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Evaluating Whether Indonesia Should Maintain or Revise Its Local Incorporation Requirement for Foreign Investors

M. Hawin[1*], Simon Butt[2], Reni Budi Setianingrum[3]
[1] *Faculty of Law, Universitas Gadjah Mada, Indonesia*
[2] *School of Law, University of Sydney, Australia*
[3] *Faculty of Law, Universitas Muhammadiyah Yogyakarta, Indonesia*
**Corresponding Author: hawin@mail.ugm.ac.id*

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ABSTRACT

The article reviews the locally incorporated company requirement for foreign investors in Indonesia. It uses a normative juridical method, focusing on examining positive law through a statute approach. It involves analyzing relevant laws, regulations, cases, and literature and includes interviews with law scholars and an official from Indonesia's Investment Coordinating Board to gather expert opinions. The data obtained is analyzed using qualitative techniques. It discusses the advantages and disadvantages of the requirement in international foreign investment law and Indonesia concluding that its advantages outweigh the disadvantages, and some of the disadvantages have been resolved. Hence, the article argues that the requirement remains appropriate for Indonesia and should be maintained. However, certain investment treaties have weakened the requirement as a defense against legal action by locally incorporated companies in international arbitration. To overcome this problem, the country should renegotiate its bilateral investment treaties (BITs) that give the companies direct legal action rights and develop new BITs that contain balanced rights between foreign investors and Indonesia. Additionally, the locally incorporated company requirement should be reinforced by Indonesia's negative list policy, prioritizing specific sectors for local investors.

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1. Introduction

The attention given to Foreign Direct Investment (FDI) may seem grossly out of proportion, considering its contribution in absolute terms to the host country's gross capital formation or GDP. FDI is essential for economic growth, contributing through capital accumulation and technology transfer. In FDI law, state governments play a key role in promoting and attracting foreign investments. FDI involves the host country offering opportunities for investors from other countries, with investments taking the form of acquisitions, joint ventures, or the establishment of new companies in the host country.[1]

In FDI Law, host states have the right to set entry requirements for foreign investors. One common requirement is that foreign investors must establish locally incorporated companies. In Indonesia, foreign investors are required to form a Limited Liability Company (*Perseroan Terbatas*) under Indonesian law as a condition for foreign investment,[2] which means that foreign investment cannot take other forms of business like partnerships. This policy has been in force since Indonesian Law Number 1 of 1967 on Foreign Investment and maintained by Article 5(2) of Indonesian Law Number 25 of 2007 on Investment (Indonesian Investment Law 2007) as last amended by Law Number 6 of 2023 (the 2023 Job Creation Act).

The Indonesian Investment Law of 2007, as amended by the 2023 Job Creation Act, does not explain the reason for requiring foreign investors to establish locally incorporated companies. However, the former Foreign Investment Law of 1967 provided clarification, stating that the requirement ensured legal certainty for the company's status under Indonesian law and the capital invested in the country. This suggests that other business forms, such as partnerships, lack similar certainty. While partnerships like general and limited partnerships are governed by the Indonesian Civil and Commercial Codes, they are not legal entities. Despite this, their legal status is not entirely uncertain, as their operations are regulated by these codes, and capital is disclosed in official announcements and registrations.

The appropriateness of the locally incorporated company requirement is worth examining. Under this requirement, a company becomes a legal entity with limited liability. In the event of a dispute between the company and Indonesia, the Indonesian government cannot claim damages beyond the company's assets, except in rare cases where the corporate veil can be pierced. This suggests the requirement may disadvantage Indonesia. Conversely, if foreign investors were to use partnerships, the government could claim damages exceeding the partnership's assets, as partners are personally liable for the partnership's losses.

In international forums, the locally incorporated company requirement can give rise to the problem of the protection of foreign investors. The incorporation of the company in a host State has made it difficult for its foreign investors to get protection from its home State. In Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (the Barcelona Traction Case) (ICJ Reports 3, 1970), for example, shareholders of a company incorporated in a host State could not be protected by their home State and their protection was the sole right of the host State. Another problem can arise if the locally incorporated company intends to take legal action against the host State through International Center for the Settlement of Investment Disputes (ICSID) arbitration. ICSID can deny the legal action since it does not have jurisdiction to settle disputes between a national company and the host State.[3] However, Article 25(2)(b) of the ICSID Convention allows a host state to agree that a national company is considered foreign due to foreign control, enabling the company to access ICSID arbitration. However, this right depends on foreign control and the host state's consent, making it uncertain. Investment treaties address this by including shares in the definition of investment,

[1] Manuel Fernandez, Mariam Mohamed Almaazmi, and Robinson Joseph, 'Foreign Direct Investment in Indonesia: An Analysis from Investors Perspective', *International Journal of Economics and Financial Issues*, 10.5 (2020), 102–12. https://doi.org/10.32479/ijefi.10330.

[2] Wahyu Kurniawan and others, 'The Role of Law in Public Private Partnerships: Indonesia', *Journal of Law, Policy and Globalization*, 24.6 (2021), 1–11. https://doi.org/10.7176/jlpg/115-12.

[3] Walida Ahsana Haque, 'Legal Protection Against The Failure to Compensate on International Investment Dispute', *Yustisia Jurnal Hukum*, 8.2 (2019), 205–19. https://doi.org/10.20961/yustisia.v8i2.28490.

allowing shareholders to make claims and locally incorporated companies to sue the host state directly through international arbitration. This creates a new issue, as the locally incorporated company requirement becomes obsolete as a defense for the host state against legal action. Indonesia's Investment Law 2007 is inconsistent with its National Treatment principle. While Article 4(2) promises equal treatment for both local and foreign investors, Article 5(1) allows local investors to choose any form of business, whereas Article 5(2) mandates that foreign investors establish a locally incorporated legal entity. This creates a disparity in treatment between local and foreign investors.

The Jokowi Government has prioritized improving ease of doing business to create more job opportunities, as seen with the enactment of Law Number 11 of 2020 (now Law Number 6 of 2023) on Job Creation. This law amends several existing laws, including the 2007 Investment Law, but does not address the locally incorporated company requirement for foreign investors. Some writings on foreign investment in Indonesia fail to address the appropriateness of the locally incorporated company requirement. For instance, Indah Sari discusses the conditions for foreign investment but does not evaluate the requirement itself.[4] Nur Rahmi Febriani discusses the certainty advantage of the requirement without questioning its appropriateness. The article aims to review Indonesia's locally incorporated company requirement for foreign investment and assess whether it should be maintained or changed. Section 2 analyzes the advantages and disadvantages of the requirement in international foreign investment law, while Section 3 focuses on its implications within Indonesia. The article concludes with recommendations on whether the country should keep or modify the requirement.

2. Research Method

This research employs a normative juridical method, focusing on the examination of positive law using a statutory approach. The writer has collected, reviewed, and analyzed relevant laws, regulations, and law literature including journals and other sources. Interviews with law scholars including an official of Indonesia's Investment Coordinating Board have been conducted to obtain their opinions about the issues of the research. The data obtained is analyzed using qualitative analysis to interpret legal provisions, identify patterns, and evaluate expert perspectives to draw well-founded conclusions.

3. Result and Discussion

3.1. The Locally Incorporated Company Requirement and Its Advantages and Disadvantages in International Foreign Investment Law

FDI is an important microeconomic and macroeconomic tool for both developing and emerging countries.[5] To invest efficiently abroad, investors must have properties that other companies do not, and the host States must offer advantages in terms of location, productivity, and operations. Many factors affect an investor's decision to invest in a country, one of them

[4] Indah Sari, 'Syarat-Syarat Penanaman Modal Asing (PMA) Di Indonesia Menurut Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal', *Jurnal Ilmiah Hukum Dirgantara*, 10.2 (2020), 50–75. https://doi.org/10.35968/jh.v10i2.462.

