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ASEAN Comprehensive Investment Agreement: Will Indonesia's BITs Obligations be Irrelevant?

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ABSTRACT

The entry into force of the ASEAN Comprehensive Investment Agreement (ACIA) on 29 March 2012 brought ASEAN Member States closer towards the realization of the ASEAN Economic Community (AEC) by 2015. ACIA is expected to enhance the competitiveness of the region in attracting and bringing in more of the critically-needed foreign direct investment (FDI) to boost the region's growth and development.

Nonetheless, ACIA raises a new concern relating to the fate of the existing twenty six (26) Bilateral Investment Treaties (BITs) that ASEAN Member States have amongst themselves. ACIA does not specify whether the BITs will be terminated, thereby possibly leading to the application of a dual regime of investment protection on investments and investors of ASEAN Member States. This analysis will be useful. For investors, they will understand the best treatment that they can get, and for governments, they can anticipate to ensure its measures are in compliance with its minimum legal obligations by virtue of Most-Favored Nation(MFN) clause either under their BITs or ACIA.

For the purpose of this analysis, the paper picks Indonesia and its BITs as the case study. The paper will look and compare several investment protection obligations contained in Indonesia's BITs and select the most favorable standards. Then, it will compare the standard with the provisions in ACIA, and analyze the standard providing better treatment towards foreign investors. Subsequently, the paper will analyze further the interaction between the regimes in practice. Eventually, the last chapter will be the conclusion where the author will also provide recommendation upon the current state of the regimes.

INTRODUCTION

An analysis of BITs of a country will always be useful to know the investment protection regime for foreign investors in the country. At the same time, it is similarly important for policymakers to understand their minimum obligations towards foreign investors.

Historically in 1960s and 1970s, most BITs serve the purpose of protecting investments from developed countries in developing countries.[1] Currently, both developed and developing countries invest abroad, resulting into conclusion of BITs between developing countries as well with the belief that investment is important to fuel the desired economic growth no matter where they come from. By now, the number of BITs has reached to more than 2,857 BITs.[2]

Recently, Economic Integration Agreements (EIAs) seem to slowly replace the role of BITs. In 2012, United Nations Conference for Trade and Development (UNCTAD) noted only 20 new BITs were concluded—the lowest annual number in the last 25 years. On the other hand, in 2012, 10 EIAs in the form of Free Trade Agreement (FTA), Economic Partnership Agreement, Framework Agreement, and many more, were concluded.[3]

An EIA that includes investment rules can be traced back to 1957 amongst Arab states. Then, in 1994 another agreement was concluded by Mexico, Canada, and the US, namely the North America Free Trade Agreement (NAFTA). This agreement is comprehensive and contains investment rules those inspire lots of EIAs nowadays, including ACIA.

ACIA itself was concluded by the ten members of ASEAN. Currently, the discussion about ACIA is particularly important because many considered Asia to be the next center of the world's economy.[4] Such opinion is not without any merits because ASEAN in particular boasts robust economic growth and resilience during the global financial crisis. Being the home of close to 600 million people with young demographic, positive economic growth, attractive market, and richness in resources, ASEAN is exotically appealing to foreign investors, both from inside and outside of the region.

ACIA is an EIA applicable in ASEAN Member States, among others to regulate and guarantee protection of investments in the area. Nevertheless, these Members still have BITs among themselves and third countries. Therefore, it is interesting to analyze the legal framework of investment protection that will apply to ASEAN nationals who invest in ASEAN countries (**ASEAN investors**).

This research seeks to focus on the relationship and interaction between the two legal frameworks for investment protection applicable for ASEAN investors—BITs with ASEAN Member States and ACIA – by taking the example of Indonesia as its case study. It is particularly important because with the co-existence of the two regimes, ASEAN Member States will have to ensure that its policies and treatments towards foreign investors are at the very least in compliance with the most favorable standards provided to foreign investors under either of the regime. In this connection, the paper will provide such findings besides of trying to see the practical relationship between the two regimes and the status of Indonesia's BITs post-ACIA.

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[1] See for example Article 1 Indonesia-France BIT (1973) that protects only investments of French nationals in Indonesia, and no protection for investments of Indonesian nationals in France.
[2] UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (Geneva: UN Publication) 2013, 101.
[3] UNCTAD 2013, 101.
[4] Clinton; Australia Paper, 4-5.

This paper will be divided into four parts. Part One will explain about the development of foreign investments in Indonesia, and the legal framework under which they are protected. Then, it will continue by providing brief historical background of the regional legal framework of investment protection in ASEAN up to the conclusion of ACIA. Further, it will provide the methodological explanation of the analysis along with the explanation of MFN clause and its implication. Part Two contains the main analysis of several provisions contained in Indonesia's BITs and ACIA, namely 1) standards of treatment including national treatment ("**NT**"), fair and equitable treatment ("**FET**"), and full protection and security ("**FPS**"), 2) expropriation, and 3) treaty exceptions. Part Three will analyze the interaction between the two legal regimes. Part Four will be the conclusion and the authors' recommendation.

PART ONE:

INDONESIA, FOREIGN INVESTMENTS, AND ACIA IN A NUTSHELL

A. Indonesia: Foreign investments and BITs policy

Indonesia, the largest economy in ASEAN by GDP (PPP) of US$ 1.212 trillion in 2012, compared to US$ 327 billion and US$ 646 billion for Singapore and Thailand respectively during the same period.[6] The country is an archipelago rich in natural resources. As such, foreign investment activities in the country were mostly Foreign Direct Investment (FDI) in the extraction of natural resources. Indonesia then has become the largest producer of rubber, the largest exporter of palm oil, and the second largest exporter of thermal coal in the world.[7] Commodities accounted for one fourth of Indonesia's GDP and more than one fifth of the total government revenue in 2007.[8]

Prior to the entry into force of its EIAs, Indonesia provides investment protection to foreign investments and investors in the country through its 66 BITs as of 2011 besides its domestic investment law.[9] Indonesia's first BIT was concluded with Belgium in 1970. 42 of Indonesia's BITs were concluded during 1991-2000.

B. The Legal Frameworks of Investment Cooperation in ASEAN

ACIA is a legal instrument for protection and promotion of investment applicable for ten ASEAN countries, namely, Indonesia, Malaysia, the Philippines, Singapore, Thailand, Vietnam, Burma, Lao, Cambodia, and Brunei Darussalam.

