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Comprehensive or BIT by BIT: The ACIA and Indonesia's BITs

Junianto James LOSARI*
Centre for International Law, National University of Singapore, Singapore
james.losari@nus.edu.sg

Abstract

The entry into force of the ASEAN Comprehensive Investment Agreement (ACIA) in 2012 brought ASEAN closer towards the realization of the ASEAN Economic Community by 2015. Nonetheless, a new concern arises regarding the fate of twenty-six Bilateral Investment Treaties (BITs) that exist among the ASEAN governments. This may raise confusion for the ASEAN governments regarding the applicable standards of investment protection to grant investors. Indonesia was chosen as a case-study because its Investment Coordinating Board recognizes the importance of understanding Indonesia's obligations under the BITs within the context of the ACIA regime, and is in the midst of reviewing its BITs. This paper seeks to provide a better understanding of the interactions between and among these agreements to ensure that the ASEAN governments' policies comply with their legal obligations. It also provides recommendations on how they could streamline the standards and work towards a single regime of investment protection.

Indonesia is the largest economy in the Association of Southeast Asian Nations (ASEAN) by GDP (PPP), with US$ 1.212 trillion in 2012, compared to US$ 327 billion and US$ 646 billion for Singapore and Thailand during the same period, respectively.[1] The country is an archipelago rich in natural resources. As such, foreign investment activities in the country had been dedicated primarily to the extraction of natural resources through Foreign Direct Investment (FDI). As a consequence, Indonesia has become the largest producer of rubber, the largest exporter of palm oil, and the second largest exporter of thermal coal in the world.[2] In 2007, commodities accounted for one-quarter of Indonesia's GDP and more than one-fifth of the total government revenue.[3]

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1. International Monetary Fund, *World Economic Outlook Database October 2012*, online: <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx>.
2. Indonesian Investment Coordinating Board (BKPM), Facts of Indonesia: Natural Resources, online: <http://www2.bkpm.go.id/contents/general/7/natural-resources>.
3. *Ibid*.

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Several international arbitration cases have been brought against Indonesia in the past,[4] with the latest ones being *Newmont v. Indonesia*,[5] *Rafat Ali v. Indonesia*,[6] and *Churchill Mining v. Indonesia*.[7] With its numerous investment treaties, Indonesia is exposed to potential investor-state arbitration disputes as investors scrutinize the policies that affect their investments. Some will not hesitate to bring a dispute to international arbitration against the state. International litigation is costly for any government, not only in terms of the financial costs, but also in terms of the other resources that will have to be spent in its defence. States must also consider the effect such litigation can have on its reputation among prospective investors. For this reason, it is important for Indonesia to understand its obligations under its various investment treaties.

Consequently, Indonesia, through its Investment Coordinating Board, is reviewing its investment treaties and has even decided to discontinue all of its Bilateral Investment Treaties (BITs).[8] At the same time, it is making efforts to improve its investment climate by encouraging infrastructure development,[9] reforming its bureaucracies,[10] maintaining macroeconomic stability, and taking various investment and trade measures. Nonetheless, changes in government policies may affect investors who are protected by Indonesia's International Investment Agreements (IIAs).

As of 2011, Indonesia is party to more than sixty BITs and various IIAs. Its first BIT was concluded with Belgium in 1970. In addition, foreign investors in Indonesia are protected by the domestic investment law[11] and concession contracts that they may have entered into with the government. At the regional level, Indonesia is a party to the ASEAN Comprehensive Investment Agreement (ACIA),[12] the ASEAN-Australia-New Zealand Free Trade Agreement with Investment Chapter,[13] the ASEAN-China Investment Agreement,[14] and the ASEAN-Korea Investment Agreement.[15]

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4. *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1; *Cemex Asia Holdings Ltd v. Republic of Indonesia,* ICSID Case No. ARB/04/3.
5. *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia*, ICSID Case No. ARB/14/15, registered 15 July 2014, but withdrawn 25 August 2014 after Newmont agreed to renegotiate with Indonesia.
6. *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13.
7. *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40.
8. Ben BLAND and Shawn DONNAN, "Indonesia to Terminate More than 60 Bilateral Investment Treaties" *Financial Times* (26 March 2014).
9. See Coordinating Ministry for Economic Affairs of Indonesia, *Master Plan for the Acceleration of Expansion of Indonesia's Economic Development 2011–2025 (MP3EI)*, Regulation of the President No. 32 of 2011.
10. Desy NURHAYATI, "Bureaucratic Reform 'Heading in Right Direction'" *The Jakarta Post* (18 September 2013).
11. Law No. 25 of 2007 of the Republic of Indonesia on Investment.
12. *ASEAN Comprehensive Investment Agreement*, 26 February 2009 (entered into force 29 March 2012) [*ACIA*].
13. *ASEAN-Australia-New Zealand Free Trade Agreement* (entered into force for all Member States 10 January 2012).
14. *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China* (entered into force 1 August 2010).
15. *2009 Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the ASEAN and the Republic of Korea* (entered into force 1 September 2009).

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The discussion about ASEAN and the ACIA as the current regional investment protection regime of the association is particularly important because many consider Asia to be the next centre of the world's economy.[16] This opinion is not without merit because ASEAN boasted robust economic growth and resilience during the global financial crisis. Being the home of close to 600 million people with a young demographic, positive economic growth, attractive markets, and an abundance of resources, ASEAN is appealing to foreign investors across the region and around the world.

After its establishment in 1967, ASEAN had no legally binding agreements, let alone one on investment protection. However, this did not prevent the original ASEAN Member States from forging economic co-operation among themselves in the areas of manufacturing, finance, trade, energy, environment, and tourism. During the pre-1980 era, ASEAN Member States' economic co-operation was conducted through their own national and regional development programmes. In 1987, the expansion of co-operation in the area of investment occurred through the conclusion of the ASEAN Agreement for the Promotion and Protection of Investments (ASEAN IGA).[17] The structure and content of the ASEAN IGA reflects an IIA that guarantees investment protection, including the standard of most-favoured nation (MFN) treatment, fair and equitable treatment (FET), expropriation, and investor-state dispute settlement (ISDS).

From 1990 to 2000, the relevant ASEAN Member States developed stronger economic co-operation by signing the 1992 ASEAN Free Trade Agreement (AFTA), the 1995 ASEAN Framework Agreement on Services, and the 1998 ASEAN Investment Area (AIA). The difference between the AIA and the ASEAN IGA is that the former serves to liberalize the ASEAN economies, with the ambitious goal of opening up all industries for investment to all ASEAN Investors[18] by 2010 (or 2013, for newer ASEAN members).[19] The AIA also includes a phasing out system as prescribed by each country's Temporary Exclusion List.

Both the AIA and the ASEAN IGA are legally binding agreements that support the single objective of creating an ASEAN Free Trade Area to increase the region's

16. Hillary CLINTON, "America's Pacific Century" *Foreign Policy Magazine* (November 2011), online: Foreign Policy <http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century>; Department of Prime Minister and Cabinet of Australia, "Australia in the Asian Century" (2012), online: Australian Government <http://www.asiaeducation.edu.au/verve/_resources/australia-in-the-asian-century-white-paper.pdf> at 4–5.

17. *Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, 15 December 1987 (entered into force 2 August 1988) [*ASEAN IGA*], as amended by *Protocol to Amend the Agreement for the Promotion and Protection of Investments*, 12 September 1996 [*Protocol to ASEAN IGA*].

18. *Framework Agreement on the ASEAN Investment Area*, 7 October 1998 (entered into force 25 May 1999) [*AIA*], art, 1 defines an ASEAN investor as:
    (i) a national of a Member State; or
    (ii) any juridical person of a Member State,
    making an investment in another Member State, the effective ASEAN equity of which taken cumulatively with all other ASEAN equities fulfils at least the minimum percentage required to meet the national equity requirement and other equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment.

19. *Ibid.*, art. 7(1)(a).

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comparative advantage as a production base for the world.[20] However, the two agreements demonstrate a rather patchy way of developing a regional legal framework for investment protection in the region. Although they are complementary, there are also overlaps between them. Article 12(1) of the AIA provides that the ASEAN IGA and its 1996 Protocol will remain in force along with the AIA. However, if the latter provides *better or enhanced provisions*, such provisions shall apply.[21]

To complicate matters, besides being party to the ACIA, Indonesia and the other ASEAN Member States have BITs among themselves (intra-ASEAN BITs). Indonesia concluded a BIT with Vietnam in 1991, years before the latter became an ASEAN Member State in 1995. Later, Indonesia followed with a BIT with Laos in 1994, before the latter became an ASEAN Member State in 1997. Interestingly, Indonesia continued to conclude BITs with other ASEAN Member States despite the existence of the ASEAN IGA among them, namely with Malaysia in 1994, Thailand in 1998, Cambodia in 1999 (Cambodia became an ASEAN Member in 1999), the Philippines in 2001, and Singapore in 2005. Indonesia has seven of the region's twenty-six intra-ASEAN BITs.

Despite the number of intra-ASEAN BITs and the existence of the AIA and the ASEAN IGA, the ten ASEAN Member States—Indonesia, Malaysia, the Philippines, Singapore, Thailand, Vietnam, Myanmar, Laos, Cambodia, and Brunei Darussalam—decided to conclude the ACIA in 2009. The agreement contains commitments for liberalization, promotion, facilitation, and the protection of foreign investments under one harmonized regime. The agreement consists of forty-nine Articles, two Annexes, and one Schedule. It covers: (1) progressive investment liberalization in Member States; (2) a regime of enhanced investment protection; (3) improvement of transparency and predictability of investment rules, regulations, and procedures; and (4) promotion of investment.[22] However, for the purpose of this analysis, this paper will deal primarily with investment protection, as liberalization could be an entire paper on its own.

