IMPLEMENTATION OF NATIONAL TREATMENT PRINCIPLE IN INDONESIA-JAPAN ECONOMIC PARTNERSHIP AGREEMENT (IJ-EPA)

A BACHELOR DEGREE THESIS

Presented as the Partial Fulfillment of the Requirements to Obtain the Bachelor Degree at the Faculty of Law Universitas Islam Indonesia Yogyakarta

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Bismillahirohman nirrohim

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Demikian, surat pernyataan ini saya buat dengan sebenar-benarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

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MOTTO

"Whoever has fear to Allah, then Allah gives way out to him and gives sustenance from the direction that is not unexpected.. whoever has fear to Allah, then Allah makes his affairs become easy.. those whoever has fear to Allah will be blotted out their sins and get a great reward.."

(QS. Ath-Thalaq:2, 3 and 4)

"Life is like sail around the world and fly around the sky everything needs an effort. no matter how heavy, just skip and face by your faith. you have God" - Agustina Bella Pratiwi

"Life is a series of experiences, each one of which makes us bigger, even though sometimes it is hard to realize this. For the world was built to develop character, and we must learn that the setbacks and grieves which we endure help us in our marching onward."

- Henry Ford

DEDICATIONS

This thesis is dedicated to:

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Yogyakarta, 17 August 2018

The Writer

Agustina Bella Pratiwi

ABSTRACT

Investment activity between countries has developed rapidly. The flow of Foreign Direct Investment (FDI) reaches a higher level per year. This activity is beneficial for both investors and host countries. Interdependence and competition then emerge as a result of investment growth. To cover the development of this investment, many multilateral and bilateral investment agreements were concluded, where one of the main legal sources was Trade-Related Investment (TRIMs). One of the most influential principles based on this Agreement, national treatment creates challenges to the application of the principles discussed. Both TRIMs which refer to the General Agreement on Tariffs and Trade (GATT) and International Investment Agreements (IIAs) and other Bilateral Investment Agreements (BIT) do not provide a clear standard measure of how to apply national treatment. This will cause an open interpretation of the national treatment clause. In this condition, Indonesia as a developing country must take steps carefully to protect national interests. Although FDI offers many benefits to Indonesia, protection of national interests must be taken into account in policy making. Because of the binding nature of national treatment to Indonesia, the state must provide treatment that is no less favourable to foreigners than citizens. Under these circumstances, the obligation to protect national interests and provide national treatment is contested. Until now, Indonesia has established investment relations with several countries and one of its biggest investors is Japan. For decades Indonesia and Japan have established economic relations through trade and investment. On August 20, 2007 the two countries agreed to form the Indonesia-Japan Economic Partnership Agreement (IJ-EPA) which became effective on July 1, 2008. With the aim of strengthening investment relations between the two countries and guaranteeing legal certainty. IJ-EPA is classified as a more comprehensive bilateral investment agreement.

Keywords: investment, investor, national treatment, Indonesia-Japan Economic Partnership Agreement (IJ-EPA).

TABLE OF REFERENCES

CHAPTER I

INTRODUCTION

A. Context of Study

Indonesia has a potential source of economic power. Sources from its abundant natural wealth require human resources and financial resources (investments). And in the management of potential sources, has constraints of the low saving rate of society, ineffective and efficient capital accumulation, insufficient human skills, and less modern level of technology. The capital needs to manage the natural resources and optimize the potential of the existing economy so that there is an added value not only for the state but also for the society in general. The capital is not only in the form of funds (fresh money), but includes technology (skills), and human resources.[1] Indonesia's economic development in today's era of globalization requires substantial funds and additional funding. The investments that are only sourced from within the country alone are not sufficient to encourage national economic development on a larger scale. Therefore, it takes the presence of foreign investment to support and assist domestic investment to accelerate economic development in Indonesia.

The entry of foreign capital to the Indonesian economy is a demand of the situation, in terms of both economic and political Indonesia. The collection of funds for the development of the Indonesian economy through direct capital investment is an excellent and effective alternative to the withdrawal of other

[1] Aminuddin Ilmar, *Hukum Penanaman Modal Di Indonesia*, (Jakarta : Kencana, 2007), p.2.

International funds such as loans from abroad.[2] The presence of both domestic and foreign investment provides a number of benefits for the government that can absorb labor in the recipient country, can create demands of domestic products as raw materials, can increase the state income from the tax sector, the transfer of technology, transfer of knowledge, especially for foreign export-oriented investors can generate direct foreign exchange for the country.[3] In addition, direct investment activities also result in significant benefits for host country due to their permanent nature or term long.[4]

Improving the development of a welfare and prosperity of its people, can be done in different ways between countries with one another. One of the ways is attract as much foreign investment as possible to enter the country. However, it needs a mature preparation since there are intense competitions in entering the global market. Foreign investment in Indonesia can be encouraged in two forms of investment, namely portfolio investment and direct investment.

Portfolio investment can be made through the capital market with securities instruments such as stocks and bonds. Meanwhile foreign direct investment is a form of investment by building, buying or acquiring a total company. When viewed and compared to portfolio investment, foreign direct investment has more advantages due to its permanent or long-term nature, foreign investment contributes to technology transfer, management skills transfer and new

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[2] Yulianto Ahmad, *"Peran Multilateral Investment Guarantee Agency (MIGA) dalam Kegiatan Investasi"*, Jurnal Hukum Bisnis Vol. 22 No. 5, Tahun 2003,p.39.

[3] Sentosa Sembiring, *Hukum Investasi Pembahasan Dilengkapi dengan Undang - Undang No. 25 Tahun 2007 Tentang Penanaman Modal*, Nuansa Aulia, 2010, p.24.

[4] Asmin Nasution, *Transparansi dalam Penanaman Modal*, Pustaka Bangsa, 2008, p.1.

job creation.[5] In addition, other objectives can be achieved with the entry of foreign capital such as developing import substitution industry to save foreign exchange, encouraging non-oil exports to generate foreign exchange, transfering technology, building infrastructure, and developing disadvantaged areas. Trade and investment are both separated and close to business activities. Both of them go hand in hand, either in substitutes or complements.[6]

In international level, investment agreement started with Multilateral Agreement on Investment (hereafter MAI) as the efforts taken by international community in reaching the development of investment within the society. One form of international agreement governing investment activities is Trade-Related Investment Measures (hereafter TRIMs). TRIMs is a product from 1994 as concluded from the Uruguay round agreement.[7]

TRIMs as one of the agreements in the World Trade Organization (WTO) convention and consists the rules for investment related to trade. The TRIMs Agreement is intended to reduce or eliminate trading activities and increase the freedom of investment activities between countries. The main purpose of TRIMs is to unify the policies of member countries in relation to foreign investment and prevent trade protection in accordance with GATT principles. In the regional level, there are several regulations show the common practice of investment such as North American Free Trade Agreement [hereinafter NAFTA] 1994,[8] ASEAN

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[5] Pandji Anoraga, Perusahaan Multinasional dan Penanaman Modal Asing, Pustaka Jaya, 1995, p.46

[6] Mitsuo Mitshushita, Thomas J. Schoenbaum, & Petros C. Mavroidis. The World Trade Organization: Law Practice, and Policy, 2006, Oxford Univesrity Press, Great Britain, p.831.

[7] It is an Annex 1A to the General Agreement on Tariffs and Trade 1994 [GATT 1994].

[8] Enter into force on January 1st, 1994

Comprehensive Investment Agreement 2009,[9] ASEAN Australia New Zealand Agreement, Japan-Mexico Free Trade Agreement, IISD Model IIAs, Energy Charter Treaty.

Instead of Multilateral Investment Agreements (hereinafter MAIs), the most common agreement, Bilateral Investment Treaties (hereinafter BITs) also exist.[10] These primary agreements carry out the investment liberalization bilaterally between states.[11] These various investment agreements provide a wide range of application scopes, systems, rules and principles. One of the most common issues is about the principle of national treatment, but there is no absolute standard of how the national treatment principle is applied.

Even one main legal basis of national treatment, TRIMs as refer to General Agreement on Tariffs and Trade 1994 (hereinafter GATT 1994) only provides the application scope of national treatment. There is no specific rule explains how the application of national treatment principles in the world of international investment. Article 2 section 1 of TRIMs set the principles of "National Treatment" and "Qualitative Restrictions", it states that "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIMs that is inconsistent with the provisions of Article III or Article XI of GATT 1994." This article prohibits WTO Members from implementing any investment measures that are inconsistent with national treatment (article III GATT) and Quantitative Restrictions (article XI GATT). Even Annex of TRIMs it

[9] Open for signature in February 26th, 2009

[10] Saceerdotti, Giorgio, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Recuil De Court, 1997, p.269.

[11] Mitsuo Mitshushita, Thomas J. Schoenbaum, & Petros C. Mavroidis, *The World Trade Organization: Law Practice, and Policy*, Oxford Univesrity Press, 2006, Great Britain, p.832.

provides an Illustrative List of measures that are inconsistent with the stated principles. Meanwhile, in article III GATT provides the scope application of national treatment of: (1) internal taxes and charges; (2) laws, regulations and requirements affecting the sale, transportation, distribution or use of products; and (3) internal quantitative regulations requiring the mixture, processing or use of products in specified proportions.

In terms of trading activity, article III GATT 1994 is related to "National Treatment" in the field of domestic taxation and article XI relates to general restrictions on quantitative restrictions. Both Articles relate to the use of such instruments to discriminate imported goods, prohibit international trade or protect local production.[12] The problem arises in the question of whether or not a prohibition in a production of trading activity violates the principle of national treatment in which the principle is the basis of international investment activity. There is no clear and absolute International Investment Agreement (hereafter IIA) standard size, even GATT in terms of investment. This has led to open an interpretation of national treatment and creates a vague legal test that everyone can interpret the principle differently based on individual interests. It may also occur in Indonesia. As a member country of the WTO, Indonesia is the subject to the rules under TRIMs and GATT, where the rights and obligations under TRIMs and GATT have been realized in Law No. 25 of 2007 on Capital Investment. In particular, the obligations of the principle of national treatment contained in article 3 (1) letter d where Indonesia provides the basis of investment in

[12]See Article III:1 GATT 1994.

investment on equal treatment and non-discrimination of country of origin.[13] Article 4, paragraph 2 (2) of Law No. 25 of 2007 concerning investment also states that, "in establishing the basic policy referred to in paragraph (1), the government shall give equal treatment to domestic investors and foreign investors paying attention to the national interest ... "[14] it explains that equal treatment means that the government should refrain and give the same treatment to investors who have invested in Indonesia, unless it is specified by law.

In addition to these national regulations, there are also IIA and BIT which provide binding clauses on national treatment for Indonesia. Those clauses obligate Indonesia, among others, to improve market-oriented policies and create transparent and non-discriminatory investments between countries and investors. Indonesia on the one hand has an obligation to provide national treatment in accordance with applicable rules. On the other hand, Indonesia also has an obligation to protect the national interest. The binding nature of national treatment creates a dilemma for Indonesia about whether Indonesia will provide national treatment and abandon national interests or provide national treatment to protect national interests. Indeed, foreign direct investment has multiplier effects in Indonesia for a country's development. It provides employment in Indonesia, increase foreign exchange and technology transfer or transfer of knowledge.[15] Nevertheless, Indonesia enters into FDI, national treatment should be implemented and allow the protection of national interests to be abandoned. On the one hand, national treatment and national interest are equally important and

[13]See article 3(1) letter d Law number 25 of 2007
[14]See article 4 section (2)Law number 25 of 2007 and the elucidation p.11
[15]Hendrik Budi Untung, *Hukum Investasi.*, Sinar Grafika, 2010, p.41 – 42.

inseparable. This factual situation raises the question of whether the application of the principle of national treatment is a liberalization to protect the national interest in Indonesia.

Japan is invested the most in Indonesia since the opening of foreign investment in Indonesia. It then, accelerates the pace of investment growth in Indonesia. The government has provided tax incentives to foreign investors such as tax breaks for foreign investors investing in Indonesia through Law No. 25 of 2007 on investment to attract Japanese investors to invest in Indonesia. The Japanese entrepreneur, Yasuo Hayasi,[16] assessed and gave appreciation of the passing of the Law No. 25 of 2007 on investment, which considered that the law would protect Japanese investors in Indonesia to increase their investment.[17] Although Indonesia guarantees the principle of national treatment as stipulated in Article 4 paragraph 2 (2) of the Investment Law, but Article 6 number 2 of the investment law states that *"the treatment referred to in paragraph (1) shall not apply to investors of a country that obtains privileges under an agreement with Indonesia."* From the explanation of the verse, the national treatment principle can be reduced as long as there is an agreement between Indonesia and the country concerned.

Indonesia-Japan Economic Partnership Agreement (IJ-EPA) is a bilateral economic agreement between Indonesia and Japan. In chapter 5, it sets about investment activities between Indonesia and Japan. With the Indonesia-Japan Economic Partnership Agreement (IJ-EPA), the expected benefits are to increase

[16] Yasuo Hayasi merupakan pimpinan Organisasi Perdagangan Internasional Jepang (Jetro)

[17] H.Salim HS, Budi Sutrisno,*Hukum Investasi di Indonesia*, Rajawali, 2014, p.21.

business confidence and provide greater legal certainty for Japanese investors. Providing foreign businesses, a clearer and more specific treatment, including more in rights and obligations.

Therefore, in this thesis, the author discusses two issues: How is the implementation of national treatment principle in the investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA) and what are the benefit of the implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA)?

B. Problem Statement

Based on the context of study above, there are two major problems of discussion:

1. How is the implementation of national treatment principle in the investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA)?
2. What are the benefit of the implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA)?

C. Research Objectives

Based on the context of study and problem statements above, therefore the purposes of this research are:

1. To get better understand the implementation of national treatment principle in the investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA).

2. To analize the benefits of the implementation based on Indonesia-Japan Economic Partnership Agreement (EPA-IJ).

D. Theoritical Review

In Indonesian terms, on Law No. 25 of 2007, the term of *penanaman modal*[18] is used as a format judicial term, but in common language people use the term *investment*.[19] Both of them is capital investment and investment are both known in legislation and in business field, which is the term of capital investment more popular is used in legislation while the term of investment is more popular in business.[20] Basically, both terms have similar meaning as they refer to the investment in the form of Foreign Direct Investment (FDI) and Foreign Indirect Investment (FII).[21]

On the Investment Act 2007, it is mentioned that, investment shall be any kinds of investing activity by both domestic and foreign investors for running business within the territory of the Republic of Indonesia.[22] According to Law Dictionary,[23] *"investment is the commitment of money or capital to purchase financial instruments or other assets in order to gain profitable returns in the*

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[18] Law No. 25 of 2007, In Indonesian term, investment is defined as *"penanaman modal"*.

[19] Sentosa Sembiring,p.33; Abdurachman. *Ensiklopedia Ekonomi Keuangan Perdagangan*. Cetakan Ke-enam. 1991, Radnya Paramita, Jakarta, p.340; Winardi. *Kamus Ekonomi (Inggris-Indonesia)*. Cetakan Ke-delapan, 1982, Alumni, Bandung, p.190; Departemen Pendidikan dan Kebudayaan RI. *Kamus Besar Bahasa Indonesia (KBBI)*. Edisi Ke-empat, 1995, Balai Pustaka, Jakarta, p.386.

[20] Ida Bagus Rahmadi Supancana, *Kerangka Hukum Kebijakan Investasi Langsung di Indonesia*, Ghalia Indonesia, 2006, p.1.

[21] FII is in the form of sale and purchase of portfolio shares, and conducted through Capital Market.

[22] Article 1 (1) Law no. 25 of 2007 about investment.

[23] See The Law Dictionary: Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

form of interest, income (dividend), or appreciation of the value of the instrument. It is related to saving or deferring consumption."

From several definitions above, there is no different understanding in using the terms of investment and capital investment. The key of investment is that there is an activity conducted by individual or legal entity to invest some or whole of the income as a capital for certain business activity aimed to earn the profit, interests and/ or dividend. Individual or legal entity who invest their income and conduct investment is called as investor. In article 1 number 4 Investment Act 2007[24] defines investor as any individual or corporation that makes investment in form of either domestic or foreign investors. Investment Act 2007 distinguishes the domestic investor as any individual of Indonesian citizen, Indonesian corporation, the state of the Republic of Indonesia, or any region making investment within the territory of the Republic of Indonesia.[25]

Whereas the foreign investor is any individual of foreign citizen, foreign corporation, or foreign state making investment within the territory of the Republic of Indonesia."[26] Foreign investors are often referred to Foreign Direct Investment (FDI) where the concept of direct investment is often distinguished by the term portfolio investment.[27] A direct investment is often defined as an investment activity involving: transfer of funds; long term project; the purpose of regular income, the participation of the person transferring the funds and business risk.

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[24]See article 1 number 4 of Law no. 25 of 2007 of Investment Act

[25]Investment Act 2007, article 1 number 5.

[26]*Ibid*, article 1 number 6.

[27] M. Sornarajah, *the International Law on Foreign Investment*, 2nd Ed., (Cambridge; Cambridge University Press, 2004), p. 7.