Specifically in economic sector, ASEAN has enlarged its regional cooperation to cover industry, financial sector, trade, energy, environment, tourism, and food. However, actions were mostly taken in their own national and regional development programmes without strictly binding legal documents. The expansion of the cooperation was then followed by expansion in the area of investment through the conclusion of the ASEAN Agreement for the Promotion and Protection of Investments (ASEAN IGA) in 1987.[10] ASEAN IGA is a legally binding agreement that creates rights and obligations on the Member States. The structure and content of ASEAN IGA reflect an IIA that guarantees investment protection. ASEAN IGA is drafted similarly to BITs that grant all investment protection, including the standard for MFN, FET, expropriation, and ISDS.

During 1990-2000, ASEAN countries moved to develop their cooperation more aggressively by signing the 1992 ASEAN Free Trade Agreement (AFTA), the 1995 ASEAN Framework Agreement on Services, and the 1998 ASEAN Investment Area (AIA). AIA entered into force in 1999. The difference between AIA and ASEAN IGA is the former serves as a liberalization tool for investment in the region with an ambitious goal of opening up all industries for investment to all ASEAN investors by 2010 (or 2013 for some newer Members),[11] with phasing out system as prescribed by each country's Temporary Exclusion List. AIA is also quite progressive as it provides both NT and/or MFN guarantee at establishment stage.[12]

AIA and ASEAN IGA are legally binding agreements that support the single objective of creating an ASEAN Free Trade Area to increase the region's comparative advantage as a production base for the

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[6] International Monetary Fund, *World Economic Outlook Database October 2012,* last visited: 6 September 2013.
[7] BKPM, Facts of Indonesia: Natural Resources.
[8] Ibid.
[9] Law No. 25 of 2007 on Investment
[10] ASEAN IGA, as amended by Protocol to ASEAN IGA.
[11] Article 7 (1) (a) AIA.
[12] Article 4 (b), Article 7 (1) (b) and Article 8 (1) AIA.

world.[13] With the two agreements, the development of regional legal framework for investment protection in ASEAN was rather patchy. The two agreements, besides having complimentary relationship also have overlaps.[14] Article 12 (1) of AIA provides that ASEAN IGA and its 1996 Protocol will remain in force along with AIA. However, if the latter provides *better or enhanced provisions*, such provisions shall apply.[15]

ACIA, as the next generation of the legal framework for investment in ASEAN was concluded in 2009. As the result of consolidation and revision of ASEAN IGA and AIA, ACIA is more comprehensive. The main objective of merging them was to respond to the more competitive global environment and with a view towards enhancing ASEAN's attractiveness as an investment destination with a free and open investment regime.[16] ACIA entered into force in 29 March 2012. It consists of 49 Articles, 2 Annexes and 1 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.[17] For the purpose of liberalization, ACIA covers the following sectors, manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to these five sectors, and other sectors that may be agreed upon by all Member States in the future.[18] Even so, each ASEAN Member State continues to retain a single Schedule of Reservation of liberalized sectors with negative list approach (ACIA Schedule). This paper will not deal much with the issue of liberalization.

C. Methodological explanation

As mentioned earlier in the introduction, this research paper will focus on the analysis of the several provisions contained in the reviewed Indonesia's BITs and ACIA. The analysis of those provisions will generally be divided into three parts, namely 1) overview of the types of the provision in each of Indonesia's BITs and identification of the MFN treatment amongst the types, 2) analysis of the provisions in ACIA, and 3) comparison between the MFN treatment under Indonesia's BITs and under ACIA.

A MFN treatment clause in IIAs is meant 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 to entry and operation of foreign investors and/or offers protection to investors and their investments without any commitment to make these conditions easier or less restrictive.[19]

In practice, besides claiming violation of MFN treatment, the MFN clause is mostly used by investors/claimants to incorporate/ import more favorable substantive provisions[20] or ISDS[21] from a third-party treaty (other BITs) into the basic treaty. In practice, this may allow incorporation of a more favorable treatment from a BIT to another BIT as long as Indonesia is a contracting party to both. Therefore, it is important to analyze and compare the two regimes using the MFN approach as it may help governments to identify the minimum 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 MFN clause, there are limitations as demonstrated by the following variations.

[13] Liao, 13.
[14] See the comparison in Annex I Table 3.
[15] *Yaung Chi v. Myanmar,* ¶82.
[16] ASEAN Economic Community Blueprint, ¶26.
[17] Article 1 ACIA.
[18] Article 3(3) ACIA.
[19] UNCTAD 2010, 14.
[20] *Bayindir,* ¶227-235.
[21] *Maffezini,* ¶56, 62-63.

The first variation simply imports "more favorable" substantive protection standards. In *ADF v. United States,* the MFN clause was used 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 that had been given restrictive interpretation of FET according to CIL in 2001.[22] Unfortunately, the tribunal rejected to adopt such approach simply because the investor did not prove the existence of such 'autonomous standards' under current international law.[23]

The second variation imports provisions which are absent in the basic treaty. In *Bayindir v. Pakistan,* the basic treaty of the Pakistan-Turkey BIT (1995), 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 such FET treatment and it should be read into the basic treaty based on the wording of the MFN clause and the preamble of the treaty that also referred to the FET standard.[24]

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). However, the tribunal rejected this attempt and found that the basic treaty has to be validly invoked at the first place before the investor can validly resort to the MFN treatment.[25]

The fourth variation deals with the elimination of provisions of the basic treaty. This attempt was done in *CMS v. Argentina*, where the claimant sought to eliminate the emergency exception clause in the basic treaty of the US-Argentina BIT. However, the tribunal ruled that the absence of such provision in other treaties simply could not eliminate the provision from the basic treaty.[26]

Besides substantive provisions, investors have also attempted to import MFN procedural provisions. However, this practice is particularly controversial, and the end of the debate remains unclear, particularly for 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 (1991) could be used to avoid the waiting period before recourse to international arbitration was available by virtue of the Spain-Chile BIT that did not contain such a waiting-period requirement.[27]

Majority of tribunals have been reluctant to incorporate broader ISDS provisions by virtue of an MFN treatment clause. Following these decisions, some newer generation IIAs have included a special clause to restrict the application of MFN clauses to procedural provisions.[28]