[5] Edmund Ntom Udemba and Lucy Davou Philip, 'Policy Insight from Renewable Energy, Foreign Direct Investment (FDI), and Urbanization towards Climate Goal: Insight from Indonesia', *Environmental Science and Pollution Research*, 29.36 (2022), 54492–506. https://doi.org/10.1007/s11356-022-19599-9.

is the FDI policy.[6] One of the factors that investors can consider when investing their capital is the legal protection and certainty provided by the host States through the laws and regulations issued.[7] Host States usually provide various incentives for foreign investors, one of which is incentives for investors who invest in special economic zones.[8] Attracting greater FDI flows can help plug a country into the international trading system as well as promote a more competitive business environment[9] and also investments made by overseas investors are expected to accelerate the reduction of a country's poverty rate.[10]

In foreign investment, many countries require that foreign investor form joint ventures with local companies to carry out their desired economic activities.[11] The aim is not only to obtain capital, expertise, and new technologies but also to prevent foreign domination in important business sectors. Even in some countries, for example in the Andes region such as Bolivia, Colombia, Ecuador, and Peru, joint ventures may be the only legal vehicle for foreign investment. Host States often require foreign investors to establish locally incorporated companies under domestic company laws, particularly in developing countries. This approach aims to maximize the benefits of foreign investment for economic development and may apply broadly across sectors with certain exceptions. For example, the Philippines' Foreign Investment Law 1991 defines investment as equity participation in a locally incorporated enterprise, meaning foreign investors must invest through a local company. However, this requirement excludes banking and financial institutions. Jonathan Bonnitcha highlights this in his 2017 IISD report, Investment Laws of ASEAN Countries: A Comparative Review.[12]

India, under its Consolidated Foreign Direct Investment Policy Circular dated October 15, 2020 (FDI Policy), also generally requires foreign investors to establish a local limited liability company or a limited liability partnership. It is not allowed in the micro, small, and medium enterprise sectors.[13] However, foreign investors in India can establish liaison, branch, project, or representative offices under specific conditions. For instance, in the banking sector, prior

[6] Barli Suryanta and Arianto A. Patunru, 'Determinants of Foreign Direct Investment in Indonesia', *Global Journal of Emerging Market Economies*, 15.1 (2023), 109–31. https://doi.org/10.1177/09749101211067856.

[7] Devi Andani, 'Tinjauan Hukum Investasi Dampak Judicial Review Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal', *Nurani Hukum*, 2.2 (2020), 14. https://doi.org/10.51825/nhk.v2i2.8431.

[8] Susanne A. Frick and Andrés Rodríguez-Pose, 'What Draws Investment to Special Economic Zones? Lessons from Developing Countries, *Regional Studies*, 57.11 (2023), 2136–47. https://doi.org/10.1080/00343404.2023.2185218.

[9] Sasidaran Gopalan, Rabin Hattari, and Ramkishen S. Rajan, 'Understanding Foreign Direct Investment in Indonesia', *Journal of International Trade Law and Policy*, 15.1 (2016), 28–50. https://doi.org/10.1108/JITLP-01-2016-0003.

[10] Herman Soegoto, Surjatno Wiganepdo Soegoto, and Daniel Francois Meyer, 'The Role Of Domestic Investment, Foreign Investment, And Micro, Small And Medium-Sized Enterprises For Poverty Reduction In Indonesia', *Journal of Eastern European and Central Asian Research*, 9.5 (2022), 901–13. https://doi.org/10.15549/jeecar.v9i5.1072.

[11] Deni Welfin, 'Perlindungan Hukum Bagi Investor Indonesia Pada Perusahaan Joint Venture Dalam Perusahaan Penanam Modal Asing', *Unes Law Riview*, 6.2 (2023), 7178–84. https://doi.org/10.31933/unesrev.v6i2.

[12] Rizaldy Anggriawan and others, 'Passenger Name Record Data Protection under European Union and United States Agreement: Security over Privacy?', *Hasanuddin Law Review*, 8.2 (2022), 95–110. https://doi.org/10.20956/halrev.v8i2.2844.

[13] Seema Singha, Soma Roy Dey Choudhury, and Brajesh Kumar, 'Foreign Direct Investments and Spillover Effect on Entrepreneurial Activities in India: An Empirical Study', *Journal of Global Entrepreneurship Research*, 12.1 (2022), 423–39. https://doi.org/10.1007/s40497-022-00337-x.

approval from the Reserve Bank of India (RBI) is necessary to open such offices. Additionally, in sectors where foreign investment is limited to less than 100%, such as power exchanges, digital media news streaming, private security agencies, and print media, partnerships with local investors are mandatory, typically structured as local limited liability joint ventures.

The establishment of a locally incorporated company is also required generally in Indonesia, Article 5(2) of Indonesia's Investment Law provides that 'unless otherwise stipulated by the law, any foreign investment shall be in the form of limited liability company based on the law of the Republic of Indonesia.'[14] Incorporation in Indonesia must adhere to the Limited Liability Company Law (Law Number 40 of 2007, amended by Law Number 6 of 2023). However, exceptions exist if supported by other laws. For example, foreign banks can open branches in Indonesia without this requirement due to Indonesian Banking Law. Additionally, under Article 4 of Regulation No. 35 of 2019, foreign individuals or entities can conduct business in Indonesia if they have a permanent place of business in the country.[15] Host States may also require local incorporation only for certain sectors. For example, in Malaysia, Oliver J Borgers in Lexology Foreign Investment Review 2022 stated that the requirement is only for certain sectors like transportation services, freight forwarding and shipping, financial services, oil and gas, communications, and multimedia.

In China, certain sectors necessitate joint ventures between foreign and domestic investors,[16] requiring the establishment of a local legal entity under the Company Law. Examples include printing, nuclear power plant operations, domestic water and air transportation, civil airport construction, and broadcasting. The subsequent subsection will explore the advantages and disadvantages of local incorporation for both host States and foreign investors..

3.1.1. The Advantages of the Locally Incorporated Company Requirement

Host States often encourage or mandate local incorporation by foreign investors to maximize the benefits of foreign investment for local development. By becoming a national legal entity, the company falls under the host State's control, allowing easier implementation of performance requirements, such as employing local workers, transferring technology, ensuring local equity participation, and utilizing local content.

Regarding the use of local workers requirement, in Malaysia, for example, in certain sectors, the use of expatriates on the board of directors and key managerial personnel is restricted.[17] For example, in the oil and gas industry and distributive trade industry, minimum *Bumiputera* or Malay participation on boards of directors, management, and/or employee levels is required.[18] In addition, the Immigration Act 1959/63 provides that an employment permit can

[14] Edi Krisharyanto and Fries Melia Salviana, 'Implementation of Bilateral Investment Treaty at Joint Enterprise Agreement', 140.Icleh (2020), 64–66. https://doi.org/10.2991/aebmr.k.200513.013.

[15] Wachid Aditya Ansory, Ikarini Dani Widiyanti, and Nuzulia Kumalasari, 'The Application of the Most-Favored-Nation Principle to the „Over Top" Companies in Investment Activities of Indonesia', *Lentera Hukum*, 6.2 (2019), 189–202. https://doi.org/10.19184/ejlh.v6i2.11254.

[16] Wenwei Guan, 'Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective', *Asian Journal of Comparative Law*, 12.1 (2017), 115–39. https://doi.org/10.1017/asjcl.2017.3.

[17] Evelyn S. Devadason, 'Foreign Labour Policy and Employment in Manufacturing: The Case of Malaysia', *Journal of Contemporary Asia*, 51.3 (2021), 398–418. https://doi.org/10.1080/00472336.2020.1759675.

[18] Chin Yee Whah and Benny Teh Cheng Guan, 'Malaysia's Protracted Affirmative Action Policy and the Evolution of the Bumiputera Commercial and Industrial Community', *Sojourn*, 32.2 (2017), 336–73. https://doi.org/10.1355/sj32-2d.

be issued only if there are no residents in Malaysia who can undertake relevant employment mentioned in an applicant's service contract. In Indonesia, Article 10(1) of Indonesia's Investment Law 2007 requires investors to prioritize Indonesian citizens as their workers.[19] Article 10(2) of the Law provides that they can use foreign citizens only for experts and/or certain positions in line with applicable laws and regulations.[20]

Transfer of technology is sometimes required of locally incorporated companies. In Malaysia, for example, this is true in the area of the automotive industry.[21] The World Bank Group's 2022 Investment Policy and Regulatory Review highlights that Malaysia offers various tax incentives to boost technology transfer in industry. Similarly, India incentivizes technology transfer through agreements with foreign investors. In February 2021, the Indian Council of Medical Research (ICMR) pledged up to USD 100,000, while the Indian Foundation for Innovative New Diagnostics (FIND) committed up to USD 400,000 for local partners and researchers.