Meanwhile, portfolio investment is often associated with investments made through the stock market or the stock exchange by securities purchasing (securities).[28] Therefore, the key difference of both domestic and foreign investor is the nationality of investor itself. The relationship between investor and the recipient of capital is very close because the investor as the owner of the capital will be willing to invest in the recipient country and the recipient country should be able to provide the legal certainty, legal protection and security for the investor in the business activity. A capital is an asset in the form of money or other non-monetary form owned by an investor with an economic value.[29] The capital can be divided into domestic capital and foreign capital.

The domestic capital is capital owned by the state of the Republic of Indonesia, an individual Indonesian citizen, or business entity in the form of a legal entity or not incorporated.[30] While foreign capital is capital owned by a foreign country, an individual foreign citizen, foreign business entity, foreign legal entity, and / or an Indonesian legal entity which is partly or wholly owned by a foreign party.[31]

The various international agreements governing international investment are both multilateral and bilateral. The national treatment standard is the single

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[28]Rudolf Dolzer dan Christoph Schreuer, *Principles of International Investment Law*, 1st Ed., (New York: Oxford University Press, 2008), p.60.

[29]See the definition of *"modal"* in Article 1 number (7) of the Investment Law. Thus the capital can be either a technology (*know-how)* that has economic value.

[30]See article 1 number 9 of Investment Act

[31]See article 1 number 8 of Investment Act. Foreign investment shall be in the form of a limited liability company (Article 5 paragraph 2 of the Capital Investment Law) based on law number 40 year 2007 regarding Limited Liability Company. However, foreign investment activities may be non-equity or contractual under a specific agreement such as in the case of a franchise agreement or management agreement with due regard to the prevailing laws and regulations.

most important standard of treatment enshrined in international investment agreements. At the same time, it is the most difficult standard to achieve, as it touches upon economic and political sensitive issues. In fact, there is no one of country has so far seen to grant national treatment without qualifications, especially when it comes to the establishment of an investment.

The principle of national treatment comes from the Argentine Legal Expert and Diplomat, Carlos Calvo, who is well known as the *Doctrine of Calvo*. As a principle that is currently more practiced in the world trade law, the underlying meaning of the principle of national treatment itself remains inseparable from the meaning underlying the principle of national treatment in international law, namely a principle that builds a relationship obligations of a country to foreigners in in the country. [32] National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in the same circumstances. In this way the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.

National Treatment (GATT article III) stands alongside Most Favourable Nantion (hereafter MFN) treatments as one of the central principles of the WTO agreement. Under the national treatment rule, members must not accord discriminatory treatment between imports and “like” domestic products (with the exception of the imposition of tariffs, which is a border measure). In relation to investment, TRIMs article 2 section (1) states clearly that WTO member shall not

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[32] Carlos Calvo, *Le Droit International Theorique*, Fifth Edition, Arthur Rousseau, Paris, 1896, p.231-232

apply any trade-related investment measures that are inconsistent with article III of GATT 1994.[33] The principle of national treatment according to the TRIMs thus implies that this principle obliges the state, in particular the member countries of the WTO agreement to no longer enact laws and / or any national legislation that discriminates between FDI and domestic investment, particularly with respect to investment in the field trade in goods. From this article, it is to be noted that investment activity shall bound to national treatment principle as such.

According to UNCTAD, the national treatment standard is one of the main general standards which used to secure a certain level of treatment for FDI in the host countries.[34] National treatment seeks to grant foreign investors treatment comparable to domestic investors operating in the host state.[35] Rudolf Dolzer mentioned, "The clauses state that the foreign investor is accorded treatment no less favourable than that which the host state accords to its own investors".[36]

In relation to FDI, national treatment involves an economic aim not dissimilar to that which has motivated its adoption in trade agreements: foreign and domestic investors should be subject to the same competitive conditions on the host country market, and therefore no government measure should unduly favour domestic

[33] See article 2 of TRIMs

[34] Including fair and equitable treatment (UNCTAD, 1999a) and MFN treatment (UNCTAD, 1999b).

[35] *United Nations Conferences Trade and Development. National Treatment. (UNCTAD/ITE/IIT/11).* Vol. IV. (New York and Geneva, 1999), p.3. [UNCTAD, National Treatment].

[36] Rudolf Dozer, *National Treatment: New Developmens. Making the Most of Internaional Investment Agreemnts: A Common Agenda*, 2005, Symposium co-organized by ICSID, OECD AND UNCTAD, Paris, p.1.

investors.[37] However, because the distinction made in the field of trade in goods between border measures and internal measures.

On the Economic Partnership Agreement Indonesia-Jepang (EPA-IJ) also guarantee the principle of National Treatment which stated on the article 59 mention that *"each party shall accord to investors of the other Party and to their investment no less favourable investors and to their investments with respect to investment activities."* The same treatment in the context of national treatment in Law no. 25 Year 2007 in investment is guarantee of equal treatment from the government both to foreign investment and domestic investment is graded under article 3 section (1) letter d which mention that the principle of equitable and nondiscriminatory treatment against country of the origin is the principle of indiscriminate service based on the rules of law between domestic and foreign investors, as well as among foreign investors.

In order to encourage the creation of a conducive national business climate for investment and accelerate the increase of capital investment, the government must provide equal treatment for both domestic and foreign investors with due regard for the national interest. [38]In addition, the government is required to ensure legal certainty, business certainty and business security for investors since that is in accordance with the provisions of legislation.

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[37]However, the rationale for the granting of national treatment varies, depending on the economic sectors and the subject matter involved. Thus, in a certain sense, the assimilation of aliens and nationals may be seen as forming part of international protection and the promotion of human rights, as far as basic standards of treatment of the person and property are concerned (e.g. protection against arbitrary government action, guarantees of human rights). This rationale may or may not extend beyond the treatment of the person to touch upon property rights and the rights of legal persons (UNCTC, 1990a); UNCTAD, National Treatment, p.8-9

[38] See article 4 section 2 letter a of Law No. 25 of 2007

E. Research Methods

1. Type of Research

   The type of this research is the normative legal research. This study conceptualizes law as the legal norms that include existing positive law.

2. Sources of Legal Material

   The source of legal material is divided into three; primary legal materials, secondary legal materials and tertiary legal materials. The primary legal materials that were used to complete this research are laws and regulations, both nationals and internationals such as well as other jurisprudence related to national treatment principle. The secondary legal materials comprise of books, journals, articles, documents and news that cover various aspects within this topic and written by relatively highly qualified writers which all of those related to national treatment principle.

   As for the tertiary legal materials are law dictionary and business dictionary.

3. Legal Material Approach

   The approach in this research is using the combination of the normative approach. Which will be centering on statute approach, conceptual approach and comparative approach.

4. Legal Material Collecting

   The process of collecting legal material in the making of this research was done through both library studies by digging up as many as possible

knowledge and information from the books, journal, articles, documents and news, as well as from national and international laws.

5. Legal Material Analysis

   In the process of analyzing of legal material during the process of this research, it is applied the qualitative method of analysis. Which is done by describing the already gained data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher‟s own arguments which supports legal material.

F. Systematical of Writing

In this thesis, the writer divides the chapter into four chapters: Chapter I Introduction; Chapter II General Overview of Investment Law; Chapter III the legal test of national treatment principle in investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA) and the obstacles of implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA); and Chapter IV Conclusion and Recommendation.

In the Chapter I, the writer explains the context of study, problem statements, research objectives, theoretical review, research method and systematical of writing. In this research, there are two research problems: how is the implementation of national treatment principle in the investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA) and what are the benefits of implementation based on Indonesia-Japan Economic Partnership

Agreement (IJ-EPA)? To answer the problems, the writer analyze Indonesia-Japan Economic Partnership Agreement (IJ-EPA), especially for on investment based on the theoretical review of International and Indonesian Investment Law sourced from TRIMs, GATT, Investment Act 2007, and other related laws, regulations, books, journals, and research reports.

Chapter II is about general overview of investment. This chapter is divided into two sub-chapter: International Investment Law and Indonesian Investment Law. Both sub-chapters explain the history of investment, basic understanding of FDI and investors, sources of law, applicable principles, Japanese investment in Indonesia and description of IJ-EPA.

Discussion in chapter III is divided into two sub-chapters: the legal test of national treatment principle in investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA) and the benefit of implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA). The first subchapter answers the first problem statement by comparing the national treatment clauses in IJ-EPA and its interpretation in the National regulation. In order to answer the second sub-chapter, the writer provides factual grounds on the benefits of the implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA).

As the last chapter, chapter IV explains the summary results of the discussion as the answers of two problem statements in this thesis. The first answer explains the legal test of national treatment principle in the investment under Indonesia-Japan Economic Partnership Agreement (IJ-EPA). The second

answer explains the benefits of implementation based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA). At the end, the writer adds two recommendations to the reader in handling both problems.

CHAPTER II

GENERAL OVERVIEW

A. Investment Law

Investment Law is the entire rule of law that regulates the relationship between investors and recipients of capital, business fields that are open to investment, and regulates the procedures and conditions for investing in a country. Investment law is divided into two, namely international investment law and national investment law. Both of them consist of definitions of terms, application scope and principles. Each branch has its own rules and regulations which depend on territorial-based scope. Here, the theoretical review of investment divides the chapters into two sub-chapters: International Investment Law and Indonesian National Law.

1. International Investment Law

In the international community, investment and trade are an inseparable part, mutually sustainable and must work together. Investment is a source of driving economic growth towards sustainable development in the global era. The discussion of investment is an integral part of the previous trading rules. The establishment of International organization regulatory body was deemed necessary as an effort to originally took the form of specific responses to specific trade and investment policy issues.[39]

[39] See WTO Working Group on the Relationship between Trade and Investment, WTO Doc. WT/WGTI/W/7 of 18 September 1997 [WTO Working Group, 1997]; *Ibid*, p.832

The first most affecting and well-known organization is WTO. The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. The Agreement is a contract between member states that bind the government to comply with it in the implementation of its trade policy. At its heart are the WTO agreements, negotiated and signed by the bulk of the world‟s trading nations and ratified in their parliaments.[40]

The goal is to ensure that trade flows as smoothly, predictably and freely as possible. The product of WTO itself GATT 1994 and TRIMs.

a. History of GATT

In an effort to realize the ideals of world economic improvement that was destroyed by the second world war II. The United States pioneered the international conference held at Bretton Woods, New Hampsire, USA on July 22, 1947. The conference was later known as *the Bretton conference*. The 22-nation meeting finally did the *Havana Charter* which contained the *International Monetary Fund* (IMF) agreement, but because the US Congress as the initiator of International Trade Organization (ITO) failed to reach agreement on the form of ITO organization and operating system, the formation of ITO was dissolved and then as instead in the form of *General on Tariff and Trade* (GATT) in 1947.

40 https://www.wto.org/english/thewto_e/thewto_e.htm

On the way, GATT has conducted several negotiations starting in 1947 in Geneva (Austria), Annency (France), Havana (Cuba), Torguay (UK), Tokyo (Japan), Punta del Este (Uruguay), Montreal (Canada), Brussels (Belgium), and the last Uruguay Round Marrakesh (Marrocco 1986-1994). The most congregations were Geneva meetings held from April to November 1947. The conference elaborated *"three ring circus"*.[41] 1) draft an ITO charter; 2) prepare schedules of tariff reductions; and 3) prepare a multilateral treaty containing the general principles of trade, namely GATT.

At the last Round of Negotiation on Uruguay Round Marrakesh is considered one of the most decisive negotiations GATT development in the future. Uruguay's round is the longest round of talks and covers the broader regulatory facets. There are not just talks on tariff and non-tariff issues but also other issues that are classified as non-trade aspects such as intellectual property rights and the interests of poor countries to be considered. Then in the last round was approved approval to form a trade organization that is called *World Trade Organization* (WTO) which is came into force on 1 January 1995[42] promoting the package of agreements that opened for signature at Marrakesh on 15 April 1994.

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[41] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*. Second Edition, 1997, MIT Press, Massachusetts, p.37.

[42] See Protocol of Provisional Application to the General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. p.308. [Provisional Application to the GATT 1947].

1) TRIMs

a) History of TRIMs

Trade-Related Investment Measures is a WTO Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").[43]

TRIMs has strong connection to GATT 1994 because as a result from Uruguay Round Agreement deals directly with foreign investment.[44] The TRIMs Agreement makes an important contribution to the development of capital investment and paves the way for further discussion of future rules by assisting member countries to be more transparent in their legal investment policies. With this foreign investor will get legal certainty in doing business in other WTO member countries.

TRIMS relates back to the GATT by stating that „no member shall apply any TRIM that is inconsistent with the provisions of Article III (on national treatment) and Article XI (on quantitative restrictions) of GATT".[45] The annex to the agreement contains an illustrative list of measures. The illustrative lists covers: local content requirements; export performance requirements; and trade balancing requirements; foreign exchange balancing requirements; restrictions on an enterprise"s export or sale for export of products.

Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the Council for Trade in Goods of all

[43] See article 1 on Agreement Related-Trade Investment Measures.
[44] M. Sornarajah, The International Law on Foreign Investment, p.266
[45] See article 2.1 on Agreement Related-Trade Investmnet Measures

TRIMs they are applying that are not in conformity with the provisions of this Agreement. The agreement requires 5 (five) years for developed countries and (7) years for developing countries and poor countries to be able to implement.[46]

TRIMs as a new issue in the WTO GATT which aims to eliminate or reduce any policies that could hamper activities and increase freedom of investment activity and prohibit the existence of investment rules that can disrupt and hinder free trade. In general, TRIMs prohibit investment policies that do not comply with GATT 1994 especially those set forth in Article III and XI GATT 1994.

b) Objectives and Basic Principles in TRIMs

Currently developing countries are of the view that foreign capital can provide working capital, bringing material expertise, science and market connections. In addition, foreign investment also plays a role in increasing state revenues through export activities and reduce the number of unemployed because of the opening of employment by multinational companies. The positive aspects of the foreign investment help the host country's economic development efforts.

But on the other hand, foreign investment can also have a negative impact on the recipient countries that foreign investment by multinational companies can dominate and "turn off" local companies that still do not

[46]See article 5.1 and 5.1 on Agreement Related-Trade Investmnet Measures

have the capacity of capital, managerial skills and market connections that can be comparable and compete with multinational companies. Consequently, developing countries see the need for oversight and requirements for foreign investment to prevent those negative aspects through TRIMs where the main objective of this requirement by the recipient country is to regulate and control the flow of foreign investment in such a way as to satisfy the purpose of its development.

TRIMs is an investment agreement relating to the trade in goods which is accommodated by several principles in GATT which are specifically related to foreign investment, namely.[47]

1. National Treatment (Article III of GATT)

   National Treatment is about the same treatment by host country to foreign investors and domestic investors. The principle of national treatment requires equal treatment of host country products with similar products from abroad. For example, the same sales tax will be imposed for similar products sold by foreigners and self-trafficked countries. In other words, National Treatment prohibits discriminatory regulations as a means of protecting domestic products.

In the appendix the TRIMs agreement is set on the illustrative list of prohibited capital investment requirements which are contrary to national treatment principles, including:[48]

a. Local content requirements

[47] Article 1 of TRIMs
[48] Annex of TRIMs

Requirements that require the purchase or use of products originating domestically or from other domestic sources specified on the basis of certain products, the volume or value of the product, or by comparison and volume or value of local production;

b. Trade balancing requirement

The terms of purchase or use of imported products by a company or investor are limited to a certain amount which is related to the volume or value of the local production being exported;

2. Quantitative Restriction (Article XI GATT)

Requirements for investments that are not in accordance with the requirement to abolish quantitative restrictions are:[49]

a. the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

b. the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

c. the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

[49] *Ibid*

3. Article XX GATT regulates exceptions that permit deviations from GATT obligations for the purpose of applying national arrangements in the field of national health and security.
4. Transparency obligations (Article X of GATT)
5. Consultation among WTO members in case of dispute (Article XXII of GATT)
6. How to resolve disputes (Article XXIII of GATT)

b. Sources of International Investment Law

A treaty is an agreement made between two or more countries in connection with an investment. The treaties agreed by the investor and recipient countries in the field of investment are as follows:

a. International Centre for the Settlement of Investment Dispute (ICSID).[50]

   Arbitration institutions that function to resolve disputes of foreign investment between countries and citizens of other countries.

   There are two patterns of dispute resolution set out in ICSID namely: dispute resolution through conciliation and dispute resolution by using arbitration.

b. Agreement on Trade Related Investment Measures (TRIMs).

   It is an agreement on trading rules concerning trade. These TRIMs specify that member countries may not apply trade-related investment rules (TRIMs) as opposed to Article III of GAAT on national

[50] The establishment of this institution was initiated by the World Bank and was established on 14 October 1966 in the United States.

treatment and Article XI GAAT on the prohibition of quantitative restriction.

c. The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA).[51]

   An international institution established by the World Bank. The objective of the MIGA agency is to provide assurance to investors against noneconomic risks and play a role in promoting the flow of investment for productive purposes to developing countries.

d. The Treaty of Rome.[52]

   This agreement gives everyone the freedom to make business in the field of services and capital. Article 52 through article 58 of the agreement on the right to establish a company, states, among others, that the freedom to establish a company, including the right to engage in activities as a self-employed person. Included is the right to establish and execute its business, in particular firms or firms, on the basis of national treatment principles.

e. The North American Free Trade Agreement (NAFTA).