1. MFN treatment clauses in Indonesia's BITs[29]

With regards to the subject-matter scope of a MFN treatment clause, 53 of the reviewed Indonesia's BITs extend the treatment to investments. 23 of the 53 BITs also extend MFN treatment to both investments

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[22] NAFTA Minimum Standard of Treatment.
[23] *ADF,* ¶194.
[24] *Bayindir,* ¶163-167.
[25] *Société Generale,* ¶41.
[26] UNCTAD 2010, 24.
[27] *Ibid.,* ¶62-63.
[28] Article 88 Japan-Switzerland EPA (2009): "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".
[29] See Annex II Table 7 and 8.

and investors. The consequence of entitling MFN only to investments is the BIT excludes foreign individuals or companies from MFN treatment and limiting it to the locally established juridical person constituted in the host State or assets acquired under the legislation of the host state.[30]

Among the reviewed Indonesia's BITs, only three BITs did not have any MFN clause.[31] 57 BITs have clauses that cover only the post-establishment stage. Only two also cover the establishment stage.[32] MFN treatment in the establishment stage casts any selective liberalization. By contrast, the post-establishment MFN treatment only applies once the investment is established.[33]

None of Indonesia's BITs explicitly excludes MFN clauses' applicability to ISDS provisions, however arguably the absence of the term 'all matters' will prevent such practice.

In order to further regulate the scope of application of the MFN treatment clause, 46 out of the 59 reviewed Indonesia's BITs include MFN exception,[34] while two have none at all.[35] MFN exception clause prevents the issue of 'free-rider' by excluding MFN treatment that the host state may provide to third parties due to customs unions, FTAs, economic integration organization agreement, or even some other international agreements. Besides this exception, 25 of those BITs, also included additional exception for the application of MFN treatment to tax treaties, either general taxation or double taxation treaties. Few others also exclude MFN treatment for agreements to facilitate cross-border trade, specific commercial agreements, or treatments for development of financial institutions.

2. MFN treatment clause in ACIA

Article 6 of ACIA accords MFN treatment to investors and investments, 'in like circumstances' at the establishment through the relative Right of Establishment (RoE) and at the post-establishment stages. Footnote 4 provides that investments falling within the scope of ACIA will enjoy any preferential treatment granted by a Member State to other ASEAN investors or non-ASEAN investors and their investments under any existing or future agreements to which the Member State is a party to. This arguably includes BITs of Member States, as there is no exception to this effect.

ACIA also contains exceptions of granting the MFN treatment. It excludes the incorporation of a MFN provision from any sub-regional arrangements between and among 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. Further, footnote 4 of ACIA also excludes MFN incorporation of ISDS procedures from other agreements to which Member States are party.

3. Comparison of MFN clauses in Indonesia's BITs and ACIA and its implication

The MFN clause in ACIA provides broader coverage to both investments and investors compared to most of the reviewed Indonesia's BITs due to MFN exception for agreements establishing customs unions, economic unions, *etc.* as found in 53 of Indonesia's BITs. The implication of MFN exception clause is that non-ASEAN investors whose home states have BITs with Indonesia may not invoke MFN treatments in ACIA.

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[30] UNCTAD 2010, 43.

[31] Indonesia-Swiss (1974); Indonesia-Tunisia (1992); Indonesia-Qatar (2000).

[32] Indonesia-Finland BIT (2006) and Indonesia Denmark BIT (2007).

[33] Indonesia-Australia BIT (1992); Indonesia-Argentina BIT (1995); Indonesia-Singapore BIT (2005).

[34] See Annex II Table 8.

[35] Indonesia-France (1973) and Indonesia-UK (1976).

PART TWO:

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

A. General Standards of Treatment

1. Absolute standards: FET and FPS

Fair and equitable treatment (FET) and full protection and security (FPS) are the most basic protections for investments. In investor-state disputes, FET is normally used as a secondary claim if the claim of expropriation failed to advance. In BITs, FET can be combined with other principles, such as FPS, non-discrimination, and MFN treatment.

Although most BITs contain FET clauses, the standard lacks a precise meaning.[36] This principle had raised lots of controversies, mostly in the context of NAFTA's Chapter 11.

Most BITs do not define the standard or substantive protection granted by FET, as can be seen in the following provision:

> "…investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment…"[37]

, such an FET clause is considered to incorporate an independent or autonomous FET standard.

As an independent or autonomous standard, there are two theories of FET protection developed by Professor Vandevelde based on his observation from previous tribunal decisions, namely the enhanced FET and the unified FET.[38] The enhanced FET basically guarantees investors' expectation and legal certainty,[39] including the stability of the legal and business frameworks in the host country.[40] On the other hand, the unified FET harmonizes the four distinct inquiries of past tribunals,[41] namely 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";[42] 3) whether the conduct "substantially changed the legal and business framework under which the investment was decided";[43] and 4) whether the conduct was "in breach of representations made by the host State which were reasonably relied on by the claimant."[44] Overall, the unified theory seems to be the most comprehensive protection.

In contrast, the new IIAs that link the standard with CIL use the following wording:

> "… for greater certainty, the foregoing provision prescribes the customary international law minimum standard of treatment of aliens. 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."[45]

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[36] UNCTAD 2007, 28.
[37] Article 3 Indonesia-Chile BIT (1999).
[38] Vandevelde, 49.
[39] *Tecmed*, 154.
[40] *Occidental Exploration*, ¶83; *Metalclad*, ¶99.
[41] Vandevelde, 49.
[42] *Waste Management,* ¶98.
[43] *Sempra,* ¶303; *Enron Award*, ¶264.
[44] *BG Group,* ¶297.
[45] Article 5(1) and 5(2) US-Uruguay BIT.

The FET linked to CIL, as developed by the *Neer* case, finds violation of the standard when the conduct of the host country amounts to an "outrage", "bad faith", "willful neglect of duty", or conduct "so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[46] Several tribunals have also acknowledged that this FET standard evolves and is not frozen to standards developed in the *Neer* case.[47]

Clearly from the cases, the more favorable protection is under the autonomous FET which requires lower threshold to prove violation. However, from the perspective of the host countries, the latter provides more flexibility and discretion for governments to regulate and to pursue their public policy objectives.[48]

a. ***FET and FPS clauses in Indonesia's BITs***[49]

58 of Indonesia's BITs use the autonomous FET standard with several variations. Only the Indonesia – Turkey BIT does not have an FET clause. However, by virtue of the MFN clause in the BIT, Indonesia and Turkey still have to grant this protection to investments in their territories. As such, the autonomous standard will be the MFN treatment of Indonesia's BITs.

b. ***FET and FPS clause in ACIA***

The drafters of ACIA seem to have considered the previous arbitral tribunals' discussions regarding this standard. Thus, they decided to define the specific content of the standard and made the language self-explanatory in Article 11 ACIA.