In China, qualified technology transfer is eligible for specific tax incentives. According to Article 90 of the Regulation on the Implementation of the Enterprise Income Tax Law, resident enterprises (locally incorporated companies) benefit from exemptions on the first RMB 5 million of income from qualified technology transfers, while amounts exceeding this limit are taxed at half the standard rate. For a technology transfer to be exempted from income tax, it must satisfy such requirements[22] as that the special treatment of tax must be enjoyed only by resident enterprises and it must be 'recognized by a department of science and technology at or above the provincial level'. Additionally, technology transfer is also exempted from value-added taxes.

In Indonesia, Article 10(3) and (4) of the Investment Law 2007 mandates that investors enhance the skills of Indonesian workers through training and technology transfer. Additionally, Article 18(3) stipulates that foreign investors can receive facilities or incentives only if they meet conditions such as employing local workers, utilizing local content, and facilitating technology transfer.[23] Article 18(4) of the Law outlines that facilities or incentives for investors include reductions in income tax, import duty holidays or reductions on imported capital goods, machinery, or equipment not available domestically, import duty holidays or reductions on raw materials or support materials, value-added tax holidays or postponements for imported capital goods or machinery, and property tax reductions.[24]

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[19] Budi Santoso and others, 'Examining the Employment Dimension of Corporate Social Responsibility (Between Global Initiatives and Indonesia Statutory)', *Yustisia*, 12.3 (2023), 309–23. https://doi.org/10.20961/yustisia.v12i3.71716.

[20] Ayu Putri Rainah Petung Banjaransari, 'Regulation of The Use of Foreign Workers in Indonesia After The Job Creation Act: Problems and Solutions', *Constitutionale*, 3.1 (2022), 43–58. https://doi.org/10.25041/constitutionale.v3i1.2558.

[21] Abdul Rahman Hamdan, Mohamad Syazli Fathi, and Zainai Mohamed, 'Evolution of Malaysia's Technology Transfer Model Facilitated by National Policies', *International Journal of Engineering and Technology(UAE)*, 7.2 (2018), 196–202. https://doi.org/10.14419/ijet.v7i2.29.13317.

[22] Muwu Li, Yabin Zhang, and Zhenguo Wang, 'Will the Tax Reduction and Exemption Policy for High Technology Enterprises Improve the GVC Position of Chinese Firms?', *Sustainability (Switzerland)*, 15.4 (2023). https://doi.org/10.3390/su15043570.

[23] Abdul Thalib, 'Technology Transfer in Indonesia and China: A Comparative Study', *Jurnal Hukum Ius Quia Iustum*, 23.2 (2016), 251–70. https://doi.org/10.20885/iustum.vol23.iss2.art5.

[24] Muhammad Ikhsan S Bella and Ivan Yudianto, 'The Impact of Tax Incentives on Foreign Direct Investment: The Case of Tax Holiday and Corporate Income Tax Rates in Indonesia', *Journal of Accounting Auditing and Business*, 4.2 (2021), 34–48. https://doi.org/10.24198/jaab.v4i2.34397.

By mandating local incorporation, host States can enforce local equity participation requirements, often favoring joint ventures in foreign investment. In Malaysia, certain sectors—such as petroleum, electricity, water, alternative energy, construction, wholesale and retail trade, travel, transportation, telecommunications, financial services, real estate, health services, media, and entertainment—require foreign investment to be structured as joint ventures with local partners. Minimum local participation varies, with some sectors like electricity and retail requiring at least 51% local ownership, while others, such as investment banks and nursing homes, do not have such strict requirements. Overall, these sectors necessitate minimum equity ownership by local Malaysians (Bumiputera) or indigenous ethnic groups.

The World Bank's 2022 Investment Policy and Regulatory Review for India states that foreign investors must partner with local investors in several sectors, including power exchanges, news TV channel up-linking, digital media streaming, terrestrial FM broadcasting, private security, banking, and print media. Similar to Malaysia, there is no general minimum requirement for local participation. However, specific sectors like power exchanges and news media require at least 51% local participation, while others allow for less than 50%. The World Bank Group's 2022 Investment Policy and Regulatory Review for China indicates that several sectors require at least 51% local participation. These sectors include printing, construction and operation of nuclear power plants, domestic water transportation, public air transportation, civil airport construction, broadcasting and TV ratings surveys, and cinema operations.

Host States can mandate locally incorporated companies to use local content in manufacturing and exporting products, despite such requirements being contrary to the Agreement on Trade-Related Investment Measures (TRIMs Agreement). In Malaysia, the World Bank Group's 2022 Investment Policy and Regulatory Review notes that local content is indirectly required in the automotive industry by limiting excise duty reductions to manufacturers using a specified percentage of local components. Similarly, in Thailand, Section 20 of the Investment Promotion Act empowers the Board of Investment to impose local content requirements as conditions for certain incentives granted to investors.

In Indonesia, Article 18(3) of the Investment Law indirectly requires the use of local content. The article provides that investors can receive incentives or facilities provided several conditions are satisfied, one of which is the use of locally produced capital goods, machinery, or equipment. However, no law generally requires the use of local content.[25] In 2018, Indonesia issued Government Regulation No. 29 of 2018 concerning Industry Empowerment which contained several provisions on the use of local content requirement in case of government procurement.[26] It is debatable whether the measure is against the National Treatment principle contained in the TRIMs Agreement or falls under the government procurement exception mentioned in Article III(8) b of the GATT 1994.

Jeremy argues that requiring banks to be locally incorporated offers several benefits, such as easier monitoring of a foreign bank's consolidated risk profile compared to branch structures. Local incorporation would also enhance a host State's ability to wind down a foreign bank's

[25] Faris Al-Fadhat and Praba Satya Handana, 'The Political Economy of Local Content Requirements Policy in Indonesia's Telecommunication Manufacturing Industry 2015-2020', *Nation State: Journal of International Studies*, 6.2 (2023), 79–95. https://doi.org/10.24076/nsjis.v6i2.1102.

[26] A. Utami and others, 'Implementation of the Government Regulation of the Republic of Indonesia Number 29 of 2018 Concerning Industrial Empowerment (Case Study in the National Shipbuilding Industry in East Java)', *International Journal of Social Science and Education Research Studies*, 04.04 (2024), 276–84. https://doi.org/10.55677/ijssers/v04i4y2024-01.

domestic operations during distress and promote more active foreign banks, thereby increasing competition in the retail banking sector. Additionally, host countries can mandate that locally incorporated companies exhaust local remedies before seeking international arbitration, allowing the State of incorporation to resolve disputes within its domestic legal system.

In Indonesia, according to Article 5(2) of the country's Investment Law 2007, the incorporation of foreign investment as a Limited Liability Company (*Perseroan Terbatas*) must be based on Indonesia's Law Number 40 of 2007 on Limited Liability Company (Indonesia's Limited Liability Law).[27] Under Article 7(1) of the Law, the company must be established by a notarial deed in Indonesian language. A notary is a State official who ensures that the company's articles of incorporation and articles of association comply with the Limited Liability Law and its implementing regulations.[28] In Indonesia, companies must have at least two founders, except for micro and small enterprises, which can have a single founder as per Law Number 11 of 2020. Article 18 of the Limited Liability Company Law mandates that a company's objectives and activities must align with applicable laws. Additionally, Article 33(1) requires that at least 25% of the authorized capital be fully paid up, and Articles 15(b) and 74(1) stipulate that limited liability companies must engage in corporate social responsibility.

