendirian Perseroan Terbatas." Lex Renaissance 3, no. 2 (2018), p. 407-422.
45 Cahyani Aisyah, Op. Cit.
46 Muhammad Faiz Aziz and Nunuk Febriananingsih, Op. Cit.
47 Ibid.
48 Public Relation Division, "Kemenkumham Akhirnya Launching Perseroan Perorangan: Badan Hukum Khas Indonesia" Directorate General for Legal Administrative Affairs, The Ministry of Law and Human Rights, https://portal.ahu.go.id/id/detail/39-berita/2924-kemenkumham-akhirnya-launching-perseroan-perorangan-badan-hukum-khas-indonesia (accessed 17 May 2022).
49 Data taken from Directorate General for Legal Administrative Affairs, The Ministry of Law and Human Rights database.
50 Chandra Gian Asmara and Samuel Pablo, "Menkumham Sebut Permen Notaris Jadi Biang Turunnya EODB RI," CNBC Indonesia, https://www.cnbcindonesia.com/news/20181101173327-4-40192/menkumham-sebut-permen-notaris-jadi-biang-turunnya-eodb-ri (accessed 17 May 2022).
51 Chandra Gian Asmara, "Jokowi Menyadari Urus Izin di Indonesia Itu Masih Ruwet!" https://www.cnbcindonesia.com/news/20190423144647-4-68301/jokowi-menyadari-urus-izin-di-indonesia-itu-masih-ruwet (accessed 17 May 2022).

their service in Ministerial Regulation No. 3 of 2017 on Notary Fee Service for LLC Establishment. This regulation was claimed ineffective as there were Notary reluctant to comply with this law.[52] Cenggana (2019) also found that this Ministerial Law conflicted with the Law on Notary. This put micro and small investors facing the difficult reality that they need to spend quite a sum of money before their business is even established.

The other favorable factor why LLC has many admirers is the people's familiarity with technology. As shown by the online trading trend, the government believes that micro and small investors will be benefited from a simple and easy-to-use application to start a company. The Minister of Law and Human Rights claimed that he is targeting millennials as a market for it.[53] The familiarity with technology is one of the reasons why The Minister is confident that the Millenials can establish a company without hassle. Thus, the application was set up to be as easy as possible.[54]

As the single shareholder concept is technically the newest feature of LLC, the regulators hope that it can benefit from LLC's advantage as a business entity. Although it might be too early to judge, a single shareholder for LLC may be more preferred to replace the traditional LLC in the long run. Since it is significantly more affordable and easier to incorporate. As a result, Notary may see their role reduced if this happens.

4. Comparison with Netherlands and Thailand

Notary investment involvement is generally bound to the civil law system, particularly in starting a business. Common law countries do not use Notary to establish a company because their main task is generally limited to giving legal advice, preparing legal documents, and acknowledging the authenticity of certain documents or statements.[55] However, with Indonesia introducing LLC with a single shareholder, some critics suggest that the absence of a Notary in establishing a company is a common law concept that is deemed not fit to apply in Indonesia. Indonesia indeed adopted the Civil Law system as Indonesia was colonized by the Netherlands. However, to conclude that Indonesia is a Civil Law country might be a stretch. Because technically, Indonesia adopted many legal systems such as Islamic Law and

52 Siti, Damayanti, Penerapan peraturan menteri hukum dan hak asasi manusia nomor 03 tahun 2017 tentang biaya jasa hukum notaris untuk pendirian perseroan terbatas (PT) terhadap penggiat usaha mikro, kecil, dan menengah (UMKM) di kota Pangkalpinang. Diss. Universitas Bangka Belitung, 2018.

53 Biro Humas, "Launching Aplikasi Perseroan Perorangan, Yasonna: Pertama di Dunia!" https://www.kemenkumham.go.id/berita/launching-aplikasi-perseroan-perorangan-yasonna-pertama-di-dunia.

54 Ibid.

55 Ma Junyu, Op. Cit.

Customs Law (Adat Recht).[56] That being said, limiting Indonesia's legal system to Civil Law only is a misconception.

Even in civil law countries, the concept of the Notary varies. Especially in company establishment. This paper will compare the Notary's role in the Netherlands and Thailand. The Netherlands is a proper comparison to Indonesia since we adopt so many regulations from its legal system. Thailand is an even better comparison thanks to its socio-culture and geographical aspects. Both countries use civil law as their primary legal system. So comparing them with Indonesia is pretty relevant.

In the Netherlands, the Notary stands alongside attorneys-at-law, bailiffs, and tax advisors as some of the vital legal professions.[57] Its main task is to draw up deeds, especially concerning family law, property law, and corporate law.[58] Its involvement in corporate law is the reason why Notary holds a strategic role in Dutch investment law too. In other words, Indonesia has a relatively similar role as Notary to the Dutch legal system thanks to its importance in corporate law.

The Dutch Legal system has also acknowledged a single shareholder for LLC since the 1992 Dutch Civil Code (Nieuw Burgerlijk Wetboek).[59] It can be seen in Nieuw Burgerlijk Wetboek translation.

> Article 64 Section 2
> First Chapter of Book 2 on Legal Persons
> Title 4 regarding Companies Limited By Shares
> Nieuw Burgerlijk Wetboek
>
> A company shall be incorporated by one or more persons by notarial deed.

This article in principle, explains that LLC (Companies Limited by Shares) is no longer established by agreement, as an individual can incorporate it. Interestingly, Nieuw Burgerlijk Wetbok still mandate the incorporation by notarial deed. The Netherlands Notary's involvement in LLC incorporation is bound to the fact that the Notary is involved with the legal person's birth.[60] Therefore, there is a shift of concept with the Indonesian Civil Code as LLC in the Netherlands is not necessarily based on agreement.

Notary also exists in Thailand and its role has been developing for many years.[61] To be a Notary in Thailand, an attorney (Tanai Kwam) needs to enroll in a particular legal training course from

56 Choky Ramadhan, "Konvergensi Civil Law dan Common Law di Indonesia dalam Penemuan dan Pembentukan Hukum," Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada [Online], 30.2 (2018), p. 213-229.

57 Access, "What Does A Notary Do In The Netherlands?" Answers To Questions About Moving to and Living in The Netherlands, https://access-nl.org/housing-netherlands/buying-house/what-does-a-notaris-Notary-do-in-the-netherlands/ (accessed on 17 May 2022)

58 Ibid.

59 Fahrurozi Muhammad, "Mendukung Kemudahan Berusaha Bagi Usaha Mikro, Kecil, dan Menengah Berbadan Hukum Dengan Gagasan Pendirian Perseroan Terbatas Oleh Pemegang Saham Tunggal". Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional 7 (3) (2018), p. 445-464.

60 KNB,"The Notary – Areas of Law," KNB, https://www.knb.nl/english/the-Notary/areas-of-law (accessed on 12 May 2022)

61 Alfred E. Iombino, Notary Public Handbook: Principles, Practices & Cases, National Edition (First ed.). (Norwell: East Coast Publishing, 2011), p. 12.

the Thai Council of Lawyers to get their Notary's license.[62] This means that only an attorney can be appointed as a Notary, or a Notary means a lawyer who has a Notary license. Some of its authorities are attestation and confirmation of authenticity documents and other information such as signature, address, translation, and whatnot.[63]

The Notary has no involvement in establishing a company in Thailand. To start a business in Thailand, the agency that involved are the Department of Business Development, Ministry of Commerce; The Revenue Department, Ministry of Finance; and Bank.[64] The unavailability of a Notary on this matter is because Thailand develops a system where the consumer or founder of the company, can establish it by themselves through the aforementioned agency. Learning from Thailand, we can conclude that Notary does not always have to be involved in enterprise incorporation. Even when they adopt the civil law system like Indonesia or Netherlands.

D. Closing

The involvement of Notary in the Investment sector through LLC establishment remains to exist in Indonesia. Although the existence of a Single Shareholder LLC dismisses its role, Notary is still needed to incorporate a conventional LLC with 2 (two) or more shareholders. Which still dominates the number of LLCs in Indonesia. Furthermore, the role of the Notary will always be mandated as long as the LLC concept in Indonesia is still based on Private Partnership, or established by an agreement between 2 (two) founders. Unless there is a law that amends such clause which shifts the concept of LLC as a unique entity and disparate from Private Partnership in Civil Code.

However, we can not deny the condition where the digital age affects the Notary business model. As its role legally diminished in establishing LLC through Law on Job Creation, there is no guarantee that legislators will maintain its involvement in company incorporation in the future. This condition means the lawmakers may opt to provide an alternative to the Notary service, which can also mean there is a possibility that they may favor technology to replace its role as yearned by the public. Particularly since the investment atmosphere has rapidly changed where traditional investment-related professions have been victimized and replaced by technology as a result.

62 Ibid.

63 Yaya Kareng, Ong Argo Victoria, and R. Juli Moertiyono. "How Notary's Service in Thailand." Sultan Agung Notary Law Review 1.1 (2019), p. 46-56.

64 Doing Business Team, "Doing Business In Thailand," The World Bank, https://www.doingbusiness.org/content/dam/doingBusiness/country/t/thailand/THA.pdf (accessed on 17 May 2022).

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CLOSING LEGAL LOOPHOLES ON INDONESIA INVESTMENT LAW IN DIGITAL AGE

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ABSTRACT

The balance of investor protection and state regulatory rights has been a prominent discussion by legal scholars since the early 21st century. During the same period, information, communication, and technology development have also been progressing rapidly to form the digital age. Nevertheless, legal scholars have not widely discussed the impact of the digital era on investment law activities and data regulations. This research attempts to provide a substantial discussion on the influence of the digital age on investment activity and data localization requirements from the standpoint of Indonesia. This study seeks to understand the existing investment law regulations in this digital era by employing normative juridical methods. The Research found that the development of the digital age generates some misconceptions and loopholes in investment activity and data localization requirements within our domestic and international legal framework. Therefore, the improvement of related regulations is essential to grant better legal clarity in the future.

Keywords : digital age, investment law, data localization, performance requirement.

A. Introduction

The development of the world of information, communication, and technology (ICT) has been soaring rapidly over the last decade. As a result, the way of how people live their lives is different.[1] Currently, data is referred to as the new oil, which illustrates how important data is in human activities, both in the economy itself, to the defense and security stage of a country.[2] The growth in the use of information and technology devices is even geometrical, much faster than the rate of population growth itself. In a study conducted by the Cisco Internet Business Solutions Group (IBSG), it was stated that in 2010, the world's population was around 6.3 billion people, while the use of digital devices reached

1 Ruth Ande et al., "Internet of Things: Evolution and Technologies from a Security Perspective," *Sustainable Cities and Society* 54 (March 1, 2020). , p. 9.

2 Data becomes important when it is managed with purpose including by selling the information from the collected and refined data, See Yberthia Karlsson Supervisor and Silvia A Carretta, *Data as Protected Investment Under International Investment Law*, 2021. , p. 4.

5 billion with a ratio of 0.08. This number then changes and increases every year. By 2020, the population has reached 7.6 billion people, while the digital devices used have reached 50 billion, so the ratio becomes 6.58.[3] This condition shows that the digital era has become an essential part of who we are today.

The digital age is an era where many things around our lives are almost entirely digitized. There are many benefits of digitization.[4] From a process and economic point of view, the cost can be reduced significantly, and time-consuming becomes more efficient. From an environmental perspective, paper use has also been reduced massively because information can be created and transferred digitally. Document archiving efforts can also be more centralized and well-stored compared to traditional methods. Another aspect of business, namely risk management, can also be better anticipated because the transition and transformation of data can be in real-time, making it possible to be handled more quickly before problems become more acute. In general, the digital era also allows the creation of more jobs, improves the community's quality of life and make it easier for citizens to access information and public facilities.

The digital era is considered an era that is developing swiftly while the speed of readiness and proficiency of our human resources and infrastructure has been unable to keep up.[5] While the digital world continues to run athigh speed, humans are still trying to catch up in various aspects of the transition from the analog to the digital world. Likewise, the legal framework of economics, both in the domestic and international fields, has not been able to anticipate existing developments in this digitized era. This could occur because various regulations in the economic field such as the WTO agreement which was approved in 1994 have not predicted the existence of the digital era that we are currently experiencing. It is also true especially with agreements in international investment, both those in the WTO in the form of Trade-Related Investment Measures (TRIMs) and in other bilateral or multilateral agreements. From the early 2000 until the present many of international investment agreements have been silent in regulating the digital era in the sphere of foreign investment.

The emergence of the digital era has raised various questions among legal scholars. With the emergence of data as a valuable commodity, how it is

3 See Priya Matta and Bhasker Pant, *INTERNET-OF-THINGS: GENESIS, CHALLENGES AND APPLICATIONS, P. Matta and B. Pant Journal of Engineering Science*, vol. 14, 2019. , p. 1721.

4 Päivi Parviainen et al., "Tackling the Digitalization Challenge: How to Benefit from Digitalization in Practice," *International Journal of Information Systems and Project Management* 5, no. 1 (2017), www.sciencesphere.org/ijispm. , p. 64. See also Olena Khandii, "Social Threats in the Digitalization of Economy and Society," *SHS Web of Conferences* 67 (2019): 06023. , p. 2.

5 Matta and Pant, INTERNET-OF-THINGS: GENESIS, CHALLENGES AND APPLICATIONS, vol. 14, p. 1733.

obtained, managed and utilized raises some concerns in the field of privacy and security. It is true that recently, consent for data and user information retrieval has been intensified through the consent of users or consumers. However, in practice, this is not the final solution for data security. After authorizing consent in data collection and use, the user or consumer does not have the tools and mechanisms and is never informed about what will happen to the data provided. If, for example, data misuse occurs, whether intentionally or unintentionally, our legal framework is limited to identifying what law is applicable and who will bear the responsibility. There are many stages and persons involved in this digital era ranging from collecting, storing, processing, and utilizing data, including those who use data illegally.

As part of the international community and as a sovereign entity, the state of Indonesia cannot be separated from this problem. The current Investment Law, namely Law Number 25 of 2007 concerning Investment as amended by Law Number 11 of 2020 concerning Job Creation, is also lagging and silent in regulating investment law in the current digital era.[6] The regulation of the Investment Law still regulates investment activities as an economic activity in analog conditions. Meanwhile, in this digital era, a lot of things have changed. Therefore, various investment arrangements are deemed insufficient to accommodate investment activities carried out in the digital era.

This paper describes the gaps and challenges faced in regulating investment in the digital era. Some of the things discussed in this study are the legal status of companies and investment activities that make foreign direct investment in the digital era. Data management also becomes a fundamental issue regarding state privacy and security. Thereby, whether data management can be used as a performance requirement or not in conducting investment activities also emerges. This study aims to provide an overview and analysis of the two problems above to contribute ideas in adjusting investment regulations in the digital era in the future.

B. Research Method

This research is normative legal research. Normative studies are carried out to understand the application of law following the theories and legal principles that apply in the provisions regarding investment both internationally and nationally. In this study, the main data is collected from various primary legal materials such as cases, international legal agreements, and domestic investment laws in various countries.

6 The necessity for investment law reform becomes urgently required nowadays, see also Surya Oktaviandra, "Penataan Ulang Pengaturan Penanaman Modal Asing Di Indonesia Melalui Momentum Pembangunan Ibu Kota Negara," *Majalah Hukum Nasional* 52, no. 1 (2022).

This study utilized legal materials that are enacted or circulated in the last decade, between the year of 2012 and 2022. Therefore, the problems in this study are answered by including the results of an analysis from the latest investment provisions that qualitatively applied by the investment law in recent years. This study limits its scope where the elements of foreign direct investment in the regulation of investment law are the main topic. This type of investment is sensitive due to its nature as a foreign investment and its application in this digital era.

All collected data are analyzed, and the analysis makes up the result of this research. The findings then are grouped into two major blocks to be discussed. Firstly, the paper discusses investment law's development, dynamics ,and legal challenges in this digitized era. In doing so, this paper also entails comparing the legal regime of investment law in a previous analog era and the current development of the digital economy. The second block discusses data localization as a condition of performance requirements in investment law. The discussion includes a debate on whether it is better to prohibit such requirements to provide a flowing trade between states or to leave a space for the state to establish its regulatory rights for public purposes.

C. Discussion

1. Legal Regime on Investment Activities in the Digital Era

Protection of foreign direct investment is found in many international agreements or treaties and is intended to protect foreign investors against intervention policies from the government.[7] These International Investment Agreements (IIAs) have been the primary source of international investment law since the 21st century and in many ways supersede the previous existence of customary international law by large.[8] To date, at least 3,000 recorded international treaties had been made worldwide to regulate foreign investment.[9] From the breadth of these FDI arrangements, clauses often debated and have received

7 Henrik Horn and Thomas Tangerås, "Economics of International Investment Agreements," *Journal of International Economics* 131 (July 1, 2021). , p. 1. Protection of foreign investment includes its investment and investor right with special right to bring a dispute to a ISDS mechanism against a host state.

8 David Collins, "Performance Requirement Prohibitions in International Investment Law," in *Handbook of International Investment Law and Policy* (Springer Singapore, 2019), 1–20. , p. 11.

9 Widener Law Review et al., *The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration Author Journal Title Link to Published Version THE UNCERTAINTY OF LEGAL DOCTRINE IN INDIRECT EXPROPRIATION CASES AND THE LEGITIMACY PROBLEMS OF INVESTMENT ARBITRATION**, 2016, http://hdl.handle.net/10072/336375http://widenerlawreview.org/. , p. 2. See also David Collins, *An Introduction to International Investment Law* (Cambridge: Cambridge University Press, 2017)., Rudolf Dolzer, dan Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012)., Campbell McLachlan QC, et al., *International Investment Arbitration: Substantive Principle* (Oxford: Oxford University Press, 2010)., Kate Miles, *The Origin of International Investment Law* (Cambridge: Cambridge University Press, 2013).

much attention among legal scholars are fair and equitable treatment (FET) and expropriation.[10]

In this digital era, there have been a very significant change in economic activity.[11] Businesses that were previously carried out physically by establishing a company and conducting business in the country of location can now be carried out remotely. The retail network first popularized this form in the form of e-commerce, such as Amazon, E-bay, and Alibaba. Then we are also familiar with various pioneering start-ups in the transportation sector, such as Uber, Grab, and Gojek. The digital economy market likewise grows significantly in the cinema business within digital platforms such as Netflix, Amazon Prime, Disney and Apple TV. Various companies that were previously still analog are now forced to transform into digital.

Digital businesses cross national borders and have characteristics of foreign investment. They might be legalized in the form of foreign direct investment later on or not. An excellent example of this case is Netflix in Indonesia. The Netflix business is originally categorized as an analog one. They started their business as a company offering DVD rentals to its members in 1997. Over time, in 2007, Netflix began to introduce streaming services. With this basis, for the first time Netflix then started to enter Canada before finally reaching the whole world. In Indonesia, Netflix initially entered in 2016 before being suspended by Telkom groups, a giant telecommunication state-owned enterprise, not long after. Netflix can only operate freely in Indonesia after the Telkom Group unblocked its business in 2020. This conflict between Netflix and Telkom Group shows the typical characteristics of the digital economy. For executing its business remotely, Netflix does not seem to need a physical presence and infrastructure in Indonesia as a host state.[12] To become a Netflix user, citizens in Indonesia must create an account and pay the subscription fee. The following trading process is that users can enjoy products on Netflix in the form of movies which can be done online, namely watching via streaming or downloading and watching later offline. The main requirement is an internet connection

10 Ibid. , p. 2.

11 Adapting business to digital age is a 'do or die' mission for enterprise. Digital era has modified the environment of business nowadays. It also changes consumer behaviors. According to Parviainen, et al, the impact of this digitized era toward organization can be viewed from three point of views as follows: (1). *Internal efficiency*; i.e., improved way of working via digital means and re-planning internal processes; (2). *External opportunities*, i.e., new business opportunities in existing business domain (new services, new customers etc.; and (3). *Disruptive change*; digitalization causes changes business roles completely, see Parviainen et al., "Tackling the Digitalization Challenge: How to Benefit from Digitalization in Practice." , p. 66.