FET in ACIA is limited solely to denial of justice, specifically the due process principle. This treatment is procedural.[50] Due process principle requires the state 1) to provide prior notice to the relevant party whom it applies its coercive power, and 2) to provide an opportunity for the party to contest the application before an international tribunal, including right of legal representation.[51]

The FET and FPS clause in ACIA effectively limits any broad interpretation of the standard. This type of provision supports the argument that Indonesia's BITs have broader coverage than CIL. In fact, the FET and FPS clause of 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 effectively casts away any presumption of breach as in the case of *Metalclad,* where the language of Article 1105 links FET to international law in a way that makes it easy to find that a violation of another obligation also violates the principle of FET.[52]

c. ***Comparison of FET and FPS clauses in Indonesia's BITs and ACIA***

The MFN treatment of FET and FPS in Indonesia's BITs is more favorable to investors compared to the treatment in ACIA. It also clarifies FPS as taking measures as maybe reasonably necessary, possibly indicating that as long as such measures have been taken, there would be no breach even though damage exists. The autonomous FET principle in the BITs provides more protection to investors, including stability of the legal and business framework, legitimate expectation, and due process, in addition to the linkage to MFN, NT, and non-arbitrary measures.

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[46] *Neer,* 556; *ELSI*, ¶15; *Pope & Talbot Award*, ¶118; *GAMI*, ¶116, 123,125,127.
[47] *ADF*, ¶179.
[48] UNCTAD 2007, 29.
[49] Annex II Table 5.
[50] Bjorklund 2005; *ADC*, ¶435.
[51] Vandevelde, 49-50.
[52] *Metalclad,* ¶102, 105.

The implication of the more favorable FET clause in Indonesia's BITs is as long as the BITs are still in force, most likely ASEAN investors will prefer to invoke the FET and FPS standard under their relevant BITs with Indonesia.

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. Notably, this standard simply requires *no less favorable* treatment to foreign investments or investors than to domestic investments or investors.[53] The main purpose of this clause is to create a level playing field between foreign and domestic investors.

Discrimination may be *de jure* or *de facto.* NT clauses in BITs are generally worded broadly to provide protection for both types of discrimination.[54] Such a claim does not require demonstration of the host state's discriminatory intent.[55] Additionally, in evaluating whether discrimination exists, some tribunals have questioned whether the difference in treatment has been justified by a rational policy objective.[56]

a. <u>NT clauses in Indonesia's BITs</u>[57]

No NT Clause	**Implicit NT through FET provision**	**NT Clause**	
		Establishment and post-establishment	**Post-establishment**
14 BITs	29 BITs	14 BITs	2 BITs

The BITs which do not incorporate NT clause seems to indicate that Indonesian government seeks to preserve its policy space to support its domestic investors. Even so, some argued that BITs incorporate the standard through the FET provision which prohibits arbitrary or discriminatory measures to the development, management, maintenance, use, enjoyment, expansion, sale and if it is the case, the liquidation of such investments. However, most tribunal and commentators seem to treat 'discriminatory' in this context as precluding nationality-based discrimination.[58] They argue that since many treaties contain both obligations to accord NT and to refrain from according discriminatory and arbitrary treatment in relations with FET,[59] based on the principle of effective interpretation, the latter should be interpreted differently to ensure each provision has meaning.[60] If this is the case, then 43 of Indonesia's BITs do not contain NT clause. Nevertheless, NT can be incorporated by virtue of MFN clause as long as it is not NT for establishment stage.

Of all Indonesia's BITs which explicitly incorporate the NT clause, none requires the investors and investments to be 'in like circumstances' with the domestic investors and

[53] UNCTAD 2007, 36.
[54] Bjorklund 2008, 30.
[55] *Myers,* ¶254.
[56] *Ibid; Pope and Talbot Award,* ¶103.
[57] See Annex II Table 6.
[58] *LG&E*, ¶146; Newcombe and Paradell, 15.
[59] Article II(2)(b) Argentina-US BIT.
[60] Sinclair, 118-119.

investments.[61] Six of these BITs made NT contingent upon the domestic legislation of the host country. This type of NT in itself justifies discrimination against foreign investment if the domestic laws and regulations of the host country allow it. Earlier Indonesia's BITs with the Netherlands and Swiss in their Protocols allowed this discrimination explicitly.

Based on the elaboration above, the most favorable NT clause is the one that protect both investments and investors explicitly both at establishment and post-establishment stages, without any contingency on the domestic laws and regulations.

b. NT clause in ACIA

Article 5 of ACIA accords NT to foreign investors and investments 'in like circumstances' to its own investors with respect the admission, establishment, acquisition, expansion, management, conduct, operation, and the sale or disposition of investments in its territory'. Clearly, ACIA requires ASEAN Member States to grants RoE in the form of NT to ASEAN investors. Additionally, the term 'like circumstances' requires tribunals to approach a two-step analysis when determining whether a measure violates the standard, namely 1) whether there were in fact differences in treatment between domestic and foreign investors or their investments, and 2) if the difference was found, then whether investors or investments were 'in like circumstances'.[62]

c. Comparison of NT clauses in Indonesia's BITs and ACIA

It appears that the NT clauses in the MFN treatment of Indonesia's BITs and ACIA are similar insofar both are not contingent upon domestic laws and regulations. Nevertheless, NT clause in ACIA may require a more thorough analysis due to the existence of the phrase "in like circumstances".

Under ACIA, Member States may maintain a Schedule of Reservation for the extension of NT. As such, it may be more favorable for investors to invoke the provision from BITs if the sector they are claiming are included in the Schedule of Reservation.