   This Agreement was made within the territory of North America, which entered into force in 1994. The NAFTA Principles are National

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[51]The Convention on Multilateral Investment Guarantee Agency [MIGA] is submitted to the Board of Development on October 11, 1985, went into effect on April 12, 1988 and was amended by the Council of Governors of MIGA effective on November 14, 2010. Indonesia as a signatory Party in 1986.

[52]Treaty establishing the European Economic Community (TEEC), is an international agreement that brought about the creation of the European Economic Community (EEC), the best-known of the European Communities (EC). It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany and came into force on 1 January 1958.

Treatment, Most Favor Nation (MFN) Principle, and non-discriminatory treatment.

f. The OECD‟s Study and Draft on Multilateral Agreement on Investment of 1994.

g. The framework agreement for the ASEAN Investment Agreement 1998 as amended in 2001 [the Framework AIA].[53]

2. National Investment Law

Investment law is a legal branch consisting of a set of rules governing investment activities undertaken for the purpose of conducting business, investor rights and obligations, guarantees of the rights and interests of legitimate investors to encourage investment activities accompanied by the provision of incentives and related requirements and licenses with investment.[54] Thus the broad definition of investment law is a law that regulates not only limited to regulations that specifically regulate investment activities, but also includes laws governing the subject of legal investment actors, agreements to start investment activities, licensing investment activities as well as the process of the ongoing investment activity.

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[53]The decision of the Fifth ASEAN Summit held on 15 December 1995 to establish an ASEAN Investment Area (hereinafter referred to as "AIA"), in order to enhance ASEAN‟s attractiveness and competitiveness for promoting direct investment, was amend with Protocol to Amend the Framework Agreement on the ASEAN Investment Area in Ha Noi, 14 September 2001.

[54] National Assembly No. 59-2005-QH11 Law on investment Pursuant to the 1992 Constitution of the Socialist Republic of Vietnam as amended by Resolution 51-2001-QH10 Passed by legislature X of the National Assembly at Its 10th Session on 25 December 2010. On November 26, 2014, the Regulation has been amended by Law no. 64-2014-QH13 on Investment. In the new regulation no longer include the definition of investment law.

Investment law is not only limited in the civil law, but also includes public law, especially on the legal aspects of state administration such as related to licensing process of capital investment and accountability of state or government asset in investment, aspects of state law such as related to government process of Negara Indonesia become an investor and his legal actions during his investment activities and also relate to international legal aspects such as how the application of international legal principles relates primarily to the State or foreign governments as investment, as well as the most dominant international agreements affecting investment law in a country.

a. Principles and Objectives of Investment

The underlying principles of investment in Indonesia are:[55]

1) The principle of legal certainty; means the principle within a legal state that places laws and statutory provisions as the basis for any policies and actions in the field of investment.
2) The principle of transparency; means an open principle to the right of the people to obtain correct, honest and non-discriminatory information about investment activities.
3) The principle of accountability; means the principle that determines that every activity and the end result of the implementation of investment must

[55]Article 3 of Law no. 25 Year 2007 of Investment

be accountable to the public or the people as the highest sovereign of the state in accordance with the provisions of legislation.

4) The principle of equal treatment and does not distinguish the origin of the country; means the principle of treatment of non-discriminatory services under the provisions of legislation, whether between domestic investors and foreign investors or between the domestic investment and the investment of foreign countries.
5) The principle of togetherness; means the principle that encourages the role of all investors together in their business activities to realize the welfare of the people.
6) The principle of efficiency in justice; means the principle underlying the implementation of capital investment by promoting the efficiency of justice in an effort to create a fair business climate, conducive and competitive.
7) Principle of sustainability; meaning that the principle is planned to run the process of development through investment to ensure welfare and progress in all aspects of life, both for the present and future.
8) Principles of environmentally sound; meaning that the principle of investment is carried out by maintaining and prioritizing the protection and maintenance of the environment.
9) Principle of independence; meaning that the principle of investment is done by still prioritizing the potential of the nation and the state by not

closing themselves to the entry of foreign capital for the realization of economic growth.

10) The principle of balanced advancement and national economic unity; means the principle that seeks to maintain the balance of regional economic progress in the national economic unity.

Furthermore, the purpose of the implementation of investment in

1. Increasing national economic growth;
2. Creating employment;
3. Promote sustainable economic development;
4. Improve the competitiveness of the national business world;
5. Enhance national technology capability and capability;
6. Encouraging potential economic to be a real economic power by using data originating, both from domestic and abroad; and
7. Improve the welfare of the people.

In order to encourage the creation of a conducive national business climate for investment to strengthen the competitiveness of the national economy and accelerate the increase of investment,[57] the central government establishes the policy;[58]

1. Provide equal treatment for domestic investment and foreign investment with due regard to national interests. What is meant by *"equal treatment"* means that the government does not distinguish the treatment of investors

[56] Article 3 paragraph (2) Law No. 25 of 2007 of Investment
[57] Article 4 paragraph (1) Law No. 25 of 2007 on Investment
[58] Article 4 paragraph (2) Law No. 25 of 2007 on Investment

who have invested in Indonesia, unless otherwise provided by the provisions of legislation.

The principle of giving *"equal treatment"* is contained in Law no. 25 of 2007 where this provision is derived from the WTO principle, namely *National Treatment* (NT) is a provision that is treated to domestic investment that applies also to foreign investment and the principle of the *Most Favored Nations* (MFN) is an investment of a country must treated equally to WTO member countries. This is a consequence that must be faced and obeyed by the Indonesian government, given the involvement of Indonesia in various international cooperation related to investment, both bilaterally and internationally.

The Government of Indonesia shall provide equal treatment to all investments originating from any country which invests in Indonesia in accordance with the provisions of applicable legislation.[59] The enforcement of these provisions is an affirmation of the principle of non-discrimination contained in the WTO. However, the principle does not constitute investment of a country which is privileged under an agreement with Indonesia.[60]

What is meant by *"Privileges Right"* is among other privileges related to customs union, free trade area, common market, monetary union, similar institutions, and agreements between the Government of Indonesia and

[59] Article 6 paragraph (1) Law No. 25 of 2007 on Investment
[60] Article 6 paragraph (2) Law No. 25 of 2007 on Investment

bilateral, regional or multilateral foreign governments relating to certain privileges in the conduct of investment.[61]

2. Ensure legal certainty, business certainty, and security of business for the investor since the management until the end of investment activities in accordance with the legislation. Therefore, every investor is entitled to the certainty of rights, law and protection,[62] open information about his business sector, the right of service and various forms of amenity facilities in accordance with the provisions of legislation[63].
3. Opening opportunities for the development and protection of micro, small and medium enterprises, and cooperatives. The basic policy will be realized in the form of the *Rencana Umum Penanaman Modal* (RUPM).

b. Sources of Investment Law in Indonesia

Investment activities in Indonesia are regulated in Law no. 25 of 2007 concerning capital investment that supersedes Law no. 1 Year 1967 concerning foreign investment. In addition to stipulated in Law no. 25 Year 2007 on investment can be found in various laws and regulations, among others:

1) Government Regulation on No. 76 of 2008 concerning Guidelines for Incentives and Provision of Investment Facility in the Region;

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[61] Annex Article 6 paragraph (2) Law No. 25 of 2007 on Investment

[62] *"Certain of right"* means the Government ensures investors have access to right provided that the investors have fulfilled specified obligation. *"Certain of law"* means the Government ensures to place law and provisions of laws and regulations as the basic foundations in every measure and policy for investors. *"Certain of protection"* means the Government ensures investors have access to protection when carrying and investment activities.

[63] Article 14 Law No. 25 of 2007 on Investment

2) Presidential Regulation no. 76 of 2007 on Criteria and Requirements for Closed and Open Business Fields with Requirements for Investment;
3) Presidential Regulation no. 27 Year 2009 on One Stop Service in the Field of Investment;
4) Presidential Regulation no. 16 of 2012 on the General Plan of Investment;
5) Presidential Regulation no. 44 of 2016 concerning the List of Closed and Open Business Sectors with Requirements for Investment;[64]
6) Regulation of the Head of Investment Coordinating Board No. 6 of 2011 on Procedures for Implementation, Development and Reporting One Stop Service in the Field of Investment.
7) Regulation of the Head of Investment Coordinating Board No. 14 of 2015 concerning Guidelines and Procedure of Permit on Investment Principles;
8) Regulation of the Head of Investment Coordinating Board No. 15 of 2015 on Guidelines and Procedures of Licensing and Non-Licensing of Investment;
9) Regulation of the Head of Investment Coordinating Board No. 16 of 2015 on Guidelines and Procedures for Investment Facility Services;
10) Regulation of the Head of Investment Coordinating Board No. 17 of 2015 on Guidelines and Procedures for Controlling the Implementation of Capital Investment;

[64] This regulation is often referred to as the *"Daftar Negativ Investasi"* (Investment Negative List) because it is a guide for the identification of foreign investors who will invest in Indonesia which areas of business are open to investment or open to certain conditions.

11) Regulation of the Head of Investment Coordinating Board No. 6 of 2016 concerning Amendment to Head of BKPM Regulation no. 14 Year 2015 on Guidelines and Procedure of Permit Principle of Investment.

B. Definition of Investment and Investor.

The definition of investment itself is strong related with investors. The term investment comes from Latin, which is *investire* (wear), while in English, called investment. The definition should be seen as part of agreement 's normative contents, since they determine the extent and scope of application of other provisions.

1. Investment (Foreign Direct Investment)

There is no single, static conception of what constitutes foreign investment. Rather, the conception has changed over time as the nature of international economic relations has changed.[65]

In furtherance of their economic development policies, most countries have entered into one or more investment agreements that in various ways liberalize, promote, protect or regulate international investment flows. Such agreements typically apply to investment in the territory of one country by investors of another country. The meaning of the term is varied depend on the object and purpose of investment instruments.

With respect to the definition of "investment", instruments dealing with foreign investment fall in two broad categories:[66]

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[65]UNCTAD, International Investment Agreement: Key Issues, Vol. 1, p. 139.

a. Those that concern the cross-border movement of capital and resources, whether in view of its control or of its liberalization. Such instruments usually define foreign investment in narrow terms, insisting on an investor‟s control over the enterprise as a necessary element of the concept. Such instruments may list the differences between various types of investment of capital, though they may not necessarily apply different rules to each type. A classic definition employing this methodology is the one found in Annex A of the OECD Code of Liberalisation of Capital Movements (box 1).[67]

Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof:

A. *In the country concerned by non-residents by means of:*

1. *Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership or an existing enterprise;*
2. *Participation in a new or existing enterprise;*
3. *A loan of five years or longer.*

B. *Abroad by residents by means of:*

1. *Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;.*
2. *Participation in a new or existing enterprise;*
3. *A loan of five years or longer."*

b. Instruments mainly directed at the protection of foreign investment. Definitions of investment in such instruments are generally broad and comprehensive. They cover not only the capital (or the resources) that has crossed borders with a view towards the creation of an enterprise or the acquisition of control over an existing one, but most other kinds of assets

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[66] *Ibid*, p.142

[67] Code of Liberalisation of Capital Movements, Annex A, from UNCTAD, 1996a, volume II, p. 1

> of the enterprise or of the investor, such as property and property rights of various kinds, non-equity investment, including several types of loans and portfolio transactions, as well as other contractual rights, including sometimes rights created by administrative action of a host State (licenses, permits, etc.). Such a definition is found, for instance, in the World Bank-sponsored Convention Establishing the Multilateral Investment Guarantee Agency and in BITs.

OECD Benchmark Definition of Foreign Direct sets the similar standard for FDI, as follows:

> "Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a *strategic long-term relationship* between the direct investment and the enterprise which allows a *significant degree of influence* by the direct investor in the management of the direct investment enterprise. The *lasting interest"* is evidenced where the director investor owns at least 10 per cent of the voting power of the direct investment enterprise"

Many investment promotion and protection agreements concluded contain a broad definition of investment. A typical broad definition is that used in article 1(3) of the ASEAN Agreement for the Promotion and Protection of Investments.[68]

> *"The term „investment" shall mean every kind of asset and in particular shall include though not exclusively:*
> *a. movable and immovable property and any other property rights such as mortgages, liens and pledges;*
> *b. shares, stocks and debentures of companies or interests in the property of such companies;*
> *c. claims to money or to any performance under contract having a financial value;*
> *d. intellectual property rights and goodwill;*
> *e. business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."*

This definition indicates the breadth of the term "investment" as used in many such texts. initially, that investment includes "every kind of asset", suggesting that the term embraces everything of economic value, virtually without limitation.

2. Investor

Investment agreements apply typically only to investment by investors who qualify for coverage. The definition of the term "investor" is thus as important in determining the scope of an agreement as that of "investment". The definition of "investor" normally includes natural persons and legal persons (or juridical entities).[69]

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[68] ASEAN Agreement for the Promotion and Protection of Investments, article 1(3), from UNCTAD, 1996a, volume II, p. 294.

[69] UNCTAD, International Investment Agreement: Key Issues, Vol. 1, p. 150.

Commonly, the term "investor" is substituted by "nationals" to define natural persons, and "companies" to defined legal entities.[70] In the majority cases, the investor is a company but at times individuals also act as investors. The origin of the investment, in particular of the capital, is not decivise for the question of the existence of a foreign investment.

The definition might be found in the Convention on the International Centre for Settlement of Investment Disputes (ICSID Convention),[71] in article 25(1) which is states:[72]

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*

Article 25(2) of the ICSID Convention defines "national of another Contracting States" as:

a) ***any natural person*** *who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
b) ***any juridical person*** *which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration*

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[70] Ibid, p. 151

[71] Entered into force on October 14, 1966, after ratification by 20 States. As of April 10, 2006, this Convention has been ratified by 143 States. As the title of this ICSID Convention is a convention on the settlement of international investment disputes between States Parties to this Convention and citizens of other Contracting States arising out of international investment.

[72] Convention on the International Centre for Settlement of Investment Disputes, on article 25(1).

> *and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

So the relationship between investor and the capital receiver is very close because investor as the owner of money or capital will be willing to invest in recipient country, and the recipient country should be able to provide legal certainty, legal protection and security for investor in doing business.

a. The motive of the Host Country and Investors in Investing

The first reason a country invites foreign capital is to increase economic growth, in order to expand employment. With the entry of foreign capital, foreign exchange, encouraging non-oil exports to generate foreign exchange, transferring technology, building infrastructure and developing underdeveloped areas.[73] Various studies of foreign investment show that the motive of an enterprise to invest in a country is to seek profit.[74] Therefore, the presence of investors is quite instrumental in the economic development of a country where foreign direct investment runs its activities.

In general, the motive of a foreign company investing in a country is for profit, because:

1) Low Cheap Labor

[73] Erman Radjagukguk, Hukum Investasi di Indonesia Anatomi Undang-undang no. 25 tahun 2007 tentang penanaman modal, (Jakarta:Fakultas Hukum Universitas Al-Azhar Indonesia, 2007), p.13

[74] *Ibid*, p.1.

To reduce the cost of production, developed country companies invest in developing countries in order to earn cheap laborers.[75]

2) Close to Source of Raw Materials

Raw materials are a very important factor in the production process. Most developed countries have very limited raw materials, while developing countries have unexploited raw materials. For this reason, developed countries then make investments to move their industries to developing countries in order to benefit from the proximity of raw materials, in the sense that there is no need to import raw materials that will take time and cost.[76]

For Indonesia, the source of raw materials is an advantage that attracts foreign investors, the vast country and the abundance of natural resources. Natural resources are a source of raw materials to be managed into high-value products, such as rubber, cotton, petroleum, and minerals.

3) Find a New Market

Developing countries are a very effective market for marketing products from developed countries. With the new market will bring its own advantages for foreign investment countries.

Bayer (South East Asia) Managing Director Peter Glassel,[77] said that Indonesia is a major destination for investment and business development

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[75] John Robinson, Aspects of development dan Underdevelopment, (London; Cambride University Press, 1979).

[76] Erman Radjagukguk, Hukum Investasi di Indonesia Anatomi Undang-undang no. 25 tahun 2007 tentang penanaman modal, (Jakarta:Fakultas Hukum Universitas Al-Azhar Indonesia, 2007), p.10

[77] *Ibid*

in Southeast Asia because it has an area and population above 210 million is an attractive incentive for investors.

4) Royalty from Technology Transfer

As a country that has an advantage in the field of technology, developed countries will get compensation from users of these technologies. State investors will benefit from the technology transfer process through the sale of brand rights, patents, trade secrets, industrial designs. Technology transfer includes[78]:*(1) product; (2) production process; (3) machinery. In the present context, technology is categorized to include hardware technology machinery and complete plants, and so forth and software technology, training, management and marketing.*

5) Incentives for investors.

Developing countries in general provide incentives to investors to invest in their countries. Such incentives are provided to attract investors. For example, Indonesia provides various incentives, including tax holidays, tax incentives, transfer and repatriation of capital.

b. Obligations, rights, facilities and responsibilities of investors.