12 Doing business nowadays can be either physical or in information ecosystem. However, it does not necessarily mean that it has to be one option to choose. Instead, the two options present and can be mixed altogether like a glue, see Matta and Pant, INTERNET-OF-THINGS: GENESIS, CHALLENGES AND APPLICATIONS, vol. 14, p. 1720.

and a data package. However, behind this simple and inexpensive process, this mechanism harms internet service providers (ISPs), which is providing infrastructure and internet services, have made investments before. Thus, from a business ethics perspective, Netflix's previous business activities have been criticized. In addition, the activities carried out by Netflix are exemplary and have the characteristics of foreign investment activities, where Netflix, which has its head office in America, conducts business abroad. At that time, Netflix did not invest in Indonesia as a host state. This is where the initial problem occurs. The first question emerges to the condition whether an enterprise with a similar characteristic as Netflix is required to have the status of a foreign investment or not. In reality, to run a business remotely in this digital era, there is no need to invest and follow any regulations in a host state. This condition means that a digital economy like Netflix does not de facto require investing in the host state, but legally, it may be forced to invest and follow host state regulations. This form is the opposite of foreign direct investment (FDI) in the pre-digital economy where foreign companies truly needed to be present, investing by building infrastructure in the host state.

Pursuant to Investment Law in Indonesia, every foreign investment carrying out business activities in Indonesia must be in the form of a limited liability company (Perseroan Terbatas or PT) and domiciled in the territory of Indonesia. To be able to conduct business within the FDI platform in Indonesia, Investment Law stipulates as regulated in Article 5 paragraphs (2) and (3) as follows: (2) Foreign investment must be in the form of a limited liability company based on Indonesian law and domiciled within the territory of the Republic of Indonesia unless stipulated otherwise by law; and (3) Domestic and foreign investors investing in the form of a limited liability company are carried out by: a). take part in shares at the time of the establishment of the limited liability company; b). buy shares; and c). take other means by the provisions of the legislation. Therefore, in a nutshell, to be legally allowed to conduct a business in Indonesia, FDI must be in PT form, has shared within the PT or take other means based on Indonesian Law. The latter condition is, however, unfamiliar and less known for its practice in Indonesia.

Enforcement for FDI to run its activities in Indonesia to have clear legality is essential to provide legal rights and obligations subject to national law. By taking the form of a PT legal entity, a foreign business is declared as an FDI and thus identified as a foreign investor with rights and obligations both under national law and in the international law sphere. Then the problem is, what about other digital-based businesses that do not have a PT legal entity as required by the Investment Law. Does it mean that

the business is not an FDI because it is not registered, has no domicile, and has never invested any capital in the territory of Indonesia, but runs a business and earns economic benefits in the territory of Indonesia? Suppose we refer to the definition of foreign investment as referred to in Article 1 point 3 of Indonesia Investment Law. It is clear that there is a limitation on what is meant by FDI. In this law, FDI defines as "investment activities to conduct business in the territory of the Republic of Indonesia carried out by foreign investors, whether using wholly foreign capital or joint venture with domestic investors." Therefore, the activity of investing is the main element that exists to consider whether an activity is a foreign investment or not.

From the description above, we can conclude that digital economic activity that carried out in the territory of Indonesia are not a FDI if it is not followed by investment and the establishment of a PT legal entity. Such efforts do not fall within the scope of legal subjects regulated as investment, both domestically and internationally. This means that if there is a legal problem, whether it is detrimental to the government or business actors, they must use other regulations according to the characteristics of the problem but not within the scope of investment law. This condition is not an ideal in which the two parties cannot directly bind rights and obligations in the business activity. From the government standpoint, it will be pretty challenging difficult to regulate and apply the law because the business actor is not a legal entity and is physically present in Indonesia. If there is a violation of privacy and security, the government will find it difficult to apply the applicable laws in Indonesia. Meanwhile, for business actors, without clear rights and obligations in the event of blocking or other treatment, it will also be difficult to sue the government, both within the framework of national and international law.[13]

Having discussed domestic law regulation, this paper swifts to the international legal regime. In Indonesia – Australia Comprehensive Economic Partnership Agreement (IA CEPA, 2019), investment means that every asset that an investor owns or controls, has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk. This type of definition is also similar to the provision found in other latest renowned IIAs such as ASEAN Comprehensive Investment Agreement (ACIA, 2009) and Indonesia – Republic of Korea Comprehensive Economic Pratnership Agreement (IK CEPA, 2020. It is also similarly stated in Regional Comprehensive Economic Partnership

13 IIAs, originally and practically, was designed for regulate investment activity of foreign in a host state with a physical present, see Karlsson Supervisor and Carretta, *Data as Protected Investment Under International Investment Law.* , p. 5.

(RCEP, 2020), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, 2018), and United States- Mexico- Canada Agreement (USMCA, 2020). The consensus from these IIAs leads us to the conclusion that in international investment law, the definition of investment also includes business activity that falls into the characteristic of investment such as the commitment of other resources, any expectation of profit or risk assumption besides the traditional view of capital commitment. This broad scope takes us to a different approach compared to what we have in Indonesia's domestic law. according to international investment law, investment can be in various forms, not only capital.

Investment can also be in the form of permits, licenses, authorizations, and other similar rights to run a business in the territory of a state. In addition, CPTPP footnote 12 also stipulated that "[f]or greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to invest, such as channeling resources or capital in order to set up a business, or applying for a permit or license." Therefore, whenever commitment between the government and enterprise has occurred, a permit for the license has been granted or investor expectation was made, there will be investment law to protect that legal relationship.

USMCA also assists us in determining the limitation of investment whereas not every commitment shall be considered as investment. USMCA provides more clarity on what does not constitute as investment. An order or judgment entered in judicial or administrative action and claims to money that arise solely from commercial contracts for the sale of goods or service are not deemed as investment.[14] Therefore, business relationships and attached commitment between enterprises are not always considered as investment. This can be understood by simply discerning the fact that international investment law's main concern is the protection of foreign investors` assets and rights of business against the host state.[15]

2. Performance Requirement on Data Localization

Performance requirements are conditions imposed on foreign investors before entering investment in the host state. It is also considered a method for the government to control the existence of FDI and simultaneously seek to maximize the benefits derived from the

14 Similar language also found in Indonesia – Republic of Korea Comprehensive Economic Partnership Agreement (Indonesia – Korea CEPA, 2020).
15 Horn and Tangerås, "Economics of International Investment Agreements." , p. 1.

existence of FDI.[16] Various adjustments to social standards are also considered to be obtained by requiring various things to FDI, such as the use of tools or resources that are environmentally friendly or using workers who need special attention such as residents and people with particular needs.[17]

The performance requirement provision can be written in domestic and international law. In domestic law, it can be allowed by leaving it not regulated or in the form of permission on written language. Recent domestic investment laws tend to employ the first option.[18] Some give incentives for the conditions provided by the foreign investor.[19] Article 18 of Indonesia Investment Law stipulates that government will grant investment facilitation provided that the foreign investor that expand and make new business by employing, among others, plenty of workers, making infrastructure development, transferring technology, and making partnership with micro, small and medium-sized enterprises.[20] China's Foreign Investment Law is also considered as doing the same thing with the following arrangements in Article 22:

...The State encourages technological cooperation to be conducted in the course of foreign investment and on the basis of the principle of volunteerism and business rules. The conditions for technological cooperation are to be determined through consultation by the various parties to the investment on the basis of equality and the principle of fairness. Administrative organs and their employees must not force the transfer of technological [sic] through administrative measures.[21] [emphasis added]

This method is a gentle method used by a country in encouraging technology transfer, infrastructure development, and so on from FDI. The state does not use coercion as can be a problem in GATT and TRIMs as well as current international treaty practices. However, it continues to encourage the fulfillment of these requirements in the form of providing incentives. Thus, even though

16 Collins, "Performance Requirement Prohibitions in International Investment Law." , p. 2.
17 Ibid. , p. 2.
18 See Law No.116 of 2013 Regarding the Promotion of Direct Investment in the State of Kuwait (2013), Lao People's Democratic Republic Law on Investment Promotion (2016), Mongolia Law On Investment (2013), Myanmar Investment Law (2016), Qatar Law no. (1) of 2019 On Regulating Non-Qatari Capital Investment in the Economic Activity (2019), South Africa Protection of Investment Act (2015), United Arab Emirates Federal Law by Decree No. (19) of 2018 Regarding Foreign Direct Investment (2018), Law of the Republic of Uzbekistan On investments and investment activity (2019), ZIMBABWE INVESTMENT AND DEVELOPMENT AGENCY ACT [CHAPTER 14:37] (2020), accessed online on https://investmentpolicy.unctad.org (last visited on 29 May 2022).
19 Indonesia Law Number 25 of 2007 concerning Investment Law and Order of the President of the People's Republic of China Number 26 on Foreign Investment Law of the People's Republic of China (Adopted at the Second Session of the 13th National People's Congress on March 15, 2019). See also Surya Oktaviandra, *Memahami Hukum Penanaman Modal Indonesia* (Malang: Madza Media, 2022).
20 See Indonesia Investment Law Number 25 of 2007 Article 18 for full details.
21 Collins, "Performance Requirement Prohibitions in International Investment Law." , p. 17.

it is not coercive, investors will indirectly be forced to do so to getting the facilities that are usually given to foreign investors.

On the one hand, performance requirements are generally prohibited in the IIA in the Trade-Related Investment Measures Agreement (TRIMs Agreement). The main reason is that it is inconsistent with provisions agreed in WTO. Performance requirement can be in the of form of a trade barrier and tends to discriminate against investors with local businesses (Article XI GATT of the prohibition on quantitative restrictions and Article III GATT of national treatment).[22] In article 14.10 of the USMCA, it is stated that these countries are prohibited from imposing requirements on technology transfer, production processes and other forms of proprietary knowledge in FDI activities. Similar language is also found in Article 14:6 regarding the prohibition of performance requirement as a practice of Indonesia in its investment agreement with Australia in the form of an IA CEPA. On the other hand, performance requirements such as the requirement for technology transfer are also the core of why FDI is encouraged by developing countries. Therefore, we can conclude a general idea that the IIAs in developed countries generally support the prohibition of this clause. Meanwhile, when FDI involves the relationship between developed and developing countries, using a performance requirement clause is seen as one way to support an increasingly equitable world economic development.[23] This can also be seen in the TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights) agreement from the WTO which supports technology transfer from developed countries to developing countries as written in Article 66 paragraph 2 of TRIPs which states:

"Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

There are two major approaches in discerning whether or not performance requirements are valid or necessary. The first approach is the performance requirement which tends to hinder the smooth flow of investment and trade as a whole is considered unfounded. Meanwhile, the second stream views the critical role of performance requirements as tools that can be used for technology transfer and equitable distribution of the world economy. One case that can describe how the tribunal views the

22 Imposed only on trade in goods, but not in services. See also Surya Oktaviandra, *Standar National Treatment Dalam GATT : Materi Dan Kasus* (Malang: Madza Media, 2022).

23 However, in its latest IIA with Australia within IA CEPA Indonesia agreed to include clause on the prohibition of performance requirement, see Article 14:6 Indonesia – Australia Comprehensive Economic Partnership Agreement.

difference between the two approaches on the performance requirement application can be seen in the case of Lemire vs. Ukraine.[24] In this case, the Government of Ukraine requires that investors who broadcasts radio insert 50 percent of their broadcast content from Ukraine. Investors in this case assume that there is a violation of the provision prohibiting performance requirements. In its consideration, the tribunal believes that the government has the right to maintain or defend its national identity. However, the tribunal explained that the performance requirements contained in the investment agreement must be seen as an effort to improve the economy of the two countries as a whole according to the object and purpose of the provisions. Meanwhile, maintaining Ukrainian national culture is non-linear to the object and purpose of the provision.[25]

In this digital era, where data has become a medium and a commodity, its utilization is vital because it has a significant role in human life.[26] Misuse of data can have severe consequences for the privacy and security of individuals and the country. The high difficulty for data to be understood by general people contributes significantly to data vulnerability. Today, most of the confidential information can be extracted from managed data. This includes email accounts, bank account numbers, digital wallet accounts and others vital information that are extremely risky to fall into the hands of irresponsible parties, either individually, organizations, or certain governments.

Once data is misused, access to a device or account can be entered. Qualified information and technology capabilities can even modify data as desired.[27] In the context of protecting state security, the government is interested in ensuring a digital economy that uses data from consumers as media and tools in carrying out their business activities to ensure data privacy and security. Therefore, data localization becomes a fundamental issue in this regard. On the one hand, data as part of the trade component in this digital era must be sought to flow as smoothly as possible from one country to another.[28] On the other hand, data regulation, be it storage, used, and utilized, is also a concern of state security.[29] Nonetheless, internet

24 Joseph Charles Lemire vs Ukraine, ICSID Case No. ARB/06/18 (28 March 2011)
25 Collins, "Performance Requirement Prohibitions in International Investment Law." , p. 16. See also Alexandre Genest, *Performance Requirement Prohibitions in International Investment Law* (Leiden: KOninklijke Brill NV, 2019). , p. 71.
26 Dongpo Zhang, *Big Data Security and Privacy Protection*, 2018. , p. 275.
27 Khandii, "Social Threats in the Digitalization of Economy and Society." , p. 2-3.
28 Dan Ciuriak, World Trade Organization 2.0: Reforming Multilateral Trade for the Digital Age, 2019. , p. 4.
29 The process of digitization, including in economic activities, must be supported by institutionalization in the process of its use. Therefore, a code of ethics in the internet world, both by users and data processors, must exist. Meanwhile, the freedom that is owned in the digital world must be proportional with the responsibility for maintaining the security of a country. The last thing must be done with the commitment of government to maintain the privacy of its citizen., see Khandii, "Social Threats in the Digitalization of Economy and Society."

security is not only a concern from state point of view, but also employed by foreign investor to determine location to set up business.[30]

Data localization is a limitation of database storage in spesific locations within a particular territory of a state. This can be done in order to restrict the transfer of data outside the state's permitted borders. Data localization is considered a performance requirement because it has the characteristics of a demand for businesses to include local elements in managing data.[31] Forcing data localization can be justified on the grounds of privacy and data protection, although at the same time it can create a burden on trading activities and may be described as protectionist treatment. Report from a study by the United State International Trade Commission (USITC) on digital trade showed that requirment for data localization becomes one of the top barriers in digital economy.[32]

However, international law generally supports the freedom for states to take necessary actions in the circumstances and in the interests of a state's security. This concept is related to two things. First, every state has equal sovereignty. Second, one of the main objectives of a state is to protect to its citizens. Based on these two considerations, the security exception clause is essential . It has a high tendency to be accepted as long as it is carried out with fair, equitable, and non-discriminatory treatments.

Referring to the necessity for protecting of state privacy and security, the government may establish data localization as one of the requirements to enter investment in its territory. When we spot from the aspect of object and purpose, it is clear that data localization is not intended to hinder trading activities and should not be a tool to discriminate or target certain foreign investors. Meanwhile, when examined from the aspect of proportionality, the necessity of data localization can be understood to have been proportional to the potential and security risks.

As a country with huge population, Indonesia has become a heaven for a digital economy. Most of the previous giant enterprises mentioned before like Google, Netflix, Amazon, Uber and Grab have targeted Indonesia as their market. While it is valuable for foreign enterprises, the rise of a digital economy is also benefits the nation. Digital economy has been recognized for its impact on various fields, creating job opportunities, bolstering economic

, p. 5.

30 Youxing Huang, Na Jiang, and Yan Zhang, "Does Internet Security Matter for Foreign Direct Investment? A Spatial Econometric Analysis," *Telematics and Informatics* 59 (June 1, 2021). , p. 17.

31 Collins, "Performance Requirement Prohibitions in International Investment Law." , p. 19.

32 See A Porges and A Enders 'Data Moving Across Borders: The Future of Digital Trade Policy' E15 Initiative (April 2016) at 4 in Ibid. , p. 18.

development, and improving life standards. With many enterprises doing their businesses in, Indonesian territory, the data traffic contains information increases significantly. The privacy of data, even a simple one, cannot be underestimated nowadays. To become a user, subscriber, or online buyer will sacrifice our personal information such as email account, phone number, even citizenship registration number. Those data can be collected, managed, and utilized in secrecy. In the worst scenario, it is possible to be bought in data market or hacked by an irresponsible person. To some extent, it may only harm the user in a personal capacity, but to a possible extent, it will jeopardize national security. Therefore, states, especially the targeted market like Indonesia must have its own capability to ensure regulation that will protect the state from the misuse of data in this digital age, including by foreign enterprises.

As mentioned before, Investment Law in Indonesia generally adopts the voluntary approach to encourage foreign investment in certain requirement desirable for Indonesia's interest. It does not force foreign investment by any other mean to fulfill certain requirements before investing and running a business unless for a legal entity in the form of PT. Investment Law certainly is not in the position to state clearly the prohibition of performance requirements. From this standpoint, it creates a space for the government to establish a certain requirements the authority decides to do so, including data localization. However, the recent IIAs with several countries showed that Indonesia supports the prohibition on performance requirement.

Article 14:6 of the IA-CEPA stipulated a general prohibitons on performance requirements, However, it was silent and not regulate whether or not there is a ban on performance requirements in terms of data localization requirements. Likewise, paragraph 6 of the same article only states that any prohibition on performance requirements can only be excluded from actions taken to protect the environment which reads "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures. This means two things. Either the prohibition of data localization requirements is raised in Article 14:6 if it needs to be modified, or even data localization is agreed as an exception and appears together with paragraph 6 that can be excluded from actions related to the environment and security.

One thing is certain, when it is clearly stated in the investment agreement that only those that are included in the list are prohibited, it means that conditions

outside of that are implicitly allowed. The explanation of the performance requirement article of IA-CEPA and IK-CEPA stipulate: "[F]or greater certainty, paragraphs 1 and 2 shall not apply to any requirement other than those set out in those paragraphs."[33] Thereby, suppose there is a data localization requirement between the investments of the two parties, In that case, foreign investors cannot claim that there has been a violation of the rules prohibiting the performance requirement. The arbitrator in this case is also not allowed to carry out his interpretation considering that the limitation has been clearly stated in the agreement.

So far, we have identified the consideration of providing data localization for national security as another matter of performance requirements. Recent general regulation and practice in international law have forbidden performance requirement, but states may still encourage conditions before foreign investor enter investment by utilizing incentive methods. States may also rely on the exclusion of data localization from current criteria on the prohibition of performance requirement since it is not included in the current regulation which prohibits mostly for a set up on national content and prohibition on import and export. Another option is to explicitly regulate general or security exception in IIA. One of the recent IIAs that has provided the rule for security exception is RCEP. Contracting states in RCEP between ASEAN, Australia, China, Japan, New Zealand, and Korea seemed to join in the understanding of the importance of national security. Article 10.15 of security exceptions of this agreement provide a guarantee for contracting states to impose any measure that essential to protect its own security interest. Based on this provision, parties of the agreement will be able to conduct any necessary measure to protect and secure their national security interest, which may include a requirement for data localization. The requirement is not listed in the performance requirement prohibition article, and at the same time, the states can argue that any measure outside that list is not prohibited. Moreover, this security exception clause provides robust ground for state to apply rules necessary to ensure national security even if it is contrary to the previous provisions in the agreement.

D. Closing

The world we live in today is a world in which technology and information are moving in significant rate. Everything has become digitalized which affects the pattern of life, habits, lifestyle, and the business model. The digital economy is a new trend of doing business that provides seamless access across

33 IA CEPA, footnote 11 and IK CEPA footnote 20.

national borders. This study has explored the extent to which the development of the digital economy has implications for the foreign investment sector. From the research that has been carried out, it can be seen that there are differences in the concept of investment in the investment law in Indonesia with the current practice. Thus, a gap that creates confusion and ambiguity in domestic law in responding to FDI. On the other hand, the practice of investment agreements is slightly more capable of catching up and closing the gap, but not entirely fixing the problems. This can be noticed in the data localization settings that are vital and determine the security level of a country that is the host state of FDI carried out with a digital economy platform. This study subsequently attempts to identify how national laws that tend not to prohibit the occurrence of data localization requirements are faced with the latest international treaty regulations which generally prohibit performance requirements.