B. Expropriation

Protection of foreign investors' investments from unlawful expropriation is one of the main drivers of BITs. Generally, countries may expropriate foreign investments, provided it was done on a non-discriminatory basis, for a public process, in accordance with due process of law, and against the payment of compensation.[63] Traditionally, the legal debate focused on these conditions. However, the discussion has shifted to the question of what constitutes indirect expropriations because nowadays there is almost no direct expropriation case. This section will discuss both issues.

1. Expropriation clauses in Indonesia's BITs[64]

Expropriation clauses exist in all of Indonesia's BITs, and they apply to *expropriations* and *nationalizations*, both direct and indirect. As in most BITs, they avoid defining the terms or clarifying the distinction between two. 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,[65] and transfer of its property's legal title to the government or a third

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[61] Newcombe and Paradell, 16; Bjorklund 2008, 33.
[62] *Feldman,* ¶170.
[63] UNCTAD 2007, 44.
[64] Annex II Table 9
[65] *Santa Elena*, ¶76.

party.[66] On the other hand, indirect expropriation occurs even when the legal title remains with the owners,[67] especially where the host state adopts certain measures that deprive the owners of the possibility of utilizing their investments.[68] This concept is more controversial because the term lacks of clarity regarding the degree of interference or deprivation towards investors' rights of ownership.

There are basically three approaches of reasoning for arbitral to determine an indirect expropriation. The first is known as the *sole effect* doctrine, that is when a measure has a permanent character, or substantially deprives the investor's property rights, or conflict with the investor's investment-backed expectations, the measure amounts to indirect expropriation.[69] The most crucial point is the existence of substantial interference/ deprivation of investors' right of ownership of its investments.[70] Not all government actions making certain investments less profitable will necessarily amount to an expropriation.[71]

31 of the Indonesia's BITs provide an implicit guidance regarding the level of interference which may constitute an indirect expropriation, including the phrase of either *or any other measures having the effect of* ***dispossession****,* or *having effect equivalent to such* ***deprivation***.

The second approach in defining indirect expropriation takes into account countries' frequent enactment of regulations to pursue its public policy objectives. The tribunal in *Tecmed* found it necessary to balance between the substantial deprivation of investor's legitimate expectation and the host state's public policy objective.[72]

The last approach of defining indirect expropriation as developed in *Methanex* finds that a government's measure <u>will not be expropriatory</u> 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.[73] The implication of following this approach is that there will no longer be notion of lawful expropriation as the criteria for a measure to be non-expropriatory is the same as the criteria of lawful expropriation, except the obligation to compensate. This will render the clause of lawful expropriation in a BIT meaningless. This approach has received a lot of criticisms and subsequent tribunals have been reluctant to follow such approach.[74]

Since all of Indonesia's BITs cover both direct and indirect expropriation, it is hard to say that there is a MFN treatment. The clauses that include the term dispossession and deprivation are not necessarily more favorable as these terms are normally used by tribunals in their assessment, regardless their absence.

2. Expropriation clause in ACIA

Article 14 (1) of ACIA covers both direct and indirect expropriation. Footnote 10 of ACIA also carves out any measure of expropriation relating to land and places it under the domain of the host state's domestic laws and regulations. It appears that Member States of ACIA realize that

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[66] Newcombe, 8.
[67] *Feldman,* ¶366-367; *Tippetts*, ¶225; Dolzer and Schreuer, 92; Brunnee, Kindred, & Saunders, 693; McLachlan 2007, 290; Newcombe & Paradell, 327.
[68] *CME*, ¶608; *Metalclad*, ¶103.
[69] *LG&E,* ¶190; *Metalclad,* ¶103; Dolzer, 65-93.
[70] *EnCana v Ecuador*, ¶172-183; *Middle East Cement,* ¶107; *Waste Management,* ¶141, 147.
[71] *Tecmed,* ¶115; Newcombe, 2.
[72] *Tecmed,* ¶122.
[73] *Methanex*, Part IV Chapter D, ¶7; Weiler, 918-919; Schneidarman, 95.
[74] *Fireman's Fund*, ¶176; *Glamis Gold*, ¶356.

lands are critical to support their current development policies, especially in the development of infrastructure.[75] As such, Member States seeks to regulate this issue in its domestic laws. One of the reasons could be to expedite the process and prevent disputes regarding land acquisition from being brought before international arbitration.

Besides footnote 10, paragraph 5 of the same provision also carves out the possibility of claiming that the issuance of compulsory licenses granted in accordance with the TRIPs Agreement to be expropriatory. There is a debate on whether an issuance of compulsory license amounts to indirect expropriation. Although compulsory license is a phenomenon happening in Brazil, India, and Thailand,[76] there has been no case on point finding it expropriatory.

Furthermore, Annex 2 of ACIA provides further elaboration on what constitutes expropriation. Its paragraph 4 provides that '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)'. This basically was done to provide more policy space for the government in regulating investments.

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

The expropriation clauses in Indonesia's BITs and ACIA seem to be very similar in covering both direct and indirect expropriation. Nevertheless, it is important to focus on indirect expropriation which remains rathers unclear. Arbitration tribunals have the discretion to determine the applicable approach to determine the existence of indirect expropriation. As such, if the clauses are more or less similar, then none will be more favorable than the other. However, due to the carve outs in ACIA and further elaboration in the Annex 2 of ACIA, the expropriation clause in Indonesia's BITs cover broader range of governmental measures and is more favorable to investors.

C. Treaty Exception

The trend of including treaty exceptions in an IIA started only recently. The rationale for its inclusion is to exempt a Contracting Party from the obligations of the IIA in situations where compliance would be incompatible with key policy objectives specified in the agreement,[77] including the development of the host state.

A treaty exception clause has been used as a policy tool by governments to strike a balance between investment protection and the safeguarding of other values or objectives considered to be fundamental by the countries concerned, e.g. public health, safety, national security/ essential security and public order, protection of natural resources, prudential measures for financial services, and environmental protection. Treaty exception clause provides the host country with significant room of maneuver in controlling investment in the country. If the host state successfully invoked the treaty exception, it would be exempted from any breach of obligations that it might have committed under the IIA. In such a case, the investor would be left with nothing.

1. Treaty exception clauses in Indonesia's BITs

Types of Treaty Exceptions in Indonesia's BITs

[75] Master Plan on ASEAN Connectivity.
[76] Jenei.
[77] UNCTAD 2007, 80.