Rights and obligations are an inseparable unity. The granting of some rights and facilities is actually created for investors to invest in Indonesia and aims to ensure investment activities in Indonesia run well.

1) Liabilities of Investors

[78] *Ibid*

In Law no. 25 of 2007 concerning the obligation of investors to be regulated in Article 15 which provides that every investor has an obligation to:

a) Applying the principles of good corporate governance

Good Corporate Governance is a pattern of relationships, systems, and processes used by corporate organs (Board of Directors, Board of Commissioners, GMS) to provide value added to shareholders on an ongoing basis over the long term, while taking into account other stakeholders based on legislation and norms. Applies.[79]

The Good Corporate Governance Principles which are also embraced by OECD and some other institutions place the principle of responsibility as a pillar of Good Corporate Governance.

The principle of responsibility is conformity in the management of the company against sound corporate principles and applicable legislation including taxation, industrial relations, environmental protection, occupational health / safety, payroll standards and fair competition.[80]

Therefore, every investor is obliged to apply the principles of good corporate governance. In the case of investment is a limited liability company listed on a stock exchange or an open company is

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[79] Siti Anisah and Lucky Suryo Wicaksono, *Hukum Investasi* (Yogyakarta: UII Press), p. 110

[80] Ridwan Khairandy dan Camilia Malik, *Good Coorporate Governance: Perkembangan Pemikiran dan Implementasinya di Indonesia* (Yogyakarta: Kreasi Total, 2007, p. 60.

obliged to undertake disclosure principle as part of the implementation of Good Corporate Governance.[81]

b) Implement Corporate Social Responsibility (CSR)

CSR is very closely related to sustainable development, this is related to a company in carrying out its activities must base its decisions not only base on financial factors, such as profits or dividends but also must be based on social and environmental consequences for now and for the long term.4 CSR is not only interpreted as simply a responsibility because of its voluntary nature, but must be done as mandatory in the meaning of liability because it is accompanied by sanctions.

Both domestic and foreign investors must submit and comply with CSR requirements as legal obligations if they want to invest their capital in Indonesia. Implementation of CSR is a form of sustainable development and create an investment climate for investors to realize the welfare of society can be achieved.

The regulations on Corporate Social Responsibility are contained in Law no. 40 of 2007 concerning Limited Liability Company in article 74 and also affirmed by article 15 letter b Law no. 25 Year 2007 concerning capital investment which stipulates the obligation of every investor to perform Corporate Social

[81] Article 1 number 25 Law No. 8 of 1995, about the Capital Market regulate disclosure principle. With the principle of openness in the capital market, the public company can be accountable for information, financial reports, and information disclosure about the environment to the public.

Responsibility where attached to each subject of investor (either in the form of legal entity or non-legal entity) conducting investment activities to keep creating a harmonious, balanced and corresponding relationship with environment, values, norms and culture of the local community. The law provides sanctions against investors who do not carry out their obligations to implement CSR, which can be subject to administrative sanctions or other sanctions in accordance with the provisions of legislation.

c) Make a report on investment activities and submit to the Investment Coordinating Board (BKPM)

The report of investment activities which includes investment developments that include investment activities conducted by the company in each location and investment business field, except for trading business and encompasses constraints faced by investors submitted periodically to BKPM and local government responsible in the field capital investment. For companies that engage in investment activities in the field of trading business, LKPM is sufficient based on the location that has been declared in principle permit.

d) Respect local traditions and culture around the location of investment business activities.

Given that Indonesia is a country with diverse traditions and cultures, in order to create a harmonious relationship between

investors and local residents, investors must take account of the growing norms or traditions in the region.

e) Comply with all laws and regulations.

In conducting investment activities in Indonesia, the law provides an obligation for investors to comply with all rules contained in the laws governing and / or relating to investment.

2) Investor rights

In Article 14 of the Capital Investment Law there are a number of rights granted by the government to investors who invest their capital in Indonesia, namely:[82]

a) Right to obtain certainty of rights, legal certainty and protection certainty.

The right to obtain certainty of rights is the existence of government guarantees for investors to acquire rights as long as investors have carried out the prescribed obligations. Furthermore, the right to obtain legal certainty is the guarantee of the government to place laws and statutory provisions as the main basis in every action and policy for investors. Finally, the right to certainty of protection is a government guarantee for investors to obtain protection in carrying out investment activities.

b) Right to obtain open information about the field of business undertaken.

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[82] Siti Anisah dan Lucky Suryo Wicaksono, *Hukum Investasi* (Yogyakarta: FH UII Press), p. 11

Investors are granted the widest possible access by the government in relation to the information required and related to the business sector undertaken, in particular in relation to regulatory and licensing matters.

c) Right of service.

Investors are entitled to the convenience of services and / or permits to obtain land rights, immigration service facilities, import licensing facilities. Therefore, the government has established Investment Coordinating Board to carry out the tasks and coordination of the implementation of policies in investment, establishing norms, standards and procedures of investment, promoting capital investment in Indonesia, helping to solve various obstacles and consultation problems faced by investors and carry out services one-door integrated system. With that, investors do not need to go to several agencies or institutions to obtain the information needed with respect to the plan of investment.

The one-stop coordination and service function of BKPM is intended to enable the agency to act as a "one stop investment service center".[83]

d) The right to obtain various forms of ease of facilities in accordance with the provisions of legislation.

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[83] Jonker Sihombing, *Hukum Penanaman Modla di Indonesia,* Bandung: PT Alumni, p. 100

The Government has an obligation to provide facilities to investors investing include expansion of business and new capital investment.

3) Facilities and Incentives for Investors

In order to stimulate investment in Indonesia, the government provides various facilities and incentives to investors investing in Indonesia, either new investors or investors who will expand their business.[84] In accordance with Law no. 25 Year 2007 has provided various facilities and incentives to investors by providing tax incentives, facilities related to land rights, immigration service facilities and import licensing facilities.

For investors who will undertake new capital investment, they will obtain investment facilities if they meet at least one of the criteria as stipulated in Article 18 paragraph (3), namely:

1. Absorbs a lot of manpower;
2. Includes high-priority scale;
3. Including infrastructure development;
4. Transfer of technology;
5. Conducting industry prionir;
6. Being in remote areas, underdeveloped areas, border areas, or other areas deemed necessary;
7. Maintain environmental sustainability;

[84] Article 18 paragraph 3 Law No. 25 of 2007 about Investment.

8. Carry out research, development and innovation activities; Associated with the form of facilities and incentives provided by

the government for foreign investors who invest their capital in Indonesia, include:[85]

a) Tax Facilities

Investors who extend business and investors who make new investments and meet the criteria set forth in Article 18 paragraph (3) shall obtain tax facilities by the government pursuant to article 19, granted in accordance with national industry policies established by the government the arrangement is further stipulated by Regulation of the Minister of Finance, where the facilities are in the form of:

1. Income Tax through deduction of net income up to a certain level to the amount of investment made within a certain time;
2. Exemption or relief of import duty on the import of capital goods, machinery, or equipment for production purposes not yet produced domestically;
3. Exemption or relief of import duties on raw materials or auxiliary materials for the purpose of production for a certain period of time and certain conditions;
4. Exemption or suspension of value added tax on the import of capital goods or machinery or equipment for production purposes

[85] Dhaniswara K. Harjono, *Hukum Penanaman Modal, Tinjuan terhadap Pemberlakuan Undang-undang No. 25 Tahun 2007 Tentang Penanaman Modal* (Jakarta: PT. Raja Grafindo Persada), p. 138

that have not been produced domestically for a certain period of time;

5. Accelerated depreciation or anortization; and
6. The tax relief of the earth and buildings, especially for certain areas, on a particular region.

The exemption or deduction of corporate income tax in a certain amount and time can only be given to new investors who are prioner industries, ie industries that have broad linkages, provide high added value and externality, introduce new technology, and have strategic value for the national economy.[86]

A waiver or exemption facility is granted to an ongoing investor who replaces machinery or other capital goods.[87]

b) Land Rights Related Facilities

Every investor who will invest in Indonesia will be given the ease of providing services and / or licensing of land rights. Article 22 of Law No. 25 of 2007 relating to land rights and land use to foreign investors determines that for land rights in the form of rights to buildings, right to use and use rights under applicable laws and regulations.[88] There are five requirements for granting rights to land, which can be given and extended in advance for investment activities,

[86] Article 18 paragraph 5, Law No. 25 of 2007, Investment Law

[87] Article 18 paragraph 6, Law No. 25 of 2007, Investment law.

[88] the regulation in question is the law no. 5 of 1960 on basic agrarian stipulations, where article 55 paragraph (1) is stipulated that the right to use the building and the right to operate is only open to the possibility of being entitled entirely with foreign capital, if the right is made possible by the law regulating national development.

namely investment.[89] Conducted in the long run and linked to changes in the structure of the Indonesian economy more competitive;

1. With the level of risk of investment that requires a long-term payback in accordance with the type of investment activity undertaken risk of return on the old investment;
2. Does not require large area;
3. Using state land; and
4. Do not disturb the sense of community justice and do not harm the public interest.

The land rights granted by the government to a foreign investment company are:

1) Building Rights (HGB)

Right to use the building is the right to build and owns buildings on the ground to establish and owns buildings on land which is not his own with a maximum period of 30 years and the possibility to be extended to a maximum of 20 years.[90] Foreign investors may try for 50 years after obtaining the land with the right to use the right to operate in accordance with the stipulated

[89] H. Salim dan Budi Sutrisno, *Hukum Investasi di Indonesia*, (Jakarta: PT. Raja Grafindo Persada), p. 315

[90] Article 35 paragraph (1) of Law no. 5 of 1960 juncto Article 25 of Government Regulation no. 40 of 1996 on Right to Build and Use Right.

time frame.[91] Building rights of the rights holder can be extended or renewed for 30 years, if they fulfill the following:[92]

1. The land is still being used properly, in accordance with the circumstances, nature and purpose of granting such rights;
2. Terms of granting rights are fulfilled;
3. The land is still in accordance with the Regional Spatial Plan concerned; and
4. Rightsholders still qualify as rights holders.

Land that can be granted with Building Utilization Right is state land, management rights land, and property rights land.[93]

The disposal of the Right to Build is the non-performance of the decision on the grant of building rights obtained by the holder of building rights, including:[94]

1. The expiration of the period specified in the decision of grant or renewal;
2. Canceled its rights by authorized officers before their expiry due to: non-fulfillment of obligations of rights holders and / or violation of provisions; non-fulfillment of the conditions or obligations set forth in the agreement on the granting of rights

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[91] Siti Anisah dan Lucky Suryo Wicaksono, *Hukum Investasi* (Yogyakarta: FH UII Press), p. 121

[92] Article 26 paragraph (1) of Government Regulation No. 40 of 1996

[93] Article 21 of Government Regulation No. 40 of 1996

[94] Article 40 of Law no. 5 of 1960 on Basic Agrarian Stipulations and article 35 of Government Regulation No. 40 of 1996.

to the building; a court decision that has had permanent legal force.

3. Released voluntarily by the rights holder before the term expires;
4. Removed by law number 20 of 1961 concerning the revocation of land and the objects on it;
5. Abandoned;
6. The land is destroyed;
7. No longer qualify as a holders of building rights.

2) Cultivation Rights (Hak Guna Usaha)

Cultivation Rights is the right to cultivate land directly controlled by the state, within a certain period of time. The subject of Cultivation Rights is an Indonesian citizen and a Legal Entity.[95] Individually, a foreigner can‟t use Business Use Rights, but institutionally as in a legal entity may have the Right to Use Business. The land that can be granted with Cultivation Rights is only state land.[96]

The term of the right to operate is 25 years and can be extended for a maximum period of 35 years.[97] Thus, the total period of 60 years for the Cultivation Rights. The right to operate upon the application of the right holder may be renewed or

[95] Article 30 of Law no. 5 of 1960 and article 2 of Government Regulation No. 40 of 1996

[96] Article 28 of Law no. 5 of 1960 and article 4 of Government Regulation No. 40 of 1996

[97] Article 4 of Government Regulation No. 40/1996

renewed for 35 years after the term of such entitlement has expired. The application for extension of the period of the Rights of Business shall be filed no later than two years before the expiry of the term of the Cultivation Rights. The removal of the Cultivation Right is the non-validity of the decision on the grant of cultivation rights obtained by the holder of building rights, including:

1. The expiration of the period specified in the decision of grant or renewal;
2. Canceled its rights by authorized officers before their expiry due to: non-fulfillment of obligations of rights holders and / or violation of provisions; a court decision having a permanent legal power;
3. Released voluntarily by the rights holder before the term expires;
4. Revoked under the law no. 20 of 1961 on the revocation of land rights and objects thereon;
5. Abandoned;
6. The land is destroyed;
7. No longer qualify as a holder of the right to operate.

3) Right to Use

Right to use is the right to use and or to collect the proceeds of land directly controlled by the state or the land of another

person's property to utilize or reap the proceeds from the right to use the land.[98]

The Subject Rights of Use includes; Indonesian citizen; Foreigners domiciled in Indonesia; Foreign Legal Entities that have representation in Indonesia.[99] And land that can be granted with Right to Use is state land, management rights land and property rights.[100]

Duration of land use to foreign investors is given longer in Law no. 25 of 2007 concerning investment as set forth in Article 22 that Rights Use may be granted with the amount of 70 years by way of granted and extended in advance at once for 45 years. The right to use the building on the rights holder's application may be renewed or renewed for 30 years if eligible:[101]

1. The land is still being used properly, in accordance with the circumstances, nature and purpose of granting such rights;
2. Terms of granting rights are fulfilled;
3. The land is still in accordance with the Regional Spatial Plan concerned; and
4. Rightsholders still qualify as rights holders.

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[98] Article 41 of Law no. 5 of 1960

[99] Article 42 of Law no. 5 of 1960 and Article 39 of Government Regulation No. 40 of 1996

[100] Article 43 of Law no. 5 of 1960 and Article 40 of Government Regulation No. 40 of 1996

[101] Article 41 of Law no. 5 of 1960

Land that can be granted with Right to Use is state land, management rights land, and property rights.[102] The disposal of the Right to Use is the non-validity of the decision on the grant of building rights obtained by the holder of building rights, including:[103]

1. The expiration of the period specified in the decision of grant or renewal;
2. Canceled its rights by authorized officers before their expiry due to: non-fulfillment of obligations of rights holders and / or violation of provisions; non-fulfillment of the conditions or obligations set out in the agreement on granting the right to use; a court decision that has had permanent legal force.
3. Released voluntarily by the rights holder before the term expires;
4. Revoked under the law number 20 of 1961 on the revocation of land rights and objects thereon;
5. Abandoned;
6. The land is destroyed;
7. No longer qualify as a right holder.

[102] Article 43 of Law no. 5 of 1960 and article 41 of Government Regulation No. 40 o f 1996

[103] Article 55 to Article 58 of Government Regulation Number 40 Year 1996

c) Immigration Service Facilities.

Immigration facilities constitute convenience provided to investors in connection with the traffic of persons entering or outside the territory of the Republic of Indonesia (Article 1 point 1 of Law No. 9 of 1992 on Immigration). Article 23 Investment law provides facilities for services and / or licensing of immigration facilities to:

1. Foreign investment requiring foreign workers in investment realization;
2. Capital investment requiring temporary foreign labor in the framework of machine repair, temporary tools for repair of machinery, other production aids, and after sales service; and
3. Candidates of investment that will conduct investment assessment.

Foreign investors investing in Indonesia are provided facilities in the field of immigration as regulated in Article 23 paragraph (3) of Law number 25 of 2007, in the form of:

1. The granting of limited stay permits to foreign investors for two years;
2. The granting of limited residence permit status to investors to a residence permit can be made after living in Indonesia for two consecutive years;
3. The grant of reentry for multiple trips for holders of limited stay permits and a validity period of one year shall be granted for a

maximum period of 12 months commencing from the time the residence permit is granted;

4. The granting of reentry permit for multiple trips for holders of limited stay permits and with a validity period of two years shall be granted for a maximum period of 24 months since from the time the residence permit is granted;
5. Re-entry permit for multiple trips for holders of permanent licenses is granted for a maximum period of 24 months from the date the permanent residence permit is granted.

The competent authority to grant limited residence permit and transfer of permanent resident status is the Directorate General of Immigration and the issuance of such license on the recommendation of the Investment Coordinating Board.

d) Import Licensing Facility

Import licensing facility is a convenience provided to investors to import goods into Indonesia as set forth in article 24 of Law no. 24 of 2007, import licensing facilities are granted for import:

1. Goods which, as long as they are not contradictory to the provisions of laws and regulations governing trade in goods;
2. Goods that do not negatively affect the safety, security, health, environment and morals of the nation;
3. Goods in the relocation of factories from abroad to Indonesia; and
4. Goods capital or raw materials for own production needs.