The primary objective of the ACIA was to draw on and consolidate the ASEAN IGA and the AIA to create a comprehensive agreement to respond to the more competitive global environment—with a view towards enhancing ASEAN's attractiveness as an investment destination with a free and open investment regime.[23] Upon its entry into force, the ACIA phased out the ASEAN IGA and the AIA.[24] However, the ACIA did not clarify its relationship with the existing intra-ASEAN BITs. This paper explores this relationship and the potential implications of the performance and enforcement of Indonesia's intra-ASEAN BITs under dual regimes, using MFN treatment as a tool for comparison, as is explained in greater detail in Section I. Since BITs primarily regulate investment protection, Section II of

20. LIAO Man-Li, "The Research on ASEAN Investment Legal Regime", Soochow University, 2008 at 13.
21. *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar,* ASEAN Case No. ARB/01/1 (31 March 2003), ASEAN Arbitral Tribunal (ICSID Additional Facility Rules) at 82.
22. *ACIA*, *supra* note 13, art. 1.
23. ASEAN Secretariat, "ASEAN Economic Community Blueprint" *ASEAN Secretariat* (2008), online: <http://www.asean.org/archive/5187-10.pdf> at 26.
24. *ACIA*, *supra* note 13, art. 47.

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this paper will focus on the comparison between the two regimes where the level of investment protection may differ from each other. Section III, analyzes the relationship between the two regimes and the applicable legal framework of investment protection to ASEAN Investors. Sections IV and V contain the author's recommendations and the conclusion.

By understanding the applicable legal framework, investors can understand the extent of investor protection afforded to them under the IIAs. For the host country, particularly Indonesia, this analysis can help the government understand the minimum-required standard of protection that it is granting under its IIAs and can ensure that its policies and treatment towards foreign investors comply with those obligations.

I. MFN AS A TOOL OF COMPARISON

An MFN treatment clause in IIAs is intended to create a level playing field between all foreign investors of different nationalities who wish to invest in the host state. It can apply to conditions of entry and operation of foreign investors.[25] In practice, besides claiming violation of MFN treatment, the MFN clause in the primary BIT—under which a dispute is brought—is mostly used by investors/claimants to incorporate/import more favourable substantive provisions[26] or rules of dispute settlement[27] from a third-party treaty (secondary BIT) into the primary BIT. In practice, this allows a claimant to use the MFN clause in the primary Indonesian BIT, under which the dispute is brought, to obtain a more favourable treatment from another Indonesian BIT, subject to the scope of the MFN clause in the former BIT. Therefore, it is important to analyze and compare the two regimes of the ACIA and Indonesian BITs using the MFN approach, as it may help governments to identify the minimum level of protection that they should grant to their foreign investors.

Although it is possible to import substantive protection standards from third-party treaties by virtue of an MFN clause, there are limitations, as demonstrated by the following variations. The first variation simply imports "more favourable" substantive protection standards. In *ADF v. United States*, the MFN clause was used in an attempt to benefit from an allegedly broader FET provision (autonomous standards) contained in the US-Albania BIT compared to the FET provision in Article 1105 NAFTA (North American Free Trade Agreement) that had been given restrictive interpretation according to Customary International Law (CIL) in 2001.[28] Unfortunately, the tribunal rejected this approach simply because the investor did not prove the existence of such "autonomous standards" under current international law.[29]

25. UNCTAD, *Most-Favoured-Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II* (Geneva: United Nations, 2010) at 14 [*UNCTAD 2010*].

26. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, at 227–35 [*Bayindir*].

27. *Emilio Augustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the tribunal on the objections of Jurisdiction, 25 January 2000, at 56, 62–3 [*Maffezini*].

28. NAFTA Free Trade Commission, *Minimum Standard of Treatment in Accordance with International Law*, Notes of Interpretation of 31 July 2001.

29. *ADF Group Inc. v. USA*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, at 194 [*ADF*].

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The second variation imports provisions that are absent in the primary treaty. In *Bayindir v. Pakistan,* the Pakistan-Turkey BIT (1995), as the primary treaty under which the case was brought, did not contain an FET clause. The investor then sought to import the FET clause from other BITs of Pakistan. The tribunal finally agreed that the Turkish nationals are entitled to FET and it should be read into the primary treaty based on the wording of the MFN clause and the preamble of the treaty that also referred to the FET standard.[30]

The third variation seeks to broaden the scope of application of the agreement, both *ratione materiae* and *ratione personae*. In *Société Generale*, the claimant sought to broaden the investment definition in the Dominican Republic-France BIT (1999) by importing the definition in DR-CAFTA (2004).[31] However, the tribunal rejected this attempt and found that the primary treaty has to be validly invoked in the first place before the investor can validly resort to the MFN treatment.[32]

The fourth variation deals with the elimination of provisions of the basic treaty. This attempt was argued in *CMS v. Argentina*,[33] where the claimant sought to eliminate the emergency exception clause in the primary treaty, the United States-Argentina BIT.[34] However, the tribunal ruled that the absence of such a provision in other treaties simply did not eliminate the provision from the primary treaty.[35] Even so, questions might arise with regard to two different treaties with different treaty exceptions where one has fewer exceptions than the other. Can an MFN clause operate to eliminate treaty exceptions contained in the primary treaty? However, the author will not explore this issue further as it is beyond the scope of this paper.

In addition to the import of substantive provisions, investors have also attempted to import more favourable rules of dispute settlement. However, this practice is particularly controversial,[36] particularly with regard to admissibility and jurisdictional threshold issues.

The admissibility issue was raised in *Maffezini*, where the tribunal held that the MFN treatment clause in the Argentina-Spain BIT[37] could be used to avoid the waiting period before recourse to the competent courts of the host state and

30. *Bayindir, supra* note 27 at 163–7.

31. *Dominican Republic-Central America-United States Free Trade Agreement* (entered into force for all states 1 January 2009).

32. *Société Generale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, at 41 [*Société Generale*]; *Rafat Ali Rizfi v. Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013, at 223.

33. *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/08, Award, 12 May 2005 [*CMS Award*].

34. *The Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* (entered into force 20 October 1994); *ibid.* at 377.

35. *UNCTAD 2010*, *supra* note 26 at 24; *ibid.* at 377.

36. For further reading, Michael EWING-CHOW and NG Wuay Teck, "*Caveat Emptor*: Three Aspects of Investment Protection Treaties" (2010) Asian Yearbook of International Law 14.

37. *Agreement for the Reciprocal Promotion and Protection of Investments Between the Kingdom of Spain and the Argentine Republic*, 3 October 1991 (entered into force 28 September 1992) [*Argentina-Spain BIT*].

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international arbitration by virtue of the Spain-Chile BIT,[38] which did not contain such a waiting period requirement.[39] The clause contains the phrase "in all matters", which was considered broad enough to cover rules of dispute settlement. The relevant MFN clause in Article IV(2) of the Argentina-Spain BIT provides:

> *In all matters* subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country. [emphasis added]

In contrast, other tribunals have been reluctant to incorporate rules of dispute settlement from secondary treaties by virtue of an MFN clause.[40]

Paparinskis argues that "states can limit, extend or clarify" the scope and content of MFN clauses both with respect to primary obligations and rules of international dispute settlement.[41] However, he suggests that states articulate their policy concerns in legal terms because it is not clear how those limitations can be implied into the interpretative process.[42] The *MTD Committee* said that an MFN clause in principle "attracts any more favourable treatment extended to third State investments and does so unconditionally", unless the clause expressly limits its scope to the types of rights provided by the treaty.[43] He also proposes an interpretation of "favourable" in the ordinary meaning to determine objectively whether the relevant matters are comparable. This is because there are standards—especially in rules of dispute settlement—that cannot be determined as being more favourable than the other, e.g. whether international dispute settlement through arbitration is more favourable than domestic dispute settlement.[44]

The author is more inclined to agree with the view that some MFN clauses may extend to rules of dispute settlement as in the case of *Maffezini*, provided the language is broad enough and there is no explicit statement from the parties against such extension. However, the parties to treaties may also limit the scope of an MFN clause by explicitly addressing it in the treaties. This is more consistent with the interpretation under Articles 31 and 32 of the Vienna Convention on the Law of

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38. *Acuerdo entre la Republica de Chile y El Reino de Espana para La Proteccion y Fomento Reciprocos de Inversiones* (entered into force 28 March 1994).

39. *Maffezini*, *supra* note 28 at 62–3; *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, 21 June 2011, at 104–8; *RosInvestCo v. Russian Federation,* SCC Case No. Arb. V 079/2005, Award on Jurisdiction, October 2007, at 124–35.

40. *Plama Consortium Ltd. v. Republic of Bulgaria,* ICSID Case No. ARB/04/15, Decision on Jurisdiction, 8 February 2005, at 202, 215; *Salini Costruttori S.p.A and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan,* ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, at 112; *Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, at 220.

41. Martin PAPARINSKIS, "MFN Clauses and International Dispute Settlement, Moving Beyond *Maffezini* and *Plama*?" (2011) 26 ICSID Review Foreign Investment Law Journal 14 at 26.

42. *Ibid.,* 37f.

43. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile,* ICSID Case No. ARB/01/07, Decision on Annulment, 21 March 2007 at 64; *ibid.,* 41.

44. Paparinskis, *supra* note 42 at 49; Campbell MCLACHLAN, L. SHORE, and M. WEINIGER, *International Investment Arbitration: Substantive Principles* (New York: Oxford University Press, 2007) at 257.

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Treaties (VCLT).[45] Following these decisions, more recently concluded IIAs include a special clause to carve out the application of MFN clauses to rules of dispute settlement.[46]

A. *MFN Treatment Clauses in Indonesia's BITs*

With regard to the subject-matter scope of an MFN clause, some of Indonesia's BITs extend the treatment only to investments,[47] while others extend to both investments and investors.[48] The consequence of extending MFN only to investments is that the BIT excludes foreign individuals or companies from MFN treatment and limits it to the locally established juridical person constituted in the host state or assets acquired under the legislation of the host state.[49] Moreover, the United Nations Conference on Trade and Development (UNCTAD) report explains that some measures may affect only investors and not investment, and vice versa, as well as both investment and investors.[50] Therefore, the most comprehensive protection is if the MFN clause extends to both investment and investors.