This research also shows that international investment agreements are still missing in regulating the data localization controversy. Therefore, if there is an investment dispute over performance requirements related to data localization, the tendency for decisions of the tribunal to be varied and uncertain. This needs to be anticipated and corrected by investment law both domestically and internationally in the future. The utilization of data and its misuse will not disappear, even more increase massively in the future, so this needs to be the attention of stakeholders, especially the government as a sovereign power and states as a unitary international community responsible for global peace and prosperity.

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Curriculum Vitae of Author

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LOGICAL CONSEQUENCES IN INDONESIA'S POSITION IN INVESTMENT DISPUTES IN ARBITRATION FORUM ICSID

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ABSTRACT

This Research aims to: (i) explain the termination of BITs unilaterally by Indonesia which has implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum; (ii) Explaining the aspiration of ISDS review in the Regional Comprehensive Economic Partnership (RCEP) has implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum. And (iii) Explaining the counter-claim discourse in the BIT and/or ISDS has implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Methodologically, this type of research is normative legal research or doctrinal legal research, and the nature of this research is descriptive-analytic research. Data collection techniques through in-depth interviews and library research. The results show that the termination of BITs unilaterally by Indonesia is not legally a violation of investment law, and has no implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum. The ISDS review in the regional comprehensive economic partnership (RCEP) does not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum, because the change to the ISDS mechanism is only in the form of a proposal or input to the RCEP forum. Meanwhile, the discourse on the counteclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Because if a counterclaim is possible in the BIT until it is followed by the mechanism in the ISDS and international arbitration forums (ICSID, UNCITRAL, and others), then it is beneficial for Indonesia as the host country.

Keywords: BITs, ISDS, ICSID, RCEP

A. Introduction

In this study, the intended investment dispute is between foreign investors and the host country of investment. As the host country of investment, Indonesia has been sued several times by foreign investors through arbitration. Arbitration in the Indonesian legal system has been regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution; Arbitration is a way of

settling civil disputes outside the general courts based on an arbitration agreement made in writing by the disputing parties.

Regarding arbitration, Indonesia promulgated Law no.30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Arbitration Law and APS). The Arbitration Law and APS are the main foundations for implementing arbitration and alternative dispute resolution. Other provisions governing dispute resolution in the investment sector in Indonesia are Chapter XV Article 32 of Law Number 25 of 2007 concerning Investment. There are three alternative ways of resolving investment disputes, namely: (i) based on consensus, (ii) through arbitration or alternative dispute resolution (APS), and (iii) through courts., (iv) through international arbitration based on the agreement of the parties.[1]. Suppose parties did not include an agreement regarding the choice of law and the choice of forum in case of a dispute. In that case, not every government investment dispute with a PMA must automatically be resolved by the ICSID Arbitration Board.[2]

Apart from being based on the Investment Law, dispute resolution through arbitration is also settled based on bilateral investment treaties (BITs) agreed between Indonesia and other countries. Indonesia is currently a party to more than 60 BITs in force. In all agreed-upon BITs, there are provisions for dispute resolution through arbitration, and almost all BITs refer to the settlement mechanism in ICSID arbitration.

Nowadays, due to the very rapid development of global investment, investment dispute resolution has been established with a settlement mechanism called the investor-state dispute or commonly called the Investor-State Dispute Settlement (ISDS) which was formed with the aim of protecting the interests of foreign investors investing in the recipient country. host country investment) so that it will attract investors to invest in other countries.[3] In general, it can be said that of the 10 lawsuits by investors against Indonesia as the host country investment, the Government of Indonesia has won more in ISDS. In general, it can be concluded that from the 10 lawsuits by investors against Indonesia as a host country investment, the Indonesian government has won more in ISDS. The meaning of RI winning more than losing in arbitration at ICSID proves that it is not entirely true to say that the ISDS mechanism and the ICSID tribunal are only in favor of investors. In general, it can be summarized that the Government of Indonesia has won more

1 Helmi Kasim, "Arbitrase sebagai mekanisme penyelesaian sengketa penanaman model (Arbitration as investment dispute settlement mechanism), *Jurnal Rechtsvinding*, Media Pembinaan Hukum Nasional, April 2018, 7(1), 81
2 Sentosa Sembiring, *Hukum Investasi*, Nuansa Aulia, Bandung, 2010, hlm.21.
3 Helmi Kasim,Op.Cit., hlm.82

in ISDS. The Indonesian government won four ISDS disputes, losing only two cases. Outside of the "win-lose" case, the plaintiff (investor) withdraws the lawsuit, or the parties resolve the dispute outside of arbitration.

Regarding Indonesia's actual position on the ISDS dispute, several developments have implications for Indonesia's position in the ICSID arbitration forum. The three developments are regarding Indonesia's policy to cancel the BIT, the plan to form RCEP, and the discourse on counterclaim from the defendant to the plaintiff in BIT content.

Regarding the policy of unilaterally terminating BITs, Indonesia has carried out more than 60 BITs signed with more than 50 countries, including some developed countries such as Australia, France, England, and the Russian Federation. On the one hand, the decision to terminate the BITs shows Indonesia's efforts to become a more sovereign country in terms of foreign investment and to create a dispute mechanism between investors and the state (ISDS), which is accepted not only internationally but also domestically.[4] Termination of the BITs will undoubtedly have implications for the dispute mechanism between investors and the state (ISDS) at the ICSD arbitration forum and similar forums such as UNCITRAL, Permanent Court of Arbitration (PCA) in The Hague, and others. The termination of the BITs will have implications for the ISDS and the ICSID arbitration forum because, in the BITs, there is an agreement on the ISDS and ICSID mechanism. The problem is, if the BITs have terminated, what agreement or legal basis governs the ISDS, and to what extent can the investor accept it.[5]

The next problem is the emergence of a counterclaim discourse from the defendant to the plaintiff in the ISDS. This is due to the assumption that the investment dispute settlement arrangement with the ISDS mechanism favors investors more than the investment recipient country. This imbalance in taking sides with the ISDS mechanism has given rise to the discourse of a counterclaim from the defendant to the plaintiff about what investment recipient countries can do under the ISDS mechanism. So far, counterclaims from the defendant to the plaintiff are very rare. For the 684 BITs that sued in ISDS, the counterclaim from the defendant to the plaintiff did not exceed 15 cases.[6]

Discourse counterclaim the defendant to the plaintiff has not been included in the ISDS clause, even though the counterclaim from the defendant to the plaintiff can provide a sense of justice for the investment recipient country. The

4 Hamzah, "Bilateral investment treaties (BITS) in Indonesia: A Paradigm Shift, Issues, and Challenges," *Journal of Legal, Ethical and Regulatory Issues*, 2018, 21(1), 1-13.
5 Hamzah, ibid.
6 Ibid, hlm.2223

counterclaim from the defendant to the plaintiff can streamline the arbitration mechanism because the investment recipient country carries it out in the same arbitration forum [7] (ICSID, UNCITRAL, London Court of International Arbitration, ICC, or other arbitration forum agreed by the parties).

The United Nations (UN) in January-February 2020 discussed the issue of counterclaim from the defendant to the plaintiff. It is not easy for a party to counterclaim on the other party because it must at least meet several requirements. One of the counterclaims from the defendant to the plaintiff can be used as part of the investment dispute resolution mechanism. If previously, namely in an investment agreement between the two countries, there has been a mutual agreement regarding the existence of a counterclaim mechanism to determine the court's jurisdiction in investment arbitration.[8] This means must be a prior agreement between the parties regarding the counterclaim from the defendant to the plaintiff. The investment agreement must be agreed upon between the parties regarding determining the jurisdiction of the arbitral tribunal regarding claims and counterclaims.[9]

The implications for the ISDS and the ICSID forum, namely the negotiations on a Regional Comprehensive Economic Partnership (RCEP), which has been ongoing since 2012. At the forum, India, Indonesia, and Australia wanted the ISDS to be reviewed, while China insisted that the ISDS be continued.[10] RCEP negotiations until 2019 showed that the ISDS mechanism had not been regulated in the RCEP. The failure to agree on ISDS in the RCEP is strong evidence of the RCEP member countries' rejection of ISDS. The executive director of Indonesia for Global Justice (IGJ), Rachmi Hertanti, stated that the ISDS mechanism is an exclusive right granted to foreign investors in international trade and investment agreements. The ISDS mechanism has been considered to hold the country hostage to the interests of investors because it has provided legal immunity for investors.[11]

Indonesia's attitude regarding ISDS in the RCEP, as stated by the Chairperson of Trade Negotiating Committee (TNC) RCEP, Iman Pambagyo, is Indonesia

7 Ibid.,hlm.2226
8 Ibid,hlm. 2227
9 Dafina Atanasova, Carlos Adr uiuan Martinez Benoit, and Josef Ostfansky, "*Counterclaims Investor-State Dispute Settlements* (ISDS) Under International Investment Agreement (IIAS)," Trade and Investment Law Clinic Paper 2012, The Graduate Institute, Center for Trade and Economuic Integration, Geneva.
10 I Gede Wahyu Wicaksana, Vinsensio Dugis, Baiq Wardhani, "ASEAN RCEP, Mega Regionalisme & Prospek Diplomasi Perdagangan di Asia Pasifik, " working paper, hal.5, can be downloaded on http://setnas-asean.id/site/uploads/document/journals/file/599d5d9f2e5ca-presentasi-4-paper-psa-psa-universitas-airlangga.pdf.
11 Zubi Mahrofi, " Mekanisme ISDS tidak diatur dalam RCEP dinilai langkah tepat," AntaraNews,com, Friday, 25 Oktober 2019, 18.51 WIB. can be dowloaded on https://www.antaranews.com/berita/1131891/mekanisme-isds-tidak diatur=dalam=rcep-dinilai -langkah-tepat.

proposing that the ISDS settlement must be complete in a local court. If the settlement of the investment dispute is to proceed to an international arbitration mechanism, Indonesia proposes that it obtain government approval first. Indonesia's attitude is contrary to the attitude of developed countries, which argue that if an investment dispute in local courts fails and then proceeds to a national arbitration mechanism, it is carried out automatically without having to obtain approval from the government of the host country at the end of the year.[12]

Based on this background, the author deems it necessary to conduct research titled "Implications of Termination of Bilateral Investment Treaty (BITs) and Counterclaim Discourse on Indonesia's Position in Investment Disputes at the ICSID Arbitration Forum".

B. Research Method

The legal research method used is normative legal research or doctrinal legal research, which focuses on legal principles, legal norms, legal principles, and legal doctrines in order to answer legal issues,[13] by examining secondary data by investigating the study, including a description of the research subject as shown in Fig this study between foreign investors and foreign countries recipient country or host country. The background that raised implications of investment dispute issues (BIT, RCEP, and counterclaim) on Indonesia's position in investment disputes at the ICSID arbitration forum implemented in books, scientific works, laws and regulations, and other regulations as well as conventions, and agreements between countries regarding investment disputes and other supporting data related to the theme of this research.

The nature of this research was descriptive-analytical research, which was to reveal or provide an accurate description of a problem or situation.[14] Descriptive-analytical research seeks to summarize qualitatively various situations or various phenomena of social reality that develop in society[15], in this case, related to positive law regarding investment disputes.

Data analysis in this study used the Miles, Huberman, & Saldana model,[16] which uses four stages of analysis, namely: (i) Data collection (data collection), in the form of data

12 "Indonesia Keberatan, ISDS tak Masuk dalam Poin RCEP", Gatra.com, 22 October 2019, 14.31. Can be downloaded on https://www.gatra.com/detail/news/452426/ekonomi/indonesia-keberatan-isds-tak-masuk-dalam-poin-rcep.

13 Soerjono Soekanto, *Penelitian Hukum Normatif*, Jakarta, Grafindo Persada,1983, hlm.62

14 Ishaq, *Metode Penelitian Hukum dan Penulisan Skripsi, Tesiis, serta Disertasi* (Bandung: Penerbit Alfabeta, 2017), hal 20.

15

16 Miles, M.B., Huberman, A.M., & Saldana, J., "*Qualitative Data Analysis: A Methods Sourcebook.* Edutiin 3. Thousand Oaks:: SAGE Publications, Inc., 2014, hal 33.

collection through the primary-data (in-depth interview), even secondary data (via library-research), which is intended to be able to answer the formulation of the first, third, and fourth research; (ii) Data condensation was the process of selecting, focusing, simplifying, abstracting, and/or transforming data that appears in interview transcripts, documents, and other empirical materials. (iii) Data display is a collection of organized and summarized information so that conclusions can be drawn; and (iv) Verifying conclusions as the final process of data analysis.

C. Discussion

1. Implications of BIT Termination in the Context of ISDS at the ICSID Forum

Implications Settlement of investment disputes through an arbitration forum system, which underlies BITs as the basis for an investment dispute arbitration lawsuit, had a position as an early generation agreement containing less specific regulations (impress), and when it comes to setting up a dispute before international Arbitration, giving it a vast scope based on inconsistent and unpredictable decisions. Awareness of deficiencies in dispute resolution between investors and the host country also occurred because of the temporary nature of the arbitral tribunal (ad hoc) and lack of transparency and legitimacy.

The protection of foreign Investment so far is based on the national laws of the host country (host country) and international agreements. According to national law, the protection of foreign investors in Indonesia is covered by Law Number 25 of 2007 concerning Investment. This law underlies the Government in making policies related to the formation and participation in signing international agreements.

The legal basis for terminating BITs carried out by Indonesia on the grounds of national interest is most likely the provisions contained in Law Number 24 of 2000 concerning International Agreements, where one of the reasons, namely Article 18 point (h), stated that an international agreement could be terminated if there are things that are detrimental to the national interest.

Indonesia's reason for ending its BITs is to conduct a review of all BITs, and this also said closely related to the issuance of Law no. 7 of 2014 concerning Trade which was ratified and issued on March 1, 2014. Article 85[17] of this law gives authority to the Government or the Government and the DPR to unilaterally

17 Article 85 of the Trade Law: (1) The government with the approval of the DPR can review and cancel international trade agreements whose approval is carried out by law based on considerations of national interests; (2) The government may review and cancel international trade agreements whose ratification is carried out by a Presidential Regulation based on considerations of international interests.

annual international trade agreements[18] previously approved, whether ratified in the form of a presidential regulation or a law considering national interests.[19]

Concerning this research question, Indonesia unilaterally terminated many BITs almost simultaneously. Indonesia has terminated 26 BITs. The termination is carried out unilaterally according to the rules provided in the BITs. BITs that have been terminated are as follows: Egypt, Norway, Malaysia, France, Slovakia, China, Italy, Netherlands, Laos, Bulgaria, Spain, Kyrgyzstan, Turkey, Romania, Cambodia, Vietnam, India, Hungary, Singapore, Pakistan, Switzerland Argentina, Belgium, UK, Germany, and Australia.

The background of Indonesia ending BITs unilaterally, according to a source from BKPM, aimed to review whole existing Indonesian BITs in terms of substance and relevance. Furthermore, Indonesia would make BITs with a more modern approach and elements following national interests.

According to a BKPM source, the government has the option to create a new BIT that is more modern and in line with national interests. Previously several countries also canceled BITs unilaterally. Among these are Ecuador, Bolivia, South Africa, and India. According to Hamza,[20] several factors caused Indonesia to terminate and discontinue several BITs. These factors were:

a. As the host country or host-state, Indonesia does not feel that it has benefited from these BITs. Indonesia views that the last BIT could not accommodate good business relations between the host country with the investor's country of origin (home country or home state). Therefore, the previous BITs need to be evaluated, and for the first stage, the BITs need to be unilaterally terminated by Indonesia.
b. In the implementation of BIT, there is often a misinterpretation of the clauses Most Favorite Nation (MFN), National Treatment (NT), and Fair and Equitable Treatment (FET), and Expropriation. Indonesia wants the drafts related to MFN, NT, and FET to be compiled in more detail and clearly to avoid misinterpretation and claims for compensation from investors.
c. The previous BITs limited the sovereign rights of the state to regulate the economy and society, meanwhile, Indonesia wanted BITs to freely to regulate the country's economy without violating the rights of foreign investors.

18 Investment is also part of international trade under Indonesian law, namely according to Law no. 30 of 1999 concerning Arbitration which states that what is included in commercial law according to Indonesian law includes investment.

19 MichaelJ. Struett, *"The Transformation of State Responsibilities under the Rome Statute for the International Criminal Court"*, Chapman Law Review Volume 8:172, 2005, hal. 173-174.

20 Hamzah, "Bilateral Investment Treaties (BITS) in Indonesia: a Paradigm Shift, Issues and Challenges," (2018), 21 *Journal of Legal, Ethical and Regulatory Issues*, 8-9.

d. The Indonesian government wants to ensure that the new BITs can provide balanced protection between foreign investors and domestic investors.
e. So far, BITs have given the duration and termination of the agreement too long.
f. There has been an increase in the number of claims for compensation in international forums involving Indonesia, causing losses to the state.

According to BKPM sources, the legal implication is that the Indonesian government no longer has the treaty obligation in the form of various forms of protection to foreign investors of the partner country. However, protection has still been obtained through the survival clause for investors who already exist at the time of termination and through national law, especially the Investment Law. The implications of the termination of BITs can also cause investment disputes, especially between investors and Indonesia's position. The termination of BITs has indirectly made Indonesia a country that is considered an unfriendly country to investors.[21]

BITs usually specify that the agreement must be valid for a certain period, as Survival Clause regulated, which is said to prevent unilateral termination of the agreement with immediate effect. This clause extends the host country's international obligations by extending the agreement's validity for a longer period, usually 10 or 15 years.[22] Very few BITs do not regulate this clause.[23] BITs that regulate this period include a mechanism for extending the agreement. Two approaches were commonly used. Thus, investments made after that date do not receive protection from the terminated BITs but may seek protection from other agreements following the agreement of the two countries in the future, either by creating new BITs instead of the terminated BITs or through multilateral investment agreements in which each country was a signatory party.

Furthermore, based on the provisions of the survival clause, the state party to the agreement, that period found to have violated the substance of the BITs. The investor who feels aggrieved can be held accountable, either in the form of granting the rights that the investor should own or if there is an investment dispute. The dispute that can be resolved takes it to international arbitration following the agreement between the two countries regarding the dispute resolution mechanism regulated in the agreement, even if the agreement has been terminated. According to BKPM,

21 Arif Havas Oegroseno, *Indonesia's Bilateral Investment Treaties: Modernising for the 21st Century*, https://www.rsis.edu.sg/rsis-publication/rsis/indonesias-bilateral-investment-treaties-modernising-for-the-21st-century/ accessed on 10 Januari 2016.
22 Ibid.
23 UNCTAD, *"International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal"*, IIA Issues Note No. 4 (2013), www.unctad.org/diae

Indonesian attitude, after unilaterally terminating the BITs, it is necessary to analyze the cost and benefit of BITs with partner countries in detail. It will only make BITs if the cost and benefit analysis results show BITs are needed.

2. RCEP from a Legal Perspective

The forum that was used for review was not only the Regional Comprehensive Economic Partnership (RCEP) forum but also other relevant international forums. The RCEP Forum had relatively more limited participants, namely 10 ASEAN member countries and six partner countries (China, Japan, South Korea, New Zealand, Australia, and India. Although India was a partner country in 2019), and the interests of other countries are more prominent participants and did not reflect world powers. The most intensive forum to discuss the ISDS review was the UNCITRAL forum.