C. Indonesia-Japan Economic Partnership Agreement

Japan is one of the countries that experienced rapid economic growth. In the latter half of the 1960s, Japan which previously experienced a balance of payments deficit experienced a continuous surplus in line with the rapid economic growth that is projected in heavy industry and petrochemicals. Through the growth of surplus funds, Japan began investing surplus funds outside Japan, especially Indonesia. The investment of surplus funds is intended to obtain natural resources to meet the needs of the industry, and to take advantage of cheap power in Indonesia as well as to maintain broad market centers in the territory of Indonesia, as well as seek out increasingly difficult industrial places in Japan.[104]

Japanese investment in Indonesia began when the New Order government issued Law no. 1 of 1967 concerning foreign investment to attract foreign investment in Indonesia with minimal requirements. Since the opening of investments in Indonesia, Japan has accelerated the pace of investment growth in Indonesia.[105]

The development of Japanese investment in Indonesia is also due to government support from both sides. From the Indonesian government that provides stimulus to the creditor countries to provide investment in Indonesia.[106]

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[104] Nasution. 2013, "Investasi Asing Jepang di Indonesia Masa Orde Baru Tahun 1967-1974", Avatara, e-journal Pendidikan Sejarah Volume1, No 2, May. P.231

[105] *Ibid*, p.234

[106] *Ibid*

Indonesia Japan Economic Partnership Agreement abbreviated as IJEPA is a bilateral economic cooperation agreement made by the Government of Indonesia with the Government of Japan. This agreement is the first bilateral economic partnership agreement made by Indonesia.

In this agreement, the two countries have agreed on many economic matters, such as trade in goods, trade in services, investments, Intellectual Property Rights, and energy and mineral resources. The agreement also includes eleven negotiating groups, namely *Trade in Goods, Rules of Origin, Customs Procedures, Trade in Services, Investment, Movement of Natural Persons, Government Procurement, Intellectual Property Rights, Competition Policy, Energy and Mineral Resources,* and *Cooperation.*

This agreement is valid after the Government of Japan and the Government of the Republic of Indonesia have exchanged diplomatic notes which states that, through their respective national legal procedures, this agreement is in effect. In this agreement adopted some general principles of law, as follows:

1. *National Treatment,* is one of the principles set forth in Article in General Agreement on Tariffs and Trade (GATT), a principle which states that The volume of an imported product should be treated the same as the domestic product.[107]
2. *Most Favoured Nations Treatment*, is one of the principles in international trade set forth in Article I GATT, a principle which states that a new trade

[107] Huala Adolf, *Hukum Perdagangan faternasional* (Jalraita: PT Raja GrafindoPersada,2006), p. 111.

policy is implemented on a non-discriminatory basis. According to this principle a state is committed to giving other states equal treatment in the implementation of import and export policies and in respect of other costs.[108]

3. *Transparency*, is one of the principles that obliges states to be open or transparent to various trade policies so as to facilitate business actors to conduct trading activities.[109]

D. Investment according to Islamic perspective

Islam teaches its people to try to get a better life in the world and in the hereafter. Gaining a good life in this world and the hereafter that can guarantee the achievement of the welfare of the birth and the mind (*falah*).[110] One way to achieve welfare is to conduct investment activities.

The investment comes from the English investment of the base invest[111] which means to save. In Arabic the investment is called istitsmar[112] which means "to bear fruit, grow and increase in number." In Webster's New Collegiate Dictionary, the word invest is defined as to make use of for futures benefits or advantages and commit (money) in order to earn a financial return. the word investment is defined as the outlay of money for income or profit, whereas in the

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[108] *Ibid*, hlm. 108.

[109] Antonius Yudi Triantoro, *et aL*, SeJkilas WTO *{World Trade Organization)* (Jakarta: Direktorat Perdagangan, Perindusfriaa, Investasi, dan Hak Kekeayaan Intelektual, Direktorat JenderaJ Multilateral, Departeraen Luar Negeri Rl), p.4.

[110] Abdul Aziz, Manajemen Investasi Syariah (Bandung; Alfabeta, 2010), hlm., 14

[111] Ahmad Antoni K. Muda,Kamus Lengkap Ekonomi. (tk;Gitamedia Press, 2003), p. 195.

[112] Bank Indonesia, Kamus Istilah Keunagan dan Perbankan Syariah, p. 30.

dictionary of financial capital market terms, investment is defined as the investment of money or capital in a company or project for the purpose of obtaining profit,[113] although sometimes profit or loss because investment is a type of activity not sure.

The investment activity of an active believer places priority on projects that will serve to promote justice by facilitating the empowerment of needy and disadvantaged economies consistent with the principle of humanity. Investing in projects with high job creation potential, has enormous benefits in improving health and education and investment projects that eliminate infrastructure bottlenecks and improve technology. From an Islamic perspective, investments that reduce poverty, create jobs, improve health and education, especially for the segment of the needy population where economic growth and equity are needed to complement each other.[114]

In Islamic law, investment is called mudaraba, which is to give money capital to people who trade so that will get a percentage of profit. The scholars agree that this investment system is permissible. The legal basis of this system is ijma ', which is the agreement of the scholars in establishing a law in religion based on the Qur'an and hadith in a case that occurred. A Muslim who invests his money will not be taxed on the amount he has invested, but is taxed on the profits generated from his investments. Because, in an Islamic economy, all unutilized assets are taxed, so Muslim investors would be better off exploiting their funds for investment rather than keeping their funds in an untapped form.

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113 Zainal Arifin, Dasar-Dasar Manajemen Bank Syariah (Jakarta: Alfabet, 2003), p. 7

114 http://myviewpoint2u.blogspot.co.id/2009/04/investment-from-islamic-perspective.html, access on 3 May 2018

From all the above descriptions can be concluded that the Islamic view of investment is very important and necessary preparation, this is implied in Al-Qur'an letter Al-Hasyr 18 which calls on the believers to prepare for tomorrow one of the preparations that if seen from an economic perspective is an investment. The meaning of lafadz means tomorrow morning, the day after (futures). Investment is a form of economic activity. For every treasure is zakat. If the treasure is silenced (not productive) then gradually will be consumed by zakatnya, one of the wisdom of zakat is to encourage every Muslim to invest his property. The treasure invested will not be consumed by zakat unless its profit alone. In order to avoid un-Islamic investment, every self must know the business ethics in investing, because ignorance and lack of knowledge about investment in Islam sometimes make people origin only in investing their wealth and sometimes fall on the act of violating the Shari'a.

In this case it is meant that if one wants to invest should pay attention to the ethical norms and morals which are prohibited and which is allowed by religion, In addition must also be subject to and comply with positive laws governing the existence of investments that are not contrary to Al-quran, Al-hadith, ijmak and qiyas namely Law no. 21 of 2008 concerning Sharia Banking. The concept of Islam shows that all material possessions and all means of production are essentially God's property, whereas human beings are limited to getting the mandate to manage them to be useful for their lives. Islam as a religion that sees investment business activities as a manifestation of human existence as the ruler of the earth (*khalifah fil ard*) and the implementation of the meaning of

worship to the Creator, strongly denounced the resources that are not utilized properly.

CHAPTER III

IMPLEMENTATION OF NATIONAL TREATMENT PRINCIPLE IN INDONESIA-JAPAN ECONOMIC PARTNERSHIP AGREEMENT (IJ-EPA)

A. The Implementation of National Treatment Principle in Investment Under Indonesia-Japan Economic Partnership Agreement (IJ-EPA)

The implementation of the principle of national treatment is not without implications. National treatment and national interests are equally important for the development of a country where it must go hand in hand and balance. As a sovereign country, Indonesia has the same rights and obligations as other countries. Thus, in terms of freedom of contract, Indonesia can propose to get mutual benefits in preparation for bilateral investment agreements as stated in the Investment Under Indonesia-Japan Economic Partnership Agreement (IJ-EPA). The benefits can be achieved by both foreign investors and Indonesia as the host country. This can be seen from the principle of national treatment clause. Although there are exceptions contained in the clause, Indonesia as a host country must be able to give full attention to the application of the principle of national treatment.

1. National Treatment Principle in Investment Law

The United States and some European countries before World War II, had set the international standards for the protection of foreign investment to accommodate the needs of developed countries and their investors which were applied to various aspects of the law. These include arrangements on the

protection of the rights of foreign investors, dispute resolution, human rights and aliens, and protection in the event of an uprising or disorder.[115] The developed countries contend that the regulation of the standard of treatment of foreign investors shall be obeyed by all countries since the regulation of standard of treatment as a minimum standard that must be applied internationally.[116] The standard of treatment requires equal treatment between foreign investors and domestic investors.

The existence of standard treatment to foreign investors encourage a variety of debates because of differences in view between developed and developing countries. The existence of the standard of treatment to foreign investors could make the domestic investors left their own country,[117] since the standard of treatment is likely to benefit more to the foreign investors and create unbalance treatment between the foreign companies and domestic companies. Developing countries argue that the entry of foreign investment is seen as a threat and a new form of colonialism in the economic field. In addition, developing countries always hold to the reasons of state sovereignty and independence within the country. Meanwhile the developed countries emphasize the importance of transparency of capital and the removal of policies that become obstacles to foreign investment.

Developing countries as host country recipients are no longer see the entry of foreign investment as a form of threat. This is an evidence that the policies of

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[115] Huala Adolf, Perjanjian Penanaman Modal dan Perjanjian Perdagangan Internasional, p. 23

[116] *Ibid*, p. 24.

[117] OECD, "Fair and Equitable Treatment Standart in International Investment Law". OECD *Working Papers on International Investment* (OECD Publishing, 2004), p. 20.

developing countries that seek to attract foreign investment into their country is a shift of paradigm. Developing countries argue that foreign investment can provide working capital and brings positive effect on the financial, science, capital and market connections.[118]

The existence of international trade agreements is related to investment since the Uruguay Round of 1986-1994 international trade and investment are two inseparable disciplines. The national regulations of the member countries in the field of investment shall not be contrary to international trade agreements related to investment. The Non-Discrimination Principle is one of the basic principles of the WTO system and it has been discussed in relation to investment. The rationale behind the need to apply this principle of non-discrimination is that the host countries are using legitimate reasons to treat different investors the same.[119] Meanwhile international customary law does not require host country to ensure treatment of non-discrimination against foreign investors who wish to develop activities within their territory or even to those who have established their business activities.[120] The main objective of MFN's obligation is to ensure equal opportunity for similar imported goods, or similar export goods to all WTO members.[121]

In article 1 of GATT, the principle of MFN is that "members are bound to provide the products of each member of the tariff treatment". In addition, Article

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[118]William A. Fennel and Joseph W. Tyler, *Trade and International Investment from GATT to Multilateral Agreement on Investment* (1995), p. 23.

[119]Huala Adolf, Perjanjian Penanaman Modal Dalam Hukum Perdagangan Internasional

[120]*Ibid*

[121] Peter van den Bossche, Daniar Natakusumah, Josep Wira Koesnaidi, *Pengantar Hukum WTO (World Trade Organization)* (Jakarta: Yayasan Obor Indonesia, 2010), p.117

III of GATT states that the National Treatment principle that “once imports have entered a market, they are treated no less favorably than equivalent domestically produced goods”. Thus, it can be concluded that the two principles require the participants of the WTO to respect against each other (the principle of non-discrimination), and the principle of MFN is an action on the border while National Treatment Principle is valid internally after the product goes into the market.[122]

Argentine lawyer and diplomat Carlos Calvo, made a statement later known as the Doctrine of Calvo, the doctrine is also referred to as the principle of national treatment in which Calvo argued that "it is certain that aliens who establish themselves in a country have the same right to protection as the nationals, but they ought not to lay claim to a protection more exrendend ..”[123] Furthermore, Calvo described his basic thinking on the principle of national treatment, namely:[124]

1. Equality, sovereignty and independence of governments are paramount rights of the States;
2. States, being equal, sovereign and independent, have the right to expect non-interference from other states;

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[122] See also Understanding The WTO: The Basics-Principle Of Trading System, available at https://www.wto.org/english/ thewto_e / whatis_e / tif_e / fact2_e.htm (last accessed July 15, 2018). To facilitate the understanding of this principle, under the WTO agreements, countries can not discriminate against their trading partners. When given special treatment such as the reduction of import duty to a country, the importing country shall give equal treatment to other WTO member countries.

[123] Carlos Calvo, *Derecho International Teorico y Parctico*, Buenos Aires, 1868 (here after is called Calvo II)

[124] Lucia Druetta, Assistant ed., *Carlos Calvo (Argentine, 1824-1906)*, International Judicial Academy, http://www.judicialmonitor.org/archive_winter2013/leadingfigures.html, access on 30 June 2018 at 1.24 PM.

3. Aliens have to abide by the local law of the state wherein they reside without invoking diplomatic protection of their governments in the prosecution of claims arising out of contracts, insurrection civil war or more violances.

The Convention on Rights and Duties of States made by most Latin American countries and signed by its members at The Seventh International Conference of American States held in Montevideo in 1933 also implement the National Treatment Principles which are incorporated in Article 9 of the Convention with the provisions as follows:[125]

> *The jurisdiction of States within the limits of international territory applies to all inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals.*

The principle of national treatment is one of the principles adopted by GATT in which it is now taken over by the WTO and come one of the attachments and regulatory framework for new areas of the WTO agreement.[126]

With the establishment of the WTO the national principles of treatment are also applied by the WTO even they became one of main principle in the WTO as it is listed in almost all core areas of the WTO agreement.[127] One of them is the Agreement on Trade-Related Investment Measures (TRIMs) that governs investment. In this regard, GATT lists the principle of national treatment into

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[125] Huala Adolf I, Op.Cit., H. 204; Edwin Borchard, "The Minimum Standard of the Treatment of Aliens," Paper 3469, p. 445, December 12, 2011, Faculty Scholarship Series, file downloaded from http://digitalcommons.law.yale.edu/fss_papers/3469, visited on 30 June 2018.

[126] Huala Adolf, *Hukum Perdagangan Internasional*, PT Rajawali Grafindo Persada, Jakarta, 2011, p. 97

[127] Henrik Horn, *National Treatment in the GATT*, Research Institute of Industrial Economics, Sweden, 2006, p.2

Article III of its provisions in which it consists of 10 verses that are correlated to one another. The content of article III GATT on national treatment basically leads to the form of actions that are considered contrary to the principle of national treatment. Article III: 1 GATT in this case contains the following provisions:

> *The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulation requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

The principle of *national treatment* is essentially about giving "the same treatment". With regard to the fundamental, "equal treatment" implied in the provisions of Article III paragraph 1 of GATT is indicated in terms of providing the equal protection to domestic products and imported products. This equal protection should be undertaken in the absence of internal measures of both of them domestic and imported products as a way to better protect the domestic product itself.

The internal measures of GATT are widely applicable. First, concerning all forms of action related to the determination of taxes and other charges, as well as legislation, arrangements, and legal requirements affecting the sale, purchase, transportation, distribution or use of a product. Second, an internal quantitative arrangement that requires mixing, processing, and the use of a product in a certain amount or proportion. Article III paragraph 2 GATT further explains in respect of the provisions contained in Article III: 1 GATT. In this case, Article III: 2 GATT contains the following provisions:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set fort in paragraph 1.*

According to Article III paragraph 2 of GATT, the act of a country is contrary to the principle of *national treatment* when the country implements the product of internal tax import or internal charges which exceeds imposed on the domestic product. However, the fundamental element that must be fulfilled in order that a country's actions can be said to be contrary to the principle of national treatment under the provisions of Article III paragraph 2 of this GATT is that the action must be in a position where the internal tax or internal charges imposed by the state on the imported product exceed more than those imposed on similar domestic products (*like product*).

Article III paragraph 4 GATT emphasizes the concept of national treatment principle in a slightly different perspective. The provision of Article III paragraph 4 of GATT in this case contains the following provisions:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charge which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

The phrase of *"treatment no less favorite"* as set forth in the foregoing provision, basically it has intention that in the case of a member country of the WTO agreement importing products from other member countries of the WTO agreement. The importing country shall be obliged to provide such imported products treatments that are not less favorable as given to similar domestic products. The principle of national treatment is also the framework of the rules in the TRIMs which impose provisions in the GATT into the field of foreign investment, especially in the field of trade in goods, which is regulated in Article II TRIMs. It mentions that any form of action that is considered inconsistent with the principle of national treatment it is not in accordance with paragraph 4 of GATT paragraph III.

In the Annex section of the TRIMs agreement the illustrative list is listed to provide clarity with regard to the form of state action that is considered inconsistent with the principle of national treatment under paragraph 4 of GATT paragraph 4, among other are the local content requirement and trade balancing policy. Local content requirement occurs in cases where the state, for the purpose of obtaining profit, then establishes a policy by enacting national laws or regulations in the form of requirements requiring foreign investors to purchase or use domestic products or sources of any kind originating in the country in the case of domestic investment.[128] Meanwhile, trade balancing policy according to illustrative list will occur in the event that the purchase and use of imported

[128]Dwi Martini, "Prinsip National Treatment dalam Penanaman Modal Asing diIndonesia (Antara Liberalisasi dan Kepentingan Nasional)," 5 Desember 2012, http://dwimaret.blogspot.co.id/2012/12/prinsip-national-treatment-dalam.html, access on 30 June 2018 at 3.42 PM.

products by foreign investors investing in the country depends on the quantity or value of the exported local products. An element indicating that a country's policy is a form of trade balancing policy action, namely:[129]

1. The use or purchase of imported goods by foreign investors shall only be justified if the foreign investor concerned has imported products using domestic importers;
2. The amount of imported goods which may be used by foreign investors shall be limited or limited to a certain amount based on the volume or value of the local product exported by such foreign investor.