Some of Indonesia's BITs do not have an MFN clause.[51] For those BITs that include such a clause, it only covers the post-establishment stage.[52] On the other hand, few BITs cover both the establishment and post-establishment stages,[53] such as:

> Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, …[54]

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45. *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force January 27 1980) [*VCLT*].

46. *Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation* (entered into force September 1 2009), art. 88:

> 2. It is understood that the treatment … does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes between a Party and the non-Party that are provided for in other international agreements.

47. Thirty of the reviewed Indonesian BITs extend MFN treatment to only investments.

48. Twenty-four of the reviewed Indonesian BITs extend MFN treatment to both investments and investors.

49. *UNCTAD 2010*, *supra* note 26 at 43.

50. *Ibid.*

51. *Agreement Between the Government of the Republic of Indonesia and the Government of the Swiss Confederation* (entered into force 6 February 1974); *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Tunisia of the Promotion and Protection of Investments* (entered into force 12 September 1992); *Agreement Between the Government of the Republic of Indonesia and the Government of the State of Qatar for the Promotion and Protection of Investments* (signed 18 April 2000).

52. Fifty-seven of the reviewed Indonesian BITs extend MFN treatment to post-establishment stage.

53. *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Finland on the Promotion and the Protection of Investments* (entered into force 2 August 2008) [*Indonesia-Finland BIT*]; *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark Concerning the Promotion and Protection of Investments* (signed 22 January 2007).

54. *Indonesia-Finland BIT*, *ibid.*, art. 3(2).

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The MFN treatment at the establishment stage can prevent selective liberalization if the BITs contain commitments of market access. None of Indonesia's BITs contain such market access commitments (more often linked to a National Treatment (NT) clause); thus, the government does not liberalize any sectors through its BITs. For this reason, such MFN clauses in Indonesia's BITs only provide a guarantee that foreign investors will not be treated less favourably in terms of establishment and admission procedures. By contrast, the post-establishment MFN treatment only applies once the investment is established.[55]

None of Indonesia's BITs explicitly exclude the MFN clauses' applicability to rules of dispute settlement. However, the absence of the term "all matters" in the MFN clause will effectively prevent such an application by the tribunal.[56]

In order to limit the application of MFN clauses, most of Indonesia's BITs include MFN exception clauses,[57] while a few have none at all.[58] An MFN exception clause prevents the issue of "free-rider" by excluding MFN treatment that the host state may provide to third parties. There are several types of MFN exception clauses. The first type excludes MFN treatment that the host state may provide to third parties due to customs unions, Free Trade Agreements (FTAs), economic integration organization agreements, or even some other international agreements. For example:

> The provisions of this Agreement relative to the granting of treatment no less favourable than that accorded to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference, or privilege resulting from:
>
> a. the formation or extension of a customs union or a free trade area or a common external tariff area or a monetary union or a regional association for economic cooperation or a regional arrangement for specific projects; or
>
> b. the adoption of an agreement designed to lead to the formation of extension of such a union or area within a reasonable length of time; or
>
> …[59]

Besides this exception, some BITs also include additional exceptions for the application of MFN treatment to tax treaties, either through general taxation or double taxation treaties.[60]

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55. *Agreement Between the Government of the Republic of Indonesia and the Government of Australia Concerning the Promotion and Protection of Investments* (entered into force 29 July 1993); *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments* (entered into force 21 June 2006) [*Indonesia-Singapore BIT*].

56. *Maffezini*, *supra* note 28 at 51–3.

57. Forty-seven of the reviewed Indonesian BITs contain MFN exception.

58. Six of the reviewed Indonesian BITs do not have such an exception, including Indonesia-France (1973), and *Agreement Between the Government of the Republic of Indonesia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments* (entered into force 24 March 1977).

59. *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments* (entered into force 5 November 1998), art. IV(3) [*Indonesia-Thailand BIT*].

60. Twenty-six of the reviewed Indonesian BITs contain MFN exception for taxation matters.

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B. *MFN Treatment Clause in the ACIA*

Article 6 of the ACIA accords MFN treatment to investors and investments at the establishment and post-establishment stages by providing as follows:

> 1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
> 2. Each Member State shall accord to investments of investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
> …

Further, footnote 4 provides:

> …
> (a) this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; and
> (b) in relation to investments falling within the scope of this Agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any existing or future agreements or arrangements to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States.

This clause indicates that more favourable treatment under BITs of ASEAN Member States, among themselves and with third parties, will have to be extended to ASEAN Investors[61] under the ACIA. However, it limits the application of the MFN clause to ISDS procedures.

The ACIA also contains exceptions for granting MFN treatment from any subregional arrangements between and among ASEAN Member States or the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the US, signed in Bangkok, Thailand on 29 May 1996. However, it does not contain an exception for extending MFN treatment from FTAs of ASEAN Member States. Thus, the ACIA also requires ASEAN Member States to extend MFN treatment derived from their individual FTAs with third parties.

C. *Comparison of MFN Clauses in Indonesia's BITs and the ACIA and its Implications*

In terms of the scope of investment protection, the ACIA provides protection at the establishment and post-establishment stages to both investments and investors, while most of Indonesia's BITs provide protection only at the post-establishment stage.

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61. *ACIA*, *supra* note 13, art. 4(d) defines "investor" as:

> a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State;

It should be read together with art. 19 of the ACIA on Denial of Benefits.

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The MFN clause in the ACIA allows for incorporation or invocation of more favourable substantive provisions from other investment agreements of ASEAN Member States with the exception of several treaties mentioned specifically in its footnote. At the same time, it also excludes the incorporation of rules of dispute settlement from other treaties. The limited MFN exception clause seems to open the possibility of incorporating provisions from FTAs of each ASEAN Member State. For example, an Indonesian investor in Singapore bringing a claim under the ACIA could arguably claim a more favourable provision under the Investment Chapter of the United States-Singapore FTA.[62]

On the other hand, most of Indonesia's BITs have MFN exception clauses for agreements establishing customs unions, economic unions, etc., as can be found in all of Indonesia's intra-ASEAN BITs. This means that the ASEAN Investors who invoked MFN clauses in the intra-ASEAN BITs cannot invoke more favourable treatment under any preferential trade agreements of an ASEAN Member State. For example, an Indonesian investor in Singapore cannot incorporate a more favourable provision under the Investment Chapter of the United-States-Singapore FTA into the Indonesia-Singapore BIT. A question arises whether the MFN exception clause will apply to the ACIA as an agreement establishing the ASEAN Economic Community (AEC) or as an agreement designed to lead to the formation of a free trade area within a reasonable length of time. This will be explored further in Section III.

II. COMPARATIVE ANALYSIS OF INVESTMENT PROTECTION PROVISIONS UNDER INDONESIA'S BITS AND THE ACIA

This section contains the analysis of several provisions contained in Indonesia's BITs and the ACIA, namely: (1) standards of treatment including NT and FET; (2) expropriation; and (3) treaty exceptions. The author chose these standards because they are frequently raised in investor-state arbitration disputes. The discussion and analysis of these provisions is divided into three parts: (1) overview of the types of the provision in each of Indonesia's BITs and identification of the most favourable standard among the types; (2) analysis of the provisions in the ACIA; and (3) comparison between the most favourable standard under Indonesia's BITs and the ACIA.

A. *General Standards of Treatment*

1. *Absolute standard: fair and equitable treatment (FET)*

FET is the most common general absolute standard of treatment in BITs.[63] It can be combined with other principles, such as full protection and security (FPS) and non-discrimination.[64] Although most BITs contain FET clauses, the standard lacks a

62. *United States-Singapore Free Trade Agreement* (entered into force 1 January 2004) [*US-Singapore FTA*].

63. Kenneth J. VANDEVELDE, *Bilateral Investment Treaties: History, Policy and Interpretation* (New York: Oxford University Press, 2010) at 191.

64. *Ibid.*

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precise meaning.[65] This principle has raised a significant amount of controversy. Most BITs do not define the standard or substantive protection granted by FET. For example: "investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment".[66]

This type of FET clause is considered to incorporate an independent or autonomous FET standard. As an independent or autonomous standard, Vandevelde developed two theories of FET protection based on his review of previous tribunal decisions: the enhanced FET and the unified FET.[67] The enhanced FET essentially guarantees investors' expectations and provides legal certainty,[68] including the stability of the legal and business frameworks in the host country.[69] On the other hand, the unified FET harmonizes the four distinct inquiries of past tribunals,[70] as follows: (1) whether the conduct was "arbitrary, grossly unfair, unjust, or idiosyncratic"; (2) whether the conduct "involved a lack of due process leading to an outcome which offends judicial propriety";[71] (3) whether the conduct "substantially changed the legal and business framework under which the investment was decided";[72] and (4) whether the conduct was "in breach of representations made by the host State which were reasonably relied on by the claimant".[73] Overall, the unified theory seems to offer the most comprehensive protection.

In contrast, some other IIAs link the standard with CIL, and the clause can be phrased as follows:

> [F]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights....[74]

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65. UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (Geneva: United Nations, 2007) at 28 [*UNCTAD 2007*].
66. *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments* (signed 7 April 1999), art. 3 [*Indonesia-Chile BIT*].
67. Kenneth J. VANDEVELDE, "A Unified Theory of Fair and Equitable Treatment" (2010) 43 New York University Journal of International Law & Politics at 49.
68. *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, at 154 [*Tecmed*].
69. *Occidental Exploration and Production Co. v. Republic of Ecuador*, London Court of International Arbitration, Case No. UN3467, Final Award, July 1, 2004, at 83 [*Occidental Exploration*]; *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), Award, 30 August 2000, at 99 [*Metalclad*].
70. Vandevelde, *supra* note 68 at 49.
71. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/ 00/3, Award, 30 April 2004, at 98 [*Waste Management*].
72. *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, at 303 [*Sempra Award*]; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at 264 [*Enron Award*].
73. *BG Group Plc v. Argentina*, UNCITRAL, Award, 24 December 2007, at 297 [*BG Group*].
74. *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (entered into force 1 November 2006), arts. 5(1) and 5(2).