There were different aspirations between the ISDS mechanism review at the RCEP forum and the UNCITRAL forum. At the RCEP forum, a growing aspiration was to review the ISDS mechanism from developing countries (10 ASEAN countries) and six partner countries that are incidentally non-American and European and tended to be controversial, such as aspirations to replace the ISDS mechanism. Meanwhile, the aspiration to be reviewed the ISDS mechanism at UNCITRAL was more representative of world powers because almost all countries were involved in UNCITRAL. The aspiration for ISDS review at the UNCITRAL forum was more moderate because it was only to improve the ISDS mechanism, but not to the point of wanting to replace the ISDS itself.

According to a source from BKPM, not only ISDS but all elements and articles in international investment agreements must be reviewed for improvement. All of these elements and articles continued to develop according to the needs of the times, especially related to the economic activities of investors and the form of government treatment of investors. For example, the US Model BIT had been refined several times, namely in 1994, 1998, 2004, and 2012.

Based on the ISDS article of the IACEPA agreement, the clause in the investment dispute settlement mechanism through the ISDS needed to be reviewed because there were provisions regarding the exclusion of claims. This provision stipulated that investors could not file an ISDS lawsuit if:

- Investments made in violation of the law (e.g., bribery or corruption)
- The lawsuit has no apparent basis (frivolous)
- The Measures that were being sued were the measures intended for the protection of public health

Substantially, Indonesia's proposal in the ISDS review, referring to the UNCITRAL forum, Indonesia proposed a mechanism of mandatory mediation. This proposal aimed to extend the process toward ISDS. Before heading to ISDS,

the parties were required to mediate. Indonesia has conveyed this proposal through the UNCITRAL ISDS Reform forum.

Proposals for ISDS review from Indonesia and other countries, according to a resource person from BKPM. In progress, so it could not be concluded that it failed. Substantially, Indonesia's proposal in the RCEP forum showed that Indonesia's ISDS position in FTA/CEPA was the same in all negotiations. At the RCEP forum, no single country rejected the proposal to review the dispute resolution mechanism through ISDS.

According to BKPM sources, Indonesia had never been vocal in fighting for its aspirations. Indonesia proposed to improve the ISDS mechanism comprehensively and can be independently or with other countries. According to BKPM sources, there was no general difference in interests between developed and developing countries regarding ISDS. All the countries understand the importance and risks of ISDS. At this time, all countries were looking for a standard solution to the use and avoid misusing ISDS in international investment agreements.

The ISDS mechanism tended to be detrimental to the host country, so to review the ISDS, it must be a package with the general investment agreement. ISDS did present a risk for the host country. ISDS was one of the main features of investment agreements. Without ISDS, the investment agreement became less attractive.[24] At the same time, the purpose of making an investment agreement was to increase the inflow of investment into the host country. However, some countries were currently choosing to enter into investment agreements without an ISDS mechanism, for example, the Australia-Malaysia FTA. Indonesia also had an investment agreement that did not have an ISDS element, namely the Indonesia-EFTA CEPA.[25]

Based on the description above and related to the second research question, **"**How do the aspirations for ISDS review in the regional comprehensive economic partnership (Regional Comprehensive Economic Partnership, RCEP) have implications for Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum?" it can be concluded that the ISDS review in the regional comprehensive economic partnership (Regional Comprehensive Economic PartnershipRCEP) did not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum, because the change in the ISDS mechanism was only a proposal or input to the RCEP forum. The proposal to review the ISDS mechanism at the

24 Andi M. F. Adnan, Penyelesaian Sengketa Investor-State Dispute Settlement (ISDS) Melalui International Centre for Settlement of Investment Dispute (ICSID) Ditinjau dari Perspektif HAM Internasional, (Makassar: Universitas Hassanudin, 2017), hlm. 4

25 Susan D Franck, Investment Court System (ICS) sebagai Alternatif baru Investor State Dispute Settlement (ISDS)

RCEP forum was carried out by ASEAN countries, including Indonesia. Finally, the discussion regarding reviewing the ISDS mechanism at the RCEP forum was postponed at the suggestion of China. However, the proposal for a review of the ISDS mechanism is currently ongoing in various forums. The proposal to review the ISDS mechanism was not only made by Indonesia and ASEAN countries but by many countries. The ongoing review of the ISDS mechanism is in forums outside of RCEP, especially in the UNCITRAL forum. The extent to which the implications of the results of the ISDS review will depend on how the new ISDS mechanism will be, which is currently under review at UNCITRAL.

3. The counterclaim and Indonesia's Position in Investment Disputes at the Forum Arbitrage

The mechanism for suing back or in investment disputes is often referred to as counterclaim is the act of the host government (host state) suing the foreign investor back in the case of the foreign investor's lawsuit, which is currently ongoing in the international arbitration forum. The mechanism of the counterclaim is still rarely carried out on the ISDS mechanism, both in the ICSID arbitration forum and other international arbitration forums, especially UNCITRAL.

In investment disputes, can the defendant's counterclaim mechanisms be used (whether the defendant is an investor or a host country)? Both plaintiffs can counterclaim. There are also cases where countries sued investors, including Gabon (host state) vs. Societe Serene (investor), Tanzania Electric Supply (host state) vs. IPTL, and the Government of East Kalimantan (host state) versus KPC (investors). If we compare the lawsuits from investors against the host state and counterclaims from the host state to investors, the numbers are far adrift. When the lawsuit occurred in 684 BITs in 2017, the counterclaim until 2017 only 15 cases.[26] This means that the counterclaim is still rare in the international arbitration forums ICSID and UNCITRAL.

The problem is that the mechanism of the counterclaim is not explicitly regulated in the ISDS mechanism. The mechanism counterclaim is not specifically regulated but implicitly allowed if the ISDS Article is regulated broadly, which includes "any" or "all" disputes between a Contracting State and an investor of the other Contracting State" concerning a protected investment. Phrase any or all can be interpreted to include a lawsuit mechanism by the host country to the investors. In the absence of a counterclaim mechanism in the ISDS mechanism, the advantage for the state is not obtained from ISDS but from the entry of foreign investors due to the attractiveness of investment agreements in general.

26 Kamran Musayev, "Counterclaims in treaty-based investment arbitration," University of Oslo, Norwegia, hal 5; UNCTAD, "Investor-state dispute settlement: Review of Developments in 2017 (2018), hlm. 1

Formally Indonesia has never proposed a counterclaim mechanism. Indonesia tends to agree if the counterclaim mechanism is regulated in the ISDS mechanism. There have been many lawsuits from investors against Indonesia as a host state, both claims through the ICSID international arbitration forum and the UNCITRAL international arbitration forum. Indonesia has had arbitration cases and won or lost decisions in dealing with these lawsuits. Regardless of losing or winning the lawsuit, Indonesia still feels financially disadvantaged because of many costs must be incurred in the dispute resolution process and the imbalance in position between investors and the host state, and this is due to the arrangement of investment dispute resolution with the ISDS mechanism which can be a concern for many parties because the mechanism is considered more pro-investor than the state.[27] Most IIAs allowed ISDS to be filed by investors; in practice, investors are the only plaintiffs allowed.[28] The IIA allows investors to file lawsuits with ISDS on their own behalf or behalf of their companies.[29] The imbalance in the position underlies the idea of the emergence of a counterclaim as an effort to balance the position of investors and the host state in the ISDS mechanism. The counterclaim is a counterclaim from the defendant to the plaintiff.

The imbalance in the position of the parties in submitting claims to

the ISDS mechanism raised the importance of counterclaims because:[30]

1. There are no uniform rules regarding counterclaims because the counterclaim is a new.
2. The counterclaim was very rare, from 684[31] BITs sued on ISDS, counterclaim lawsuit did not exceed 15[32]cases.
3. The counterclaim allows respondents to seek justice in the same forum so that it is more efficient.
4. For the host state, a counterclaim can be used to clear a country's reputation in a lawsuit filed by an investor.

Whereas the ISDS mechanism through the ICSID and UNCITRAL arbitration forums does not stipulate a counterclaim mechanism, it can be seen from several BITs signed by Indonesia. The BITs mechanism so far does not allow the Government of the host country

27 Indonesia for Global Justice. *'Lembar Fakta Ancaman Perjanjian TPP : Masyarakat Indonesia #TolakTPP'*, (2016).hlm. 1.
28 UNCTAD, '*UNCTAD Series on Issues in International Investment Agreements II :Scope and Definition'*, (New York 2015).hlm. 180.
29 *ibid.*
30 Kamran Musayev, 'Counterclaims in treaty-based investment arbitration', (2017) , University of Oslo Norwegia. hlm. 5.
31 UNCTAD, '*Investor–State Dispute Settlement: Review Of Developments In 2017*.hlm. 1
32 Atanasova, Benoit and Ostřanský, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration', (2014), Journal of International Arbitration.hlm.358.

(host state) to do counterclaims. The content of BITs that Indonesia terminated on average did not allow the Indonesian Government to do a counterclaim. This can be seen from several examples of BITs signed by Indonesia and the investors' countries of origin. The counterclaim mechanism is permitted in principle if it meets the following requirements: (i) Counterclaim must be under the consent of the disputing parties (host state and investors), and (ii) counterclaim must have a close relationship with the main claim.[33]

According to BKPM sources, Indonesia prioritized dispute resolution through negotiation, conciliation, and mediation. As much as possible, lawsuits through ISDS are avoided. In addition to compensation based on court decisions, settlement through ISDS will also require very high costs in dispute resolution.[34]

Based on the description above and linked to the third research question (third question: "How is the counterclaim discourse in the BIT and/or ISDS has implications for Indonesia's position in investment disputes at the ICSID arbitration forum?"), then the discourse counterclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Suppose the counterclaim is possible in the BIT until the mechanism is followed in the ISDS and the international arbitration forum (ICSID, UNCITRAL, and others). In that case, it is beneficial for Indonesia as the host country. There are settings of counterclaim in agreements (BIT), investment dispute resolution mechanisms (ISDS), and international arbitration forums (ICSID, UNCITRAL); that will prevent investors from arbitrarily suing the host country, including Indonesia. The host country can also file a counterclaim at the same forum and opportunity to improve the country's reputation and allow the host country not to lose too much when facing lawsuits from investors.

D. Closing

1. That signs the BIT. Regarding unilateral timing termination, Indonesia does so for BITs at least 10 years old following ISDS provisions. Procedurally, Indonesia has terminated BITs following the provisions, which are carried out officially through a diplomatic note from the Ministry of Foreign Affairs notifying the partner countries of Indonesian BITs or host states.
2. The ISDS review in the Regional Comprehensive Economic Partnership, RCEP did not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum because the change in the ISDS mechanism was

33 Nasution, op.cit.
34 Rachmi Hertanti, "Sengketa Investasi Bikin Negara Tekor", Opini IGJ, 2019, https//igj.or.id/sengketa-investasi-bikin-negara-tekor/

only a proposal or input to the RCEP forum. ASEAN countries, including Indonesia, carried out the proposal to review the ISDS mechanism at the RCEP forum. However, in the end, the discussion regarding the review of the ISDS mechanism at the RCEP forum was postponed at the suggestion of China. However, the proposal for a review of the ISDS mechanism is currently ongoing in various forums. The proposal to review the ISDS mechanism was not only carried out by Indonesia and ASEAN countries but by many countries. The ongoing review of the ISDS mechanism is in forums outside of RCEP, especially in the UNCITRAL forum. The extent to which the implications of the results of the ISDS review will depend on how the new ISDS mechanism will be, which is currently under review at UNCITRAL.

3. The discourse of counterclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Because if the counterclaim is possible in BIT until the mechanism is followed in ISDS and international arbitration forums (ICSID, UNCITRAL, and others), then it is beneficial for Indonesia as the host country. There presence of counterclaim in agreements (BIT), investment dispute resolution mechanisms (ISDS), and international arbitration forums (ICSID, UNCITRAL); will prevent investors from arbitrarily suing the host country including Indonesia. The host country itself can also file a counterclaim at the same forum and opportunity so that this will be able to balance the position between investors and the host country, in this case, Indonesia, and allow the host country not to lose too much financially when facing a lawsuit from investors.

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EXPLORING SOFTWARE PATENT AS A POSSIBLE SOLUTION TO ALGORITHM'S LACK OF TRANSPARENCY

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ABSTRACT

This article examines the possibility of solving the opacity of algorithms through patent law. The opacity of algorithms necessitated attempts at making it more transparent and preventing intentional secrecy, breach of privacy, discriminatory and biased decisions attributed to it, etc. As part of intellectual property rights, patent protection can solve or minimize these issues. The article first looks at algorithms' meaning, the associated issues, and the patentability of algorithms under European laws, the USA, and Asia. Artificial intelligence (AI) and its algorithms are primarily protected under trade secrets. However, protection under trade secrets amplifies this lack of transparency by allowing for the non-disclosure of how an algorithm operates, making it more difficult to solve the problems identified with algorithms. Instead, this article offers the option of patenting as a better alternative, not just as means to solving the issues associated with an algorithm, but as means to promote invention and innovation.

Keywords: Algorithm, Patent, Artificial intelligence, Opacity, Transparency, Sufficiency of disclosure.

A. Introduction

The Internet has been described as a necessary evil[1] and even though it may have negative impacts on our lives, we have been so entangled with it to the extent that one cannot possibly live in a civilized society without the use of the Internet.[2] And so, from the time the Internet was commercialized in the late 1980s by the Advanced Research Projects Agency Network (ARPANET),[3] virtually all known human activity has been linked to the Internet.

Just like any other aspect of the Internet, algorithms have also raised

1 Mohan Chandran, "Technology – A "Necessary Evil"?", Boloji (2016) https://www.boloji.com/articles/49084/technology-a-necessary-evil (accessed May 29, 2022); see also Ari Ezra Waldman, "All Those like You: Identity Aggression and Student Speech" *Missouri Law Review* 77 (2013), 653, 667.

2 James Brown, "Could you Survive a Week with no Internet?" *The Telegraph* (2014) https://www.telegraph.co.uk/men/thinking-man/10553634/Could-you-survive-a-week-with-no-internet.html (accessed May 29, 2022).

3 Raphael Cohen-Almagor, "Internet History", *International Journal of Technoethics* 2 (2011), 45, 52.

concerns. Government authorities now make decisions based on an algorithm; decisions that were previously based on human reflection are now taken automatically. In a fraction of a second, the software encodes thousands of rules and instructions,[4] businesses now advertise products based on a customer's previous purchases; Google searches are products of an algorithm, a person is placed on a no-fly list without knowing why,[5] and federal benefits are denied to a single mother algorithmically even when it is not supposed to be so,[6] etc. Just like God, nobody can fully understand how algorithms work.[7] According to Frank Pasquale, this calls for concern[8] as it has begun to have real-world consequences.[9] He further explained that "hidden algorithm can make or ruin a reputation, decide the destiny of entrepreneurs, or even devastate an entire economy."[10] To this end, there is a need for the government to regulate cyberspace.[11]

As a product of intellectual exercise, arguments have arisen about what type of intellectual property protection should be given to algorithms. Again, different jurisdictions give different algorithm protection depending on the legal system, but more importantly, the protections are subject to special requirements different from other inventions. For the traditional patent, the invention must be susceptible to industrial application, that is to say, the invention must be something that can be used in some kind of industry.[12] But for the patentability of algorithms, requirements like "a useful, concrete and tangible result",[13] "not

4 Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard Press, 2015), 8.

5 Danielle Keats Citron, "Technological Due Process", Washington University Law Review 85 (2008): 1249, 1256–1257.

6 *Ibid*. See also Deven R Desai and Joshua A Kroll, "Trust but Verify: A Guide to Algorithms and the Law", Harvard Journal of Law & Technology 31 (2017): 1, 2.

7 Ian Bogost, "The Cathedral of Computation", The Atlantic (2015) https://www.theatlantic.com/technology/archive/2015/01/the-cathedral-of-computation/384300/ (accessed May 29, 2022).

8 *Ibid*.

9 Angela Adrian, Nobody Knows you are a Dog: Identity and Reputation in Virtual Worlds, in Sylvia Mercado Kierkegaard (ed), *Cyber, Security and Privacy* (International Association of IT Lawyers, 2007), p. 411.

10 Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard Press, 2015), 8.

11 Although an earlier attempt by the US Government to control communication via the Internet (by promulgating the Telecommunications Act of 1996, which sought for the first time the inclusion of the Internet in broadcasting and spectrum allotment (see section 301thereof)), met with resistance which even led to the famous "Declaration of the Independence of Cyberspace" by John Perry Barlow. See John Perry Barlow, "Declaration of the Independence of Cyberspace", Electronic Frontier Foundation, (1996) https://www.eff.org/cyberspace-independence (accessed May 29, 2021). See also the case of *Bernstein v United States,* No C-95-0582 MHP (ND Cal filed February 21, 1995), where, in a legal action Dr Daniel Bernstein sought the court to declare unconstitutional provisions of the US policy preventing him from publishing, discussing publicly or circulating a scientific paper, algorithm, or computer program in the field of cryptology.

12 Mario Cisneros, *Patentability Requirements for Nanotechnological Inventions: An Approach from the European Patent Convention Perspective*, (Baden-Baden: Nomos Publishers, 2008), p. 49.

13 *State Street Bank and Trust Company v Signature Financial Group, Inc*, 149 F 3d 1368 (Fed Cir 1998); *AT&T Corp v Excel Communications, Inc*, 172 F 3d 1352 (The United States Federal Cir 1999).

merely an abstract mathematical process",[14] and "technical purpose"[15] was introduced to underscore the fact that patent law does not unnecessarily inhibit inventions. In Europe, programs for computers or software are expressly excluded from protection,[16] but recent judicial interpretations have relaxed this rule to incorporate that for programs for computers to be eligible for patent protection, they must serve a technical purpose.[17] This article will first examine algorithms, how they work, and the issues they raise. Furthermore, it examines the concept of patent and eligibility for a patent, and finally, the patentability of algorithms in the US, EU, and Asia (specifically China and Indonesia). It concludes with the suggestion that since patent, unlike trade secrets, allows for full disclosure before it is granted, countries should allow the patenting of algorithms without strict conditions to make the algorithm transparent.

B. Research Method

At the core of this article is the analysis of algorithm and how it affects lives. It also proffers the solution to the transparency issues through patent protection. In the first instance, the doctrinal research is used to explain present legal protection granted to algorithm and decisions of courts. This type of research method asks what law governs a particular issue and the development and application of the law.[18] The primary aim of this method, also called the library-based approach, is to make specific inquiries in order to identify existing problems.[19] The article looks at software patents in the US, EU, and Asia (specifically China and Indonesia) and the eligibility requirements using this research method.

C. Discussion

1. Understanding Algorithms.

Defining what an algorithm is has presented some problems since it can only be adequately specified in the context of programming language.[20] Even though it is challenging to define algorithms, they are real mathematical objects that can be represented.[21] A hidden algorithm has been defined as "an

14 *Alice Corp v CLS Bank International* 573, 208, 134 United States Supreme Court 2347 (2014).
15 Case T-1358/09 *Classification/BDGB Enterprise Software* [European Patent Office 2014] ECLI: EP: BA: 2014: T135809.
16 Convention on the Grant of European Patents of October 5, 1973, article 52.
17 Case T-1358/09 *Classification/BDGB Enterprise Software* [European Patent Office 2014] ECLI: EP: BA: 2014: T135809.
18 Salim Ibrahim Ali, Zuryati Mohamed Yusoff, and Zainal Amin Ayub, "Legal Research of Doctrinal and Non-Doctrinal", *International Journal of Trend in Research and Development* 4 (2017) 493 http://www.ijtrd.com/papers/IJTRD6653.pdf
19 Ibid, 493.
20 Donald E Knuth, *Selected Papers on Computer Science* (Cambridge: Cambridge University Press 1996), 1.
21 Nonson S Yanofsky, "Towards a Definition of an Algorithm", *Journal of Logic and Computation* 21 (2011), 253.

information processing method, a step-by-step process that turns a certain set of data into something else— perhaps a smaller, filtered set of data, a result that is more useful than the original for the algorithm user".[22] The classical meaning of an algorithm is that the device is a list of instructions that leads its user to a specific response or output based on the available data.[23]

a. How algorithm operates.