The principle of national treatment according to the TRIMs thus implies that this principle requires the state. Especially for the member states of the WTO agreement to no longer enact laws or any national legislation that discriminates between FDI and domestic investment and with respect to investment in the field of goods trade. According to UNCTAD, the national treatment standard for treatment of FDI in the host countries[130] which seeks to grant foreign investors treatment comparable to domestic investors operating in the host state.[131] Rudolf Dolzer mentioned, "The clauses state that the foreign investor is accorded treatment is no less favourable than that which is the host state accords to its own investors."[132] On the Economic Partnership Agreement Indonesia-Japan (IJ-EPA),

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[129] *Ibid*

[130] *United Nations Conferences Trade and Development. National Treatment. (UNCTAD/ITE/IIT/11).* Vol. IV. (New York and Geneva, 1999), p.3. [UNCTAD, National Treatment].

[131] Rudolf Dozer, *National Treatment: New Developmens. Making the Most of Internaional Investment Agreemnts: A Common Agenda*, 2005, Symposium co-organized by

[132] *Ibid*

it also mentions that *"each party shall accord to investors of the other Party and to their investment no less favourable investors and to their investments with respect to investment activities."*

2. The Exception in Capital Investment.

The exception to the principle of National Treatment is a reflection of the needs of each contracting party in terms of protecting the principal. The principle of equal treatment to every investor, may be exempted to investors of a country which obtain privileges under an agreement with Indonesia. These privileges is related to customs unions, free trade areas, common markets, monetary unions, similar institutions, and agreements between the Indonesian government and bilateral, regional or multilateral foreign governments relating to certain privileges in the conduct of capital investment.[133] Article 59 paragraph 2 of the Indonesia-Japan Partnership Agreement also includes an exception to the National Treatment principle which mentions, *"Notwithstanding paragraph 1, each party may prescribe special formalities in connection with investment activities of investors of the other party in its area, provided that such formalities do not materially impair the other party and to their investment pursuant to this chapter".*

Article 63 in the Indonesia-Japan Economic Partnership Agreement (IJEPA) regulates the prohibition of achievement claims related to investment activities in its investors field. Article 63 of the Indonesia-Japan Economic Partnership Agreement (IJEPA) states:

[133]Explanation of article 4 paragraph (2) Investment law.

Neither Party shall impose or enforce any of the following requirements, in connection with investment activities in its Area of an investor of the other Party:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its Area, or to purchase goods or services from natural or legal persons or any other entity in its Area;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of the investor;

(e) to restrict sales of goods or services in its Area that investments of the investor produce or provide by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to appoint, as executives or members of board of directors, individuals of any particular nationality;

(g) to locate the headquarters of the investor for a specific region or the world market in its Area;(h) to achieve a given level or value of research and development in its Area; or

(i) to supply to a specific region or the world market exclusively from its Area, one or more of the goods that the investor produces or the services that the investor provides.

In practice, there are several models related to national treatment.[134] One category of exceptions to the principle of national treatment is subject-specific exceptions, which include:

a. Customs Clearance

In article 20, IJEPA regulates the elimination of customs duties whereby each party shall eliminate or reduce the customs duty on the goods of origin of the other party appointed for the purpose of investment activity as per the terms and conditions set forth in annex 1 to IJEPA.[135] The regulation happened because of the request of either party, the parties

[134] UNCTAD, National Treatment, p.45.

[135] Article 20 paragraph 1 IJEPA

negotiating on such issues to improve the condition of market access on the designated goods of origin[136] and eliminating any other duties or levies imposed on or relating to the importation of the goods of the other.[137] However, in article 20, paragraph 4, there is an exception which states:

> *Nothing in this Article shall prevent a Party from imposing, at any time, on the importation of any good of the other Party:*
> *(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III of the GATT 1994, in respect of the like domestic good or in respect of a good from which the imported good has been manufactured or produced in whole or in part.*
> *(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in Annex 1A to the WTO Agreement, and the Agreement on Subsidies and Countervailing Measures in Annex 1A to the WTO Agreement; and*
> *(c) fees or other charges commensurate with the cost of services rendered.*

As a result, the abolition or reduction of customs duties applied to certain goods on the basis of the most-favoured-nation principle. The applied rate becomes equal to, or lower than, the rate of customs duty to be applied in paragraph 1 on the originating which is classified under the same tariff line as that particular good and each party is required to notify the other party of such removal or deduction.[138] In cases where its most-favoured-nation applied rate of customs duty on a particular good is lower than the rate of customs duty to be applied in accordance with paragraph 1 on the originating good which is the good quality of the party shall respect the lower rate with respect to that originating good.

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[136] Article 20 paragraph 2 IJEPA
[137] Article 20 paragraph 3 IJEPA
[138] Article 20 paragraph 5 IJEPA

b. Trade in Services

Chapter 6 of article 76 of the IPEPA regulates trade in services in which the chapter applies to actions by person who trade in services[139] which does not apply to:[140]

1) in respect to air transport services, measures affecting traffic rights, however granted; or to measures affecting services directly related to the exercise of traffic rights, other than measures affecting:
   a) aircraft repair and maintenance services;
   b) the selling and marketing of air transport services; and computer reservation system services;
2) Cabotage in maritime transport services;
3) subsidies provided by a Party or a state enterprise thereof, including grants, government supported loans, guarantees and insurance;
4) measures affecting the movement of natural persons of a Party, unless otherwise provided in a Schedule of Specific Commitments in Annex 8;
5) measures affecting natural persons of a Party seeking access to employment market of the other Party, or measures regarding nationality, or residence or employment on a permanent basis; and
6) government procurement.

[139] Article 76 paragraph 1 IJEPA
[140] Annex 7 IJEPA ayat 2 (a) (i)

The provisions on financial services are included in the additional provisions of Annex 7 to IJEPA. Financial service means any service of a financial nature. It may be either an individual or a juridical person from a party requesting to supply or provide financial services but not a public entity.[141]

c. Temporary Safeguard Measures

Article 70 paragraph 1 in IJEPA states:

"A Party may adopt or maintain measures not conforming with its obligation under Article 59 relating to cross border capital transactions and Article 67relating to transfers, in the case:
(a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
(b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management in particular, monetary and exchange rate policies.

Further Article 70 paragraph 2 in IJEPA explains that the acts referred in article 70 paragraph 1 IJEPA that it meets the following requirements:

1) shall be consistent with the budget of the International Monetary Fund Agreement;
2) shall not exceed that required to handle the conditions set forth in paragraph 1;
3) is temporary and removed as soon as conditions permit; and
4) shall be notified to the other party immediately.

[141] Annex 7 IJEPA ayat 2 (a) (ii)

The provisions of this Article shall not alter the rights enjoyed and the obligations to be fulfilled by either party.

d. Taxation

Expropriate or nationalize investment,[142] in its investment territory or taking any action similar to expropriation or nationalization, is an act of taxation, to the extent that the act of taxation is a takeover as provided for in paragraph 1 of article 65 IJEPA.[143]

Article 65 paragraph 1 in IJEPA explains that an act of expropriation or nationalization may be carried out if:

1) For public purposes;

2) On a non-discriminatory basis;

3) in accordance with applicable legal process and article; and

4) With adequate compensation, effective and paid quickly. **e. Cooperation**

To enhance cooperation, the parties can make mutual beneficial agreements. It further liberalizes and facilitates trade and investment between parties and promote the welfare of the people of the parties.[144] Such cooperation may be in the following areas:[145]

1) Manufacturing industry;
2) Agriculture, forestry and fisheries;
3) Promotion of trade and investment;

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[142] Article 65 IJEPA paragraph 1
[143] Article 73 IJEPA paragraph 1
[144] Article 134 (a) IJEPA
[145] *Ibid*

4) Development of human resources;
5) Tourism;
6) Information and communication technology;
7) Financial services;
8) Government procurement;
9) Environment;
10) And other fields agreed upon by the participants.

f. Energy and Mineral Resources

Chapter 9 of article 98 in IJEPA regulates the cooperation of both parties in promoting and facilitating investment between the parties in the energy and mineral resources sector through:

1) discussing effective ways on investment promotion activities and capacity building;
2) facilitating the provision and exchange of investment information including information on the laws, regulations and policies of the Parties;
3) encouraging and supporting investment promotion activities of each Party or the business sectors of the Parties, relating to, in particular, the exploration, exploitation and production of energy and mineral resources and infrastructure infrastructure facilities in the energy and mineral resources sector; and
4) discussing effective ways of creating stable, equitable, favorable and transparent conditions for investors.

The execution and operation of such cooperation shall be subject to the availability of funds, rules and applicable laws of each party.[146] Meanwhile, article 99 in IJEPA regulates the limitation of import and export of energy and mineral resource. Each party shall ensure its obligations to comply with the provisions of GATT 1994. If the prohibitions or restrictions relating to the export or import of such goods are irrelevant or deviate from the provisions of GATT, the parties shall provide relevant information about such prohibitions or limitations as soon as possible to others.[147]

3. Implementation of National Treatment Principle on Law no. 25 of 2007 with the Indonesia-Japan Partnership Agreement

The implementation of the principle of national treatment is not without implication. National treatment and national interests are equally important for the development of the state. So it can not be denied that Indonesia needs Foreign Direct Investment as a supporter of economic growth.

Indonesia as a host country is obliged to protect foreign investors and their investment under the national treatment principle clause. On the other hand, Indonesia as a sovereign country has an obligation to protect their national interests. Both national and national interests must be balanced.

As a sovereign country, Indonesia has the same rights and obligations as any other country. Thus, in terms of freedom of contract, Indonesia can propose to gain mutual benefits in the preparation of bilateral

[146] Article 134 (b) IJEPA
[147] Article 99

investment treaty. Under the principle of reciprocity, contracting parties may obtain mutual beneficial exchanges in the preparation of the Bilateral Investment Treaty clauses. In the context of Foreign Direct Investment, the benefits can be achieved by foreign investors and Indonesia as the host country. It can be seen from the national treatment principle clause. The clause of the principle of national treatment may have legal consequences for Indonesia. Unfortunately, there are no parameters and standards of interpretation of the principle of national treatment which is clear and absolute. Therefore, Indonesia should be able to give full attention in the application of the principle of national treatment.

The implementation of national treatment can be seen in bilateral treaty agreement between Indonesia and Japan, namely Indonesia-Japan Economic Partnership Agreement (IJ-EPA). Indonesia-Japan Economic Partnership Agreement affirmed the application of the national treatment principle. It is contained in article 59 where the principle is also contained in Article 6 of Law number 25 year 2007 concerning investment. In terms of facilities, in the Indonesia-Japan Economic Partnership Agreement (IJ-EPA) there is no clause that provides special facilities for foreign investors in Indonesia that distinguish with domestic investors as listed in article 18 of Law number 25 year 2007 about investments related to the provision of investment facilities.

And for example of the appropriateness of applying the principle of national treatment to IJ-EPA with Law number 25 year 2007 about investment, can be seen from the following clause:

Table 3.1

Subject	Indonesia-Japan Partnership Agreement (IJ-EPA)	Law No. 25 of 2007 On Investment
Nationalization Act	• Article 65 paragraph 1 states that any party may engage in the act of nationalization or the taking of ownership of an investor if: a public; on a non-discriminatory basis; in accordance with due process of law; and upon payment of promopt, adequate and effective compensation. • Article 65, paragraph 2, explains in more detail that the compensation shall be equivalent to the fair market value of the expropriation investments at the time when the expropriation was publicly announced or when the expropriation took place, whichever is the earlier. • Article 65, paragraph 3, explains the investor effected by expiration shall have a rights of access to the courts of justice or the administrative tribunals or agencies of the party making the expropriation to seek a prompt review of the investor case and the investor's case and the amount of compensation.	• Article 7 paragraph 1 states, the government shall not take nationalization action or the acquisition of ownership rights of investors, except by law. • Article 7, paragraph 2, explains in more detail that the act of nationalization or expropriation of ownership rights of government investors will provide compensation whose amount is determined based on market price. • Furthermore, in Article 7 paragraph 3 states, if between the two parties is not reached agreement on compensation or compensation, the settlement can be done through arbitration.

Asset Transfer	• Article 67 paragraph 1 stated that each party shall ensure that all transfers relating to investments in its Area of an investor of the other Party may be made freely into and out of its Area without delay. Such transfers shall include those of: (a) the initial capital and additional amounts to maintain or increase investments; (b) profits, capital gains, dividents, royalties, interests, fees and other current incomes accruing from investment; (c) proceeds from the total or partial sale or liquidation of investments; (d) payments made under a contract including loan payments in connection with investments; (e) earnings and remuneration of member from the other Party who work in connection with investments in the area of the former party; (f) Payments made in accordancewith expropriation and compensation. (g) payment arising out of the settlement of a dispute.	• Article 8 provides for the transfer of assets which states that the investor may transfer the assets he owns to the party desired by the investor in accordance with the legislation except the assets held by the state. Investors are granted the right to transfer in foreign currencies, including: a. capital, profits, bank interest, dividends and other income; b. additional funds required for financing of investment; c. royalties or fees to be paid; d. compensation for damages; e. compensation for expropriation; f. proceeds of sale or liquidation of investment.

The implementation of the national treatment principle in the Indonesia-Japan Partnership Agreement (IJ-EPA) is in conformity with Article 6 of Law No. 25 of 2007 on investment. There is no clause that distinguishes

the rights, obligations and facilities for foreign investors with domestic investors. Nevertheless, there are exceptions contained in IJ-EPA but the exceptions are allowed under TRIMS section 3 and Act 25 of 2007 Article 6.

Another step that can be done is the formation of the right and clear law. Indonesia as an old country house must be able to make strong regulations and policies related to Foreign Direct Investment (FDI). These laws and regulations must also consider the national interest. Indonesia will not easily open for capital ownership, but Indonesia should also consider the need for protection of national interests.

B. The Benefit of Implementation Based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA)

The realization of the implementation of the Indonesia-Japan Economic Partnership Agreement (IJ-EPA) brings benefits for both foreign investors and Indonesia itself as a host country. The importance of the principle of national treatment related to Foreign Direct Investment (FDI) in Indonesia is one of the things that support the realization of the implementation of the Indonesia-Japan Economic Partnership Agreement (IJ-EPA).

1. The Importance of National Treatment Principles in Indonesia

The importance of the national treatment principle related to Foreign Direct Investment (FDI) in Indonesia is an inseparable matter because it has a strong relationship with the interests of the parties, both the investor and the host country. Currently FDI practice has grown rapidly in many developed

and developing countries. Much of the country's development is influenced by the development of FDI including Indonesia.

For most developing countries, FDI is important as an external source of financing. A more significant benefit to the host country of FDI is the transfer of production technology and the host country can also gain employee training in operating a new business that contributes to the human resources of the host country. In addition, the profit generated by FDI contributes to corporate tax revenues in the host country. According to UNCTAD 2014 World Investment Report, Indonesia is one of the three most attractive destinations for multinational companies for 2014-2016, ahead of India and Brazil. In terms of FDI inflows, Indonesia ranks fifth among the countries of East Asia after China, Hong Kong, Singapore and India.[148]

2. Perceptions of Investors or Japanese Companies on the Investment climate in Indonesia.

During 2015, there were two surveys of Japanese economic stakeholders in Japan related to the investment climate in the world, especially in Indonesia. The two surveys are the following.[149] First, Survey Report on Overseas Business Operations by Japanese Manufacturing Companies 2015. It was the latest survey from Japan Bank for International Corporation (JBIC) it has related to the investment activities of Japanese overseas manufacturing

148 http://www.indonesia-investments.com/news/todays-headlines/q3-2015-foreign-direct-investment-in-indonesia-grows-18.1-in-rupiah-terms/item6068 accessed on 30 June 2018.

149 Activity Report for Fiscal Year 2015, Indonesia Investment Promotion Center (IIPC) Tokyo Japan, acquired during internship at IIPC Japan office in March 2018.

companies in 2015, with some conclusions related to the investment climate in Indonesia.

Indonesia remains second in terms of promising country as an investment destination of Japanese manufacturing companies abroad in the medium term (3 years). This rating is unchanged when compared to previous year survey results, where India remains at the first level. Meanwhile for Japan's Small Medium Enterprise (SME) category, Indonesia is ranked first as a promising country for Japanese SME companies as the destination country to increase its investment in the next 3 years.

That the reasons or positive factors of Indonesia for Japanese manufacturing companies are future growth potential of local market, current size of local market, inexpensive sources of labor, supply base for assemblers and concentration of industry. Meanwhile, some of the negative factors that still concern Japanese companies on the investment climate in Indonesia in this survey such as rising labor costs, execution of legal system unclear, underdeveloped infrastructure, intense competition with other companies and difficult to secure management level staff.