Essential security and public order (Type 1)	**Financial (Type 2)**	**Public Health (Type 3)**
5 BITs	1 BIT	1 BIT

Seven of Indonesia's BITs contain treaty exception clauses. There are three types of treaty exception clauses in those BITs, namely dealing with 1) essential security or interest and public order, 2) financial issues, and 3) public health.

A variation to Type 1 can be seen in the Indonesia – Germany BIT (2003), where the exception is limited only to MFN and NT clauses.[78] This is actually peculiar considering other treaty exception clauses require the application of such a measure in a non-discriminatory manner.

In practice, the issue that has arisen with regards to the general exception of essential security is whether the provision is the same as the necessity defense under CIL as prescribed by Article 25 ILC Articles. If it is the same, then little deference shall be given to the host state. However if not, the question is whether a country can freely determine what constitutes essential security.

The Argentine cases have to an extent shed some lights. Argentina invoked defenses under Article XI of the US-Argentina BIT and the necessity defense under CIL. The tribunals simply read the test of the necessity defense under CIL into the test for necessity of Article XI of the US-Argentina BIT.[79] However, the annulment committee along with some other cases found that the two tests are not the same, and that Article XI of the US-Argentina BIT is basically a self-judging provision that entitles the state to determine what it considers as essential security interests.[80] The tribunal in *LG&E* also found that self-judging provision should still be subject to good faith review.[81] It does not require the measure to be the "only way" to address the situation.[82] Based on those cases, more deference is still given to the state's consideration for a self-judging provision.

The main difference between a self-judging provision and the necessity defense is the latter requires the fulfillment of the cumulative conditions prescribed in Article 25 ILC Articles. Another difference between the two is the implication of its successful invocation. In the case of the necessity defense, Article 27 ILC Articles provides that a finding precluding wrongfulness does not affect the duty do compensate for the material loss caused by the act.[83] On the other hand, the successful invocation of self-judging provision will protect the state from any claims of compensation because there has been no breach of the IIA.[84]

From the reviewed Indonesia's BITs, none contains the phrase "it considers necessary" or "its own essential security interests".

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[78] Ad Article 3 Indonesia-Germany BIT (2003).

[79] *CMS Award*, ¶373; *Enron Award*, ¶332; *Sempra,* ¶385.

[80] *LG&E*, ¶212, 239;

[81] *LG&E*, ¶214, 250; White and Staden, 377-378.

[82] Alvarez and Khamzi, 398.

[83] *CMS Award*, ¶390.

[84] *Continental,* ¶199; *LG&E,* ¶124.

Type 2 allows temporary safeguard measures for financial purposes even though it might not be consistent with the NT and Transfers clauses in the BIT.[85] Financial purposes include serious balance of payment and external financial difficulties, as well as movement of capital that cause or threaten to cause serious difficulties for macroeconomics management, particularly monetary and exchange rate policies. Nevertheless, in order to invoke this exception, the provision also provides several conditions that have to be fulfilled, in order to prevent arbitrary measures by the government.

Type 3 appears to be inspired by Article XX of the GATT 1994. However, the provision included in Indonesia-Mauritius BIT (1997) did not contain any qualification as that found in the Chapeau of Article XX, namely the requirements for the measure to be done in non-discriminatory and non-arbitrary manner.

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 favorable protection when such exception does not exist.

2. Treaty exception clause in ACIA

Article 17 of ACIA contains 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, 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 ACIA prohibits the application of measures adopted within this general exception clause in a manner that constitutes arbitrary or unjustifiable discrimination between Member States or their investors, or a disguised restriction on investors of any Member State and their investments. This qualification clearly follows the qualification contained in the Chapeau of Article XX of the GATT 1994.

Article 18 of ACIA also stipulates security exceptions whose language for essential security interests in Article 18 (b) is explicitly designed to be a self-judging clause with the phrase 'which it considers necessary'. This means that deference is given to the state to decide what constitute its own essential security interests.

Besides security exception clause, ACIA also provides exception in the field of finance, as found in Article 16 on Measures to Safeguard the Balance of Payments. This provision seems to be partly inspired by the previous experience of the region during the 1997 Asian Financial Crisis. The provision provides that a Member State may adopt or maintain restrictions on payments or transfers related to investments where pressures on the balance-of-payments of a Member State in the process of economic development necessitate such restriction.

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

The treaty exception clauses under ACIA have broader coverage of exempted areas compared to the clauses in Indonesia's BITs. ACIA is clearly designed to provide more policy space for governments in formulating and implementing its investment policies. Only recent Indonesia's BITs contain treaty exception clauses. At the same time, this indicates that Indonesia's BITs without treaty exception provide more favorable treatment to investors.

For ASEAN investors, having lots of treaty exception clauses in ACIA is not preferable. On the other hand, Indonesian government may welcome ACIA because it provides more room for

[85] Article 8 Indonesia-Libya BIT (2009).

government to implement policies that might be needed to address certain extreme or extraordinary developments in the current world that is getting even more uncertain.

PART THREE:

INTERACTION BETWEEN THE BITS AND ACIA

Article 47(1) of ACIA provides that upon the entry into force of the Agreement, ASEAN IGA and AIA shall be terminated, and this is supposed to effectively end the patchy legal framework of foreign investment in the region. However, this is not the end of the story because of the continuing co-existence of the Member States' BITs.

Despite having ACIA, Indonesia has seven BITs with ASEAN Member States. A question arises as to which investment protection regime will apply to foreign investments from ASEAN Member States which have BITs with Indonesia. Does this mean that the investor has the right to choose the BIT's or ACIA's provisions that is more favorable for their investments, as in the case of AIA and IGA?

A. Comparison of BITs and ACIA standards

No	Standard	Most-favorable in Indonesia's BITs	ACIA	Most-favorable provision
1	**FET and FPS**	Autonomous standard	Limited to denial of justice, specifically the due process principle (procedural)	BITs
2	**National Treatment**	No contingency on domestic laws and regulations	No contingency and granted at the establishment stage	ACIA, but NT at the establishment stage cannot be incorporated into BIT by virtue of MFN clause
3	**MFN Treatment**	No exception.	Excluded applicability to incorporate procedural provisions.	
4	**Expropriation**	All similarly protect investment from unlawful direct and indirect expropriation	It also covers both direct and indirect expropriation, but there are several carved-out sectors as provided in its footnote 10 and Annex II	Arguably BITs provide more favorable protection
5	**Treaty exception**	No treaty exception	A comprehensive set of treaty exceptions	BITs, but if it exists in an IIA, it cannot be eliminated by virtue of MFN.