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In *Merrill & Ring*, Canada argued that a CIL-linked FET clause refers to the standard of protection that was developed by the *Neer* case.[75] Violation occurs when the conduct of the host state amounts to an "outrage", "bad faith", "wilful neglect of duty", or conduct "so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[76] However, several tribunals opined that CIL evolves and therefore FET is not frozen to the standards developed in the *Neer* case.[77] According to one of the tribunals, the standard is broader and protects against "all such acts or behavior that might infringe a sense of fairness, equity and reasonableness".[78]

From a review of the cases, it is clear that the more favourable protection for investors is the autonomous FET, which requires a lower threshold to prove violation and provides a broader scope of protection. However, from the perspective of a host country, the CIL-linked FET clause provides more certainty with regard to the treatment that it should grant, along with the flexibility and discretion to regulate and pursue its public policy objectives,[79] provided that the clause specifies the CIL standard. Otherwise, tribunals will continue to interpret it as a broader and evolving CIL standard.

(a) *FET clauses in Indonesia's BITs*: Of Indonesia's BITs, only the Indonesia-Turkey BIT does not include an FET clause.[80] However, by virtue of the MFN clause in the BIT, Indonesia and Turkey still have to grant this protection to investments in their territories. The FET clauses in all other BITs of Indonesia are left vague and undefined. For example, Article II(2) of the Indonesia-Algeria BIT[81] provides:

> Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment …

As such, the autonomous FET standard will be the most favourable clause in Indonesia's BITs.

(b) FET *clause in the ACIA:* The ACIA contains a different type of FET clause than those in Indonesia's BITs. Article 11(2)(a) of the ACIA defines the standard as follows:

> [F]air and equitable treatment requires each Member State *not to deny justice* in any legal or administrative proceedings in accordance with the *principle of due process*. [emphasis added]

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75. *Merrill & Ring Forestry LP v. Canada,* Award, 31 March 2010, at 121 [*Merrill & Ring*]; see also Vandevelde, *supra* note 68 at 192–3.

76. *Neer v. Mexico,* 4 R. Int'l Arb. Awards, 15 October 1926, 4 at 61–2; *Case Concerning Electtronica Sicula S.p.A (United States of America v. Italy)*, Judgment of 20 July 1989 [1989] ICJ Rep 1989 at 15; *Gami Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004 at 116, 123, 125, 127.

77. *ADF*, *supra* note 30 at 179; *Pope & Talbot Inc. v. Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001, at 118 [*Pope & Talbot Award*]; *Merrill & Ring*, *supra* note 76 at 193.

78. *Merrill & Ring*, *supra* note 76 at 210, 213.

79. *UNCTAD 2007*, *supra* note 66 at 29.

80. *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Turkey Concerning the Promotion and Protection of Investments* (entered into force 28 September 1998).

81. *Agreement Between the Government of the Republic of Indonesia and the Government of the People's Democratic Republic of Algeria Concerning the Promotion and Protection of Investments* (signed 21 March 2000).

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The clause is expected to limit broad interpretation of the standard and the treatment tends to be procedural,[82] as the due process principle requires a state: (1) to provide prior notice to the relevant party to whom it applies its coercive power; and (2) to provide an opportunity for the party to contest the application before an international tribunal, including the right of legal representation.[83]

In fact, Article 11(3) of the ACIA also adds that "a breach of another provision of the Agreement, or a separate international agreement, does not establish that there has been a breach of the article". This casts away any presumption of breach as in the case of *Metalclad*, where the tribunal found that the language of NAFTA Article 1105 links FET to minimum standard under customary international law in a way that makes it easy to conclude that a violation of another international obligation also violates the principle of FET in that agreement.[84]

(c) *Comparison of the FET clauses in Indonesia's BITs and the ACIA*: The FET clause in Indonesia's BITs is arguably more favourable to investors compared to the clause in the ACIA. The autonomous FET clause provides more protection to investors, including stability of the legal and business framework, legitimate expectation, and due process. In some BITs, the FET clause is also linked to MFN, NT, and non-arbitrary treatment.

An example which demonstrates the difference between the autonomous FET clause and the ACIA's FET clause is as follows. An investor in the mining sector has obtained an official assurance from a government official in charge of issuing operation licences that its licence will be valid for five years, provided he fulfils the requirements as mentioned in the licence. Although he complied continuously with the requirements, after a period of three years, the government decides to terminate the licence claiming that the operation of the factory contributes to environmental degradation. The investor challenges the termination before the administrative tribunal in the country, but the tribunal finds the termination legal. In such case, the investor could claim that the host state has breached his legitimate expectation in violation of the state's FET obligation. Under the BITs, most likely the tribunal will find a violation of the FET clause due to the initial representation given to the investor at the time of issuance of the licence. However, under the ACIA, the arbitration tribunal would most likely not find the host state in breach because the investor had not been denied access to the administrative tribunal.

The implication of the more favourable FET clause in Indonesia's BITs is that investors may, when there is an alleged FET violation, either bring a dispute under the BIT, or alternatively, incorporate the more favourable clause into the ACIA by virtue of the MFN clause. The latter requires the investor to demonstrate that the FET clause in Indonesia's BITs is more favourable. This may not be challenging, as the FET clause in the ACIA arguably has a very narrow scope. From a practical perspective, investors

82. Andrea BJORKLUND, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" (2005) 45 Virginia Journal of International Law 809.

83. Vandevelde, *supra* note 68 at 49–50.

84. *Metalclad, supra* note 70 at 100; *S.D. Myers Inc. v. Government of Canada,* NAFTA Arbitration, Partial Award, 24 November 2000, at 224–64 [*SD Myers*].

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may prefer to bring it directly under the BIT, because there is no need to argue for incorporation of the BIT standard by virtue of the MFN clause. In turn, this requires the government to ensure that its measures do not violate the autonomous FET standard of treating ASEAN investors as well as other foreign investors.

2. *Relative standard: national treatment*

NT is a contingent standard of treatment, because its application requires a comparative analysis between the treatment granted by the host state to its domestic investments or investors and the treatment granted to foreign investors of the other contracting party.[85] In order to create a level playing field between foreign and domestic investors, it requires no less favourable treatment to foreign investments or investors than to domestic investments or investors.

In analyzing whether the NT obligation has been breached, tribunals normally assess whether there is either *de jure* or *de facto* discrimination. NT clauses in BITs are generally worded broadly to provide protection for both types of discrimination.[86] The host state's discriminatory intent is not necessarily decisive, but practical impact is required to constitute a breach.[87] Additionally, in evaluating whether discrimination exists, some tribunals have questioned whether the difference in treatment has been justified by rational policy objectives of the government through the analysis of whether the investors are in "like circumstances".[88]

(a) *NT clauses in Indonesia's BITs*:[89] Most of Indonesia's BITs do not contain an NT clause. Although some of them contain an FET provision that prohibits arbitrary or discriminatory measures to the investments, most tribunals and commentators seem to treat "discriminatory" in that context as precluding nationality-based discrimination.[90] Based on the principle of effective interpretation, they argue that because many treaties contain both obligations to accord NT and to refrain from according discriminatory and arbitrary treatment in relations with FET,[91] the latter should be interpreted differently to ensure each provision has meaning.[92] Arguably, NT can be incorporated by virtue of an MFN clause, provided it is not NT at the establishment stage.

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85. *UNCTAD 2007*, *supra* note 66 at 36.

86. Andrea BJORKLUND, "National Treatment" in August REINISCH, *Standards of Investment Protection* (New York: Oxford University Press, 2008) at 30.

87. *S.D. Myers, supra* note 85 at 254.

88. *Ibid* at 247–51; *Pope & Talbot Award, supra* note 78 at 103.

89. Sixteen of Indonesia's BITs do not contain any NT clause. Twenty-nine of Indonesia's BITs contain an NT clause implicitly through the FET provision. On the other hand, seventeen of Indonesia's BITs contain an NT clause, with two of them covering both the establishment and post-establishment stages.

90. *LG&E Energy Corp v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at 146 [*LG&E*]; Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties* (Alphen Aan Den Rijn: Kluwer Law International, 2009) at 15.

91. *Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991 (entered into force 20 October 1994), art. II(2)(b) [*Argentina-US BIT*].

92. Ian SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Melland Schill Fund, 1984) at 118–19.

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Another variation can be seen in Article V(2) of the Indonesia-Laos PDR BIT,[93] which limits its application to the matter of compensation for losses:

> The treatment shall not be less favourable than that which the latter Contracting Party accords to its own nationals or nationals of any third State, whichever is more favourable to the nationals concerned.

Few BITs make NT contingent upon the domestic legislation of the host state. This type of NT clause justifies discrimination against foreign investment if the domestic laws and regulations of the host state allow it.[94] In fact, earlier BITs of Indonesia with (e.g. the Netherlands and Switzerland) explicitly allowed this in their Protocols.[95] For example, the relevant part of the Protocol of Indonesia-Netherlands BIT provides:[96]

> The Government of the Republic of Indonesia, while recognizing the principle of national treatment of investments made by nationals of the Kingdom of the Netherlands, reserves its right to maintain limited exceptions to national treatment of such investments in view of the fact that there are separate laws governing investments in Indonesia …

In sum, the most favourable NT clause in Indonesia's BITs is the one that protects both investments and investors explicitly at the post-establishment stage, without any contingency for domestic laws and regulations.