An algorithm works by collecting data about a person over some time and using the same to make predictions. This process has been described much better by Betsy Anne Williams and others thus:

> When traces of people's lives are recorded as "data," and pieced together into "big data," the resulting mesh is densely packed with correlations—personal characteristics that tend to show up together. These patterns can exist within a single person's data, revealing themselves as autocorrelations, when a single aspect of a person's life is measured repeatedly over time (e.g., last year's income helps predict this year's income).[24]

This collection of data is called big data, which could be defined as "datasets beyond the scale of a typical database, which are held and analysed using computer algorithms"[25] and since no one fully understands how these datasets are analysed, it has been described as a black box.[26] The underlining here is the issue of secrecy.

b. Issues Associated with Algorithmic Decisions.

In this part, the article looks at some of the issues associated with algorithmic decisions that could be said to be part of the general secrecy or transparency concerns regarding algorithms.

1) Internet discrimination

Algorithmic activities, in many cases, have shown that they could be discriminatory. Skewed information, false rationale or simply the preferences of their software engineers mean that algorithms and other artificial intelligence very effectively imitate and even enhance

22 Kyle Chayka, "5 Hidden Algorithms That Rule Your World: From the NSA to OKCupid", *Pacific Standard* (2013) https://psmag.com/social-justice/nsa-okcupid-5-algorithms-rule-world-69709 (accessed May 29, 2022).
23 Christopher Steiner, Automate This: How Algorithms came to Rule our World (Penguin Groups, 2012), 10. Joshua A Kroll et al., "Accountable Algorithms" *University of Pennsylvania Law Review* 165 (2017), 633, 640.
24 Betsy Anne Williams et al., "How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications" JI Policy 8 (2018), 78, 82.
25 Turnbull Mahoney, "Navigating New Zealand's Digital Future: Coding our way to Privacy in the age of Analytics", NZLSJ 3 (2015), 420, 423.
26 Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard Press, 2015).

human prejudice.[27] In the US, the judicial system has developed to the extent that judges now depend on the outcome of algorithms to determine if an offender should be convicted or not.[28] In the case of State v Loomis[29] the US Supreme court, while relying on COMPAS, an algorithm used by the US courts which predicts the likelihood of an offender committing another offense, held that "[i]f used properly with an awareness of the limitations and cautions, a circuits court's consideration of a COMPAS risk assessment sentencing does not violate a defendant's right to due process."[30]

In research conducted by Jeff Larson and others, COMPAS was discovered to be racially biased. According to the analysis, the system predicts that black defendants present a greater risk of offense recurrence than white defendants.[31] But this is not so as both the commission of offenses and reoffending go beyond colour.[32] These issues of discrimination form part of the transparency paradox associated with algorithms.[33]

Instances can be given where the search for black-sounding names produces ads that suggest arrest records instead of the actual thing being searched.[34] There is also discrimination based on Google ads searches. In research recently carried out,[35] it was found that Google's algorithm targeted ads, show ads for jobs that pay more to men than they show to women.[36] It is suggested that this may be a result of what women usually search for on the Internet, which makes algorithms filter results to suit the

27 Daniel Cossins, "Discriminating Algorithms: 5 Times AI showed Prejudice" New Scientist (2018) https://www.newscientist.com/article/2166207-discriminating-algorithms-5-times-ai-showed-prejudice/ (accessed May 29, 2022).

28 Robert Brauneis and Ellen P Goodman, "Algorithmic Transparency for the Smart City" YJLaw Tech 20 (2018),103, 107.

29 *State v Loomis* 88 NW 2d 749, 770 (Wisconsin Supreme Court, United States of America 2016).

30 *Ibid*.

31 Jeff Larson et al., "How We Analysed the COMPAS Recidivism Algorithm", ProPublica (2016) https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm (accessed May 29, 2022).

32 Timothy Revell, "Algorithms that Change Lives should be Trialled like New Drugs", New Scientist (2018) https://www.newscientist.com/article/2158755-algorithms-that-change-lives-should-be-trialled-like-new-drugs/ (accessed May 29, 2022). (The writer found out that when it comes to predicting accurately who is likely to commit another offence, it is generally random, untrained people on the Internet, and not necessarily black defendants).

33 Neil M Richards and Jonathan H King, "Three Paradoxes of Big Data", SLR 66 (2013), 41.

34 Deven R Desai and Joshua A Kroll, "Trust but Verify: A Guide to Algorithms and the Law", Harvard Journal of Law & Technology 31 (2017),1, 3.

35 Tom Simonite, "Probing the Dark Side of Google's Ad-Targeting System" MIT Technology Review (2015) https://www.technologyreview.com/s/539021/probing-the-dark-side-of-googles-ad-targeting-system/ (accessed May 29, 2022).

36 *Ibid*. See also Matt Southern, "Google's Ad-Targeting Algorithms Accused of Discrimination", Search Engine Journal, (2015) https://www.searchenginejournal.com/googles-ad-targeting-algorithms-accused-of-discrimination/136280/ (accessed May 29, 2022).

datasets that a particular algorithm holds about a woman.[37]

2) Algorithm and its Threats to Identity.

Inasmuch as big data identifies, it also threatens identity.[38] Identity is about our privacy, making choices, and electing what to buy or not to buy – an instinctive desire over our being.[39] With the continued reliance on big data and algorithms, the pooled data on what we buy, whom we chat with, what we search online, etc., threaten our right to privacy. The companies that control these data may end up knowing us more than we do ourselves and would eventually control, against our will, what we should do and where to go.[40] In other words, they can modify our behavior.[41]

The fear of how these companies manage our personal data was manifested when Cambridge Analytica harvested the profile data of millions of Facebook users for political gains without their consent.[42] This event led many people to become more aware of how vulnerable they could be in an algorithm-controlled age.[43]

3) Financial and Price Algorithm – the Wall Street Experience

Algorithms that help investors analyze and buy or sell stocks and other instruments have been created. The experience of the Wall Street where shares crashed has been attributed partly to the effect of algorithms.[44] Also, the flash crash of the British Pound in 2016 was attributed to 'software gone haywire',[45] as the trading machine was accused of overacting "to tweets about the French president's comments on Brexit".[46] These events show that overreliance on algorithms may lead to financial trading without real value for the money.

A corollary to this is the issue of price discrimination. Online sellers and service providers have been found to discriminate

37 Anja Lambrecht and Catherine Tucker, "Algorithmic Bias: An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads", SSRN Electronic Journal (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852260 (accessed May 29, 2022). (The writers hold contrary views).

38 Neil M Richards and Jonathan H King, "Three Paradoxes of Big Data", SLR 66 (2013), 43.

39 *Ibid*; see also Julie E Cohen, "What Privacy is for", HARV L REV 126 (2013). 1904, 1906.

40 Andrew Leonard, "How Netflix Is Turning Viewers into Puppets", Salon (2013) https://www.salon.com/2013/02/01/how_netflix_is_turning_viewers_into_puppets/ (accessed May 29,2022). See also Sarah Arnold, Netflix and the Myth of Choice/Participation/Autonomy in Kevin McDonald and Daniel Smith-Rowsey (eds) *The Netflix Effect: Technology and Entertainment in the 21st Century* (Bloomsbury, 2016), 90.

41 Mireille Hildebrandt, "Algorithmic regulation and the rule of law", Phil Trans R Soc 376 (2018), 2.

42 Jim Isaak and Mina J Hanna, "User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection" CSDL 51 (2018), 56.

43 *Ibid*.

44 Jill Treanor, "The 2010 'Flash Crash': How it Unfolded", The Guardian (2015) https://www.theguardian.com/business/2015/apr/22/2010-flash-crash-new-york-stock-exchange-unfolded (accessed May 29, 2022).

45 Jamie Condliffe, "Algorithms Probably Caused a Flash Crash of the British Pound" MIT Technology Review (2016) https://www.technologyreview.com/s/602586/algorithms-probably-caused-a-flash-crash-of-the-british-pound/ (accessed May 29, 2022).

46 *Ibid*.

prices by geographic location and time of the day.[47] This form of discrimination is based on consumers' willingness to pay.[48]

4) Algorithm and Faulty Decisions by Government.

Some governmental decisions are based on algorithms, and this, on some occasions, has resulted in some faulty decisions. Because of the opacity of automated decisions, nobody questions this, as people even hardly understand the variables considered by the machine before arriving at a decision.[49] This leads to the question of accountability and transparency. Due to the rise in terrorism and the need to combat it, governments now rely on face recognition algorithms to determine whom to allow in a country. The "No Fly" list by the US government has been reported to erroneously label up to 1,500 innocent travelers as terrorists.[50] A single mother was reported to have been erroneously denied federal benefits[51] buttressing the point that "automated systems also make incorrect judgments that escape judicial review".[52] Automation threatens due process values, falsifies central administrative law assumptions[53] and reduces transparency in policymaking. In the next section, this article looks at existing attempts at curtailing some of these concerns regarding algorithms different from patent protection.

2. Existing Solution to the Opacity of Algorithm

a. Transparency and Accountability of Data

Big data is meant to make the world easier and more transparent, but its mining is invisible, opaque, and shrouded in a series of physical, legal and privacy design.[54] To curb these concerns, there should be algorithmic transparency and accountability.

While algorithmic transparency means that the algorithmic inputs and the use of the algorithm itself must be known but not necessarily fair,[55] algorithmic accountability means that organizations using algorithms must be responsible for the decisions taken by these algorithms,

47 Oren Bar-Gill, "Algorithmic Price Discrimination When Demand is a Function of Both Preferences and (Mis) perceptions", Uni Chi Law Review 86 (2018), 1.
48 *Ibid*.
49 Charles Vincent and Jean Camp, "Looking to the Internet for Models of Governance", Ethics Info Tech 6 (2004), 161.
50 Danielle Keats Citron, "Technological Due Process", *Washington University Law Review* 85 (2008), 1249, 1257.
51 *Ibid*.
52 *Ibid*,1300.
53 *Ibid*.
54 Neil M Richards and Jonathan H King, "Three Paradoxes of Big Data", SLR 66 (2013), 42 – 43.
55 Nicholas Diakopoulos, "Algorithmic Accountability: Journalistic Investigation of Computational Power Structures", *Digital Journalism* 3 (2015), 398, 400.

even if the decisions are taken by a machine and not by a human being.[56]

b. Testing and Evaluating Algorithms

Algorithms could be monitored through the black-box and white-box settings.[57] The analyst has access to the source code in the White- box settings, but in Black- box settings, the analyst is limited to seeing only the system inputs and outputs, but not its internal function.[58] Kroll believes that although these measures are inadequate, they go a long way in enhancing the technical solution.[59]

c. Legal Framework.

The law on trade secrets is now increasingly used to protect the rights of algorithm inventors and programmers. Although the TRIPs Agreement[60] makes provisions for the protection of undisclosed information,[61] such protection must be subject to measures to "protect the public".[62] To make algorithms more transparent, the government should always endeavour to force companies to disclose the secrecy behind their algorithm when the public interest requires it. Companies that do not properly use the data they store should be punished for lack of transparency where such data has been mined and used for other reasons.[63]

The General Data Protection Regulation (GDPR)[64] is specifically on data protection in Europe, and it requires that those who are into automated decision making and profiling can only do so if necessary for the entry of contracts or has been authorized by the EU or any Member state or the person profiled already consented.[65] The data controller has the burden of providing "measures to safeguard the data subject's rights and interests".[66] Similarly, a data subject has the right to be forgotten, i.e., to have their data erased if they withdraw their consent; the data are no longer necessary, if the data has been unlawfully obtained, etc.[67]

56 Dickey Megan Rose, "Algorithmic Accountability", TechCrunch (April 30 2017) https://techcrunch.com/2017/04/30/algorithmic-accountability/ (accessed May 29, 2022)
57 Deven R Desai and Joshua A Kroll, "Trust but Verify: A Guide to Algorithms and the Law", *Harvard Journal of Law & Technology* 31 (2017) 1, 36.
58 *Ibid*.
59 Joshua A Kroll et al., "Accountable Algorithms" *University of Pennsylvania Law Review* 165 (2017), 633, 647.
60 Agreement on Trade-Related Aspects of Intellectual Property Rights April 15 1994) (UNTS 299, 33 ILM 1197) (1994).
61 *Ibid,* art 39.
62 *Ibid*, art 39 (3).
63 Alex Hern and David Pegg, "Facebook fined for data breaches in Cambridge Analytica Scandal", The Guardian (2018) https://www.theguardian.com/technology/2018/jul/11/facebook-fined-for-data-breaches-in-cambridge-analytica-scandal (accessed May 29, 2022).
64 EU General Data Protection Regulation [2016] OJL119/1.
65 *Ibid*, art 22.
66 *Ibid*, art 22(3).
67 *Ibid*, art 17; Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González* (2014) ECLI:EU:C:2014:317.

But some have doubts whether the GDPR has finally addressed these concerns.[68]

3. Patent and Patentability

Intellectual property rights are a type of property that includes intangible creations of the human intellect[69] and they confer a form of monopoly on the rights holders as an economic incentive for their creation. There are various types of intellectual property rights, but the most common are trademarks, copyrights, trade secrets, industrial design, and patents. This work will only discuss patents but will make reference to trade secrets as a form of protection granted to algorithms. According to the World Intellectual Property Organisation (WIPO), "a patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem".[70] This protection, lasting twenty years,[71] can only be granted subject to the full disclosure of the technical information about the invention,[72] otherwise called the sufficiency of disclosure or enablement. The essence of this sufficient disclosure is to give persons knowledgeable in the art of the invention the opportunity to work on that invention after the exclusivity period.[73]

On the other hand, patentability refers to the requirements or substantive conditions an invention must meet before it could be protected under a patent. These requirements are that the invention must be a patentable subject matter, novel, non-obvious (as in the US or involve an inventive step as used in the EU), useful (as in the US or susceptible of industrial application as in EU law). In the context of patentability, computer programs and algorithms are either expressly excluded from protection or included for protection with some special conditions. Bearing this in mind, the article will examine how computer programs, business methods, and algorithms are protected or excluded from patentability. This article will do so

68 Howard Yu, "GDPR isn't Enough to Protect us in an Age of Smart Algorithms", The Conversation (2018) https://theconversation.com/gdpr-isnt-enough-to-protect-us-in-an-age-of-smart-algorithms-97389 (accessed May 29, 2022).

69 World Intellectual Property Organisation, "Understanding Industrial Property", World Intellectual Property Organisation, https://tind.wipo.int/record/28945 (accessed May 29 2022).

70 World Intellectual Property Organisation, "Patents", WIPO, https://www.wipo.int/patents/en/ (accessed May 29 2022).

71 Most national and international patent laws grant twenty years of exclusivity to patent rightsholders. See, for instance, article 33 of the General Agreement on Trade-Related Aspects of Intellectual Property 1869 UNTS 299, 33 ILM 1197; article 22 of the Law of the Republic of Indonesia, Number 13 of 2016 on Patent; section 7 of the Nigerian Patents and Designs Act, Cap P2, Laws of the Federal Republic of Nigerian, 2004.

72 World Intellectual Property Organisation, "Patents", WIPO, https://www.wipo.int/patents/en/ (accessed May 29 2022).

73 Poliana Belisário Zorzal et al., "Sufficiency of Disclosure and Genus Claims for Protection of Biological Sequences: A Comparative Study among the patent Offices in Brazil, Europe and the United States" *Biotechnology Research and Innovation* 3 (2019), 92.

by looking at the laws in the US, EU, and Asia (specifically China and Indonesia).

a. Patentability of Computer Programs and Algorithms

Algorithms now constitute a large chunk of software patent applications in some jurisdictions.[74] Before analysing the legal regime in some jurisdictions, it is essential to look at what the WIPO says about the patentability of computer software. Patenting software has taken numerous ways. Some countries award patents for all software, but many exclude computer programs. In many of these nations, computer programs are not patentable "as such," allowing patent protection for computer programs with "technical character.[75]As a rationale for excluding software from patentability, it is often said that invention in this field involves cumulative, sequential development and re-use of others' work. Another reason for the exclusion is that the need to preserve interoperability between programs, systems and network components does not fit with the patent system because the options available for subsequent inventors may be limited.[76] Some argue that patenting computer software is vital to encourage investment in this field and stimulate innovation in other technological areas developing alongside computer technology.[77]

Business methods have traditionally been in the public domain or under trade secret protection. Today, information technology enables new business models by processing and transferring technical, commercial, and financial data.[78] Due to the enormous economic risks of novel business methods and the growth of e-commerce, the debate over patenting business methods continues.[79] It is also important to note that the General Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) does not exclude the patentability of algorithms, computer programs, or business methods.[80]

74 Richard N Stern, "Analysis of US PTO Data Showing Number of Software and Non-Software Patents Issued Each Year From 1991 to 2011" http://docs.law.gwu.edu/facweb/claw/ch-8D3.htm (accessed May 29, 2022), where the author says that the absolute number of software application increased as at 2011, to 125, 000 as against 25, 00 when the courts had not determined the patentability of algorithms. See also Doug Laney, "Algorithm Patents Increased 30x The Past Fifteen Years", Gartner Blog Network (2016) https://blogs.gartner.com/doug-laney/patents-for-algorithms-have-increased-30x-the-past-fifteen-years/ (accessed May 29, 2022); where the writer observed that 'nearly 17,000 patents applications in 2015 mention "algorithm" in the title or description, versus 570 in 2000' in the US.

75 World Intellectual Property Organisation, "Patent Expert Issues: Computer Programs and Business Methods", WIPO, https://www.wipo.int/patents/en/topics/computer_programs.html (accessed May 29 2022).

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 See article 27 (2 and 3), where the TRIPs Agreement allows Members to exclude only diagnostic, therapeutic and surgical methods for the treatment of humans or animals, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-

1) Patentability of Computer Programs in the EU

Under the EU patent law, computer programs and methods of doing business are expressly excluded from patent protection. Article 52 (2) of the European Patent Convention (EPC)[81] provides that:

The following, in particular, shall not be regarded as inventions within the meaning of paragraph 1:

(a) discoveries, scientific theories and mathematical methods;
(b) aesthetic creations;
(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
(d) presentations of information.

Even though computer programs, mathematical models, and algorithms are expressly excluded from patent protection, the 2022 Guidelines for Examination in the European Patent Office (EPO) gives an instance where such inventions could be protected. In other words, protection would be given to such invention if there is proof that it has "technical character".[82] If a claim is directed to a method with technical means (e.g., a computer) or to a device, and its subject matter has a technical character, then it is patentable under Article 52(2 and 3). The exclusion applies if a claim is about a mathematical method that is entirely abstract and does not require any technical means.[83] The Claim by the Applicants in the case of Classification/BDGB Enterprise Software,[84] was "[a] method for the computerized classification of an unclassified text document into one of a plurality of predefined classes based on a classification model obtained from the classification of a plurality of pre-classified text documents which respectively have been classified as belonging to one of said plurality of classes, said document and said documents respectively comprising a plurality of terms which respectively comprise one or more symbols of a finite set of symbols".[85] The Boards of Appeal of the EPO held that "a mathematical algorithm contributes to the technical character of a computer-implemented method only in so far as it serves a technical purpose" and that "[i] n the present case, the algorithm serves the general purpose of classifying text documents".[86] So, for an algorithm to be patentable under the EU Patent law, it must contribute to the technical character of a computer method. In IBM/Computer

biological and microbiological processes, and where exclusion is necessary to protect public order and morality.

81 Convention on the Grant of European Patents – (European Patent Convention) [1973] OJ EPO/01.

82 European Patent Office, "Guidelines for Examination in the European Patent Office, 2022", https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_3_3.htm (accessed May 29, 2022).

