

**DENIAL OF BENEFITS CLAUSE UNDER INVESTMENT TREATY IN
PREVENTING TREATY SHOPPING BY CORPORATE ENTITY**
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ABSTRACT

This legal research aims to understand and analyze denial of benefits clause under investment treaty in preventing treaty shopping by corporate entity. There are 3 (three) research questions that will be discussed in this legal research. *Firstly*, concerning the procedural requirement of denial of benefits clause in arbitration decision. *Secondly*, concerning the limits of denial of benefits clause in preventing treaty shopping by corporate entity. And *thirdly*, finding a possible denial of benefits clause to be adopted by Indonesia through existing investment treaties.

This legal research use normative research method, the Author gathered the data for this research is gained through mainly literary studies, by examining existing laws and/or literatures.

From this legal research, the Author deduced 3 (three) conclusions. *Firstly*, from jurisprudences, there are two perspective on the invocation of denial of benefits clause. Namely, retrospective application and prospective application. Tribunals' decision has been diverged because there are no treaty-based time limit to guide the invocation of denial of benefits clause. *Secondly*, Burden of proof, the unclear threshold of substantial business activities, and the dynamic of corporate ownership and control would limit the utility of the clause. And finally, the Author found Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments offers a possible denial of benefits clause to be adopted by Indonesia new model bilateral investment treaty.

Key words: Denial of benefits, Treaty Shopping

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**KLAUSULA ‘DENIAL OF BENEFITS’ DI BAWAH TRAKTAT
INVESTASI DALAM MENCEGAH ‘TREATY SHOPPING’ OLEH
ENTITAS KORPORASI**

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INTISARI

Penulisan hukum ini bertujuan untuk memahami dan menganalisis klausula ‘*denial of benefits*’ di bawah traktat investasi dalam mencegah ‘*treaty shopping*’ oleh entitas korporasi. Terdapat 3 (tiga) rumusan masalah yang akan didiskusikan di dalam penulisan hukum ini. Pertama, tentang kebutuhan prosedural klausula ‘*denial of benefits*’ dalam keputusan arbitrase. Kedua, tentang batasan klausula ‘*denial of benefits*’ dalam mencegah ‘*treaty shopping*’ oleh entitas korporasi. Dan yang ketiga, untuk menemukan klausula ‘*denial of benefits*’ yang mungkin dapat diadopsi oleh Indonesia dari traktat yang sudah ada.

Penulisan hukum ini menggunakan metode penilitan normatif, penulis memperoleh data untuk penulisan hukum ini melalui studi literasi, dengan memeriksa hukum yang sudah ada dan/atau literature yang sudah ada.

Dari penulisan hukum ini, penulis mendapatkan 3 (tiga) kesimpulan. Yang pertama, dari yurisprudensi, ada dua perspektif terhadap penggunaan klausula ‘*denial of benefits*’. Yaitu penggunaan retrospektif dan penggunaan prospektif. Perbedaan pendapat pengadilan arbitrase disebabkan oleh tidak adanya dasar hukum tertulis tentang waktu pada klausula ‘*denial of benefits*’. Yang kedua, Beban pembuktian, ketidak jelasan ambang batas aktivitas bisnis dan dinamika kepemilikan dan kontrol dapat membatasi penggunaan klausula ‘*denial of benefits*’. Dan yang terakhir, penulis menemukan bahwa *Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments* memiliki klausula ‘*denial of benefits*’ yang mungkin dapat diadopsi oleh Indonesia pada *model bilateral investment treaty* milik Indonesia.

Kata Kunci: Denial of benefits, Treaty Shopping

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