(b) *NT clause in the ACIA*: Article 5(1) and (2) of the ACIA provides:

> 1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
> 2. Each Member State shall accord to investments … treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors …

Clearly, the ACIA requires ASEAN Member States to grant the rights of both pre-establishment and post-establishment in the form of NT to ASEAN investors. This can be in the form of market access commitments, such as allowing foreign equity ownership in certain sectors which were previously closed to foreign investors. These commitments are reflected in each ASEAN Member State's schedule. Additionally, the term "like circumstances" requires tribunals to analyze further the circumstances

93. *Agreement Between the Government of the Republic of Indonesia and the Government of the Lao PDR Concerning the Promotion and Protection of Investments* (entered into force 14 October 1995) *[Indonesia-Lao PDR BIT]*.

94. Newcombe and Paradell, *supra* note 91 at 16; Bjorklund, *supra* note 87 at 33.

95. Protocol, *Agreement Between the Government of the Republic of Indonesia and the Government of Swiss Government,* 6 February 1974, para. 2.

96. Protocol to art. III(1) of the *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of the Netherlands on Promotion and Protection of Investment*, 6 April 1994.

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of the domestic and foreign investors. Nevertheless, there is no clear explanation on how this analysis is to be done; therefore, tribunals may exercise their discretion in interpreting this matter.[97]

(c) *Comparison between NT clauses in Indonesia's BITs and the ACIA*: It appears that the most favourable NT clause in Indonesia's BITs and the NT clause in the ACIA are similar insofar as both are not contingent upon domestic laws and regulations. Nevertheless, the NT clause in the ACIA may require a more thorough analysis due to the existence of the phrase "in like circumstances".[98]

With regard to the application of the NT clause, one can use the example of Singapore. Its government has recently issued a new regulation that stipulates that all foreigners wishing to purchase residential properties are subject to Additional Buyer's Stamp Duty (ABSD) of 15 percent, except for nationals of the United States, Switzerland, Lichtenstein, Norway, and Iceland. On the other hand, Singaporeans are not subject to any ABSD.[99] The exception is granted to those specific nationals because Article 40(1) of the European Free Trade Association (EFTA)-Singapore FTA is an NT clause that is broad enough to cover acquisition of investments in real property. Article 40(1) of the EFTA-Singapore FTA provides:[100]

> 1. Each Party shall accord to investors and investments of investors of another Party, in relation to the establishment, acquisition, expansion, management, conduct, operation and disposal of investments, treatment that is no less favourable than that which it accords in like situations to its own investors and their investments or to investors and their investments of any other State, whichever is more favourable.

Residential properties arguably fall under the definition of investment under Article 4(c) of the ACIA. Although the NT clause in the ACIA is similar to that in the EFTA-Singapore FTA, ASEAN investors cannot claim an NT violation because Singapore includes a reservation on the acquisition of land or real property in its Schedule of the ACIA, as allowed under Article 9 of the ACIA.

For ASEAN investors, if their primary BITs under which they seek to bring a dispute do not contain an NT clause[101] and the basis of their claim is an NT violation, then they may bring the dispute under the ACIA. Only the Indonesia-Singapore BIT includes an NT clause with broad coverage in spite of being contingent on domestic laws and regulations.

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97. To see the diverging views of tribunals on the analysis of "like circumstances", see Jürgen KURTZ, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents" (2009) European Journal of International Law 749.

98. *Ibid*.

99. Inland Revenue Authority of Singapore (IRAS), "Stamp Duty", online: <http://www.iras.gov.sg/irashome/page.aspx?id=8996#Buyer's Stamp Duty and Additional Buyer's Stamp Duty (ABSD) for Residential Properties> (last accessed 5 November 2014).

100. See also *US-Singapore FTA*, *supra* note 63, art. 15.4(1).

101. Including: *Agreement Between the Government of Malaysia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments* (entered into force 15 June 1994) [*Indonesia-Malaysia BIT*]; *Agreement Between the Government of the Republic of Indonesia and the Government of the Socialist Republic of Viet Nam for the Promotion and Protection of Investments* (entered into force 3 April 1994) [*Indonesia-Viet Nam BIT*]; *Indonesia-Thailand BIT*, *supra* note 60.

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Indonesia's other intra-ASEAN BITs, namely the Indonesia-Lao PDR and the Indonesia-Philippines BITs,[102] contain NT clauses with narrow scope, which only apply to claims for compensation for losses due to war, armed conflict, national emergency, revolt, insurrection, or riot. If the NT violation is not related to such a claim, the clauses have little value. Nevertheless, with the MFN clause, it is possible to incorporate a more comprehensive NT clause from the ACIA into the BITs. However, NT protection at the establishment stage cannot be invoked because the investor has not qualified as an investor at the first place.

For the Indonesian government, it has an obligation to ensure at all times—except if it has made reservations—that its measures affecting ASEAN investors (in particular) do not violate its NT obligation under the ACIA due to the higher threshold of protection granted under the agreement.

B. *Expropriation*

Protection of foreign investors' investments from unlawful expropriation is one of the main drivers of BITs. Generally, countries may expropriate foreign investments under the notion of lawful expropriation, provided it is done on a non-discriminatory basis, for public purposes, in accordance with the due process of law, and against the payment of compensation.[103]

Based on previous arbitral decisions, direct expropriation occurs when a state takes concrete action, resulting in an investor's loss of control of its property[104] and transfer of its property's legal title to the government or a third party.[105] On the other hand, indirect expropriation occurs even when the legal title remains with the owner,[106] especially where the host state adopts certain measures that deprive the owner of the possibility of utilizing his/her investments.[107] Currently, many cases brought before investor-state tribunals deal with the issue of unlawful indirect expropriation. This concept is more controversial because the term lacks clarity regarding the degree of interference or deprivation towards investors' rights of ownership. Nonetheless, this assessment is fact-intensive.[108]

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102. *Agreement between the Government of the Republic of Indonesia and the Government of the Republic of the Philippines Concerning the Promotion and Protection of Investments* (signed 12 November 2001) [*Indonesia-Philippines BIT*].

103. *UNCTAD 2007*, *supra* note 66 at 44.

104. *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at 76 [*Santa Elena*].

105. Andrew NEWCOMBE, "The Boundaries of Regulatory Expropriation in International Law" (2005) 20 ICSID Review-Foreign Investment Law Journal 1 at 8 [*Newcombe*].

106. *Marvin Roy Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/(1), Award, 16 December 2002 at 366–7; Rudolf DOLZER and Christoph SCHREUER, *Principles of International Investment Law* (New York: Oxford University Press, 2008) at 92; Hugh KINDRED, Phillip SAUNDERS, Robert CURRIE, Jutta BRUNNEE, Ted MCDORMAN, Ikechi MGBEOJI, Karin MICKELSON, Rene PROVOST, Linda REIF and Chris WATERS, *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Edmond Montgomery Publications, 2006) at 693; McLachlan *et al.*, *supra* note 45 at 290; Newcombe and Paradell, *supra* note 91 at 327.

107. *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, at 608 [*CME*]; *Metalclad*, *supra* note 70 at 103.

108. George CHRISTIE, "What Constitutes a Taking Under International Law?" (1962) 33 British Year Book of International Law 307; Yves FORTIER and Stephen DRYMER, "Indirect Expropriation in the

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Arbitral tribunals have developed three approaches in determining when an indirect expropriation occurs. First, the *sole effect* doctrine proposes that a measure or a set of measures constitutes indirect expropriation when it has a permanent character, or substantially deprives the investor's property rights, or conflicts with the investor's investment-backed expectations.[109] The most crucial point is the existence of substantial interference/deprivation of an investor's right of ownership of its investments.[110] Nonetheless, if the government actions only reduce the profits of the investments, they will not necessarily amount to an expropriation.[111]

The second approach in defining indirect expropriation takes into account a country's frequent enactment of regulations to pursue its public policy objectives.[112] In other words, the nature or character of the governmental acts is taken into account.[113] The tribunal in *Tecmed* found it necessary to consider "whether such actions or measures [of the host state] are proportional to the public interest presumably protected thereby and to the protection legally granted to the investments" (bracketed text added).[114] With this approach, the analysis focuses on how the government measure is to be characterized, and how much the nature or character should weigh against the depriving effects on investors.[115]

The last approach as developed in *Methanex* provides that a government measure will not be expropriatory and no compensation shall be owed to investors, when the measure is: (1) non-discriminatory; (2) in accordance with due process; and (3) for public purpose.[116] The potential implication of following this approach is that there could no longer be a notion of lawful expropriation as the criteria for a measure to be non-expropriatory is the same as the criteria for lawful expropriation, except for the obligation to compensate. This will render the clause of lawful expropriation in a BIT meaningless. This approach has received a lot of criticism and subsequent tribunals have been reluctant to follow it.[117]

Law of International Investment: I Know It When I See It, or Caveat Investor" (2005) 19 ICSID Review-Foreign Investment Law Journal 293 at 326–7.

109. *LG&E*, *supra* note 91 at 190; *Metalclad, supra* note 70 at 103; *Nykomb Synergetics Technology Holding, AB, Stockholder v. Republic of Latvia, Riga,* SCC, 16 December 2003 at 4.3.1; Dolzer and Schreuer, *supra* note 107 at 65–93; Christopher F. DUGAN, Don WALLACE JR., Noah D. RUBINS and Borzu SABAHI, *Investor-State Arbitration* (New York: Oxford University Press, 2008) at 455.

110. *EnCana Corporation v. Ecuador*, LCIA, Case No. UN3481, Final Award, 3 February 2006, at 172–83 [*EnCana v. Ecuador*]; *Waste Management, supra* note 72 at 141, 147.

111. *EnCana v. Ecuador, ibid.* at 173–4.

112. *Tecmed, supra* note 69 at 115; Newcombe, *supra* note 106 at 2.

113. Dugan *et al.*, *supra* note 110 at 461.

114. *Tecmed, supra* note 69 at 122.

115. Dugan *et al.*, *supra* note 110 at 465.

116. *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV Chapter D at 7 [*Methanex*]; Todd WEILER, "Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter Eleven?" (2005) 6 Journal of World Investment and Trade 903 at 918–19; David SCHNEIDARMAN, *Constitutionalizing Economic Globalization: Investment Rules And Democracy's Promise* (New York: Cambridge University Press, 2008) at 95.