83 Ibid.

84 Case T-1358/09 *Classification/BDGB Enterprise Software* [European Patent Office 2014] ECLI: EP: BA: 2014: T135809.

85 Ibid, 2.

86 Ibid, 4.

Program, the Technical Board of Appeal (TBA) of the EPO refused a patent application in full because 'it was directed to a computer program product' without technical effect. This technical effect is a material effect or as

2) Patentability of Computer Programs in the USA

In 1972, the US Supreme Court held in the case of Gottschalk v Benson[87] that a process claim involving a mathematical algorithm, as such, was not eligible for patent protection because "the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself."[88] The law governing patents in the US Code Title 35 - Patents includes a "new and useful process" as an invention eligible for patent protection. It provides that "[w] hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title".[89] In Alice Corp v CLS Bank International,[90] the question for the Supreme Court was whether some patent claims for a computer-implemented, electronic escrow service involved abstract ideas. The court established two steps that must be followed to determine if such inventions would qualify for protection – 1) the court must evaluate if the examined patent claim comprises an abstract idea, such as an algorithm, method of calculation, or other general principles[91] and 2) the court would assess if the patent added "something extra" to the idea that constitutes an "inventive concept."[92] To this extent, the court ruled that the electronic escrow service involved abstract ideas and was ineligible for protection. This ruling followed the previous Supreme Court decision in State Street Bank and Trust Company v Signature Financial Group, Inc, where the court observed that for an algorithm to be eligible for a patent, the said algorithm must produce "a useful, concrete and tangible result".[93]

3) Patentability of Computer Programs in Asia.

In this subheading, this article will be looking at two Asian countries – China and Indonesia. The Patent Law of the People's Republic of China[94] is the main patent

87 *Gottschalk v Benson*, 409 US 63 (United States Supreme Court 1972).
88 Ibid, 72.
89 35 United States Code 101 – Inventions patentable.
90 *Alice Corp v CLS Bank International*, 573 US 208 (United States Supreme Court 2014).
91 *Ibid*, 2355.
92 *Ibid*.
93 *State Street Bank and Trust Company v Signature Financial Group, Inc*, 149 F 3d 1368 (United States Federal Cir 1998). See AT*&T Corp v Excel Communications, Inc*, 172 F 3d 1352 (United States Federal Cir 1999).
94 The Patent Law of the People's Republic of China (Adopted at the Fourth Meeting of the Standing Committee of the Sixth National People's Congress on March 12, 1984, and amended in accordance with the Decision

law in China and it defines invention as "inventions, utility models and designs".[95] It excludes the following inventions from protection: 1. Scientific discoveries; 2. Rules and methods for mental activities; 3. Methods for the diagnosis or treatment of diseases; 4. Animal and plant varieties; 5. Substances obtained by means of nuclear transformation.[96]

The law does not define what rules and methods for mental activities entail, but the amendment of the People's Republic of China's Guidelines for Patent Examination, which became effective on January 15, 2021, explains what could form part of these rules and methods. Under the Guidelines, when drafting claims for patent applications containing algorithms, each step of the algorithm must be "closely related" to the technical issue to be solved. Simply put, it relates to the following four correlation levels:

a. The data processed by the algorithm must have a specific technical meaning instead of being an abstract data concept;
b. The processing should reflect that the data is processed in accordance with the laws of nature;
c. The output data of the processing by the algorithm must have specific technical meaning rather than being an abstract data concept; and
d. The execution of the algorithm can solve a certain technical problem and achieve corresponding technical effects.[97]

From the preceding, it is clear that a direct method for determining whether a solution containing algorithm features is a technical solution as defined by patent law is to examine whether the algorithm steps in the technical solution are closely tied to specific technologies.[98]

In Indonesia, Law No 13 Year 2016 guides patent protection. It defines an invention as "an idea of an inventor embodied into a specific problem-solving activity in the field of technology in the form of product or process or refining and developing product or process".[99] The law excludes the following inventions from protection:

a. esthetical creation;
b. scheme;
c. rules and methods in conducting activity of:
    1. involving mental activity;
    2. games; and
    3. business.
d. rules and methods containing only computer programs;

by the 27th Meeting of the Standing Committee of the Seventh National People's Congress on Amending the Patent Law of the People's Republic of China on September 4, 1992).

95 *Ibid*, art 2.
96 *Ibid*, art 25.
97 See Peter Zhang, "Eligibility of Chinese Patent Applications in the Field of Algorithms (software)", JD Supra (2022) https://www.jdsupra.com/legalnews/eligibility-of-chinese-patent-8011341/ (accessed May 29, 2022).
98 *Ibid*.
99 The Law of the Republic of Indonesia, Number 13 of 2016 on patent, art 1(2).

e. presentation of information; and
f. discovery in the form of:
    1. new use of existing and/or known product; and/or
    2. new forms from an existing compound which does not generate significantly enhanced efficacy and contains different relevant known chemical structures to compound.[100]

The above expressly excludes patent protection for methods of doing business and methods containing computer programs only, but if the computer program involves a character that has technical effect and function to remedy an intangible or tangible issue, the invention is patentable.

b. Sufficiency of Disclosure During Patent Application and Opacity of Algorithm.

At the core of patent protection is the requirement for the applicant to sufficiently disclose the technical aspect and the literal description of the invention so that a person skilled in that field of the invention could repeat the invention after the patent period must have expired.[101] By this principle, patents are granted in exchange for disclosing the innovation (rather than keeping the information private, as with trade secrets) as quid pro quo.[102] Regarding patents for computer programs and algorithms, a question could be asked on how sufficient disclosure of the invention's technical aspect could help address the algorithm opacity issue. Each jurisdiction has its requirements for sufficient disclosure. Article 83 of the EPC[103] defines the sufficiency of disclosure requirements. It provides that "the European patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art" and that "the claims shall define the matter for which protection is sought. They shall be clear and concise and be supported by the description".[104] In Äquivalenter Aortendruck/ARC SEIBERSDORF,[105] the EPO Board of Appeals rejected a patent application based on machine learning that claimed an "artificial neural network" since the patent specification did not sufficiently disclose how the artificial neural network was created.

Similarly, the US Patent Act provides sufficient disclosure as a formal require-

100 *Ibid*, art 4.
101 Poliana Belisário Zorzal et al., "Sufficiency of Disclosure and Genus Claims for Protection of Biological Sequences: A Comparative Study among the patent Offices in Brazil, Europe and the United States" *Biotechnology Research and Innovation* 3 (2019), 92.
102 Lisa Larrimore Ouellette, "Do Patents Disclose Useful Information?", Harvard Journal of Law & Technology 25 (2012), 532.
103 European Patent Convention (n 81).
104 Ibid, art 84.
105 *Äquivalenter Aortendruck/ARC SEIBERSDORF*, ECLI: EP:BA:2020: T016118.20200512 (European Patent Office 2020).

ment during patent application. It requires that an application should be accompanied by "a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention".[106] Three elements have been read into this provision[107] to include written description, enablement (this is to enable a person skilled in the art, for instance, a "computer engineer or computer programmer, to make or use the related software-related invention without undue experimentation",[108] and best mode. In Vasudevan Software, Inc v MicroStrategy, Inc[109], the question was raised on whether sufficient written description was made. "The patents-in-suit are directed to different features of an online analytical processing ("OLAP") cube capable of collecting and processing "live" data from multiple incompatible databases".[110] The court observed that the test for the sufficiency of the written description "is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date"[111] and this "requirement is not met if the specification merely describes a "desired result"".[112] Also, in the Trustees of Boston University v Everlight Electronics Co, Ltd,[113] the test for enablement was reaffirmed thus: "[t]o be enabling, the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without 'undue experimentation'". In other words, the question is whether the invention's specification teaches a person skilled in the art, as of the effective filing date of the patent, how to manufacture such a device without undue experimentation.[114]

The same sufficiency of disclosure is also at the core of patent grants in Indonesia. As part of the application for a patent, apart from the full details of the inventor or applicant,[115] the application

106 United States Code Title 35 – Patents, section 112.
107 Poliana Belisário Zorzal et al., "Sufficiency of Disclosure and Genus Claims for Protection of Biological Sequences: A Comparative Study among the patent Offices in Brazil, Europe and the United States" *Biotechnology Research and Innovation* 3 (2019), 97.
108 Ryan N Phelan, "Why including an "Algorithm" is Important for Software Patents (Part 2)", PatentNext (2021) https://www.patentnext.com/2021/09/why-including-an-algorithm-is-important-for-software-patents-part-2/ (accessed May 30 2022).
109 *Vasudevan Software, Inc v MicroStrategy, Inc*, 782 F.3d 671 (United States Federal Cir 2015).
110 *Ibid*, 4.
111 *Ibid*, 18.
112 *Ibid*; *Ariad Pharm, Inc v Eli Lilly & Co*, 598 F.3d 1336, 1351 (United States Federal Cir 2010).
113 *Trustees of Boston University v Everlight Electronics Co, Ltd* 896 F.3d 1357, 1364 (United States Federal Cir 2018), 8 – 9.
114 *Ibid*, 12.
115 The Law of the Republic of Indonesia, Number 13 of 2016 on patent, art 25 (1).

must be accompanied by the full details of the invention.[116] The essence of this full disclosure is to "clearly and completely describe how an Invention may be implemented by a person skilled in the art".[117] This is also the situation in China where the following must be submitted for patent grant – "written request, a specification and an abstract thereof, and a patent claim".[118] The meanings of these three requirements are given by the Chinese Patent Law in the following wordings:

> The specification shall describe the invention or utility model in a manner sufficiently clear and complete that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model. The patent claim shall, on the basis of the specification, state the scope of the patent protection requested.[119]

The requirement for sufficient disclosure, even though it is to enable a person skilled in the art of the invention to repeat the invention after the patent period must have expired, also has the advantage of disclosing how an invention functions. Regarding algorithms, the requirement discloses, both to the public and government, the technical aspects of how an algorithm receives, processes, and stores private information and how it aids in decision making. In other words, the more patent is granted to algorithms and computer programs, the more these inventions are made more transparent. This is unlike trade secret that operates to hide such details, and unfortunately, trade secrets are highly used by firms wishing to protect their algorithm.[120] According to Katarina Foss-Solbrekk, this results in less overall algorithmic transparency, as trade secrets are unregistered rights, and any information regarding the algorithm itself, how it operates, or the personal data on which its findings are based may be kept on trade secret grounds. Therefore, trade secret law obscures access to the algorithm and explanations underlying automated decisions, diminishing the system's overall transparency.[121]

D. Closing

Algorithm no doubt makes life easier and impacts life positively but could be misused to produce bias and discriminatory results or breach privacy rights. When such results are produced, because an algorithm itself is shrouded

116 *Ibid*, art 25(2).
117 *Ibid*, art 25 (3).
118 The Patent Law of the People's Republic of China (n 94), art 26 (para 1).
119 *Ibid*, art 26 (para 3).
120 Katarina Foss-Solbrekk, "Three Routes to Protecting AI Systems and their Algorithms Under IP Law: The Good, the Bad and the Ugly", Journal of Intellectual Property Law & Practice 16 (2021), 256.
121 *Ibid*, 258.

in secrecy and encoded, it is almost impossible to know what happened unless by someone with prior knowledge of how the said algorithm functions. In conclusion, patent protection for algorithms and computer programs will increase algorithmic transparency. This is primarily through the sufficiency disclosure requirement of an invention before being granted a patent; this requires that a patent application discloses all the information about the invention. The stringent conditions for patent grants in the EU, US, and Asian countries examined in this article should be removed to increase the patentability of many AI systems and their algorithms. In the EU, for instance, an algorithm is expressly excluded from patent protection unless it has a "technical character" or produces technical effects. On the other hand, in the US, it must produce "a useful, concrete and tangible result" to qualify for protection. Again, the protection of AI systems and their algorithms under trade secrets or undisclosed information should be discouraged in favour of patent protection. Solutions through patent protection should be allowed for all AI systems and their algorithms if humanity is to avoid the risk of remaining pawns and puppets in the hands of hidden algorithms.

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CONTRACT RENEGOTIATION DUE TO THE COVID-19 PANDEMIC FROM THE HARDSHIP PERSPECTIVE

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ABSTRACT

The Covid-19 pandemic is something that cannot be predicted beforehand when the agreement is in progress and the fact that the existence of the COVID-19 pandemic affects the implementation and fulfillment of obligations in the agreement. Force majeure and hardship are based on different ratios. The hardship clause is needed, for the reasons: it can be used as a basis for overcoming in case of problems or failure to contract (frustration), especially long-term contracts with a very high value. Specification this research is included in the category of legal research which is a descriptive specification analytical, which is a study that seeks to describe legal problems, the legal system, and review it or analyze it according to the needs of the research. The purpose of this study is to find the position of the possibility of using the principle of hardship in the contract law system in Indonesia.

Keywords: COVID-19 Pandemic, Contract, Renegotiation, Hardship, Force majeure.

A. Introduction

The World Health Organization (WHO) has stated that COVID-19 was declared a Global Pandemic on March 11, 2020. The Indonesian government responded to this and issued Presidential Decree Number 11 of 2020 on March 31, 2020, regarding determining a health emergency Corona Virus Disease 2019 (COVID-19) community. The issuance of Presidential Decree Number 11 of 2020 because of the spread of COVID-19 has been extraordinary, with the number of deaths continuing to increase and spread across regions and have an impact on political, economic, social, cultural, defense and security aspects, as well as the welfare of the people in Indonesia.[1]

With the increasing number of COVID-19 during the pandemic, the Indonesian government also issued a policy to regulate activities related to restrictions, namely Government Regulation Number 21 of 2020

1 Indonesia, Keputusan Presiden Nomor 11 Tahun 2020 Tentang Penetapan Kedaruratan Kesehatan Masyarakat Corona Virus Disease 2019, Keppres No. 11 Tahun 2020 (Keppres PKKM Covid-19).

concerning Large-Scale Social Restrictions (PSBB) on March 31, 2020. Government Regulation Number 21 of 2020 in Article 1 states:

> "In this government regulation, what is meant by Large-scale social restrictions are restrictions certain activities of the population in an area suspected of being infected with Corona Virus Disease 2019 (COVID-19) in such a way as to prevent the possibility of the spread of Corona Virus Disease 2019 (COVID-19)."[2]

Reducing the spread of the COVID-19 virus in Indonesia requires restrictions. After that, the government issued Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters Spreading COVID-19 as a National Disaster on April 13, 2020.

The President categorized the spread of COVID-19 as a non-natural disaster and referred to two laws as the basis for the implementation, namely:

a. Law Number 24 of 2007, in Article 1 point 2 states the definition of "natural disaster":

   > "Natural disaster shall mean an event or a series of events caused by nature such as earthquake, tsunami, volcanic eruption, flood, drought, typhoon, and landslide."[3]

   Then, Article 1 point 3 states the definition of "non-natural disaster":

   > "Nonnatural disaster means a nonnatural event or a series of nonnatural events such as technological failure, modernization failure, and epidemic."[4] Law Number 4 of 1984, in Article 1 letter a mentions the definition of "epidemic":

   > "An outbreak of an infectious disease, hereinafter referred to as an epidemic, is the occurrence of an outbreak of an infectious disease in a society whose number of sufferers increases significantly more than the usual circumstances at a certain time and region and can cause disaster."[5]

   Article 1 point 19 of Law Number 24 of 2007, the government also states that the status of a disaster emergency is a situation set by the Government for a certain period of time on the recommendation of the Agency given the task of disaster management.[6] Thus, the National Agency for Disaster Countermeasure (BNPB) tasks with tackling disasters, also issued a letter from the Head of BNPB Number: 9.A of 2020 dated January 28, 2020, concerning

2 Indonesia, Peraturan Pemerintah Tentang Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Covid-19, PP No. 21 Tahun 2020, LN No. 91 Tahun 2020, TLN No. 6487, Pasal 1 (PP PSBB Dalam Rangka Percepatan Penanganan Covid-19).

3 Indonesia, Undang-Undang No. 24 Tahun 2007 Tentang Penanggulangan Bencana, LN No. 66 Tahun 2007, TLN No. 4723, Pasal 1 angka 2.

4 Ibid., Pasal 1 angka 3.

5 Indonesia, Undang-Undang No. 4 Tahun 1984 Tentang Wabah Penyakit Menular, LN No. 20 Tahun 1984, TLN No. 3273, Pasal 1 huruf a.

6 Indonesia, UU Penanggulangan Bencana, op. cit., Pasal 1 angka 19.

the Determination of the Status of Certain Emergency Disasters due to Corona Virus Disease Outbreaks in Indonesia jo. Letter of the Head of BNPB Number: 13.A of 2020 dated February 29, 2020, concerning the Extension of the Status of Certain Emergency Disasters due to Corona Virus Disease in Indonesia.[7] These two things are the basis for the issuance of Presidential Decree Number 12 of 2020 concerning the determination of non-natural disasters that spread COVID-19 as a national disaster.[8]

Presidential Decree Number 12 of 2020, which has determined the COVID-19 pandemic as a non-natural national disaster, has raised two opinions between the parties who confirm that the COVID-19 pandemic is a force majeure[9] and others who stated no reason for the imposition of force majeure. With Presidential Decree Number 12 of 2020, Mahfud MD has stated that it is not a basis for automatically canceling a contract, especially in a business contract, with the argument of force majeure. However, the issuance of this policy can be an entry point for renegotiation regarding matters regulated in the contract, where the government's goal is to maintain conduciveness in the business world.[10]

Implementing PSBB has more influence on the obstruction of debtors because the implementation of PSBB can limit the space for debtors. The regulation has coercive power so that debtors are not free to run their business or business and do not get optimal income. The reduced income of the business actor as the debtor will indicate his inability to pay off his debts or fulfill achievements in business agreements. However, there are no unilaterally changes or cancelations in business agreements because of the COVID-19 pandemic that consequences implementation of PSBB.[11]

We cannot predict when the agreement is running, and the fact that the existence of the COVID-19 pandemic affects the implementation and fulfillment of obligations in the agreement. So, how can contract renegotiation be an alternative solution to hardship? Can the teachings of hardship be applied in the agreement about the emergence of this COVID-19 pandemic? This thing is interesting to study further. This

7 Wardatul Fitri, "Implikasi Yuridis Penetapan Status Bencana Nasional Pandemi Corona Virus Disease 2019 (Covid-19) terhadap Perbuatan Hukum Keperdataan*", Jurnal Supremasi Hukum*, Vol. 9 No. 1, Juni 2020, p. 82.

8 Ibid.

9 "Force majeure is a teaching or legal concept that originates from Roman law (*vis motor cui resiti non protest*), which later developed widely in the treaty law of various countries". Agri Chairunisa Isradjuningtias, "Force majeure (Overmacht) Dalam Hukum Kontrak (Perjanjian) Indonesia", *Veritas Et Justitia*, Vol. 1, No. 1, 2015, 136-158, p. 139.

10 Mochamad Januar Rizki, "Penjelasan Prof. Mahfud Soal Force majeure Akibat Pandemi Corona", accessed from https://www.hukumonline.com/berita/a/penjelasan-prof-mahfud-soal-i-force-majeure-i-akibat-pandemi-corona-lt5ea11ca6a5956, at the date of 18 Mei 2022.

11 Jodi Pratama dan Atik Winanti, "Force majeure dalam Kontrak Bisnis Akibat Pandemi Corona", Nusantara: *Jurnal Ilmu Pengetahuan Sosial*, Vol. 8 No. 2, Februari 2021, p. 267.

paper aims to review the application of the hardship concept or teachings in agreements due to the COVID-19 pandemic emergence.

B. Research Method

This research is legal research with a normative approach method, namely an approach based on the applicable laws and regulations[12]. This research is in the legal research category, a descriptive-analytical specification. According to the research needs, this study seeks to describe legal problems and the legal system by either reviewing or analyzing them.[13] The data collection method uses secondary data from library research, namely by reading the applicable laws and regulations, literature books, and other documents related to discussing the issues.

Data analysis by processing data obtained from the field and library data then analyzed normative qualitative analysis.

Normative qualitative analysis obtains the data from the research results grouped and selected and then linked to the problem to be investigated based on the quality and truth to conclude the problem at hand.