This demonstrates that by requiring local incorporation, Indonesia as the host State can effectively control foreign investors so that foreign investment can contribute to the country's development.[29] This is internationally the case as many investment treaties have explicitly stated that they protect only investments made in line with the laws and regulations of the host State. The host State has the right to require foreign investment to comply with its domestic laws to ensure that it promotes the host State's economic development and interests. A locally incorporated company is a legal or juridical entity in the host State. Generally, it has several advantages for foreign investors. First, the liability of the foreign investors is limited to their maximum investment in the company. Consequently, foreign investors usually are not required to pay the company's obligation using their assets. Second, the company has independent rights separate from its owners. This has been demonstrated in the Barcelona Traction case, In this case, it was decided that foreign investors could not take action. Nevertheless, the ICJ explicitly stated that the company could take action. The Court in the Barcelona Traction case page 35 stated:

"It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too".

A locally incorporated company's right to claim against a host State under an investment treaty is secure, unless exceptional circumstances like control, alter ego, or undercapitalization arise. In *Tokios Tokelės v Ukraine*, the ICSID tribunal rejected Ukraine's request to pierce the corporate veil of a Lithuanian company owned by Ukrainian nationals. This case illustrates that a locally incorporated company's protection under an investment treaty is independent of its investors. By being locally incorporated, the company deserves treatment as a domestic

[27] Yusrizal, 'Peran Notaris Dalam Mendorong Terciptanya Kepastian Hukum Bagi Investor Dalam Investasi Asing', *Jurnal Lex Renaissance*, 3.2 (2018), 359–76. https://doi.org/10.20885/jlr.vol3.iss2.art7.

[28] Haingo Rabanirajona, 'Role of Notary in Abroad and Indonesia', *Jurnal Akta*, 7.4 (2020), 343. https://doi.org/10.30659/akta.v7i4.12900.

[29] Tito Bramantyo, 'The Indonesian Government'S Participation in International Investment Law and Its Reform', *Indonesian Journal of International Law*, 19.1 (2021), 83–111. https://doi.org/10.17304/ijil.vol19.1.4.

company. In Saudi Arabia, for example, foreign investors can obtain incentives only if they form local legal entities.[30] In Indonesia, Article 20 of the Investment Law provides incentives to foreign investors only if they establish limited liability companies. These incentives include reductions in income tax, import duties on capital goods and raw materials, value-added tax holidays or postponements for production equipment, and property tax reductions.[31]

3.1.2. The Disadvantages of the Locally Incorporated Company Requirement

Local incorporation makes foreign investors legal entities with limited liability, benefiting the investors but potentially disadvantaging the host State. In case of disputes, the host State can only claim the company's assets, as shareholders' liability is limited.[32] Second, by requiring local incorporation, the host State prevents its people or third parties from claiming damages over the maximum assets of the company. However, in abnormal situations, although difficult, piercing the veil of the company is possible if such situations as a controlled company, alter ego, or undercapitalization are proven by the plaintiff, and as a consequence, shareholders of the company become unlimited.

Requiring foreign investors to establish legal entities while allowing domestic investors to use any business form may violate the National Treatment principle in investment treaties. Most bilateral investment treaties (BITs) mandate that host countries treat foreign investors no less favorably than domestic investors in areas such as establishment and management. In ASEAN countries, requiring local incorporation may violate the National Treatment principle in the ASEAN Comprehensive Investment Agreement (ACIA). Article 5(1) of the ACIA mandates that each Member State treat investors from other Member States no less favorably than domestic investors in terms of "admission, establishment, acquisition, expansion, management, and operation" of investments, with "establishment" including the local incorporation requirement.

A host State may violate the National Treatment principle under Article XVII(1) of the General Agreement on Trade in Services (GATS) if no conditions are made in their schedule of commitment regarding commercial presence. They may also breach the market access obligation in Article XVI(2)(e) of GATS, which prohibits restricting the type of legal entity for service supply unless specified in the schedule. However, countries can avoid this violation by specifying such requirements. For example, Indonesia's GATS schedule limits market access by requiring a limited liability enterprise (Perseroan Terbatas / PT). Incorporating locally in different countries increases corporate formalities, which is a disadvantage for investors. These formalities include drafting by-laws, articles of incorporation, issuing stock, recording stock transfers, holding management and shareholder meetings, and documenting meeting minutes. For investors with companies in multiple States, each company requires separate records for shares, shareholders, and management, even if they are the same across companies, significantly increasing annual record-keeping.

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[30] Khaled Jadeaf Alanazi and Salawati Mat Basir, 'The Impact and Contribution of FDI to Saudi Economy During King Abdullah Regime', *International Journal of Financial Research*, 11.6 (2020), 37. https://doi.org/10.5430/ijfr.v11n6p37.

[31] Adi Lesmana and Widyono Soetjipto, 'The Effect of Corporate Tax Policy on Foreign Direct Investment: Empirical Evidence From Asian Countries', *Buletin Ekonomi Moneter Dan Perbankan*, 25.4 (2022), 647–72. https://doi.org/10.21098/bemp.v25i4.1729.

[32] Caslav Pejovic and Juliartha Nugrahaeny Pardede, 'Revising Bilateral Investment Treaties As a New Tendency in Foreign Investment Law: India and Indonesia in the Focus', *Indonesian Journal of International Law*, 17.2 (2020), 253–72. https://doi.org/10.17304/ijil.vol17.2.786.

A locally incorporated company becomes a domestic entity in the host State, making it difficult to take legal action against the host State in international forums like ICSID, which only handles disputes between foreign investors and host States. Typically, disputes between local corporations and the host State are resolved in local courts. However, under Article 25(2)(b) of the ICSID Convention, a local corporation can sue the host State in ICSID arbitration if it is controlled by foreign investors and both parties agree to treat it as a foreign corporation.

In Indonesia, Article 34(4) of the Investment Law 2007 allows investment disputes between the government and locally incorporated foreign investors to be settled through international arbitration, provided all parties agree. This suggests that such companies can be treated as foreign investors for legal action against the government in international arbitration, including ICSID, on a case-by-case basis. In the *Amco Asia Corporation v. Republic of Indonesia* case (1984), consent was indicated by an ICSID arbitration clause in the contract between the foreign investor and an Indonesian state entity. Several investment treaties have addressed the difficulty of locally incorporated companies taking legal action against host States through ICSID arbitration by broadly defining "investors" to include locally incorporated companies. This means the host State must treat its locally incorporated company as a foreign investor. For instance, the Netherlands–South Africa BIT (1995) states that "investors" include legal entities not constituted under the law of a contracting party but controlled by persons or entities in the other contracting party.[33] Article 1(2) of the Netherlands – Indonesia BIT (1994) also contains a similar definition.[34]

Foreign investors, as individuals, are not protected under customary international law and cannot take action against a State for harm done to a company they own shares in. The Barcelona Traction Case ruled that only the corporation itself, not its shareholders, can seek compensation, as the corporation's rights are the ones infringed. However, investment treaties have resolved this issue by broadly defining "investment" to include shares. For example, the *U.K.–Indonesia BIT* (1976) and newer BITs like *Indonesia–Sweden* (1992) and *Denmark–Indonesia* (2007) include shares as investments, enabling shareholders to take legal action against the host State through ICSID or other international arbitration.[35] Several cases demonstrate that ICSID has readily accepted shareholders' claims under investment treaties. For instance, in *Antoine Goetz et al. v. Republic of Burundi* (1999), ICSID accepted a claim from Mr. Antoine Goetz and other Belgian investors against Burundi. Similarly, in *Lanco Int'l, Inc. v. the Argentine Republic*, ICSID accepted a request for arbitration from the U.S. company Lanco, seeking compensation for alleged breaches of the BIT with Argentina. Despite these precedents, Patrick Dumberry argues that a customary international law rule protecting shareholders of locally incorporated companies has not emerged, citing three reasons: the absence of consistent state practice and Opinio Juris, the principle that corporations and individuals lack automatic standing before international tribunals without state consent, and the limitation that arbitral tribunals cannot exceed the treaty's wording. However, as host states sign more treaties with foreign shareholders, such rights may eventually gain broader international recognition.