B. BIT regime and incorporation of ACIA's standards

Most of Indonesia's BITs contain clauses providing that where obligations under international law between Contracting Parties entitle investments a more favorable treatment than under the BITs, then the former shall prevail.[86] This makes it possible to incorporate standards under ACIA providing more favorable treatment for ASEAN investors compared to that under Indonesia's BITs.

If the BIT does not have such a provision, is it still possible to incorporate ACIA provisions? Perhaps it will be possible to look into ACIA under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[87] The provision requires interpretation to take into account applicable international law between the parties. Since ACIA is applicable between the member states, this means ASEAN Investors can argue that it shall be taken into account by arbitral tribunals. The problem with this interpretation is there is no guarantee on the incorporation of MFN treatment from ACIA. In fact, even the host state may argue using this method of interpretation to bring in more clarity to the vaguely drafted language of BITs. For example, where BITs do not specify what FET and FPS clause means, the host state may argue that Article 31(3)(c) provides an avenue for the tribunal to look into the definition of such clause in ACIA, namely a standard that is limited only to denial of justice.

The next question regarding the existence of MFN exception clause in BITs: whether it prevents the incorporation of standards under ACIA. The analysis is two-fold. First, it is important to determine the status of ACIA, whether it is an agreement to create a customs union, economic union, monetary union, *etc*. The answer to this is rather unclear. ACIA is created within the regime of ASEAN. Although ASEAN does aspire to be an economic community (ASEAN Economic Community), it is less clear whether it fulfills the definition as an economic union intended by such MFN exception clause. Even if it fulfills the definition as an agreement leading to the formation of an economic union, the second analysis will be the phrase: "If a Contracting Party has accorded special advantages to investors of any third state…"[88] It can be seen that there is indication that the MFN exception clause operates only on the abovementioned agreements concluded with third parties. Within the context of the BITs, ACIA will not be considered as an agreement with third state, but as an agreement between parties. As such, arguably the MFN exception clause is not applicable and an ASEAN Investor instituting a dispute under Indonesia's BITs will be able to incorporate more favorable provisions from ACIA.

C. ACIA regime and incorporation of BITs' standards

The following analysis pertains the incorporation of most favorable standards in BITs when an ASEAN Investor brings a dispute under ACIA. It is important to recall that in terms of BITs, one should take into account the most favorable standard in Indonesia's BITs, including that with other third states.

Article 6 of ACIA accords MFN treatment to ASEAN investors and investments at both the establishment and post-establishment stages. Footnote 4 provides that investments falling within the scope of ACIA will enjoy any preferential treatment granted by a Member State to other ASEAN investors or non-ASEAN investors and their investments under any existing or future agreements to which the Member State is a party to. Arguably this includes BITs of Member States since there is no exception to this effect. In addition, Article 44 of ACIA provides that, "Nothing 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

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[86] Article XI Indonesia-Singapore BIT (2005).
[87] Further discussion, *see* McLachlan 2005.
[88] For example see Article III:3 of the Indonesia-Guyana BIT (2008)

that as long as Indonesia's BITs are still in force, then ASEAN investors may continue invoking protection therefrom as the obligations of ASEAN Member States under the BITs continue.

In this regard, the case for incorporation for MFN standards from BITs is much simpler. However, whether the MFN clause works in a way that allows for such incorporation will be another issue. For example, an attempt to argue that treaty exception should not be applicable because it is non-existent in other treaty would most likely be rejected as shown in previous tribunals' awards. Similarly, it will be interesting as whether one could incorporate the vague definition of expropriation in BITs to replace the definition of expropriation in ACIA that includes explicit carve outs. Unfortunately, this will be beyond the coverage of this paper.

In practice, ASEAN investors may choose to bring a dispute under their BITs against an ASEAN Member State for breach of the latter's investment protection obligations due to the possibility to argue autonomous standard of FET and FPS, lack of carved out areas for expropriation, and also the lack of treaty exception. If ASEAN investors decided to bring a dispute through ACIA, the reason might be that the investors sought to rely on other provisions of ACIA, e.g. liberalization or facilitation of investments. In that case, there is possibility to argue for MFN incorporation of standards from the BITs, provided investors can prove that the treatments envisaged in the vague language of BITs provisions are more favorable.

PART FOUR:

CONCLUSION

With the entry into force of ACIA, ASEAN Member States have a new generation IIA that has incorporated in its provisions all best practices of IIAs from around the world, including the US Model BIT, the Canada Model BIT, NAFTA, OECD Guidelines, UNCTAD Guidelines, and many others. It is a major development even compared to the latest Indonesia's BIT with Libya as it is more comprehensive and has clarified the extent of government's policy space through an extensive list of treaty exceptions. Not only that, ACIA is also different from all of Indonesia's BITs because it also seeks to advance gradual liberalization of investments.

Based on the analysis, the clauses on FET and FPS, expropriation, and treaty exception under Indonesia's BITs seem to be more favorable to investors compared those under ACIA. Meanwhile, the provisions regarding NT and MFN treatment are relatively more favorable to investors under ACIA.

The future relationship between the Indonesia's BITs with ASEAN Member States and ACIA remains unclear as nothing is explicitly provided in ACIA, specifically, whether the BITs will remain in force and Member States will use both frameworks simultaneously, or whether the Member States will let the BITs to expire. From our analysis above, it is clear that the entry into force of ACIA will not make Indonesia's BITs' obligations irrelevant. It will continue to apply together with ACIA.

The author believes that sustaining ambivalent regimes is not preferable as it may create further confusion to investors as well as governments. The conclusion of ACIA was initially meant to harmonize and unify the patchy legal frameworks of ASEAN IGA and AIA. Therefore, if ASEAN eagerly wants to harmonize its legal framework for investment protection in the region, they should further issue a Protocol that will grant ASEAN Member States certain period of time to terminate the BITs amongst themselves voluntarily after the entry into force of ACIA. By that, ASEAN investors will have only one solid legal framework that protects them, and this will also help ASEAN Member States to become more focused in defining its investment policies.