117. *Fireman's Fund Insurance Company v. The United Mexican States,* ICSID Case No. ARB(AF)/02/01, Award, 2006, at 176 [*Fireman's Fund*]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 14 May 2009, at 356 [*Glamis Gold*].

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1. *Expropriation clauses in Indonesia's BITs*

Expropriation clauses exist in all of Indonesia's BITs, and they apply to both direct and indirect expropriations. None of the clauses define the terms, nor do they clarify the distinction between the two. For example, Article IV(1) of the Indonesia-Singapore BIT provides:

> 1. Each Contracting Party shall not take any measures of expropriation, nationalization or any other dispossession, having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") against the investments of an investor of the other Contracting Party except under the following conditions:
> a. the measures are taken for a lawful purpose or public purpose and under due process of law;
> b. the measures are non discriminatory; and
> c. the measures are accompanied by provisions of the payment of prompt, adequate and effective compensation …

Thus, one cannot say that there is a more favourable clause. After all, the approaches applied by the tribunals are the ones that affect the outcome of the assessment.

2. *Expropriation clause in the ACIA*

Article 14(1) of the ACIA covers both direct and indirect expropriation by providing as follows:

> 1. A Member State shall not expropriate or nationalize a covered investment either directly or through measures equivalent to expropriation or nationalization ("expropriation"), except:[10]
> a. for a public purpose;
> b. in a non-discriminatory manner;
> c. on payment of prompt, adequate, and effective compensation; and
> d. in accordance with due process of law.

However, footnote 10 of the ACIA contains some exceptions. In particular, it carves out any measure of expropriation relating to land and places it under the domain of the host state's domestic laws and regulations. This demonstrates that the ACIA Member States seek to regulate this issue in their domestic laws. This could be done to expedite the process and prevent disputes regarding land acquisition from being brought before international arbitration. Furthermore, paragraph 5 of the same provision also carves out the possibility of claiming that the issuance of compulsory licences granted in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights is expropriatory. Although the issuance of compulsory licences is a phenomenon happening in Brazil, India, and Thailand,[118] there has been no case on point that finds it expropriatory.

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118. Stephen JENEI, "Thailand Issues Compulsory License to AIDS Drug" (13 December 2006), online: Patent Baristas <http://www.patentbaristas.com/archives/2006/12/13/thailand-issues-compulsory-license-to-aids-drug/>.

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Unlike the BITs, Annex 2 paragraph 3 of the ACIA elaborates on what constitutes indirect expropriation. Paragraph 4 further provides some carve-outs as follows:

> Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).

Essentially, this was done to provide more policy space for the government in regulating investments. This paragraph follows the approach used in *Methanex*, but it is not known how other tribunals will interpret this type of provision.

3. *Comparison of expropriation clauses in Indonesia's BITs and the ACIA*

The expropriation clauses in Indonesia's BITs and the ACIA seem to be very similar in terms of covering both direct and indirect expropriation. Nevertheless, it is important to focus on the formulation of the indirect expropriation clause, which remains unclear.

Where the language of the expropriation clause in an agreement is vaguely drafted, arbitration tribunals have the discretion to determine the applicable approach to assess the existence of indirect expropriation. In this sense, the ACIA provides clearer parameters of what constitutes indirect expropriation, as well as several carve-outs of measures that would not constitute indirect expropriation. Consider the following example. A foreign investor obtains a licence to mine and produce copper in a host state. After a period of time of production, the government requires, at the request of people living in the vicinity of the site, an environmental study to be done by an independent reputable firm. It is found that the smelter facility has polluted the environment around it, killed fish due to its bad sewage facility, and harmed the health of people living in the area. Thus, the government decides to terminate the investor's licence and ban all of the investor's activities. If the investor brings the case of expropriation under the ACIA, the action of terminating the licence would not constitute indirect expropriation, provided it is non-discriminatory and designed and applied to protect public health, safety, and the environment. As such, the government would not have to provide any compensation. This would be perceived as not favourable to investors, as compared to the vaguely drafted expropriation clause in Indonesia's BITs, which cover a broader range of governmental measures without any explicit carve-outs. Even so, it is possible that certain tribunals might adopt an approach that takes into account the nature or character of the government measure to protect public health.

When bringing a case under the ACIA, one may argue that the MFN clause allows for incorporation of more favourable treatment from Indonesia's BITs, namely the elimination of Annex 2 and the explicit carve-outs. However, this is yet to be tested. Where there is a lack of clarity regarding how a tribunal will deal with an issue, investors who have options may be more inclined to bring their cases under Indonesia's BITs.

For the Indonesian government (as well as other ACIA Member States), it is preferable to have the ACIA's expropriation clause (with the Annex), because the

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factors in determining whether an indirect expropriation occurs are stated explicitly. This will allow governments to design their measures accordingly. This differs when compared to vaguely drafted expropriation clauses in Indonesia's BITs, which provide arbitral tribunals with wide discretion to determine the approach to take, thereby affecting the factors considered in the assessment.

C. *Treaty Exceptions*

The trend of including treaty exceptions in an IIA began recently. Governments use treaty exception clauses as a policy tool to strike a balance between investment protection and the safeguarding of other values or objectives considered to be fundamental to the countries concerned, e.g. public health.[119] The clause provides the host state with significant room to manoeuvre when facing circumstances that may justify derogation from its IIA obligations.[120] If the host state successfully invokes the treaty exception, it exempts the host state from liability of its breaches. In such a case, an exception has the potential to render a practical nullity to all other provisions of the BIT.[121]

However, the invocation of a treaty exception clause is not without issues. This was demonstrated clearly in the Argentine cases involving invocation of the essential security exception.[122] The issue was whether the provision is the same as the necessity defence under CIL as prescribed by Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).[123] If it is the same, then little deference is given to the host state. However, if not, the question is whether the host state can freely determine what constitutes essential security. This matter has generated extensive debate among scholars, especially with the diverging interpretations by the tribunals in the Argentine cases.[124]

The main difference between a self-judging provision and the necessity defence is that the latter requires the fulfilment of the cumulative conditions prescribed in

119. Michael EWING-CHOW and Geraldine FISCHER, "ASEAN IIAs: Conserving Regulatory Sovereignty While Promoting the Rule of Law?" (2011) 8 Transnational Dispute Management 5 at 6–7.

120. Dugan *et al.*, *supra* note 110 at 179.

121. *Ibid.,* at 178.

122. *CMS Award*, *supra* note 34 at 349–52; *CMS Gas Transmission Co. v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision on Application for Annulment, 21 August 2007 [*CMS Annulment*]; *LG&E, supra* note 91; *Sempra Award*, *supra* note 73 at 366–8; *Sempra v. Argentine Republic,* Decision on Argentina's Application for Annulment of the award, 10 June 2010 [*Sempra Annulment*]; *Enron Award*, *supra* note 73 at 324–6; *Enron v. Argentine Republic,* Decision on the Application for Annulment, 30 July 2010 [*Enron Annulment*]; *Continental Casualty Co. v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, 5 September 2008, at 183 [*Continental*].

123. *2001 Articles on Responsibility of States for Internationally Wrongful Acts (including official Commentary)*, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001) [*ILC Articles*].

124. Jose E. ALVAREZ and Tegan BRINK, "Revisiting the Necessity Defense", (2010–11) Yearbook on International Investment Law and Policy 319; Stephan SCHILL and Robyn BRIESE, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement" (2009) 13 Max Planck Yearbook on United Nations Law at 62; Jürgen KURTZ, "Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis", Jean Monnet Center for International and Regional Economic Law and Justice, New York University, Working Paper 06/08, 2008; M. WAIBEL, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG & E" (2007) 20 Leiden Journal of International Law 637.

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Article 25 of the ILC Articles, while the former provides the host state with discretion to determine what is necessary in the light of a certain crisis.[125] Another difference between the two is the implication of its successful invocation. In the case of the necessity defence, Article 27 of the ILC Articles provides that a finding of a measure that is precluded for its wrongfulness under Article 25 of the ILC Articles does not affect the duty to compensate for the material loss caused by the act.[126] However, the tribunal in *LG&E* found that the CIL defence allows the state not to compensate investors for losses sustained during a period of crisis.[127] Arguably, the successful invocation of a self-judging provision or a treaty defence will protect the state from any claims of compensation because the breach of the IIA will be precluded.[128]

1. *Treaty exception clauses in Indonesia's BITs*

Only a few of Indonesia's BITs contain treaty exception clauses. There are three types of treaty exception clauses in BITs, including: (1) essential security or interest and public order (Type 1);[129] (2) financial issues (Type 2);[130] and (3) public health (Type 3).[131]

A variation of Type 1 can be seen in the Indonesia-Germany BIT (2003), where the exception is limited to MFN and NT clauses.[132] This is peculiar, given that other treaty exception clauses normally require the application of such measures be done in a non-discriminatory manner. None of Indonesia's BITs containing an essential security exception has the phrase "it considers necessary" or "its own essential security interests". As such, there is no self-judging essential security exception provision.

Type 2 allows temporary safeguard measures for financial purposes, even though it might not be consistent with the NT and Transfers clauses in a BIT.[133] Financial purposes include serious balance of payment and external financial difficulties, as well as the movement of capital, which causes or threatens to cause serious difficulties for macroeconomic management, particularly monetary and exchange rate policies. Nevertheless, in order to invoke this exception, several conditions have to be fulfilled in order to prevent arbitrary measures by the host state.