C. Discussions

Examine the things that are important when using the reasons for the COVID-19 pandemic as a force majeure[14], including:[15]

a. Does the force majeure clause in the contract already regulate the COVID-19 pandemic?
b. What are the definitions and limitations of force majeure that the parties in the contract have regulated?
c. What is the causal relationship between the implementation of achievements and the determination of COVID-19 as a non-natural national disaster?
d. Has the debtor had good intentions to fulfill the achievement that force majeure hindered?.

If it turns out that there is no special clause regarding the COVID-19 pandemic as force majeure in the agreement, then we need to examine whether this COVID-19 pandemic has fulfilled the elements of the force majeure arrangement in the Civil Code, namely Articles 1244[16] and 1245[17],

12 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2017), p. 119.
13 Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986), p. 52.
14 Several terms are known about this force majeure, namely "*overmacht*" (Dutch) and "*vis major*" (Latin). In Indonesian it is translated as a state of coercion. In some laws and regulations it is also referred to as a state of force majeure. Riduan Syahrani defines a coercive situation as a condition that prevents the fulfillment of an engagement that frees a person from the obligation to reimburse costs, losses and interest. Riduan Syahrani, *Seluk Beluk dan Asas-asas Hukum Perdata* (Bandung: Alumni, 2006), p. 243.
15 Ibid., p. 270.
16 Article 1244 of the KUH Perdata, translated by R. Subekti and R. Tjitrosudibio, (Jakarta: Balai Pustaka, 2013), p. 355.
17 Article 1245 of the KUH Perdata, Ibid.

which described as follows:[18]

a. The occurrence of the incident was against the will of the debtor. It is true that the COVID-19 pandemic has indeed occurred in all parts of the world where the parties to the agreement were unable to prevent the COVID-19 pandemic from occurring and this COVID-19 pandemic has also had a negative impact on several business sectors, from reduced income to business closures;
b. Unpredictable events occur. In this case, the spread of the COVID-19 pandemic was fast enough to have an impact on the agreement that was made before the COVID-19 pandemic, could not predict the rapid spread of the virus;
c. There is an obstacle for the debtor to carry out the performance. The application of PSBB allows to limit the space for debtors to fulfill certain achievements. If the debtor as a business actor continues to run his business to be able to fulfill his achievements, due to the PSBB policy, he will be subject to sanctions on the grounds that it will increase the spread of COVID-19;
d. The obstruction of the debtor is not because there is an element of error on the part of the debtor. When viewed in general terms, the implementation of the PSBB set by the Indonesian government certainly has an impact on the limited mobility and space for everyone so that it can also affect debtors in fulfilling their achievements;
e. The risk of the debtor's inability to meet performance cannot be borne by the debtor. If it is proven that the debtor cannot fulfill his achievements due to being hindered by one of the impacts of the COVID-19 pandemic, then the debtor cannot be held responsible for his inability.

Thus, the COVID-19 pandemic can be force majeure. However, there is no reason for canceling the agreement because this situation is a relative or subjective force majeure where remain implementing actual achievement or it is not impossible to do so that can negotiate alternative solutions to renegotiate.[19] To assess whether as force majeure or not, it also depends on what form of obligation a party must carry out and the condition of the party who is obliged to do it. Even though the agreement has stipulated that a pandemic or non-natural disaster is a force majeure, it is not directly sufficient to declare the debtor experiencing force majeure because it still requires sufficient

18 Velliana Tanaya dan Jessica Angeline Zai, "Penerapan Pembatasan Sosial Berskala Besar (PSBB) Akibat Pandemi Coronavirus Disease 2019 (Covid-19) Sebagai Force majeure dalam Kontrak", Law Review, Vol. 21 No. 1, Juli 2021, p. 107.

19 Annisa Dian Arini, "Pandemi Corona Sebagai Alasan Force majeure dalam Suatu Kontrak Bisnis", *Jurnal Supremasi Hukum*, Vol. 9 No. 1, Juni 2020, p. 54.

evidence related to its implementation and also fulfills the conditions for the imposition of force majeure.[20]

The debtor can still defend himself even though there is no force majeure provision related to a pandemic or non-natural disaster in the agreement because the provisions of Article 1339 of the Civil Code (KUH Perdata) stipulate that:

> "Agreements shall bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by propriety, customs, or the law."[21]

Thus, if the determination of PSBB as a government policy has a direct impact and is proven to hinder the agreement's implementation on the debtor, in that case, it can still defend itself based on force majeure, even though the agreement does not regulate specifically the situation. According to Indonesian law, implementation of the force majeure doctrine carry out for law, not for agreement in the agreement, so even though the agreement does not state, the force majeure provisions can still be used if by law.[22]

Then whether Presidential Decree Number 12 of 2020 directly impacts the implementation of obligations or achievements of the debtor? In fact, Presidential Decree Number 12 of 2020 cannot specifically affect the obstruction of performance by debtors. Due to Presidential Decree Number 12 of 2020, emphasis is more on that the COVID-19 pandemic is a non-natural national disaster in contrast to Government Regulation Number 21 of 2020 regarding the PSBB, which has the power to limit the community's movement. It is still necessary to prove that the COVID-19 pandemic has indeed hindered the implementation of the achievements in the agreement. All answers again relate to the type of case of the respective agreement and require further proof.[23]

It is not uncommon for real problems completion in many business agreements to end up in a prolonged conflict. In this case, the parties must include anticipatory clauses in the contract to protect their business interests, such as the force majeure clause. If the clause does not contain special arrangements regarding force majeure, then the parties will be subject to the law, which is the legal choice of the parties.[24]

20 Ibid., p. 49.
21 Indonesia, Kitab Undang-Undang Hukum Perdata, UU Nomor 1 Tahun 1946 (KUH Perdata), LN No. 23 Tahun 1847, Article 1339.
22 Jonsons Mangisih, et. al., "Tinjauan Yuridis Penetapan Bencana Nasional Non-Alam Penyebaran Covid-19 Sebagai Bencana Nasional Berdasarkan Keppres No. 12 Tahun 2020 Jo. Pasal 1245 KUH Perdata", Jurnal Hukum: Hukum Untuk Mengatur dan Melindungi Masyarakat, Vol. 7 Special Issue, Februari 2021, p. 83.
23 Fredrik J. Pinakunary Law Offices, "Pandemi Covid19 dan Force majeure (Overmacht)", accessed from https://fjp-law.com/id/pandemi-covid-19-dan-force-majeure-overmacht/, at the date of 18 Mei 2022.
24 Agus Yudha Hernoko, "Force majeure Clause atau Hardship Clause: Problematika dalam Perancangan Kontrak Bisnis", *Jurnal Perspektif*, Vol. 11 No. 3, Juli 2006, p. 204.

1. Force majeure and Hardship Concept

Agreement is one source of engagement. The legal relationship and legal consequences between the parties will be born with the agreement or closing. Each party will be bound to carry out its rights and obligations by the agreement's contents. As referred to by the pacta sunt servanda principle in Article 1338 of the Civil Code (KUH Perdata), in principle, the parties consider the obligation to carry out the contents of the agreement is absolute, binding like a law.[25]

There are two possibilities in the implementation of the agreement, namely, implementation of the obligations as agreed, or vice versa, cannot fulfill the obligations due to certain causes. There are two parts to the non-performance of the obligations in the agreement: due to the debtor's fault or negligence and not the debtor's fault or negligence. It is the default if the debtor does not carry out the agreement due to his error or negligence. The debtor should pay fees as a punishment for default, losses, and interest to the creditor. On the other hand, in the event of failure to implement the agreement beyond the fault or negligence of the debtor, it is called force majeure or overmacht.

The teachings of hardship in the practice of international business contracts are the teachings related to the failure to implement the agreement beyond the fault or negligence of the debtor. Based on theory and practice, the concepts of force majeure and hardship look similar.[26] However, force majeure and hardship have different ratios, namely force majeure on impossibility and hardship on changing circumstances.[27]

Based on the rules in the Civil Code, events that hinder the debtor's performance must be an event that cannot be predicted, including the closing of the agreement. Besides, it is unpredictable that the incident also occurred beyond the debtor's fault and his control. Article 1244 of the Civil Code concludes that the incident in force majeure requires no bad faith from the debtor. In this case, the debtor cannot avoid the incident. As a result, it prevents them from fulfilling their achievements to the creditor. It requires the condition after the agreement's closing and before declaring the debtor negligent.[28] If this happens, it considers force majeure. However, the debtor must be able to prove that his non-performance is beyond his fault.

Besides force majeure, Other teachings are hardship or difficult

25 Abdulkadir Muhammad, *Hukum Perjanjian* (Bandung: Alumni, 2006), p. 171.
26 Eppur Si Muove, "The Age of Uniform Law" (Rome: International Institute For The Unification Of Private Law, 2016), p. 64.
27 Michael Furmston, Drafting Force majeure Clauses: Some General Guidelines, (London: Lloyd's of London Press, 1995), p. 57.
28 R. M. Suryodiningrat, *Azas-azas Hukum Perikatan* (Bandung: Tarsito, 1995), p. 37.

circumstances. Organizations such as UPICCs have accommodated and developed hardship in practicing international contract law.[29] In contrast to force majeure, the Civil Code regulation has regulated it. Positive legal regulations have not adopted the hardship in Indonesia.

Definition of hardship is an event that occurs after the agreement's closing beyond the parties' control (unexpected or foreseen). Increasing the cost of implementing the agreement poses a risk of fundamental changes in the balance of the agreement so that it burdens the debtor, or vice versa, the decrease in implementation costs. Therefore agreement eliminates profits for creditors.[30] The concept of hardship is similar to force majeure, which is related to the occurrence of an event in the implementation of the agreement. It is unpredictable, beyond the control, and the parties' fault in the agreement. However, in contrast, to force majeure, hardship explicitly requires that the event's occurrence results in a fundamental change in the balance of the agreement.

Article 6.2.2 UPICCs states that there are three elements to determine the presence or absence of hardship, namely:[31]

a. Fundamental alteration of equilibrium of the contract;
b. An increase in the cost of performance;
c. Decrease in value of the performance received by one party.

The hardship in the implementation of the agreement also has legal consequences. Article 6.2.3 UPICCs provide alternative solutions as follows:

a. The aggrieved party has the right to request a renegotiation of the agreement with the other party. The request must be submitted as soon as possible, including the basis for renegotiation;
b. A request for renegotiation does not automatically grant the right to terminate the execution of the agreement;
c. If the renegotiation fails, the parties can submit it to the court. Courts may decide to:
    1) Terminate the agreement; or
    2) Change the agreement by restoring the balance.

In looking at hardship, there are 3 things that must be considered, namely:[32]

a. Changes in the balance in the agreement fundamentally;
b. The value of the execution of the contract is increasing by one party; and

29 Herman Brahmana, et. al, "Eskalasi dan Force majeure Dalam Peraturan Perundang-undangan", *USU Law Journal*, Vol. 3, No. 2, 2015, 78-86, p. 79.
30 Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial* (Yogyakarta: LaksBang Mediatama, 2008), p. 215.
31 UNIDROIT Principles for International Commercial Contracts 2016, "International Institute For The Unification Of Private Law" (Rome: UNIDROIT, 2016), p. 218.
32 Agus Yudho Hernoko, op. cit., p. 283.

c. The value of the contract execution is decreasing received by one of the parties.

Referring to this, it can be seen that the legal consequences of the occurrence of hardness are slightly different from force majeure. Where in force majeure, settlement proceedings carried out in court with the debtor's obligation prove the occurrence of events affecting the execution of the agreement is beyond his fault. While on the hardness, the emphasis of the settlement process is directed at the renegotiation process. The concept of hardiness dictates that the parties remain bound to execute the agreement. The way is to renegotiate to restore the balance of the agreement, that is, a fair exchange of rights and obligations. Thus, the occurrence of hardship does not necessarily result in termination or cancellation of the agreement, but makes the fulfillment of the performance delayed. Practice in Indonesian courts, hardness is often equated with relative force majeure due to the delay in the implementation of the agreement.[33]

About the failure of the implementation of the agreement, in the practice of international business agreements, there is a development of teachings called arduous or difficult conditions. The concept of hardship is similar to force majeure, namely the occurrence of events that affect the implementation of the agreement or the achievement fulfillment. It is also unpredictable, beyond the agreement's control and the parties' fault. Even so, hardship requires an event that fundamentally affects the agreement and changes the balance contained in the agreed agreement. So, can fail to fulfill achievements due to the COVID-19 pandemic also apply arduous teaching?.

The presence and the impact of the COVID-19 pandemic on the implementation of the agreement are beyond the parties' control. The emergence of the COVID-19 pandemic is something that the parties cannot predict, so this is not the parties' fault, including the debtor. The parties to the agreement do not have the power to regulate and control the arrival of a pandemic, so it is possible to use this as a basis for expressing hardship. If this is possible, the next step is to analyze whether this fundamentally affects the agreement and its implementation?.

In this regard, it needs to consider three steps, namely:[34]

First, in the force majeure discussion, the onset of the COVID-19 pandemic that affects the implementation of the agreement must be required to occur after the agreement's closing and before declaring the debtor negligent.

33 Cinantya Prima Hapsari Sularto, "Tinjauan Terhadap Klausula Hardship Dalam Hukum Perjanjian Indonesia", Tesis Magister Kenotariatan, (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2012), p. 68.

34 Nindry Sulistya Widiastiani, "Pandemi Covid-19: Force majeure dan Hardship Pada Perjanjian Kerja", *Jurnal Hukum & Pembangunan* 51 No. 3 (2021): 698-719, p. 713.

It means that at the time of closing the contract, both creditors and debtors cannot predict or suspect the occurrence of the COVID-19 pandemic, which will impact the implementation of the parties' agreement. The pandemic that causes failure to fulfill agreement achievements by debtors is also absolutely required before declaring the debtor negligent. This inability to fulfill achievements due to COVID-19 appears before agreeing and regulating the fulfillment deadline. If the COVID-19 pandemic occurs after the agreement's closing and before declaring the debtor negligent, then the failure to implement the agreement can apply the hardship.

Second, it is still the same as the force majeure discussion, and it is worth noting whether the COVID-19 pandemic hinders debtors from achieving. It means that the existence of the COVID-19 pandemic directly impacts the situation faced by debtors in the context of their efforts to fulfill achievements as promised in the agreement. Again, the COVID-19 pandemic generally impacts the company's situation, but it may not affect the debtor in the context of carrying out his obligations in the agreement. If the pandemic does not affect the agreement's implementation, then hardship cannot be applied.

Moreover, third, the most important step related to the main conditions in the implementation of hardship is whether the existence of the intended event will fundamentally affect the implementation of the agreement. Unlike in force majeure, which is sufficient in the analysis that the COVID-19 pandemic affects the fulfillment of the parties' achievements, in hardship, it requires that the impact of the COVID-19 pandemic on the agreement must be fundamental. It means to provide a change in the balance in the agreement. Article 6.2.2 of the UPICCs states that changes in the agreement balance are fundamentally related to the balance of achievement fulfillment between the parties, namely if there is an increase in performance cost. In the condition that the drastic increase in the cost of implementing the agreement causes the debtor not to fulfill, or it will experience a high loss if he fulfills as he will not experience in normal circumstances.

In this case, the COVID-19 pandemic has an impact on company income and fulfilling achievements, for example, in the form of payment of wages and other worker benefits. The increase in the cost of implementing the agreement is difficult to fulfill the payment of wages and other worker benefits. During the COVID-19 pandemic, the working relationship between employers and workers, which has an impact on company income, fulfilling achievements, for example, in the form of wages and other worker benefits, will be difficult because there is an increase in the cost of implementing the agreement. In nominal terms, the fulfillment of payment of wages and other benefits is indeed fixed, but due to the COVID-19 pandemic, the actual value

of the fulfillment costs increases. The increase in real value occurred because the company's income was affected by the COVID-19 pandemic. If so, the entrepreneur, as the debtor, is placed in a difficult situation (hardship).

In general, it is possible to apply the teachings of hardship in the event of a failure to fulfill achievements due to the COVID-19 pandemic. However, as is the case with the discussion on force majeure, the application of arduousness cannot be carried out as a general principle by striking all achievements during the COVID-19 pandemic. Applying hardship must be subjective by looking at the situation and conditions in each case. An analysis of the certainty that the presence of COVID-19 directly affects the fundamental balance of the agreement needs to be carried out. This is important, considering the COVID-19 pandemic, that not all affected the agreement's implementation and the fundamental balance. If it fulfills the requirements in the teachings of arduous, then arduous can be applied.

In the event of hardship, the legal consequences are open opportunities for the affected parties to apply for renegotiation. This renegotiation intends to arrange and re-agreed clauses of obligations that debtors find challenging to fulfill during difficult times. The goal is to restore balance in the agreement. The cancellation of the agreement is not the main starting point in arduous renegotiation. Still, it adheres to the agreement's implementation with new clauses or conditions that make it easier for debtors who are in difficulty. Hardship adheres to the fact that the obligation to carry out the contents of the agreement is absolute.[35]

2. Covid-19 Pandemic As A Hardship Clause In Business Contracts

The proof of the Covid-19 pandemic can be said to be Force Majeure will depend on how much the fundamental influence hinders the debtor in implementing the agreement and also how the form of Force Majeure clauses the parties contain in the agreement. The debtor must also be able to immediately notify the creditor of the reason he failed to fulfill the achievement in accordance with his time, because this incident is not a desire of the debtor, so in good faith the debtor informs the creditor before the risk of loss increases and can immediately find a solution to overcome the consequences arising from the non-fulfillment of the achievement agreement.[36]

In the situation that is happening when the debtor stops fulfilling its obligations, it must also be proven whether there is an element of error or intentional from the

35 Abdulkadir Muhammad, Loc.cit.
36 Rizkyana Diah Pitaloka, "Penundaan Pemenuhan Prestasi pada Kontrak Bisnis di Masa Pandemi Covid-19", Jurnal Kertha Semaya, Vol. 9 No. 3, Oktober 2020, p. 466.

debtor, so that if it is proven that there is an element of error in the debtor, the debtor must be responsible for the risk of loss that occurs. Meanwhile, if the evidence of the debtor's defense is really proven and meets all the conditions for the imposition of Force Majeure, then he will be free from risk responsibility, but in essence the nature of The Force Majeure does not eliminate the debtor's obligation to fulfill the achievement, but only eliminates the obligation to pay interest or losses.[37]

As explained above, if it turns out that the condition of the Covid-19 pandemic is categorized as a relative or subjective Force Majeure, then this circumstance does not make it impossible for the debtor to fulfill his achievements, so that what can be done after renegotiation and is proven to have hindered the debtor in carrying out his achievements is that the debtor is given the opportunity to delay the fulfillment of Obligations or achievements in the agreement and also does not bear the risks resulting from non-fulfillment of achievements. If the situation has recovered, then the debtor is obliged to fulfill all his achievements that have been delayed fulfillment.[38]

In the end, if this matter reaches the realm of the court and the debtor has done proof of the Force Majeure circumstances experienced, the judge is also the one who determines how the final decision so that those who can provide legal certainty are the judges of the court and the judge can also exceed the limitations that exist in the business agreement based on good faith.[39]

Based on this description, it can be seen that a business agreement is an agreement made by the parties in writing, the substance of which relates to commercial activities. Then, the issuance of Presidential Decree No. 12 of 2020 regarding the determination of Covid-19 as a non-natural national disaster has led to speculation that the Presidential Decree can be used as a Force Majeure against the non-implementation of an achievement during the Covid-19 pandemic. In fact, when examined, the points set forth in Presidential Decree No. 12 of 2020 does not directly affect to prevent the debtor from carrying out his achievements. Unlike the case with the determination of the PSBB which does have the power to limit the space for community movement. Until the determination of Presidential Decree No. 12 of 2020 cannot necessarily be used as Force Majeure but can open up opportunities for the parties to renegotiate their business agreements.