Second survey come from Nikkei Newspaper, Questionnaires survey (Enquete) among business leaders in Japan, China and Korea. Nikkei Newspaper is Japan's largest economic and business newspaper media distributing questionnaires to corporate leaders in Japan, China and Korea on their perceptions of the prospects of ASEAN countries that can be used as production centers for

companies and also the target markets of their companies. And the survey, concluded as follows:

Table 3.2 The Target markets of Japan, China and Korea Companies

	Ranking in ASEAN countries	
	As a Market	As a Production Site
Japanese Leaders	1st Indonesia	1st Indonesia
	2nd Thailand	2nd Thailand
	3rd Vietnam	3rd Vietnam
Chinese Leaders	1st Indonesia	1st Thailand
	2nd Thailand	2nd Indonesia
	3rd Malaysia	3rd Malaysia
Korean Leaders	1st Vietnam	1st Vietnam
	2nd Indonesia	2nd Indonesia
	3rd Thailand	3rd Myanmar

3. The Development of Investment Realization of Japanese Investment in Indonesia

Following the Indonesia-Japan Partnership Agreement (IJ-EPA) effective in 2008, the investment climate in Indonesia has increased. This can be seen through the realization of investment developments by Japanese investors in Indonesia which experienced an increase in the number of projects and investment value in the following table:[150]

[150] The Data from National Single Window for Investment, access on https://nswi.bkpm.go.id/data_statistik pada tanggal 23 Juli 2018 at 08.00 p.m.

		2009		2010		2011	
		Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)
Asia / *Asia*	Jepang / *Japan*	129	708,762.6	321	712,599	353	1,516,063.1
	Total Asia / Asia	**129**	**708,762.6**	**321**	**712,599**	**353**	**1,516,063.1**
Total		**129**	**708,762.6**	**321**	**712,599**	**353**	**1,516,063.1**

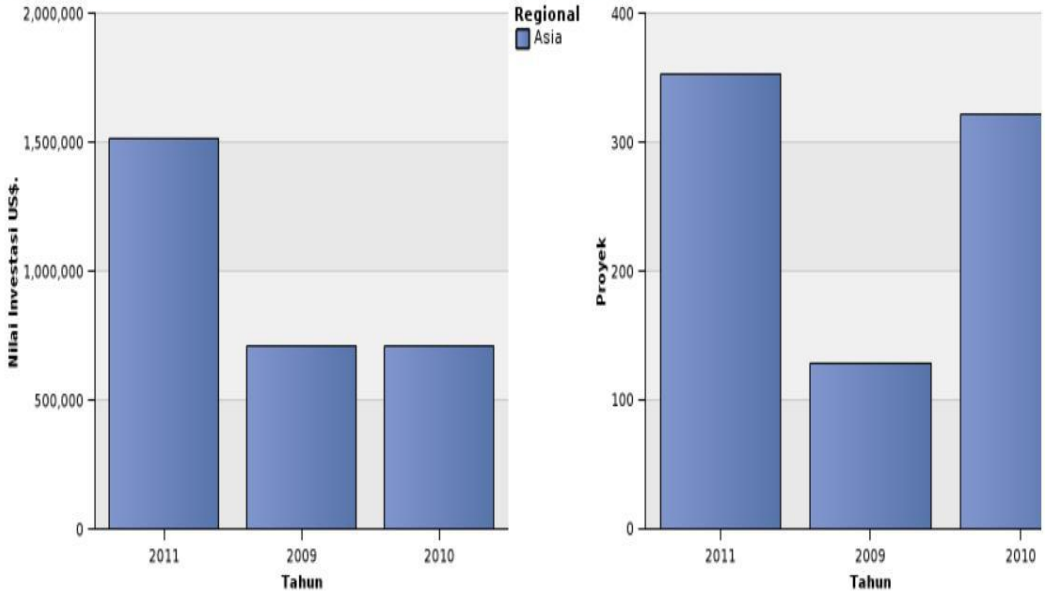

Figure 3.1 Development of Investment Realization of Japan Investment in Indonesia Year 2009-2011

In 2009 was the first year after the agreement between Indonesia and Japan through the Indonesia-Japan Economic Partnership Agreement (IJ-EPA). This year, Japan invested 109 projects in Indonesia with a total investment value of 708,762.6 US dollars. In 2010 the investment value increased by 712,599 US Dollars with the number of projects as much as 321. In 2011 the investment value rose again to 1,516,063.1 US Dollars with a total of 353 projects.

		2012		2013		2014	
		Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)
Asia / *Asia*	Jepang / *Japan*	405	2,456,940.9	958	4,712,894	1,010	2,705,131.3
	Total Asia / Asia	**405**	**2,456,940.9**	**958**	**4,712,894**	**1,010**	**2,705,131.3**
Total		**405**	**2,456,940.9**	**958**	**4,712,894**	**1,010**	**2,705,131.3**

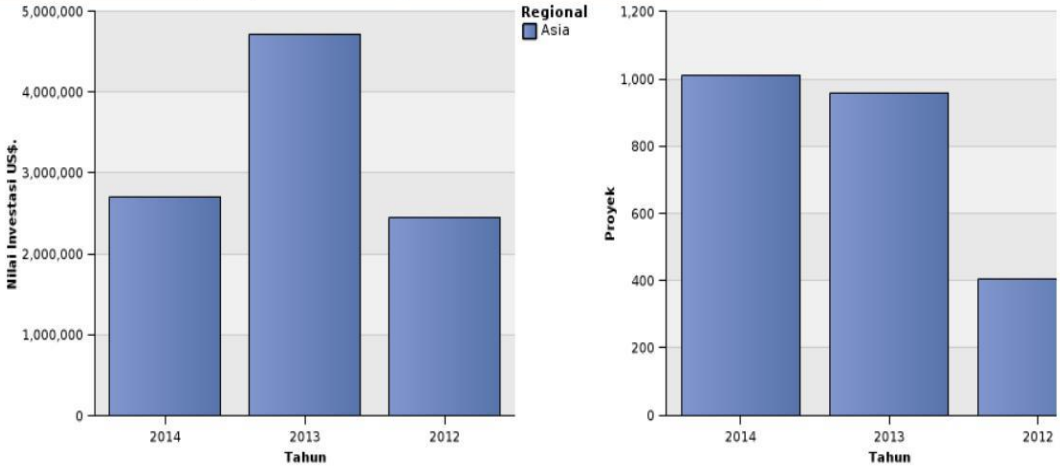

Figure 3.2 Development of Investment Realization of Japan Investment in Indonesia Year 2012-2014

In 2012 Japan invested 405 projects in Indonesia with a total investment value of 2,456,940.9 US dollars. In 2013 the investment value increased by 4,712,894 US Dollars with the number of projects as many as 958. But in 2014 the investment value dropped to 2,705,131.3 US Dollars with the number of projects totaling 1,010.

		2015		2016		2017	
		Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)	Proyek	Investasi (US$. Ribu)
Asia / *Asia*	Jepang / *Japan*	2,030	2,876,990.1	3,302	5,400,906.4	3,646	4,996,158.2
	Total Asia / Asia	**2,030**	**2,876,990.1**	**3,302**	**5,400,906.4**	**3,646**	**4,996,158.2**
Total		**2,030**	**2,876,990.1**	**3,302**	**5,400,906.4**	**3,646**	**4,996,158.2**

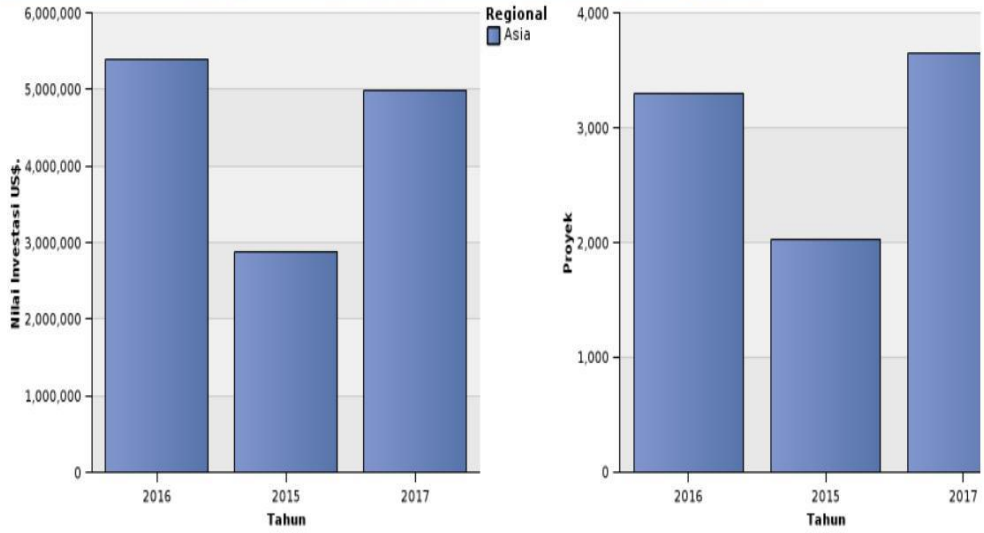

Figure 3.3 Development of Investment Realization of Japan Investment in Indonesia Year 2015-2017

The realization of investment in the January-September 2015 period was 2,495 million USD which grew 22.24% from the previous year's realization of 2,705 million USD.[151] The realization of Japanese investment in Indonesia is still dominated by industrial sector, mainly automotive industry and automotive component industry (supporting industry). Meanwhile, the investment plan for the period of January-December 2015 reached 8051 million USD, which 173.5% of the target in 2015, and grew 96.16% compared to the previous year's investment plan. The quality of the investment plan from Japan also better where in previous years the portion of the investment plan is dominated by the automotive industry

[151] *Ibid*

sector, but for the year 2015 the investment plan dominated by the infrastructure sector, especially the electricity business.

The achievement of the investment plan target for the period of January-December 2015 173.5% of the target and the realization of Japan's investment realization reach 22.24% from not apart from the excellent cooperation between IIPC Tokyo, Marketing Officer BKPM, BKPM as well as external parties BKPM such as the Embassy in Tokyo and Consulate General in Osaka, Japanese business associations, international institutions and various cooperation or agreement made between Indonesia and Japan.

Based on BKPM data, in 2016, the realization of Japanese investment to Indonesia reached 5.4 billion USD.[152] The value of this realization was the highest investment achievement in history past the achievement of the realization of investment in 2013 of 4.7 billion USD. Japan's investment in Indonesia in 2016 was predominantly coming from automotive and its supporting industries, metal and electronics industry, chemical industry, and power plant. In terms of location, 95% of Japanese investment is in Java Island, West Java (55%), Banten (17%), East Java (10%), Central Java (9%) and DKI Jakarta (4%) one of Japan's investment locations in 2016.[153]

[152] Laporan Pelaksanaan Kegiatan Tahun Anggaran 2016, Indonesia Investment Promotion Center (IIPC) Tokyo Jepang, yang diperoleh saat magang di kantor IIPC Japan pada Maret 2018

[153] *Ibid*

Several major Japanese projects in Indonesia started to construct since 2016 based on BKPM.[154] The project are construction of chemical plant by Asahi Chemical, automotive factory development by Suzuki, Mitsubishi and Daihatsu, and power project of PLTU Batang 2x1000 MW and PLTP (Geothermal) Sarullah 330 MW is one of the reasons for the high realization of Japanese investment.

Japan is also one of Indonesia's most active investment source countries that was succeed the Government's priority programs. Below are the evidences of Japanese interests and investments in Indonesia in priority programs, including the following:[155]

a. Project 35 GW of electricity

Japan invests in Indonesia in the electricity sector as follows:

1) PLTU Java 1 capacity 2x 800 MW with investment plan 2 billion USD won by Pertamina Consortium, Marubeni and Sojitz.
2) Sumitomo Corporation is also currently focusing on the implementation of the Java 4 (Tanjung Jati Expansion) 2x1000 MW PLTU project in Jepara, Central Java and PLTP Muara Laboh 1x80 MW in Solok, West Sumatra.

b. Cattle Farming

Toyota Tsusho is currently planning to invest in cattle breeding business in Sukabumi area where the company cooperates with Bogor Agricultural University.

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[154]Speech by chairman of Director of Indonesia Investment Promotion Centre (IIPC) on Bussines Trip to Hamamtsu City for attend Hamamatsu Seminar, 20 Maret 2018 at Kuretakeso Hotel, Hamamatsu City, Shizouka, Japan

[155] Laporan Pelaksanaan Kegiatan Tahun Anggaran 2016, Indonesia Investment Promotion Center (IIPC) Tokyo Jepang, yang diperoleh saat magang di kantor IIPC Japan pada Maret 2018

c. Renewable energy

Japan invests in Indonesia in the renewable power sector as follows:

1) JGC Corporation want to establish a low-calorie coal processing industry (Coal Slurry) that can not be utilized to be developed into Coal Slurry Power Plant in West Papua Province (Sorong).
2) Nippon Koei focus on developing mini hydro at 15 points all over Indonesia.
3) Toyota Tsusho, Obayashi Corporation, GRID Corporation participate in solar panels (PLTS) business in Indonesia.

d. 1 Million House Program

Japan invests in Indonesia in the renewable property sector as follows:

1) Toyota Home and Panahome invested in the establishment of housing destined for workers located within the industry.
2) IGHD entered into a cooperation agreement with an Indonesian housing company to establish a simple residential at affordable prices by the lower and middle class communities throughout Indonesia with its local partners.
3) Tokyu Land Corporation and Mitsubishi invested in establishing real estate (super block apartment) whose target market is addressed to expatriate and upper middle class society.
4) Sumitomo and Mitsubishi Corporation invested in residential real estate in Jabodetabek area.

e. Other Priority Projects

In addition to the above sectors, Japan invests in Indonesia in several sectors which are the priority of countries such as the following:

1) Mitsui, Softbank and Recruit Holding invested in E-Commerce in Indonesia.
2) Kao Corporation invested in upstream chemical products industry (Fatty acid / raw material of soap) in Riau.

In 2017, the realization of Japanese investment to Indonesia reached 5 billion USD came from 3,646 investment projects.[156] Making Japan the 2nd biggest investor in 2017 worldwide, in the last five years (2013-2017), the investment realization from Japan amounted USD 20.7 billion.[157] The realization value of this investment is still within the psychological level (above 4 b illion USD), which still shows the realization of Japanese investment in increasing trend. However, it should be observed when compared to the realization of investment in 2016, the realization of Japanese investment in 2017 dropped into 7% compared to 2016.

As Japan's investment record in Indonesia in 2016 increased 93% compared to 2015 from 2.8 billion USD increased to 5.4 billion USD. The realizable value of this investment is excluding Japanese investments that form a joint venture with other countries or Japanese investment through Special Purposes Vehicle (SPV) in other countries such as Singapore,

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[156] Activity Implementation Report for Fiscal Year 2017, Indonesia Investment Promotion Center (IIPC) Tokyo Japan, acquired during internship at IIPC Japan office in March 2018

[157] Speech by chairman of BKPM on Indonesia-changing market with E-commerce, 8 March 2018 at Palace Hotel Tokyo, Japan.

Seychelles, British Virgin Island. The share of Japanese investment using SPV and the combined state is quite significant.

By sectoral, the top 5 Japanese investment in Indonesia in 2017 was dominated by the electricity sector; gas and water; industrial of transportation and other transportation; housing; industrial and office areas and industries of paper, articles of paper and printing. Based on the location, 88% of Japanese investment is still in Java, only 12% outside Java Island, where the dominance of Japan's investment location in 2017 was located in West Java, Central Java, Special Capital Region of Jakarta, Banten and East Java. For locations outside of Java island, Japanese investment in 2017 was mostly located in southern Sumatra, West Sumatra, North Sumatra, West Kalimantan, and Bali. The top five realizations of Japanese investment came from PT. Bhumi Jati Power (Sumitomo corporation), PT. Bhimasena Power Indonesia (itochu Corporation and J-Power Corperation), PT. Aeon Mall Indonesia (AEON Co., Ltd), PT. Astra Honda Motor (Honda motor Co. Ltd), PT. Tanjungenim Lestari Pulp and Paper (Marubeni Corperation and Sumatera Pulp Corperation).

In addition, the benefits of realization of investment in Indonesia by Japanese investors are not only felt by Indonesia as host country but also affect the economic condition in Japan. The friendship between Indonesia and Japan is based on mutual respect and complementarity. Japan is Indonesia's most important development partner, Japan's economic, trade and investment relations with Indonesia have also bolstered the sustainability of Japan's

economy. In other words, the two countries complement each other and need each other.

Japan's domestic problems are potentially inhibiting growth and can affect economic stability in Japan. There are the political conditions in Japan, namely the deterioration of bilateral relations between Japan and China. The declining number of people in Japan accompanied by the increasing number of elderly and natural disasters. To overcome this, the government of Prime Minister Shinzo Abe gave special attention and fresh air to the younger generation of Japan to develop its business abroad one of them in Indonesia.[158]

Japan's economic deflation and recession for two decades have made the investment climate in the country unconducive to Japanese entrepreneurs, so many big companies in Japan have to expand their investments outside Japan. In this case, Indonesian government expects the investment to be directed to Indonesia. The ease and stability of the Indonesian state's security makes it attractive for Japan to work in Indonesia.