Apart from broadly defining 'investors' to include a locally incorporated company and 'investment' to include 'share', investment treaties usually contain investor-State dispute

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[33] Alessandra Arcuri and Bart-Jaap Verbeek, 'The New Dutch Model Investment Agreement', *Erasmus Law Review*, 12.4 (2020), 37–49. https://doi.org/10.5553/elr.000173.

[34] Nur Gemilang Mahardhika, 'An Epilogue To Bilateral Investment Treaties Regime And The Fate Of Foreign Investments Protection In Indonesia', *Jurnal Hukum Ius Quia Iustum*, 29.1 (2022), 93–117. https://doi.org/10.20885/iustum.vol29.iss1.art5.

[35] Herliana Herliana, 'Inconsistencies in Icsid Awards on Disputes Related To Mfn and Umbrella Clause', *Diponegoro Law Review*, 6.2 (2021), 247–64. https://doi.org/10.14710/dilrev.6.2.2021.247-264.

settlement (ISDS) provisions that give direct rights of action to investors against the host State.[36] As a result, foreign investors and locally incorporated companies can pursue legal action against the host state through international arbitration, including ICSID arbitration, rendering the locally incorporated company requirement ineffective as a shield for the host state against such actions. The previous discussion shows that the locally incorporated company requirement has both advantages and disadvantages, but the advantages outweigh the disadvantages, with some issues already resolved. The next subsection will explore this issue in Indonesia.

3.2. The Advantages and Disadvantages of Indonesia's Locally Incorporated Company Requirement

To foster a favorable investment climate, the Indonesian government has implemented licensing reforms since 2018, culminating in the Job Creation Law. However, some requirements still pose potential obstacles to foreign investment. In Indonesia, foreign investors have been required to establish a locally incorporated company under the former Foreign Investment Law of 1967 and the Investment Law of 2007. Article 7(2) of Presidential Regulation No. 10 of 2021, as amended by Regulation No. 49 of 2021, reiterates this requirement, stating that foreign investors must create a Limited Liability Company (LLC) according to Indonesia's limited liability company law.[37] The Elucidation to Article 3(1) of the Foreign Investment Law 1967 states that the requirement for a locally incorporated company ensures certainty regarding the company's legal status and the capital invested in the country. This is the sole statutory explanation for the requirement.

Indonesia's Investment Law 2007 which also contains the requirement does not explain. However, it can be stated that the new law impliedly has the same reason, which is legal certainty. Although the new Law does not explicitly give the legal certainty reason for the requirement, it mentions 'legal certainty' in several articles.[38] For example, Article 3(1)(a) of the Law establishes legal certainty as a key principle, while Article 4(2)(b) ensures that the state provides legal certainty for investors. Article 14(a) states that legal certainty is an investor's right. Nur Rahmi Febriani notes that the requirement's objective, implied in the general Elucidation of the Investment Law 2007, is legal certainty. She explains that a limited liability company's legal status is secure under Indonesia's Law No. 40 of 2007, as it is a legal entity recognized by the Minister of Law, has good organization, and possesses assets and liabilities separate from its shareholders. Aminuddin Ilmar in "Hukum Penanaman Modal di Indonesia" (2004) argues that the requirement helps clarify which law applies in case of disputes, while Sentosa Sembiring in his book "Hukum Investasi" (2010) states that incorporation ensures the company has distinct assets and liabilities, enabling it to sue or be sued.

In a phone conversation, Sulistiowati, a company and business law professor at UGM Faculty of Law, expressed her agreement with the aforementioned reasons. She believes that a limited liability company for foreign investors provides greater economic benefits to Indonesia, as it

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[36] David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?', *Asian Journal of International Law*, 7.1 (2017), 124–51. https://doi.org/10.1017/S2044251315000247.

[37] Fahrurozy Muhammad, 'Investment In Digital Age: The Future Role of Notary In Company Establishment', *Indonesian Law Journal*, 15.1 (2022), 1–23. https://doi.org/10.33331/ilj.v15i1.89.

[38] Januari Nasya Ayu Taduri, 'The Legal Certainty and Protection of Foreign Investment Against Investment Practices in Indonesia', *Lex Scientia Law Review*, 5.1 (2021), 119–38. https://doi.org/10.15294/lesrev.v5i1.46286.

ensures clarity regarding the capital invested by foreign entities. Her view aligns with those of other scholars mentioned later. The certainty of legal entity status benefits both Indonesia and foreign investors. For Indonesia, this status enhances control, allowing easier oversight of company establishment and ensuring compliance with laws and regulations. Indonesia can mandate minimum capital investments and require companies to engage in corporate social responsibilities, as well as performance requirements such as employing local workers, transferring technology, using local content, and encouraging local equity participation.

The control benefit is debatable; if Indonesia allowed foreign investors to form businesses other than LLCs, such as general or limited partnerships, it could still impose similar controls and requirements. For instance, the country could mandate minimum capital for partnerships and require the use of local workers, technology transfer, local content, and participation with local investors. Currently, general and limited partnerships are governed by Indonesia's Civil Code and Commercial Code.[39] The Regulation of the Minister of Law Number 17 of 2018 mandates the registration of all partnerships with the Minister of Law, allowing the government to specify requirements. However, it is simpler for Indonesia to impose these requirements on legal entities, making it easier for companies to comply.[40]

For foreign investors, the certainty of the legal entity status is advantageous.[41] The company operates independently of its owners, allowing it to enter agreements with other parties, including Indonesia. As a domestic entity, it qualifies for incentives under Article 20 of Indonesia's Investment Law 2007, which states that only legal entities are eligible for such benefits.[42] Article 18(4) of the Law specifies that incentives include income tax reductions, import duty exemptions or reductions for imported capital goods and raw materials, value-added tax holidays or postponements for imported production equipment, and property tax reductions. Indonesia primarily uses tax holidays and allowances as incentives to attract investors.

In addition to the legal certainty advantage, Riyatno, director of the legal division of the Indonesian Investment Coordinating Board, explained that the limited liability of locally incorporated companies is crucial for business stability and risk minimization. His statement implies that, due to this limited liability, a company's operations can persist even if it encounters legal issues. For instance, if a subsidiary faces a legal suit and collapses, the parent company's assets cannot be used to settle the subsidiary's debts.

Riyatno emphasized that the requirement ensures foreign investors bring a minimum capital into Indonesia, echoing Sulistiowati's opinion. This approach benefits the country and aligns with the goals of developing nations to promote economic development through local incorporation of foreign investment. This rationale is consistent with the ICSID Convention's preamble, which implies that foreign investment fosters "international cooperation for economic development."

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[39] Dhifa Nadira and others, 'The Legal Position of Limited Partnership in Indonesia through the Perspective of the Philosophy of Utilitarianism', *International Journal of Social Science and Education Research Studies*, 03.11 (2023), 2247–57. https://doi.org/10.55677/ijssers/v03i11y2023-11.

[40] Yordan Gunawan and Mohammad Hazyar Arumbinang, 'The Climate Change Litigation Based Human Rights Approach in Corporations: Prospects and Challenges', *Journal of Human Rights, Culture and Legal System*, 3.2 (2023), 288–307. https://doi.org/10.53955/jhcls.v3i2.116.

[41] Benny Hutahayan and others, 'Investment Decision, Legal Certainty and Its Determinant Factors: Evidence from the Indonesia Stock Exchange', *Cogent Business and Management*, 11.1 (2024). https://doi.org/10.1080/23311975.2024.2332950.

[42] Nurianto RS and Ahmad Fata'al Chuzaibi, 'Government Regulations toward Investment Law in Indonesia', *Research, Society and Development*, 8.9 (2019), 1–10 <https://doi.org/10.33448/rsd-v8i9.1295.