These renegotiation efforts can be in the form of rescheduling, restructuring or reconditioning (return requirements), in the hope of restoring the balance of rights

37 Velliana Tanaya dan Jessica Angeline Zai, op.cit., p. 111.
38 Rizkyana Diah Pitaloka, op.cit., p. 461.
39 Velliana Tanaya dan Jessica Angeline Zai, op.cit., p. 107.

and obligations in business agreements and can complement things that have not been regulated to adjust to the Covid-19 pandemic situation. Related to the principle of hardship, positive law in Indonesia until now has not recognized and has not regulated the principle of hardship, so in practice, clauses are usually inserted into an agreement and in solving problems related to hardship then prioritize the provisions set forth in the principle of force majeure, either intentionally or unintentionally.

In addition to force majeure, the courts in Indonesia in deciding cases related to the hardness can use the basis of good faith. In this case, good faith can be the basis for matters related to hardship, because in the event that one of the parties refuses to renegotiate so that it causes the value of the contract to be unbalanced due to a fundamental change in circumstances, the refusal can be considered contrary to good faith.

The adoption of the principle of hardship as one of the clauses in the agreement, especially agreements that have a long period of time with a very high value, is very important, it aims to overcome the difficulties in applying the principle of failure to contract (frustration) and the principle of force majeure. Therefore, the principle of hardness itself can be interpreted as one of the alternative methods to resolve cases that have the characteristics of circumstances that fundamentally affect the balance of the contract, especially to commercial contracts that are in accordance with the principle of proportionality to divide the burden of exchanging rights and obligations equally.[40]

As a development of the hardship principle, in international law, this principle is essentially an exception to the principle of pacta sunt servanda (the agreement is legally binding). The agreement shall be executed by the parties as agreed, as long as the environment and circumstances at the time of making the agreement do not change for the future. So that with a change in circumstances and it turns out that the change affects the ability of the parties to carry out the agreement, then the party who is no longer able to carry out the agreement can declare to be no longer bound or out of the agreement and the agreement is no longer binding.[41]

Agreements made legally will bind the parties based on the principles of pacta sunt servanda, but in practice it is often found that the application of these principles often gives the opposite result from the target. Therefore, as an exception the obligation to fulfill a promise may be accepted if an extraordinary

40 Ifada Qurrata A'yun Amalia dan Endang Prasetyawati, Karakteristik Asas Proporsionalitas Dalam Pembentukan Klausul Perjanjian Waralaba, Jurnal Hukum Bisnis Bonum Commune, Vol. 2, No. 2, Agustus 2019.

41 Harry Purwanto, Keberadaan Asas Rebus Sic Stantibus dalam Perjanjian Internasional, Jurnal Mimbar Hukum UGM, Edisi Khusus, November 2011, p. 108.

event has caused the obligation to be unfulfilled. Until this exception gave birth to the principle of boiled sic stantibus. In other words, the problem raised here is that there are two options, namely the rigid application of pacta sunt servanda to maintain the sanctity of the contract or the application of the rebus sic stantibus principle.[42]

The rebus sic stantibus principle has become part of the general legal principle, as well as other legal principles above and has also been embodied in the International positive law system. This principle is applicable when the agreement made by the parties is only binding as long as there is no fundamental change in the circumstances that occurred at the time the agreement was held.[43]

The hardship clause is addressed differently in countries with civil law traditions. This is because it is more subjective and has a great impact on the achievement of the implementation of a contract. In Indonesia, this doctrine is better known in international law (Agreement) and a little in insurance law. In Indonesian legislation, the existence of the rebus sic stantibus principle is recognized in Article 18 letter c of Law Number 24 of 2000 concerning international treaties. In Article 18 letter c it is stated that "an international agreement is terminated when there are fundamental changes that affect the implementation of the agreement". However, the law does not provide for restrictions on what the rebus principle of sic stantibus is.

The use of the principle cannot be applied to border contracts and the occurrence of changes in circumstances due to violations committed by the claimant. Indonesia has ratified the UNIDROIT Principles of International Commercial Contracts (UPICC) through Presidential Regulation No. 59 of 2008 as one of the efforts for legal harmonization or regulation in international contract law. In UNIDROIT there are principles, among others: the principle of pacta sunt servanda and the principle of rebus sic stantibus, where the term used is the hardness clause. Principles Rebus Sic Stantibus in section 2 under the title of Hardship, regarding the contract that must be obeyed (contract to be observerd), there are two main provisions, namely:[44]

a. The binding nature of the contract as a general rule; and
b. Changes in relevant circumstances are only related to certain contracts (such as contracts that have not been executed or that are still valid and long-term).

The hardship clause is needed, for the reasons: it can be used as a basis for

42 Suherman, Perkembangan Asas Rebus Sic Stantibus (Perubahan Keadaan Yang Fundamental) Dalam Hukum Positif Di Indonesia, Jurnal Yuridis, Vol. 3, No. 1, 2016, p. 5.
43 Ibid.
44 Taryana Soenandar, Prinsip-Prinsip UNIDROIT sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional, (Jakarta: Sinar Grafika, 2006), p. 71.

overcoming in case of problems or failure to contract (frustration), especially long-term contracts with a very high value, more flexible and can accommodate the wishes of the parties in renegotiating, dividing the burden of exchanging rights and obligations in a balanced way so that the purpose of making the contract is achieved. The benchmark for the execution of a contract can be seen to what extent the parties properly exercise their rights and obligations.

3. Renegotiating the Implementation of Business Agreements during a Pandemic

Basically, a business contract originates from the exchange of the different interests of the parties, so formulating a contractual relationship generally must begin with negotiations or negotiations.[45] Likewise, if there is a difference of opinion that occurs between them, the parties should also renegotiate to bring together the things the parties want together again. Negotiation is the interaction of the parties involved in a difference of goals or opinions to mutually try to resolve and mutually beneficial for all parties to find a common goal. In short, negotiation is a bargaining process through discussion or negotiation to resolve disputes.[46]

The renegotiation of business agreements during the COVID-19 pandemic aims at redressing the imbalance in implementing achievements. So that both parties obtain reasonable rights and obligations in good faith and cooperatively, maintain good and mutually beneficial relations with business partners, and support in a conducive business climate.[47] In the implementation of renegotiations, the parties should also be serious about following up on the results of the negotiations because the parties have mutually agreed upon, so each party should implement and implement it like an agreement.

Renegotiation can arrange the stipulated things, including rescheduling, restructuring (rearrangement), or reconditioning in good faith by both parties because the contract law in Indonesia adheres to an open system where all will return to the parties' agreement.[48] It takes good faith from both parties, debtors, and creditors, to make every effort to produce a win-win solution so that renegotiation is a good effort to jointly bear the risk to prevent harm or bias of the party.[49] The court will judge the truth of the existence of good faith in this business agreement because there are debtors who cannot pay their obligations during the COVID-19 pandemic. However, not a few debtors

45 Ibid., p. 203.
46 Gunawan Nachrawi, *Hukum Kontrak Komersial* (Bandung: CV. Cendekia Press, 2020), p. 37.
47 Agus Yudha Hernoko, "Force majeure Clause..", p. 217.
48 Velliana Tanaya dan Jessica Angeline Zai, op. cit., p. 106.
49 Ibid., p. 111.

can still pay their obligations but do not want to pay.

This renegotiation effort will result in a decision to postpone the achievement fulfillment until normal conditions return temporarily. However, delaying the fulfillment of rights and obligations in the agreement in a balanced way contained in the agreement. For example, one party who should have paid the fee cannot also make the payment immediately due to the COVID-19 pandemic, which resulted in the obstruction of the construction of a building.[50]

One example of renegotiation efforts in business agreements is rescheduling related installments and extending the interest payments period. By taking advantage of the time given, the debtor can fulfill all his pending obligations after the situation returns to normal or not in force majeure. Then, attracting a third party as a guarantor for the risk from the consequences of a force majeure is one of the wise ways that can be a profitable solution for the debtor and creditor so that both parties will not bear the loss in the event of a force majeure in the future.[51]

Before submitting a request for a force majeure event in the implementation of achievements, there are also several important things that the debtor must do, namely:[52]

a. Notifications related to the occurrence of force majeure must be submitted in good faith while still trying to do proper and reasonable things to carry out obligations to minimize the risk arising from non-fulfillment of achievements in the agreement. Notifications follow a certain period since felt impact in writing;
b. Appropriate legal references form the basis for force majeure statements;
c. The Force majeure statement intends in good faith to change the agreement, not terminate the agreement if the object that is the debtor's obligation impossible to do;
d. In the implementation of renegotiation, changes to the agreement shall be carried out by deliberation as far as possible to avoid settlement through the courts;
e. Consult with practitioners and legal consultants to provide advice and legal options to the conditions of both parties in the agreement.

In carrying out negotiations, several types of methods generally occur between the parties during negotiations, including:[53]

50 Andi Risma dan Zainuddin, "Tafsir Pandemi Covid-19 Sebagai Alasan Force majeure yang Mengakibatkan Pembatalan Perjanjian", *Jurnal Wawasan Yuridika*, Vol. 5 No. 1, Maret 2021, p. 109.
51 Inri Januar, op. cit., p. 192.
52 Putra PM Siregar dan Ajeng Hanifa Zahra, "Bencana Nasional Penyebaran Covid-19 sebagai Alasan Force majeure, Apakah Bisa?", accessed from https://www.djkn.kemenkeu.go.id/artikel/baca/13037/BencanaNasional-Penyebaran-COVID-19-sebagai-Alasan-Force-Majeure-Apakah-Bisa.html, at the date of 18 Mei 2022.
53 Ramziati, et. al., *Kontrak Bisnis: dalam Dinamika Teoritis dan Praktis* (Aceh: Unimal Press, 2019), p. 146.

a. Competitive negotiation. It is a form of negotiation carried out on complex issues and tends to be challenging to find a point of agreement;
b. Cooperative negotiation. It is a form of negotiation that does not consider the opposing negotiator as an enemy in a dispute but still considers it as a partner in cooperation to reach an agreement that benefits all parties. This form of negotiation pays excellent attention to the importance of good relations between the parties;
c. Soft and hard negotiations. Namely, a form of negotiation that will result in a pseudo agreement where there is a winning party and a losing party. This type will benefit the tough side because the parties are prone to creating threats, while the soft side chooses to give in to prevent hostility or confrontation;
d. Negotiation based on interests. Namely, a form of negotiation that chooses a middle ground between existing contradictions. This negotiation is an effort when tough negotiators meet to avoid deadlocks in implementing negotiations.

In carrying out renegotiation efforts, it is also necessary to do important things considered important as a form of sincerity and good faith from the parties to resolve existing differences of opinion. Consider several important steps as a start in negotiating, including:[54]

a. Plan a negotiation by defining the things that are the problems to be overcome. The issues presented are in the form of several issues that are the main problem and some side issues that also influence the main problem;
b. After describing several existing issues, the negotiator begins to sort and determine which issues are important and less important and whether these issues are indeed related or unrelated;
c. Determine the issues to achieve by including why we want to achieve them. This reason is important because it relates to achieving values, principles, and interests;
d. Open to consulting with negotiating partners to evaluate these critical issues to avoid fulfilling unrealistic and difficult wishes by exchanging lists or lists of several issues or interests to be negotiated.

The parties must comply with the following conditions for the renegotiation to continue effectively, namely:[55]

a. The parties negotiate voluntarily with full awareness;
b. Each party negotiating is a party that is indeed authorized to make decisions;
c. Have the same desire to solve problems;
d. The power is relatively balanced between the parties, so the parties

54 Ibid., p. 149.
55 Agus Yudha Hernoko, "Force majeure Clause...", p. 218.

mutually depend on each other.

The advantages of choosing renegotiation as an effort to resolve a debate in the case of business cooperation, among others:[56]

a. Finding common goals and mutually beneficial for both parties;
b. It does not damage the excellent relationship that has been maintained between business partners during cooperation and supports a conducive business;
c. Prevent prolonged conflict between the parties;
d. Maintain trust between business partners with each other.

Include the results of the business agreement renegotiation between the parties in the addendum agreement regarding the amended provisions, including clauses that provide legal protection for both parties and the arrangements that follow the conditions of both parties. Eventually, renegotiation expects to change the contents of the agreement. Hopefully, it becomes balanced again, even with the cancellation of the contract by agreement of both parties, debtors, and creditors in good faith. This effort also provides balanced legal protection and certainty. Provide an opportunity to perfect things that the agreement prior to the COVID-19 pandemic did not regulate.[57]

D. Conclusion

The Covid-19 pandemic is an event that occurred outside the power of the parties and beyond the fault of the parties. However, the application of perseverance in the event of failure to fulfill the achievements in the agreement is subjective and cannot be used as a general principle. Its application must be done by analyzing case by case, because not all debtors are affected by the Covid-19 pandemic which then causes debtors to be unable to fulfill their obligations under the agreement.

Hardship arrangements in the Indonesian legal system are needed, especially agreements that have a long period of time with a very high value where the goal is to overcome difficulties in applying the principle of failure to contract (frustration) so that with these provisions can be used as a basis for solving problems that arise.

56 Ibid.
57 Arya Bambang Frisyudha, et. al., "Renegosiasi Sebagai Upaya Penyelesaian Wanprestasi dalam Kontrak Bisnis Selama Masa Pandemi Covid-19", Jurnal Konstruksi Hukum, Vol. 2 No. 2, Mei 2021, p. 345.

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BOOK REVIEW "INDONESIAN PRIVATE INTERNATIONAL LAW" BY DR. AFIFAH KUSUMADARA

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We live in an open society 'where borders open for individuals, goods, services, capital, and data.'[1] This is a time when conflicts arise in a very complicated way, involving variables that cross borders and jurisdictions. There's never been a time like this, when the existence and development of private international law is so important across the globe.

As one of the fastest growing regions in the 21st century,[2] there are a few English-written books studying Private International Law in the South East Asian region, especially those focusing on Indonesia. "Indonesian Private International Law" comes to fill this gap. Written by Dr. Afifah Kusumadara and her team of scholars from the Faculty of Law at Brawijaya University in Malang, Indonesia, this book provides a comprehensive study on the subject.

The book comprises six chapters, explaining the topics systematically and thoroughly. It moves from fundamental to contemporary matters of private international law. For non-Indonesian readers, a brief history of Indonesian private international law in the first chapter will help to understand the context of the country. The complexity of legal pluralism and the challenging road to reach legal uniformity, especially in the field of this subject, are explained concisely. This short but important topic is very important for non-Indonesian readers to build further understanding of the application, development, and modernization of the law along with its challenges.

The main issues of private international law, such as jurisdictions and choice of laws, are elaborated in chapter two and three. The book explains the application of the jurisdiction in personam, jurisdiction in shipping claims, and immunities from jurisdiction. The doctrines and principles of jurisdiction in private international law have been developing really fast. Not all are recognized in current Indonesian written law such as the doctrine of forum non-conveniens, anti-suit injunctions, and unjust enrichment. However, some judicial practices accommodate them.

1 Jurgen Basedow, *The Law of open Societies: Private Ordering and Public Regulation in the Conflict of Laws,* Netherlands: Brill, 2015, p.28.
2 Marcus Kuusinen, Kacper PIerzynowski, and Ghia Yuson, *The Rise of The SouthEast Asian Tigers,* Business Sweden 2nd Edition, p.4.

Chapter two provides many important cases that will show how the written law and judicial practice interact in fulfilling the needs of the recent development in private international matters – and in some way also points the needs of changing the current Indonesian written law.

Chapter three provides a broad coverage on how Indonesian private international law being applied in various field of laws. It discusses not only the classic fields of this study, such as family law, contracts, and the law of property, but also intellectual property and the law of corporations, insolvency, and bankruptcy which are full of dynamics and changes in the recent borderless economic society. In every topic, related laws and cases are studied briefly. This is one of the book's strength since it is not easy to find a literature that tries to cover all of those fields in one strike, considering the width and the complexity of each topic.

The implications of these arrangements are that some parts may seem too short or too shallow. Some readers may feel that some cases or examples deserve more room to be discussed, especially those related to his/her interest. However, as a book that attempt to give a complete package and general view of this vast and complex study, it is understandable that the author has a limited space to explore.

For those unfamiliar with the country's legal system and its history, some parts may prompt confusion since the author sometimes uses both the Dutch Colonial laws (along with its terms) and the Indonesian laws to explain certain topics really quick. Readers may need time to digest when entering those parts. However, the author uses a consistent way to express this complicated legal system. A careful reading eventually will lead readers to understand the key points of the systems, and it will be easier to follow the following chapters.

Chapter four highlights the issue of recognition and enforcement of foreign judgments. It is very interesting that referring to current written law, foreign judgements are not recognized and, therefore, cannot be enforced in Indonesia. In this chapter, the author navigates some cases displaying the complexity of this issue in practice such as in the case of PT. Indah Kiat Pulp and Paper Tbk. v Bank America National Trust Company; et.al. and Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v Karaha Bodas Company LLC. This short chapter, like the others, adds another important issue to be discussed on the development of Indonesian private international law.

The last two chapters of the book cover two important development in Indonesian private international law: arbitration and harmonization of private international law. These two topics enrich the spectrum of the book and intrigue the readers to talk about the future of

Indonesian private international law. Both chapters display how international laws and practices play great influence in the development of law in Indonesia. On the other hand, the author also objectively mentions the shortcomings of the current laws and practices and challenges that may arise in the future, especially in the process of harmonizing national law with international laws.

At present, Indonesian law continues to draw heavily from Dutch colonial law, and the attempt to codify private international law, for unknown reasons, has never succeeded. In 2009, the National Law Development Agency conducted a study to develop private international law. The document contains the bill of a new Indonesian private international law, but even though it was completed in 2015, the Bill still has not reached the Parliament.

In the midst of this "stagnation", in the final chapter, the author recommends concrete steps and strategies to modernize the laws, an action that needs to be taken as soon as possible. She reminds us that the "commercial world has not stood waiting for legislative action."[3] Until the last pages, the books still discussed sharply the course of the future development of Indonesian private international law.

For a long time, there has not been enough attention and spotlight given to Indonesian private international law literature both domestically and internationally. This subject usually becomes only a sub-section, a chapter, of (international) law textbooks or proceedings. Some up-to-date research are still can be found, yet scattered in many journals. It is clear that there is a very limited choice available for the English-written book on Indonesian private international law, while the need to understand this subject is on the rise.

Published in 2021, this book gives the most updated development on Indonesian private international law. This is another point that differs from older literature, such as Sudargo Gautama's books on Indonesian private international law, which still use Dutch law and practices as references a lot, both in terms and case studies/examples. Afifah's book, on the other hand, provides rich examples of cases that happened after Indonesia gained independence. It really helps to portray an up-to-date and contextual version of Indonesian private international law and its shortcomings in this fast-growing world – the gap between it and international practices.

Considering the wide coverage of the books, including the last chapter that speaks strongly about the legal policy of the future development of Indonesian private international law, this work will be a great resource for both Indonesian and non-Indonesian readers that want to have a holistic view on this subject.

3 Afifah Kusumadara, *Indonesian Private International Law,* Great Britain: Hart Publishing , 2021, p.223.

Law scholars and practitioners who want to understand the complex legal system of the country will benefit greatly from reading this book.

Those involved in law and regulation making in private international law issues should also read these books to understand the urgency to modernize the laws and what can be done to achieve that. From chapter to chapter, we will see how outdated Indonesian written law compare to the international development in private international law fields. The need for modernization is evident, and this book will definitely be a great guide and rich source for the policymaker to work on this important agenda.

Curriculum Vitae of Reviewer

Viona Wijaya is a junior legal analyst in the National Law Development Agency. She studied law in Padjadjaran University, specialized in Constitutional Law. She got her Master of Laws in 2020 from the Australian National University. Her graduate research focused on elaborating how contemporary regulatory theories can inform Indonesia's regulatory reform agenda with Solar Energy Regulations as case study. She takes great interest in regulatory reform, law and society, and national law development issues. She can be contacted through her email: wijaya.viona@gmail.com

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It is an optional section for articles which are based research.

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