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125. Elizabeth A. MARTINEZ, "Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases" (2012) 23 Duke Journal of Comparative & International Law 149 at 184.
126. *CMS Award*, *supra* note 34 at 388–90; *Enron Award*, *supra* note 123 at 345; *Sempra Award, supra* note 123 at 394.
127. *LG&E, supra* note 91 at 264.
128. *CMS Annulment, supra* note 123 at 146; *Enron Annulment, supra* note 123 at 414.
129. Five of the reviewed Indonesian BITs.
130. Two of the reviewed Indonesian BITs.
131. One of the reviewed Indonesian BITs.
132. *Agreement Between the Government of the Republic of Indonesia and the Federal Republic of Germany Concerning the Promotion and Reciprocal Protection of Investments* (entered into force 2 June 2007), Ad art. 3.
133. *Agreement on Promotion and Reciprocal Protection of Investment Between the Republic of Indonesia and the Great Socialist People's Libyan Arab Jamahiriya* (signed 4 April 2009), art. 8.

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By looking at the wording of the provision, Type 3 is similar to Article XX of the GATT 1994[134] and Article XIV of the GATS.[135] A scholar has argued that this type of exception may be risky and may not necessarily expand governments' policy space as expected.[136] None of Indonesia's BITs actually include the full list of exceptions, as in the GATT or the GATS. However, the most similar could be found in Article II(3) of the Indonesia-Mauritius BIT (1997):[137]

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.

The clause is quite comprehensive, as it also incorporates an essential security exception (Type 1). Notably, it does not contain a qualification that the measure be done in a non-discriminatory and non-arbitrary manner, as can be found in the Chapeau of Article XIV GATS. Arguably, this can make it easier for host states to invoke the treaty exception. Since treaty exception clauses provide leeway for the host state to refrain from complying with its obligations under a BIT, investors will enjoy the most favourable protection when such exceptions do not exist or when there are fewer exceptions.[138]

2. *Treaty exception clauses in the ACIA*

The ACIA contains a comprehensive set of treaty exceptions, including a security exception, an exception similar to the GATS and GATT (word-by-word with some modifications), and a balance of payment exception.

Article 17 of the ACIA is another example of an exception clause similar to the GATS and GATT. It contains a treaty exception that covers a wide range of areas, including protection of public morals, maintaining public order, protection of human, animal, or plant life or health, and conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption, etc.

Article 17(1) of the ACIA also incorporates the Chapeau of Article XIV GATS, which prohibits the application of measures in a manner that constitutes arbitrary or unjustifiable discrimination between ACIA Member States or their investors where like conditions prevail, or a disguised restriction on ASEAN investors and their investments.

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134. *General Agreement on Tariffs and Trade 1994*, 15 April 1994, Annex 1A, 1867 U.N.T.S. 187 (entered into force on 1 January 1995) [*GATT 1994*].

135. *General Agreement on Trade in Services*, 15 April 1994, Annex 1B, 1869 U.N.T.S. 183 (entered into force 1 January 1995) [*GATS*].

136. Céline LÉVESQUE, "The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy" in Roberto ECHANDI and Pierre SAUVÉ, eds., *Prospects in International Investment Law and Policy* (New York: Cambridge University Press, 2013), 363–70.

137. *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Mauritius on the Promotion and Protection of Investments* (entered into force 28 March 2000).

138. Dugan *et al.*, *supra* note 110 at 179.

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Article 18 of the ACIA stipulates a security exception. The language used for essential security interests exception in Article 18(b) appears to be explicitly designed as a self-judging clause with the phrase "which it considers necessary". This means that deference is given to the ACIA Member State to decide what constitutes its own essential security interests.

The ACIA also provides an exception in the field of finance, as found in Article 16 on Measures to Safeguard the Balance of Payments. This provision can be used by ACIA Member States to take required measures to address a financial crisis, such as what happened during the 1997 Asian financial crisis. The provision provides that an ACIA Member State may adopt or maintain restrictions on payments or transfers related to investments where pressures on the balance of payments of an ACIA Member State in the process of economic development necessitate such restriction. Although the measures may amount to a breach of obligations under the ACIA, an ACIA Member State is exempted from liability if it fulfils the requirements in this provision.

3. *Comparison of treaty exception clauses in Indonesia's BITs and the ACIA*

The treaty exception clauses under the ACIA have a broader coverage of exempted areas than recent Indonesia's BITs with treaty exception clauses. The ACIA is clearly designed to provide more policy space for governments in formulating and implementing their policies.

For ASEAN investors, having lots of treaty exception clauses in the ACIA is not preferable. On the other hand, the Indonesian government, as well as other ACIA Member States, may welcome the ACIA, because it provides more room for governments to implement policies that might be needed to address certain extreme or extraordinary developments. In this connection, there is even less incentive for ASEAN investors to bring a case under the ACIA if it has the option to bring it under the intra-ASEAN BITs.

The question that arises and needs further research is whether the MFN clause applies to treaty exceptions. If both primary and secondary treaties contain treaty exceptions, but the latter contains fewer exceptions, arguably the MFN clause could apply to eliminate some of the exceptions in the primary treaty. Governments should be aware of such possibilities; therefore, in designing their policies and measures, they should bear in mind that not all treaty exceptions will be applicable, and even if they are, then certain conditions must be fulfilled, including the Chapeau requirements.

III. INTERACTION BETWEEN INDONESIA'S BITS AND THE ACIA

Article 47(1) of the ACIA provides that upon the entry into force of the Agreement, the ASEAN IGA and the AIA shall be terminated as a means to effectively end the patchy legal framework of foreign investment protection in the region.[139] However, the ACIA does not specify the fate of the intra-ASEAN BITs. Does this mean that,

139. Note that art. 47(3) of the ACIA provides the possibility for ASEAN investors to apply the provisions of the ASEAN IGA or the AIA up to 29 March 2015.

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when bringing a claim, an ASEAN investor has the right to choose either BIT or ACIA provisions, whichever is more favourable for his/her investments?

A. *Guidance from the VCLT?*

Article 30 and Article 59 of the VCLT may be the closest provisions on point dealing with the relationship of two treaties. Article 30 of the VCLT concerns the application of successive treaties relating to the same subject matter, whereas Article 59 of the VCLT concerns the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty.

However, two problems arise with regard to the applicability of these provisions to the present case: (1) different parties to the treaties; and (2) different subject matters. The provisions seem to be dealing with two treaties, an earlier and a successive treaty, rather than numerous earlier treaties and a single successive treaty. As such, the provisions are not applicable in the case of the relations between the intra-ASEAN BITs and the ACIA. In addition, the numerous pairings of parties to the intra-ASEAN BITs are different from the ten parties to the ACIA. The subject matter poses an even greater issue because the intra-ASEAN BITs cover only the promotion and protection of investments, while the ACIA covers broader subject matter, including the promotion, protection, liberalization, and facilitation of investments. This leaves little possibility for the VCLT to clarify the relationship between the two regimes.

Hypothetically, if the provisions were applicable, it could lead to an interesting outcome. Article 30(3) of the VCLT provides that if the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (*lex posterior derogat legi priori*). Based on the analysis above, most of the ACIA's provisions clarify the standards in intra-ASEAN BITs. Where the standard is already specified, a request for the application of different standards in the BITs would be incompatible with the ACIA. By applying Article 30(3) of the VCLT in the present hypothetical case, it is arguable that the BITs, being the earlier treaties, would not apply.

While it is tempting to use Article 59(1)(b) of the VCLT to argue that the ACIA would prevail over the intra-ASEAN BITs, the answer is not conclusive, as the question of compatibility creeps in again. Under the provision, for the termination of the earlier treaty it requires that "the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time". With regard to the provisions of the ACIA and the intra-ASEAN BITs, some of the provisions are clearly not incompatible because they regulate different subject matters, e.g. the liberalization and facilitation of investment. As such, using this provision to argue that the ACIA terminates intra-ASEAN BITs is not very persuasive.

B. *Guidance from the Relevant Agreements*

1 *Claiming the benefits of the ACIA into the intra-ASEAN BITs*

As discussed above, it is arguable that various standards of protection granted under the most favourable standard of Indonesia's BITs are more favourable than those

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under the ACIA. However, if the ACIA actually provides a more favourable standard, e.g. an NT clause, is it possible to claim such benefits for a dispute brought under an intra-ASEAN BIT?

Section 1 explains that most of Indonesia's BITs contain MFN exception clauses, which exclude incorporation of a clause from a customs union, an FTA, or a regional association for economic co-operation, as well as agreements designed to lead to the formation of such an arrangement. Therefore, one may claim that ASEAN investors cannot incorporate ACIA provisions into the BITs.

However, when looking at the language of an MFN exception clause, it is clear that it is actually meant to prevent incorporation of an MFN clause from an arrangement with third parties. For example, the clause in Article III(2) of the Indonesia-Singapore BIT provides:

> If a Contracting Party has accorded special advantages to *investors of any third state* by virtue of agreements establishing customs union, … or other forms of economic integration to which *either of the Contracting Parties is or may become a party* …, that Contracting Party shall not be obliged to accord such advantages of investors of the other Contracting Party. [emphasis added]

In the case of intra-ASEAN BITs and the ACIA, both parties of the BITs are also parties to the ACIA. Since the language of the MFN exception clause does not capture the nature of the ACIA as an economic integration to which both parties of the BITs are also parties, incorporation of provisions from the ACIA is presumably possible.

Furthermore, this reasoning is supported by a clause found in all of Indonesia's intra-ASEAN BITs (except the Indonesia-Thailand BIT), which provides that where obligations under international law between Contracting Parties entitle investments a more favourable treatment than under the BITs, the former shall prevail.[140] For example, in Article XI of the Indonesia-Cambodia BIT:

> If the provisions of law of either Contracting Party or obligations under international existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

As the ACIA clearly constitutes "obligations under international law" established after the conclusion of Indonesia's intra-ASEAN BITs, if it contains a regulation that extends a treatment more favourable than the BITs, it will likely prevail over the provisions of the BITs.

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140. *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Cambodia Concerning the Promotion and Protection of Investments* (entered into force 21 September 2000), art. XI [*Indonesia-Cambodia BIT*]; *Indonesia-Singapore BIT*, *supra* note 56, art. XI; *Indonesia-Lao PDR BIT*, *supra* note 94, art. XI; *Indonesia-Malaysia BIT*, *supra* note 102, art. XI; *Indonesia-Philippines BIT*, *supra* note 103, art. XI; *Indonesia-Viet Nam BIT*, *supra* note 102, art. XI.