Riyatno's statement aligns with Article 7 of Indonesia's Presidential Regulation No. 10 of 2021, which requires local incorporation of foreign investors and stipulates that their investments must exceed ten billion rupiah, excluding land and buildings. An exception exists for technology-based start-ups in special economic zones, which can invest ten billion rupiah or less under Article 8(2). Riyatno noted that while foreign investors do not challenge the locally incorporated company requirement, they find the minimum capital requirement burdensome. Riyatno explained that allowing foreign investors to establish business forms other than limited liability companies, such as general or limited partnerships, could lead to competition with local investors, raising concerns that foreign investors might outcompete them. This suggests that Indonesia's locally incorporated company requirement aims to protect local investors. However, Article 32(2) of Indonesia's Limited Liability Company Law, amended by Law No. 3 of 2023, encourages local investors to form LLCs by eliminating the minimum authorized capital requirement and permitting micro and small businesses to establish one-person LLCs, which is an exception to the general rule that requires at least two people to form an LLC[43] as required by Article 7(7) of Indonesia's Limited Liability Company. Under Article 7(1) of Indonesia's Limited Liability Company Law, one-person LLCs for micro and small businesses can be established via a self-establishment declaration, unlike general LLCs, which require a notarial deed. This could lead to more local investor-owned LLCs competing with foreign-owned LLCs.

Therefore, in the writer's view, a negative list regulation is more crucial for protecting local investors than prohibiting foreign investors from establishing partnerships. However, the current negative list of investments under Indonesia's Presidential Regulation No. 10 of 2021 (amended by Regulation No. 49 of 2021) is more limited than the previous regulation (Presidential Regulation No. 44 of 2016), indicating an intention to liberalize foreign investment. Consequently, as more sectors are opened to foreign investors, the competition between foreign and local investors increases, raising questions about the effectiveness of the country's efforts to protect local investors.[44]

Riyatno argues that Indonesia's locally incorporated company requirement acts as a strategy to prevent lawsuits from such companies or their foreign investors in international arbitration. This serves as a "shield" for Indonesia against legal actions. Although Article 32(4) of the Investment Law 2007 offers the option of settling investment disputes in international arbitration, it requires Indonesia's consent. This aligns with Article 25(2)(b) of the ICSID Convention, which allows a locally incorporated company to be treated as foreign for arbitration, but only with the host state's written consent.

Indonesia's requirement for locally incorporated companies limits claims in disputes to the company's assets, even if the losses exceed those assets. This applies to both government and citizen lawsuits. However, the corporate veil can be pierced in exceptional cases, as per Article 3(2) of Indonesia's Limited Liability Company Law (2007). If shareholders fail to meet legal entity requirements, exploit the company for personal gain, engage in illegal actions, or misuse company assets, their liability becomes unlimited, extending beyond the company's assets.

Indonesia's locally incorporated company requirement limits foreign investors' ability to sue the country through ICSID arbitration, as ICSID lacks jurisdiction over disputes between

[43] Ayu Kholifah and Shelly Kurniawan, 'One-Person Limited Liability Company : Considering Company ' S Organ Governance of the Indonesian Legal Entities for Micro and Small Enterprises', 09.01 (2024), 1–17. https://doi.org/10.14710/dilrev.9.1.2024.1-18.

[44] Yordan Gunawan and Yovi Cajapa Endyka, 'The Protection of Small and Medium Enterprises in Yogyakarta: The Challenges of ASEAN Economic Community', *Pertanika Journal of Social Sciences and Humanities*, 25.October (2017), 199–206.

national companies and the host State. However, Article 25(2)(b) of the ICSID Convention allows the host State to treat a national company as foreign due to foreign control. Additionally, investment treaties provide solutions by including shares as investments, enabling shareholders to claim, and by allowing locally incorporated companies to directly sue Indonesia through international arbitration.

Indonesia's BITs, such as the *Indonesia-Netherlands BIT* (1994) and *Indonesia-Singapore BIT* (2005), broadly define investments, including shares. Article 1(2) of the *Indonesia-Netherlands BIT* defines investors as both natural and legal persons from each contracting party. Article 9(2) states that if a dispute between investors and a contracting party isn't resolved within three months, it can be submitted to either local judicial procedures or international arbitration or conciliation.

Second, they contain a broad definition of investors to cover locally incorporated companies. Third, they contain investor-state dispute settlement (ISDS) provisions that give investors the right to sue Indonesia.[45] Those provisions have enabled foreign investors and locally incorporated companies to take legal action against Indonesia through international arbitration including ICSID arbitration. For example, *Cemex Asia Holdings Ltd v Indonesia* (ICSID, 2004), *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID, 2012), *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v Republic of Indonesia* (ICSID, 2014), etc. In these cases, foreign investors and locally incorporated companies took legal action against Indonesia without the country's written consent.

These BITs have conferred direct rights of action on foreign investors and locally incorporated companies through international arbitration if Indonesia's policies and actions adversely affect their interests.[46] Indonesia has terminated many of its BITs, following other countries in rejecting provisions like ISDS that grant excessive rights to foreign investors, conflicting with national development goals. For example, the 2005 Indonesia-Singapore BIT was replaced by a new BIT in 2018. Unlike the 2005 BIT, which broadly defined investors and allowed direct access to international arbitration, the 2018 BIT excludes locally incorporated companies from the investor definition. It also requires written consent from disputing parties before arbitration, aiming to balance the rights of foreign investors and Indonesia.[47]

3.3. Suggestion for Indonesia

The locally incorporated company requirement benefits host States by allowing them to control foreign investors, ensuring compliance with local laws and contributing to economic development. Host States can impose performance requirements, such as minimum capital, use of local workers, technology transfer, local content, and partnerships with local investors. Additionally, they can require disputes to be settled in local courts before allowing access to international arbitration.

[45] S Sefriani, 'The Urgency of International Investment Agreements (Iia) and Investor-State Dispute Settlement (Isds) for Indonesia', *Jurnal Dinamika Hukum*, 18.2 (2018), 245. https://doi.org/10.20884/1.jdh.2018.18.2.1961.

[46] Mukhamad Zulkarnain, 'Problematika Investor State Dispute Settlement Dalam Bilateral Investment Treaty Indonesia-Singapura 2018', *Jurisprudensi : Jurnal Ilmu Syariah, Perundangan-Undangan Dan Ekonomi Islam*, 15.2 (2023), 400–413. https://doi.org/10.32505/jurisprudensi.v15i2.6963.

[47] Yordan Gunawan and others, 'Journalist Protection on the Battlefield Under the International Humanitarian Law: Russia-Ukraine War', *Jurnal Hukum Unissula*, 39.1 (2023), 1–11. https://doi.org/10.26532/jh.v39i1.24685.

For foreign investors, the locally incorporated company requirement offers advantages like limited liability, asset separation from owners, and reduced business risk. The company also has the independent right to make claims in the host State's courts and is treated as a domestic company, qualifying for certain investment incentives.

The disadvantage for the host State is that it cannot claim personal liability from foreign investors due to limited liability. However, piercing the corporate veil is possible with proof of control, alter ego, or undercapitalization. If the host State requires foreign investors to establish legal entities but allows domestic investors more flexibility, it could violate the National Treatment principle in investment treaties, though no such case has been raised yet. The host State may also breach National Treatment and market access obligations under GATS, but can avoid this by including the locally incorporated company requirement as a condition.

The key disadvantages of the locally incorporated company requirement for foreign investors are: difficulty in taking legal action against the host State in ICSID arbitration, as ICSID lacks jurisdiction over disputes between local companies and the host State, and foreign investors have no direct right to sue. However, Article 25(2)(b) of the ICSID Convention allows a locally incorporated company to be treated as foreign if it is foreign-controlled, enabling ICSID arbitration. Additionally, investment treaties broaden the definition of investors to include shares and locally incorporated companies, allowing foreign investors to pursue claims through ICSID arbitration.

In Indonesia, the locally incorporated company requirement provides legal certainty, benefiting both the country and foreign investors. For Indonesia, this status allows easier control over foreign companies, ensuring compliance with laws, minimum capital, corporate social responsibility, technology transfer, use of local content, and partnerships with local investors. This aligns with the goal of promoting economic development. The requirement also acts as a shield against ICSID arbitration. Additionally, it protects local investors, who primarily use partnerships, from competition with foreign investors. For foreign investors, the company's legal entity status ensures independence from its owners, allowing it to make agreements and operate autonomously. Its limited liability contributes to business stability and risk minimization, and as a domestic company, it is eligible for incentives from the Indonesian host state. The disadvantage of local incorporation for foreign investors in Indonesia is that the country or its citizens cannot hold them personally liable due to limited liability. However, they can pierce the corporate veil if the plaintiff proves situations like control, alter ego, or undercapitalization, as outlined in Article 3(2) of Indonesia's Limited Liability Company Law.