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CME	*CME Czech Republic B.V. v The Czech Republic,* UNCITRAL, Partial Award, 13 September 2001
CMS Award	*CMS Gas Transmission Co. v. Republic of Argentina,* ICSID Case No. ARB/01/08, Award, 25 April 2005
Continental	*Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008
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Enron Award	*Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007
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Santa Elena	*Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award, 17 February 2000
Sempra	*Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007
Société Generale	*Société Generale v. The Dominican Republic,* LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008
Tecmed	*Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003
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TREATIES

AIA	Framework Agreement on the ASEAN Investment Area, 7 October 1998
ASEAN IGA	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
ILC Articles	International Law Commission, *Articles on State Responsibility for Internationally Wrongful Acts (including official Commentary),* Yearbook of the International Law Commission 2001, Vol. II (Part 2)
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Protocol to AIA	Protocol to Amend the Framework Agreement on the ASEAN Investment Area, 14 September 2001
VCLT	*Vienna Convention on the Law of Treaties,* 23 May 1969

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ANNEX I – LIST OF REVIEWED INDONESIA'S BITS

No.	Year	BIT
1.	1970	Indonesia – Belgium
2.	1973	Indonesia – France
3.	1974	Indonesia – Swiss
4.	1976	Indonesia - UK
5.	1991	Indonesia – Italy
6.		Indonesia – Norway
7.		Indonesia – Vietnam
8.	1992	Indonesia - Australia
9.		Indonesia - Poland
10.		Indonesia - Sweden
11.		Indonesia - Tunisia
12.	1994	Indonesia – China
13.		Indonesia – Egypt
14.		Indonesia – Laos
15.		Indonesia – Malaysia
16.		Indonesia – Netherlands
17.		Indonesia – Slovak Republic
18.		Indonesia – Turkmenistan
19.	1995	Indonesia – Argentina
20.		Indonesia – Kyrgyz
21.		Indonesia – Spain
22.		Indonesia – Suriname
23.	1996	Indonesia – Jordan
24.		Indonesia – Pakistan
25.		Indonesia – Sri Lanka
26.		Indonesia – Ukraine
27.	1997	Indonesia – Cuba
28.		Indonesia – Mauritius
29.		Indonesia – Mongolia
30.		Indonesia – Romania
31.		Indonesia – Syrian Arab Republic

No.	Year	BIT
32.	1997	Indonesia – Turkey
33.	1998	Indonesia – Bangladesh
34.		Indonesia – Czech Republic
35.		Indonesia – Sudan
36.		Indonesia – Thailand
37.		Indonesia – Yemen
38.	1999	Indonesia – Cambodia
39.		Indonesia – Chile
40.		Indonesia – India
41.		Indonesia – Jamaica
42.		Indonesia – Mozambique
43.		Indonesia - Zimbabwe
44.	2000	Indonesia – Algeria
45.		Indonesia – Korea
46.		Indonesia – Qatar
47.	2001	Indonesia – Philippines
48.	2002	Indonesia – Croatia
49.	2003	Indonesia – Bulgaria
50.		Indonesia – Germany
51.		Indonesia – Saudi Arabia
52.		Indonesia – Tajikistan
53.	2005	Indonesia – Iran
54.		Indonesia – Singapore
55.	2006	Indonesia – Finland
56.	2007	Indonesia – Denmark
57.		Indonesia – Russia
58.	2008	Indonesia – Guyana
59.	2009	Indonesia – Libya

ANNEX II
TABLES OF COMPARISON OF PROVISIONS IN INDONESIA'S BITS

Table 1. **FET and FPS clauses**

	Type I Independent/ autonomous FET	Type II FET linked with non-discriminatory measures	Type III FET linked with MFN to investments/ investors or both
Wording of the Clause	"Article III […] (2) investments of investors of either Contracting Party shall at all times **be accorded fair and equitable treatment** and shall enjoy **adequate protection and security** in the territory of the other Contracting Party." (emphasis added) **Indonesia-Chile BIT (1999)**	"Article III […] 1. Each Contracting Party shall **ensure fair and equitable treatment of the investments** of investors of the other Contracting Party and **shall not impair, by unreasonable or discriminatory measures**, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investment **adequate physical security and protection**." (emphasis added) **Indonesia-Jamaica BIT (1999)**	"Article IV [...] 1. Each Contracting Party shall in its territory **accord to investors** of the other Contracting Party as regards the management, maintenance, use, enjoyment or disposal of their investment, **treatment which is fair and equitable and no less favorable that which it accords to investors of any third State**." (emphasis added) **Indonesia-Thailand BIT (1998)**
The relevant BITs	Belgium (1970), France (1973); Swiss (1974); UK (1976); *1991*: Vietnam, Norway; *1992*: Sweden, Australia, Poland, Tunisia*; 1994*: Slovak Republic, Malaysia, Egypt, Laos, Turkmenistan, China; *1995:* Argentina, Kyrgyz, Spain; *1996*: Ukraine, Sri Lanka, Jordan, Pakistan; *1997*: Cuba, Romania, Syria, Mongolia, Mauritius; *1998:* Yemen, Sudan, Bangladesh, Czech Republic; *1999:* India, Mozambique, Zimbabwe, Chile, Jamaica; *2000:* Qatar, Algeria, Korea; *2001*: Philippines; *2002:* Croatia; *2003*: Germany, Saudi Arabia, Tajikistan, Bulgaria; *2005:* Singapore; *2006*: Finland; *2007*: Denmark, Russia; *2008*: Guyana; *2009:* Libya (53 countries)	*1974:* Swiss*; 1976:* UK*; 1991*: Italy; *1992:* Sweden *1994:* Slovak Republic, Turkmenistan, Laos, Netherlands *1995:* Kyrgyz Republic, Suriname *1996*: Jordan, Sri Lanka, Ukraine, Pakistan *1997:* Cuba, Mongolia, Syrian Arab Republic *1998:* Sudan, Yemen *1999:* Jamaica, Mozambique, Chile, Zimbabwe, Cambodia *2000:* Algeria, Korea *2001:* Philippines *2003*: Bulgaria, Tajikistan (29 countries)	*1994:* Egypt, Malaysia; *1998*: Thailand, Czech Republic (4 countries) **No FET and FPS Clause:** Turkey (1997) **Full protection and fair treatment:** Iran (2005)