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CLOSING LEGAL LOOPHOLES ON INDONESIA INVESTMENT LAW IN DIGITAL AGE

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ABSTRACT

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

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Research Method

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

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

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

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

C. Discussion

1. Legal Regime on Investment Activities in the Digital Era

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

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

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

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

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

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

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

10 Ibid. , p. 2.

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

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

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

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

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

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

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

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

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

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

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

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

2. Performance Requirement on Data Localization

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

14 Similar language also found in Indonesia – Republic of Korea Comprehensive Economic Partnership Agreement (Indonesia – Korea CEPA, 2020).

15 Horn and Tangerås, "Economics of International Investment Agreements." , p. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

, p. 5.

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

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

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

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

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

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

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

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

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

D. Closing

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

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

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

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

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Curriculum Vitae of Author

The author, **Surya Oktaviandra**, was born in 1985 in Padang City, West Sumatra Province. All levels of schools ranging from elementary, junior and senior high schools are pursued in the city of Padang itself. Obtained a bachelor's degree at the Law School of Andalas University in 2009. The Author had worked at Bank Rakyat Indonesia until the end of 2010, and in early 2011 worked as a civil servant as legal drafter in the Government of the City of Padang Panjang, West Sumatra Province until 2021, with the last position as Head of Performance and Bureaucracy Reformation Sub-Unit. The author continued his postgraduate study using the LPDP scholarship from Ministry of Finance of the Republic of Indonesia in 2017 and obtained his master's degree in law in 2018 on the Globalization and Law program, Spec: International Trade and Investment Law at Maastricht University (the Netherlands). Currently, the author is working as permanent lecturer at Faculty of Law, Andalas University. Author`s main research interests include international trade law, international investment law, and business and human rights.

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