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ASEAN investors may argue for more favourable treatment from the ACIA under an Indonesia-Thailand BIT by requesting tribunals to interpret the MFN clause in accordance with Article 31(3)(c) of the VCLT.[141] This provision requires that the interpretation take into account applicable international law between the parties. Essentially, this would include the ACIA. The problem with this interpretation is that the standards under the ACIA may not necessarily be more favourable than those in the BITs. Rather, this interpretation may be used by the host state to bring more clarity to the vaguely drafted language of BITs, thereby rendering the investor less favourable treatment. For example, where the BIT does not define FET, the host state may argue that Article 31(3)(c) provides an avenue for the tribunal to examine the definition of such a clause in the ACIA, a standard that is limited only to the denial of justice.

Based on the discussion above, it is arguably possible to claim benefits from the ACIA into Indonesia's intra-ASEAN BITs.

2 *Claiming the benefits of the BITs into the ACIA*

The following analysis pertains to the incorporation of the most favourable standards in Indonesia's BITs when an ASEAN investor brings a dispute under the ACIA.

The case for the incorporation of more favourable treatment from Indonesia's BITs into the ACIA is much simpler. Article 6 of the ACIA accords MFN treatment to ASEAN investors and investments at both the establishment and post-establishment stages. Footnote 4 provides:

> For greater certainty:
>
> …
>
> (b) in relation to investments falling within the scope of this Agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any *existing or future agreements or arrangements* to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States. [emphasis added]

Arguably, this includes BITs—both intra- and extra-ASEAN BITs—and even FTAs of ASEAN Member States, since there is no exception to this effect. In addition, Article 44 of the ACIA provides: "[n]othing in this Agreement shall derogate the existing rights and obligations of a Member State under any other international agreements to which it is a party." This means that as long as Indonesia's intra-BITs are still in force, the obligations of ASEAN Member States under the BITs continue, and ASEAN investors may invoke such protection.

As explained above, the applicability of an MFN clause to a treaty exception clause remains a grey area. It is unclear whether it is possible to eliminate certain treaty exceptions when the primary agreement clearly provides for it. Similarly, it is questionable whether one could incorporate the vague expropriation or an FET clause in BITs to replace the detailed stipulation on expropriation in the ACIA, which includes explicit carve-outs or FET that are more narrow.

141. For further discussion, see Campbell MCLACHLAN, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 International and Comparative Law Quarterly 279.

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In practice, since more provisions seem to be more favourable to ASEAN investors under Indonesia's BITs, they may choose to bring a dispute under the BITs. If ASEAN investors decided to bring a dispute through the ACIA, the reason might be that the ASEAN investors sought to rely on some other provision of the ACIA, e.g. an NT clause. In that case, it is possible to claim benefits from Indonesia's BITs, provided the ASEAN investors can prove that the treatments envisaged in the vague language of BITs provisions are more favourable.

IV. THE NEXT STEP FOR INDONESIA: NAVIGATING THROUGH THE DUAL INVESTMENT REGIMES

Having the dual investment regimes may be confusing for a government because it cannot be completely certain of the treatments it is required to grant to investors. As illustrated above, the complicated exercise to determine the minimum treatment that Indonesia is obligated to grant to ASEAN investors demonstrates the complexity that Indonesian government officials are facing. However, this is not the end of the story. Being able to untangle the problems discussed above does not necessarily free Indonesia from potential litigation brought by various investors. In fact, the government must take several additional measures to ensure compliance with its international obligations under the applicable regime. To prevent or reduce future disputes before international arbitration, below are several policy recommendations for the government to consider.

First, the government must work on improving co-ordination, both inter-ministerial co-ordination and central-regional co-ordination. When a government issues a policy, it may not involve only one particular ministry. For example, in issuing a ban on the exports of raw minerals from Indonesia, several ministries are required to co-ordinate and co-operate on the implementation of the ban, including the Ministry of Trade, the Ministry of Energy and Mineral Resources, and the Ministry of Finance.

Similarly, the regional and central governments must not issue conflicting regulations, as this leads to uncertainty and may eventually lead to a dispute. For example, in *Churchill Mining v. Indonesia*, the regional government issued various statements reflecting a lack of co-ordination with the central government. In this case, the President commented that the dispute was a negative result of regional autonomy.[142] His comment underscores the fact that maintaining co-ordination is critical.

Second, in order to prevent litigation before international arbitration, the Indonesian government should consider implementing a dispute prevention mechanism that can prevent a conflict from escalating to the level of a dispute.[143] This mechanism has been implemented in other jurisdictions as investor aftercare services. This provides an

142. Rabby PRAMUDATAMA, "SBY Warns of Time Bomb in RI Mining" *Jakarta Post* (8 August 2012), online: Jakarta Post <http://www.thejakartapost.com/news/2012/08/08/sby-warns-time-bomb-ri-mining.html>.

143. For further reading, see Roberto ECHANDI, "Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management" in Roberto ECHANDI and Pierre SAUVÉ, eds., *Prospects in International Investment Law and Policy* (New York: Cambridge University Press, 2013), 270–305.

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institutional response to problems encountered by investors by offering ombudsmen, who are officers appointed by the legislature to handle complaints against administrative and judicial actions and provide mediation services.[144]

By having this type of mechanism, whenever investors face a problem they can turn to an official channel to address the problem at an early stage. This can provide a prompt, inexpensive, and amicable resolution of a problem for investors. Practically, this ombudsman office can be created within an investment agency, such as the Indonesian Investment Coordinating Board (BKPM) at both central and regional levels.

In the Republic of Korea, its Office of the Foreign Investment Ombudsman is located within the Korea Trade-Investment Promotion Agency (KOTRA). However, the office is independent from the agency, accountable solely and directly to the Prime Minister.[145] The office has been used in the resolution of various cases involving measures such as taxation, investment procedures and incentives, customs and tariffs, finance, labour, legal affairs, and insurance, construction, and visas. Further, it has developed an online grievance consulting process to ensure a prompt and effective solution of problems. These measures have worked to enhance the investment environment in the country.

Third, the Indonesian government should rethink its investment protection regime, not only to untangle and resolve the issue of dual regimes posed by its BITs and the ACIA, but also to ensure that it continues to have sufficient policy space to navigate both dynamic domestic and global development. There is a need to streamline its investment protection regime and select the standards they want to apply to foreign investors.

Based on the author's analysis in this paper, the Indonesian government may want to adopt the standards in the ACIA, as it provides more certainty to the government regarding the obligations that they undertake. This is especially true for the FET clause and NT clause, as well as the expropriation clause. By having more precise formulations of these clauses, there is less discretion for tribunals to interpret the clauses too broadly.

In terms of the MFN clause, excluding its application to dispute settlement provisions is preferable. For example, this can prevent the circumvention of a cooling-off period requirement under some BITs. Such a cooling-off period is a useful dispute settlement procedure to provide opportunities for both disputing parties to settle the dispute amicably. If the dispute can be resolved at this stage, it can save both parties from spending valuable resources in litigation. As discussed in Section I, it remains questionable whether an MFN clause operates to eliminate a treaty exception. Therefore, the government may also consider excluding its applicability to treaty exception clauses. Incorporating treaty exceptions into the agreement is highly recommended, to maintain the government's policy space in tailoring its policies and

144. UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (New York: UNCTAD, 2010) at 88–90.

145. The office was established in October 1999, for further information, online: <http://www.i-ombudsman.or.kr/eng/index.jsp>.

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measures as required. The reformulation of the MFN clause should also prevent investors from invoking the vague language of standards—including FET and indirect expropriation—in older Indonesian BITs.

V. CONCLUSION

With the entry into force of the ACIA, ASEAN Member States have a new generation IIA that has incorporated the international best practices of IIAs from around the world.[146] It is a major development, even compared to some of the latest BITs, such as Indonesia's BITs with Libya and Serbia, as it is more comprehensive and arguably has secured the government's policy space through an extensive list of treaty exceptions.

Although the ACIA does not explicitly specify the fate of the intra-ASEAN BITs, it is clear that the ACIA will not make Indonesia's intra-ASEAN BITs obligations irrelevant. The same case is also applicable to other ASEAN Member States and their intra-ASEAN BITs. The BITs will continue to operate together with the ACIA. However, the author believes that sustaining dual regimes is not preferable, as it may create further confusion to investors as well as governments. After all, the objective of the ACIA was to harmonize and unify the patchy legal frameworks under the ASEAN IGA and the AIA.[147] In this regard, the author supports Indonesia's announcement to discontinue all of its old BITs,[148] and recommends other ASEAN Member States to follow the measure, particularly with regard to the intra-ASEAN BITs.

If ASEAN governments are serious about harmonizing their legal framework for investment protection in the region, they should issue a Protocol to the ACIA that will grant ASEAN Member States a certain period of time to terminate the BITs among themselves voluntarily. This is supported by Article 54(b) of the VCLT, which provides that a treaty may be terminated at any time by consent of all the parties after consultation with the other contracting states. If the parties agree to termination, the BITs can be terminated in accordance with the BITs and/or the VCLT.[149]

By terminating their intra-ASEAN BITs, ASEAN Member States will be able to apply a more harmonized investment protection regime that can help them to focus on refining their investment policies. At the same time, it will be clearer for ASEAN investors to have one solid and predictable legal framework that protects them.

146. *ACIA*, *supra* note 13, Preamble; ASEAN Secretariat, *ASEAN Comprehensive Investment Agreement: A Guidebook for Businesses and Investors* (Jakarta: ASEAN Secretariat, 2013) at 3.

147. *ACIA*, *supra* note 13, art. 26(a).

148. Bland and Donnan, *supra* note 9.

149. *VCLT*, *supra* note 46, arts. 65, 67.

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