There have been no complaints from foreign investors regarding Indonesia's locally incorporated company requirement. Since early 2022, confidence in investing in Indonesia has increased, especially following the COVID-19 pandemic. From April to June 2023, total investments reached 349.89 trillion rupiah, with foreign investment accounting for 186.3 trillion rupiah, or 53.3% of the total (Cindy Mutia Annur, 'Indonesia Terima Investasi Rp349 Triliun per Kuartal II-2023, Mayoritas Modal Asing', 2023). This trend suggests that foreign investors do not have issues with the local incorporation requirement. The advantages of the locally incorporated company requirement in Indonesia outweigh its disadvantages, which have mostly been addressed. Thus, it should maintain this requirement. However, it should review its BITs that allow locally incorporated companies to directly sue Indonesia through international arbitration, as this undermines the requirement. Treaties such as the *Indonesia-Russian Federation BIT* (2007), *Cuba-Indonesia BIT* (1997), and *Indonesia-Syrian Arab Republic BIT* (1997) still grant such rights. Indonesia should renegotiate these BITs to establish balanced rights between foreign investors and the country, using the *Singapore-Indonesia BIT* 2018 as a model, which requires the host state's written consent for legal action.

The locally incorporated company requirement is insufficient to protect local investors. With the government easing the establishment of LLCs, more locally-owned companies will compete with foreign-owned ones. Therefore, Indonesia should reconsider its negative list policy to prioritize local investors in key sectors vital to the economy.

4. Conclusion

Overall, the benefits of the locally incorporated company requirement outweigh its drawbacks, and several disadvantages have already been addressed. This is true in Indonesia as well, making the requirement still relevant and appropriate for the country. However, certain investment treaties have rendered this requirement ineffective in protecting Indonesia from legal actions brought by locally incorporated companies through international arbitration. To address this issue, Indonesia should review and renegotiate its bilateral investment treaties (BITs) with other countries that continue to grant direct rights of legal action to companies and develop new BITs that balance the rights of foreign investors and Indonesia. Regarding the protection of local investors, the locally incorporated company requirement should be supported by the country's negative list policy. Indonesia should reassess its use of the negative list policy to ensure that certain sectors are reserved exclusively for local investors.

References

Al-Fadhat, Faris, and Praba Satya Handana, 'The Political Economy of Local Content Requirements Policy in Indonesia's Telecommunication Manufacturing Industry 2015-2020', *Nation State: Journal of International Studies*, 6.2 (2023), 79–95. https://doi.org/10.24076/nsjis.v6i2.1102.

Alanazi, Khaled Jadeaf, and Salawati Mat Basir, 'The Impact and Contribution of FDI to Saudi Economy During King Abdullah Regime', *International Journal of Financial Research*, 11.6 (2020), 37. https://doi.org/10.5430/ijfr.v11n6p37.

Andani, Devi, 'Tinjauan Hukum Investasi Dampak Judicial Review Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal', *Nurani Hukum*, 2.2 (2020), 14. https://doi.org/10.51825/nhk.v2i2.8431.

Anggriawan, Rizaldy, Andi Agus Salim, Yordan Gunawan, and Mohammad Hazyar Arumbinang, 'Passenger Name Record Data Protection under European Union and United States Agreement: Security over Privacy?', *Hasanuddin Law Review*, 8.2 (2022), 95–110. https://doi.org/10.20956/halrev.v8i2.2844.

Ansory, Wachid Aditya, Ikarini Dani Widiyanti, and Nuzulia Kumalasari, 'The Application of the Most-Favored-Nation Principle to the „Over Top" Companies in Investment Activities of Indonesia', *Lentera Hukum*, 6.2 (2019), 189–202. https://doi.org/10.19184/ejlh.v6i2.11254.

Arcuri, Alessandra, and Bart-Jaap Verbeek, 'The New Dutch Model Investment Agreement', *Erasmus Law Review*, 12.4 (2020), 37–49. https://doi.org/10.5553/elr.000173.

Banjaransari, Ayu Putri Rainah Petung, 'Regulation of The Use of Foreign Workers in Indonesia After The Job Creation Act: Problems and Solutions', *Constitutionale*, 3.1 (2022), 43–58. https://doi.org/10.25041/constitutionale.v3i1.2558.

Bramantyo, Tito, 'The Indonesian Government'S Participation in International Investment Law and Its Reform', *Indonesian Journal of International Law*, 19.1 (2021), 83–111. https://doi.org/10.17304/ijil.vol19.1.4.

Devadason, Evelyn S., 'Foreign Labour Policy and Employment in Manufacturing: The Case of Malaysia', *Journal of Contemporary Asia*, 51.3 (2021), 398–418. https://doi.org/10.1080/00472336.2020.1759675

Fernandez, Manuel, Mariam Mohamed Almaazmi, and Robinson Joseph, 'Foreign Direct Investment In Indonesia: An Analysis From Investors Perspective', *International Journal of Economics and Financial Issues*, 10.5 (2020), 102–12. https://doi.org/10.32479/ijefi.10330.

Frick, Susanne A., and Andrés Rodríguez-Pose, 'What Draws Investment to Special Economic Zones? Lessons from Developing Countries', *Regional Studies*, 57.11 (2023), 2136–47. https://doi.org/10.1080/00343404.2023.2185218.

Gemilang Mahardhika, Nur, 'An Epilogue To Bilateral Investment Treaties Regime And The Fate Of Foreign Investments Protection In Indonesia', *Jurnal Hukum Ius Quia Iustum*, 29.1 (2022), 93–117. https://doi.org/10.20885/iustum.vol29.iss1.art5.

Gopalan, Sasidaran, Rabin Hattari, and Ramkishen S. Rajan, 'Understanding Foreign Direct Investment in Indonesia', *Journal of International Trade Law and Policy*, 15.1 (2016), 28–50. https://doi.org/10.1108/JITLP-01-2016-0003.

Guan, Wenwei, 'Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective', *Asian Journal of Comparative Law*, 12.1 (2017), 115–39. https://doi.org/10.1017/asjcl.2017.3.

Gunawan, Yordan, and Mohammad Hazyar Arumbinang, 'The Climate Change Litigation Based Human Rights Approach in Corporations: Prospects and Challenges', *Journal of Human Rights, Culture and Legal System*, 3.2 (2023), 288–307. https://doi.org/10.53955/jhcls.v3i2.116.

Gunawan, Yordan, Arif Budiman, Nafiza Fauziah, and Wa Ode Fithrah Az Zalia Syamsudin, 'Journalist Protection on the Battlefield Under the International Humanitarian Law: Russia-Ukraine War', *Jurnal Hukum Unissula*, 39.1 (2023), 1–11. https://doi.org/10.26532/jh.v39i1.24685.

Gunawan, Yordan, and Yovi Cajapa Endyka, 'The Protection of Small and Medium Enterprises in Yogyakarta: The Challenges of ASEAN Economic Community', *Pertanika Journal of Social Sciences and Humanities*, 25.October (2017), 199–206

Hamdan, Abdul Rahman, Mohamad Syazli Fathi, and Zainai Mohamed, 'Evolution of Malaysia's Technology Transfer Model Facilitated by National Policies', *International Journal of Engineering and Technology(UAE)*, 7.2 (2018), 196–202. https://doi.org/10.14419/ijet.v7i2.29.13317.

Haque, Walida Ahsana, 'Legal Protection Against The Failure To Compensate On International Investment Dispute', *Yustisia Jurnal Hukum*, 8.2 (2019), 205–19. https://doi.org/10.20961/yustisia.v8i2.28490.

Herliana, Herliana, 'Inconsistencies in Icsid Awards on Disputes Related To Mfn and Umbrella Clause', *Diponegoro Law Review*, 6.2 (2021), 247–64. https://doi.org/10.14710/dilrev.6.2.2021.247-264.