Profits can be obtained by the Japanese state as an investor of the results of the realization of investment in Indonesia, there is a summary of the macroeconomic indicators of Japan as follows:[159]

[158] Activity Report for Fiscal Year 2017, Indonesia Investment Promotion Center (IIPC) Tokyo Japan, acquired during internship at IIPC Japan office in March 2018

[159] *Ibid*

Table 3.1 Gross Domestic Product (GDP) Growth for Fiscal Year 2012-2017

	2012	2013	2014	2015	2016	2017
Growth of Nominal GDP	0,2%	2,6%	2,1%	2,8%	1,5%	2,5%
Nominal GDP	¥ 494,7 billion	¥ 507,4 billion	¥ 517,9 Billion	¥ 532,2 billion	¥ 540,2 billiom	¥ 553,5 billion
Growth of Real GDP	0,9%	2,6%	-0,4%	1,3%	1,3%	1,5%

Source: Ministry of Finance

In addition, the benefits gained by Indonesia as a host country for the presence of Japanese companies and direct investment flows include capacity building and human resource knowledge and technological uptake and upgrading. On the other hand, it also affects the macro economic growth is strong enough to reduce unemployment in Indonesia. The Central Body of Statistics describes the statistic of labor and unemployment in Indonesia, as follows:[160]

Table 3.2 The Statistic of Labor and Unemployment in Indonesia

In Millions of People	**2010**	**2011**	**2012**	**2013**	**2014**
Manpower	116,5	119,4	120,3	120,2	121,9
Employes	108,2	111,3	113,0	112,8	114,6
Unemployed	8,3	8,1	7,3	7,4	7,2

160 See on https://www.bps.go.id/, access on 22 July 2018 at 3.18 pm

In 2010-2014 the Central Statistics Agency table describes labor statistics and unemployment in Indonesia shows an increase in manpower and employes. Even though in 2013 there was a decrease, it was not too significant. The table also shows that the unemployment rate in Indonesia from 2013-2014 was decrease.

Table 3.3 The Statistic of Labor and Unemployment in Indonesia

In Millions of People	2015	2016	2017	2018*
Manpower	112,4	127,8	128,1	133,9
Employes	114,8	120,8	121,0	127,1
Unemployed	7,6	7,0	7,0	6,9

* Data from February 2018

In 2015-2018 the Central Statistics Agency table explained that labor statistics and unemployment in Indonesia showed an increase in manpower and employes. The table also shows the unemployment rate in Indonesia from 2015-2018 is decrease, from 7.6 million people in 2015 to 6.9 million people in 2018.

The existence of Indonesia-Japan Partnership Economic Agreement (IJ-EPA) makes bilateral relations between Indonesia and Japan closer. For example, it makes it easier to establish bilateral cooperation between Indonesia and cities in Japan, such as Memorendum of Understanding (MoU) between the Government

of Indonesia and Hamamatsu city located in Shizouka province, Japan.[161] Cooperation in the MoU is in the field of investment where the more dominant in the automotive field of the Yamaha and Suzuki brand.

[161]Speech by chairman of Director of Indonesia Investment Promotion Centre (IIPC) on Meeting with Mayor of Hamamatsu City, 20 Maret 2018 at Kuretakeso Hotel, Hamamatsu City, Shizouka, Japan

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Indonesia as a host country is obliged to protect foreign investors and their investment under the national treatment clause. On the other hand, Indonesia as a sovereign country has an obligation to protect their national interests. Both national treatment and national interests are currently being debated, but Indonesia must be able to maintain both of them equally. The state need to pay attention to BIT or IIA or by design and establish laws and regulations are precise and clear.

However, the principle of national treatment may be exempted by the existence of a bilateral agreement. The exception to the principle of national treatment is a reflection of the needs of each contracting party in terms of protecting the principal. The principle of equal treatment to every investor may be exempted to investors of a country which obtain privileges under an agreement with Indonesia.

1. The Implementation of National Treatment Principle in Investment Under Indonesia-Japan Economic Partnership Agreement (IJ-EPA)

In Article 59 paragraph 2 of the Indonesia-Japan Partnership Agreement there are also exceptions to the National Treatment Principle which states *"Notwithstanding paragraph 1, each party may prescribe special formalities in connection with investment activities of investors of the other party in its area, provided that such formalities do not materially impair the other party and to* 101

their investment pursuant to this chapter ". One category of exceptions to the principle of national treatment is subject-specific exceptions, which include customs removal, trade in services, temporary safeguard measures, taxation, corporation and energy and mineral resources.

The implementation of the national treatment principle in the Indonesia-Japan Partnership Agreement (IJ-EPA) is in conformity with Article 6 of Law No. 25 of 2007 on investment. However, IJEPA does not distinguish the rights, obligations and facilities between foreign investors and domestic investors. Nevertheless, there are exceptions contained in IJ-EPA where such exceptions are allowed under TRIMS section 3 and Act 25 of 2007 Article 6.

2. The Benefit of Implementation Based on Indonesia-Japan Economic Partnership Agreement (IJ-EPA)

Following the Indonesia-Japan Partnership Agreement (IJ-EPA) that was effective since 2008, the impact of the investment climate in Indonesia has increased. This can be seen through the realization of investment developments by Japanese investors in Indonesia which experienced an increase in the number of projects and investment value. Meanwhile, the benefits of the realization of investment in Indonesia also obtained by Japanese investors which one can restore their economic conditions when experiencing economic problems.

The existence of Indonesia-Japan Partnership Economic Agreement (IJ-EPA) brings bilateral relations between Indonesia and Japan closer. For example, it makes it easier to establish bilateral cooperation between Indonesia and cities in

Japan, such as Memorendum of Understanding (MoU) between the Government of Indonesia and Hamamatsu city located in Shizouka province, Japan. The Cooperation in the MoU is in the field of investment especially in the automotive field of the brand Yamaha and Suzuki.

B. Recommendation

From the results of the analysis, the authors recommend:

1. The Indonesian government must be careful in determining laws and regulations by taking into account the National Treatment principle clause. Although exceptions are allowed for the needs of each party in term of privileges to protecting the principal interest.
2. Indonesia as a house country must be able to make strong regulations and policies related to FDI. These laws, regulations and policies must also take into account the national interest. Indonesia will not easily open the percentage of foreign capital ownership, but Indonesia should also consider the need for protection of national interests.

REFERENCES

Abdul Aziz, *Manajemen Investasi Syariah*, Bandung; Alfabeta, 2010.

Abdurachman, *Ensiklopedia Ekonomi Keuangan Perdagangan*, Ctk. Ke-enam, Radnya Paramita,

Jakarta, 1991.

Activity Implementation Report for Fiscal Year 2017, Indonesia Investment Promotion Center (IIPC) Tokyo Japan

Activity Report for Fiscal Year 2015, Indonesia Investment Promotion Center (IIPC) Tokyo Japan, acquired during internship at IIPC Japan office in March 2018.

Agreement Between The Republic of Indonesia and Japan for an Economic Partnership (IJ-EPA).

Agreement on Trade-Related Investment Measures (TRIMs).

Ahmad Antoni K, *Muda,Kamus Lengkap Ekonomi*, Gitamedia Press, 2003.

Annex of Trade Related Investment Measures (TRIMs).

Antonius Yudi Triantoro, et aL, SeJkilas WTO {World Trade Organization), Perindusfriaa, Investasi, dan Hak Kekeayaan Intelektual, Direktorat JenderaJ Multilateral, Departeraen Luar Negeri Rl, Jakarta: Direktorat Perdagangan.

ASEAN Agreement for the Promotion and Protection of Investments, article 1(3), from UNCTAD, volume II, 1996.

Asmin Nasution, *Transparansi dalam Penanaman Modal*, ctk Pertama, Pustaka Bangsa, Medan, 2008.

Bank Indonesia, Kamus Istilah Keunagan dan Perbankan Syariah.

Carlos Calvo, Le Droit International Theorique, Fifth Edition, Arthur Rousseau, Paris, 1896.

Code of Liberalisation of Capital Movements, Annex A, from UNCTAD, volume II, 1996.

Convention on the International Centre for Settlement of Investment Disputes (ICSID Convention)

Departemen Pendidikan dan Kebudayaan RI, Kamus Besar Bahasa Indonesia (KBBI), Edisi Ke-empat, Balai Pustaka, Jakarta, 1995.

Dhaniswara K. Harjono, *Hukum Penanaman Modal, Tinjuan terhadap Pemberlakuan Undang-undang No. 25 Tahun 2007 Tentang Penanaman Modal*, Jakarta: PT. Raja Grafindo Persada).

Dozer, Rudolf, National Treatment: New Developmens. Making the Most of Internaional Investment Agreemnts: A Common Agenda, Symposium co-organized by ICSID, OECD AND UNCTAD, Paris, 2005.

Dwi Martini, "Prinsip National Treatment dalam Penanaman Modal Asing diIndonesia (Antara Liberalisasi dan Kepentingan Nasional)," 5 Desember 2012, http://dwimaret.blogspot.co.id/2012/12/prinsip-national-treatment-dalam.html, access on 30 June 2018 at 3.42 PM

Erman Radjagukguk, *Hukum Investasi di Indonesia Anatomi Undang-undang no. 25 tahun 2007 tentang penanaman modal*, Jakarta:Fakultas Hukum Universitas Al-Azhar Indonesia, 2007.

General Agreement on Tariffs and Trade 1994 [GATT 1994].

Government Regulation no. 40 of 1996 on Right to Build and Use Right.

H.Salim HS, Budi Sutrisno, *Hukum Investasi di Indonesia*, ctk. Pertama, Rajawali Pers, Jakarta, 2014.

Henrik Horn, National Treatment in the GATT, Research Institute of Industrial Economics, Sweden, 2006.

http://www.indonesia-investments.com/news/todays-headlines/q3-2015-foreign-direct-investment-in-indonesia-grows-18.1-in-rupiah-terms/item6068 accessed on 30 June 2018.

https://www.bps.go.id/, access on 22 July 2018 at 3.18 pm.

https://www.wto.org/english/thewto_e/thewto e.htm

Huala Adolf I, Op.Cit., H. 204; Edwin Borchard, "The Minimum Standard of the Treatment of Aliens," Paper 3469, p. 445, December 12, 2011, Faculty Scholarship Series, file downloaded from http://digitalcommons.law.yale.edu/fss_papers/3469, visited on 30 June 2018.

Huala Adolf, *Hukum Perdagangan Internasional*, PT Rajawali Grafindo Persada, Jakarta, 2011.

Huala Adolf, *Perjanjian Penanaman Modal Dalam Hukum Perdagangan Internasional (WTO)*, (Jakarta: PT. RajaGrafindo Persada).

Ida Bagus Rahmadi Supancana, *Kerangka Hukum Kebijakan Investasi Langsung di Indonesia*, ctk. Pertama Ghalia Indonesia, Jakarta, 2006.

Ilmar Aminuddin, *Hukum Penanaman Modal Di Indonesia*, ctk. Pertama, Kencana, Jakarta, 2007.

John H. Jackson, The World Trading System: Law and Policy of International Economic Relations. Second Edition, MIT Press, Massachusetts, 1997.

John Robinson, Aspects of development dan Underdevelopment, (London; Cambride University Press, 1979).

Jonker Sihombing, *Hukum Penanaman Modla di Indonesia*, Bandung: PT Alumni

Laporan Pelaksanaan Kegiatan Tahun Anggaran 2016, Indonesia Investment Promotion Center (IIPC) Tokyo Jepang, yang diperoleh saat magang di kantor IIPC Japan pada Maret 2018

Laporan Pelaksanaan Kegiatan Tahun Anggaran 2016, Indonesia Investment Promotion Center (IIPC) Tokyo Jepang, yang diperoleh saat magang di kantor IIPC Japan

Law No. 25 of 2007 of Investment

Law no. 5 of 1960 on Basic Agrarian

Law No. 8 of 1995, about the Capital Market

Lucia Druetta, Assistant ed., Carlos Calvo (Argentine, 1824-1906), International Judicial Academy, http://www.judicialmonitor.org/archive_winter2013/leadingfigures.html, access on 30 June 2018 at 1.24 PM.

M. Sornarajah, *The International Law on Foreign Investment*.

Mitshushita, Mitsuo., Thomas J. Schoenbaum, & Petros C. Mavroidis. The World Trade Organization: Law Practice, and Policy, 2006, Oxford Univesrity Press, Great Britain.

Nasution, "Investasi Asing Jepang di Indonesia Masa Orde Baru Tahun 1967-1974", Avatara, e-journal Pendidikan Sejarah No. 2 Vol. 1, Tahun

2013.

Nasution. 2013, "Investasi Asing Jepang di Indonesia Masa Orde Baru Tahun 1967-1974", Avatara, e-journal Pendidikan Sejarah Volume1, No 2, May. P.231

OECD, "Fair and Equitable Treatment Standart in International Investment Law". OECD Working Papers on International Investment (OECD Publishing, 2004), p. 20.

Pandji Anoraga, *Perusahaan Multinasional dan Penanaman Modal Asing*, ctk. Pertama, Pustaka Jaya, Jakarta, 1995.

Peter van den Bossche, Daniar Natakusumah, Josep Wira Koesnaidi, Pengantar Hukum WTO (World Trade Organization) (Jakarta: Yayasan Obor Indonesia, 2010).

Protocol of Provisional Application to the General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. p.308. [Provisional Application to the GATT 1947].

Radjagukguk Erman, *Hukum Investasi di Indonesia Anatomi Undang-undang no. 25 tahun 2007 tentang penanaman modal*, ctk. Pertama, Fakultas Hukum Universitas Al-Azhar, Jakarta, 2007.

Ridwan Khairandy dan Camilia Malik, *Good Coorporate Governance: Perkembangan Pemikiran dan Implementasinya di Indonesia* (Yogyakarta: Kreasi Total, 2007.

Rudolf Dolzer dan Christoph Schreuer, Principles of International Investment Law, 1st Ed., (New York: Oxford University Press), 2008.

Rudolf Dozer, National Treatment: New Developmens. Making the Most of Internaional Investment Agreemnts: A Common Agenda, 2005, Symposium co-organized by ICSID, OECD AND UNCTAD, Paris.

Saceerdotti, Giorgio, Bilateral Treaties and Multilateral Instruments on Investment Protection, Recuil De Court, 1997.

Sentosa Sembiring, *Hukum Investasi Pembahasan Dilengkapi dengan Undang - Undang No. 25 Tahun 2007 Tentang Penanaman Modal*, ctk. Kedua, Nuansa Aulia, Bandung, 2010.

Siti Anisah and Lucky Suryo Wicaksono, *Hukum Investasi* (Yogyakarta: UII Press), p. 110

Sornarajah M., the International Law on Foreign Investment, 2nd Ed., (Cambridge; Cambridge University Press, 2004.

Speech by chairman of BKPM on Indonesia-changing market with E-commerce, 8 March 2018 at Palace Hotel Tokyo, Japan.

Speech by chairman of Director of Indonesia Investment Promotion Centre (IIPC) on Bussines Trip to Hamamtsu City for attend Hamamatsu Seminar, 20 Maret 2018 at Kuretakeso Hotel, Hamamatsu City, Shizouka, Japan

Speech by chairman of Director of Indonesia Investment Promotion Centre (IIPC) on Meeting with Mayor of Hamamatsu City, 20 Maret 2018 at Kuretakeso Hotel, Hamamatsu City, Shizouka, Japan.

The Act Number 27 Year 2007 on Investment.

The Act Number 40 Year 2007 on Limited Liability Company.

The Data from National Single Window for Investment, access on https://nswi.bkpm.go.id/data_statistik pada tanggal 23 Juli 2018 at 08.00 p.m.

UNCTAD, International Investment Agreement: Key Issues, Vol. 1.

United Nations Conference on Trade and Development, National Treatment, (UNCTAD/ITE/IIT/11). Vol. III. (New York and Geneva, 1999).

United Nations Conference on Trade and Development, National Treatment, (UNCTAD/ITE/IIT/11). Vol. IV. (New York and Geneva, 1999).

United Nations Conferences Trade and Development. National Treatment. (UNCTAD/ITE/IIT/11). Vol. IV. (New York and Geneva, 1999), p.3. [UNCTAD, National Treatment].

Untung Hendrik Budi, *Hukum Investasi*, ctk. Kedua, Sinar Grafika, Jakarta, 2010.

William A. Fennel and Joseph W. Tyler, Trade and International Investment from GATT to Multilateral Agreement on Investment (1995).

Winardi. *Kamus Ekonomi (Inggris-Indonesia)*. Cetakan Ke-delapan, Alumni, Bandung, 1982.

WTO Working Group on the Relationship between Trade and Investment, WTO Doc. WT/WGTI/W/7 of 18 September 1997 [WTO Working Group, 1997]; Ibid.

Yulianto Ahmad, "Peran Multilateral Investment Guarantee Agency (MIGA) dalam Kegiatan Investasi", Jurnal Hukum Bisnis No. 5 Vol. 22, Tahun 2003.

Zainal Arifin, *Dasar-Dasar Manajemen Bank Syariah*, Jakarta: Alfabet, 2003.