Hutahayan, Benny, Mohamad Fadli, Satria Amiputra Amimakmur, and Reka Dewantara, 'Investment Decision, Legal Certainty and Its Determinant Factors: Evidence from the Indonesia Stock Exchange', *Cogent Business and Management*, 11.1 (2024). https://doi.org/10.1080/23311975.2024.2332950.

Kholifah, Ayu, and Shelly Kurniawan, 'One-Person Limited Liability Company : Considering Company ' S Organ Governance Of The Indonesian Legal Entities For Micro And Small Enterprises', 09.01 (2024), 1–17. https://doi.org/10.14710/dilrev.9.1.2024.1-18.

Krisharyanto, Edi, and Fries Melia Salviana, 'Implementation of Bilateral Investment Treaty at Joint Enterprise Agreement', 140.Icleh (2020), 64–66. https://doi.org/10.2991/aebmr.k.200513.013.

Kurniawan, Wahyu, Universitas Wijaya Putra, Nabilah Aliyyah, Universitas Wijaya, Rita Helmi, Universitas Wijaya Putra, and others, 'The Role of Law in Public Private Partnerships: Indonesia', *Journal of Law, Policy and Globalization*, 24.6 (2021), 1–11. https://doi.org/10.7176/jlpg/115-12.

Lesmana, Adi, and Widyono Soetjipto, 'The Effect of Corporate Tax Policy on Foreign Direct Investment: Empirical Evidence From Asian Countries', *Buletin Ekonomi Moneter Dan Perbankan*, 25.4 (2022), 647–72. https://doi.org/10.21098/bemp.v25i4.1729.

Li, Muwu, Yabin Zhang, and Zhenguo Wang, 'Will the Tax Reduction and Exemption Policy for High Technology Enterprises Improve the GVC Position of Chinese Firms?', *Sustainability (Switzerland)*, 15.4 (2023). https://doi.org/10.3390/su15043570.

Muhammad, Fahrurozy, 'Investment In Digital Age: The Future Role of Notary In Company Establishment', *Indonesian Law Journal*, 15.1 (2022), 1–23. https://doi.org/10.33331/ilj.v15i1.89.

Pejovic, Caslav, and Juliartha Nugrahaeny Pardede, 'Revising Bilateral Investment Treaties As a New Tendency in Foreign Investment Law: India and Indonesia in the Focus', *Indonesian Journal of International Law*, 17.2 (2020), 253–72. https://doi.org/10.17304/ijil.vol17.2.786.

Price, David, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?', *Asian Journal of International Law*, 7.1 (2017), 124–51. https://doi.org/10.1017/S2044251315000247.

Rabanirajona, Haingo, 'Role of Notary in Abroad and Indonesia', *Jurnal Akta*, 7.4 (2020), 343. https://doi.org/10.30659/akta.v7i4.12900.

RS, Nurianto, and Ahmad Fata'al Chuzaibi, 'Government Regulations toward Investment Law in Indonesia', *Research, Society and Development*, 8.9 (2019), 1–10. https://doi.org/10.33448/rsd-v8i9.1295.

S Bella, Muhammad Ikhsan, and Ivan Yudianto, 'The Impact of Tax Incentives on Foreign Direct Investment: The Case of Tax Holiday and Corporate Income Tax Rates in Indonesia', *Journal of Accounting Auditing and Business*, 4.2 (2021), 34–48. https://doi.org/10.24198/jaab.v4i2.34397.

Santoso, Budi, Safinaz Mohd Hussein, Dina Mila Prasasti, Sinta Lestari, and Ummu Sulaem Syamsudin, 'Examining the Employment Dimension of Corporate Social Responsibility (Between Global Initiatives and Indonesia Statutory)', *Yustisia*, 12.3 (2023), 309–23. https://doi.org/10.20961/yustisia.v12i3.71716.

Sari, Indah, 'Syarat-Syarat Penanaman Modal Asing (PMA) Di Indonesia Menurut Undang-

Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal', *Jurnal Ilmiah Hukum Dirgantara*, 10.2 (2020), 50–75. https://doi.org/10.35968/jh.v10i2.462.

Sefriani, S, 'The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia', *Jurnal Dinamika Hukum*, 18.2 (2018), 245. https://doi.org/10.20884/1.jdh.2018.18.2.1961.

Singha, Seema, Soma Roy Dey Choudhury, and Brajesh Kumar, 'Foreign Direct Investments and Spillover Effect on Entrepreneurial Activities in India: An Empirical Study', *Journal of Global Entrepreneurship Research*, 12.1 (2022), 423–39. https://doi.org/10.1007/s40497-022-00337-x.

Soegoto, Herman, Surjatno Wiganepdo Soegoto, and Daniel Francois Meyer, 'The Role Of Domestic Investment, Foreign Investment, And Micro, Small And Medium-Sized Enterprises For Poverty Reduction In Indonesia', *Journal of Eastern European and Central Asian Research*, 9.5 (2022), 901–13. https://doi.org/10.15549/jeecar.v9i5.1072

Suryanta, Barli, and Arianto A. Patunru, 'Determinants of Foreign Direct Investment in Indonesia', *Global Journal of Emerging Market Economies*, 15.1 (2023), 109–31. https://doi.org/10.1177/09749101211067856.

Syadzwina, Dhifa Nadhira, Dominikus Rato, and Bayu Dwi Anggono, 'The Legal Position of Limited Partnership in Indonesia through the Perspective of the Philosophy of Utilitarianism', *International Journal of Social Science and Education Research Studies*, 03.11 (2023), 2247–57. https://doi.org/10.55677/ijssers/v03i11y2023-11.

Taduri, Januari Nasya Ayu, 'The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia', *Lex Scientia Law Review*, 5.1 (2021), 119–38. https://doi.org/10.15294/lesrev.v5i1.46286.

Thalib, Abdul, 'Technology Transfer In Indonesia And China: A Comparative Study', *Jurnal Hukum Ius Quia Iustum*, 23.2 (2016), 251–70. https://doi.org/10.20885/iustum.vol23.iss2.art5.

Udemba, Edmund Ntom, and Lucy Davou Philip, 'Policy Insight from Renewable Energy, Foreign Direct Investment (FDI), and Urbanization towards Climate Goal: Insight from Indonesia', *Environmental Science and Pollution Research*, 29.36 (2022), 54492–506. https://doi.org/10.1007/s11356-022-19599-9.

Utami, Anita Puji, Mas Roro Lilik E, and Edi Suhardono, 'Implementation of the Government Regulation of the Republic of Indonesia Number 29 of 2018 Concerning Industrial Empowerment (Case Study in the National Shipbuilding Industry in East Java)', *International Journal of Social Science and Education Research Studies*, 04.04 (2024), 276–84. https://doi.org/10.55677/ijssers/v04i4y2024-01.

Welfin, Deni, 'Perlindungan Hukum Bagi Investor Indonesia Pada Perusahaan Joint Venture Dalam Perusahaan Penanam Modal Asing', *Unes Law Riview*, 6.2 (2023), 7178–84 <https://doi.org/https://doi.org/10.31933/unesrev.v6i2>

Whah, Chin Yee, and Benny Teh Cheng Guan, 'Malaysia's Protracted Affirmative Action Policy and the Evolution of the Bumiputera Commercial and Industrial Community', *Sojourn*, 32.2 (2017), 336–73. https://doi.org/10.1355/sj32-2d.

Yusrizal, 'Peran Notaris Dalam Mendorong Terciptanya Kepastian Hukum Bagi Investor Dalam Investasi Asing', *Jurnal Lex Renaissance*, 3.2 (2018), 359–76. https://doi.org/10.20885/jlr.vol3.iss2.art7.

Zulkarnain, Mukhamad, 'Problematika Investor State Dispute Settlement Dalam Bilateral Investment Treaty Indonesia-Singapura 2018', *Jurisprudensi : Jurnal Ilmu Syariah, Perundangan-Undangan Dan Ekonomi Islam*, 15.2 (2023), 400–413. https://doi.org/10.32505/jurisprudensi.v15i2.6963.