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The Foreign Direct Investment Policy Which Reflects the Proportional Protection

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Abstract

Investment law is an urgently required regulation to regulate an investment activity. Hence the formulation within those laws has not yet provided a balance protection for all parties; those are the home countries, host countries and investors. The investment law itself regulate by 3 different kinds of laws, that is the customary international law, national law and contract law. Regulating investment activities in host states will have to consider the customary international law, as the international framework. This law is applicable due to the different jurisdiction involved within the business activities. Indonesia investment law regulation firstly introduced by law Number 1 of 1967 Concerning Foreign Direct Investment. Subsequently, it was amended by law Number 25 of 2007 Concerning Investment Law. However, some research has to be carried out regarding the protection of the parties. This research analysed the principle of proportionality interest protection to provide a fair protection of parties. Eventually, the protection of the state as host country and investors as the alien in host country. This research is a normative legal research, which use statute approach, historical approach and conceptual approach to determine the principle that could be used to maximize the protection of actors within the investment activities in Indonesia.

Keyword: Investment Law; Protection; The Principle of Proportionality Interest Protection.

Introduction

Developing countries generally require accelerated development especially economic development. Economic development efforts require considerable capital, especially for industrial development, and infrastructure development. However, developing countries generally have limitations in providing capital, because state savings are very limited, also with the domestic private sector

which has limitations in funds/capital, and technology.¹ So the steps taken usually are by inviting Foreign investors to carry out investment activities. Investment is all forms investing activities, both by domestic investors and foreign investment to do business in the territory of the Republic of Indonesia. As a destination country Indonesian investors must provide various facilities, facilities and infrastructure can attract Investors to invest in Indonesia. However, limitations infrastructure is a serious obstacle. Included here, not only is it bad or limited road, port and railroad facilities, but also limited volume and quality of electricity supply and clean water.

The existence of an assumption that tends to generalize that the high flow of investment (*investment inflow*) in a country will increase revenue (*revenue*) of a country² has resulted in countries trying to attract foreign investors to invest their capital by providing various facilities and facilities. In addition, inviting the entry of foreign investors to a country requires an appropriate strategy that can ensure that investors will benefit and obtain reasonable legal protection for their investment activities. Therefore a country that will invite the entry of foreign capital must make a legal policy that can protect these interests.

Policy regulations do not bind the law directly, but have legal relevance.³ As W. Friedmann said that legal theory is between philosophy and political theory. The typical contribution of legal theory is in formulating political ideals relating to legal principles.⁴ This is then followed by the role of the economic approach to law that the law should pay attention to economic concepts and theories so that

¹ Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1995).[30].

² The high flow of foreign investment in a country characterized by the increasing emergence of multinational companies (multinational corporations) will actually shift the position of national companies. See Manuel R. Agosin and Ricardo Mayer, 'Foreign Investment in Developing Countries, Does It Crowd in Domestic Investment?' (*UNCTAD*, 2000) <http://unctad.org/en/docs/dp_146.en.pdf> accessed 23 December 2017.

³ Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia* (Gadjah Mada University Press 2002).[153].

⁴ W. Friedmann, *Teori Dan Filsafat Hukum, Telaah Kritis Atas Teori-Teori Hukum* (Rajawali Press 1990).[33].; Muchammad Zaidun, 'Penerapan Prinsip-Prinsip Hukum Internasional Penanaman Modal Asing Di Indonesia' (Universitas Airlangga 2005).[52-53].

the laws created are able to fulfill the will of the people to protect, utilize and develop their rights and assets more rationally and efficiently so that they can satisfy public interest.

The balance protection for host state and investor in this case is a material to be conducted. The proportionality principle which delivered by the implementation of the an inherence regulation based on the policy is known as the publicity principle which will give the best legal certainty for all parties in the investment activities. However, Indonesian have to be aware, that the inherence of the regulation have to be based on the ideology of economic activity and thus also will be taken as the fundamental to make the investment policy in Indonesia. this is the issue that will be discuss, whether the Indonesian investment policy have been coherence with the fundamental theory of economic and the international principle of investment to achieve legal certainty and giving the proportional protection for all parties.

Constraints and Drivers the Entry of Foreign Capital

Basically, investors always try to find opportunities from various countries to invest, because investors always try to increase the value of their investments to increase revenue for their profits. The measure of investment decision making is the opportunity for profit and investment security. In addition, foreign investors will invest in general, also see things related to physical and non-physical dimensions, considering the situation of political social and economic potential of a country that becomes the destination of its investment. They generally consider the conditions of the socio-economic, political and legal situation of an investment destination country.

Foreign capital brought to the host country also encourages domestic capital which makes it possible to use it for various businesses. In addition, this theory argues that FDI, especially in developing countries, plays a role as a “tutor” in “transfer of technology, managerial and marketing skills, market information, organizational experience, innovation in products and production techniques and

the training workers as stated by Kojima, especially MNCs are seen as “agents for the international transfer of technology and knowledge”.⁵

Sornarajah concluded that the proponents of this theory argue that the classical theory of foreign investment takes the form of beneficial to the host economy.⁶ In other words, PMA as a whole is beneficial or beneficial for host country, so it can encourage economic growth and national development. Some of the factors that support this opinion are:⁷

1. The fact that foreign capital is brought to the host state encourages domestic capital to be diverted to activities that reach the public interest;
2. Foreign investment usually brings the technology acquired in the host country and encourages diffuse technology among the host economy;
3. Encouraging new jobs;
4. Workers work with new skills related to the technology that investors bring;
5. Management skills of large projects are transferred to local personnel;
6. Infrastructure facilities are built either by foreign investors or by the State that are beneficial to the economy;
7. Renewing or upgrading various facilities such as transport, health or education that bring benefits to foreign investors and also to the community.

Focusing on the profit aspects of the FDI makes it possible to make a policy orientation argument that PMA must be protected by international law such as protection to facilitate the flow of FDI and lead economic development by developed countries. This brings the consequence of efforts to provide an altruistic policy justification power to provide protection to PMA through the principles of international law. Sornarajah argues that: *The Classical Theory of Investment is based on refutable premises that have a strong underlying investment in foreign investment.*⁸

Some documents sponsored by the World Bank are clearly based on neo-classical economic theory. The ICSID Convention begins a statement about the belief that protection for resolving disputes arising from FDI will bring benefits/benefits to economic development in developing countries.⁹

⁵ Manuel R. Agosin and Ricardo Mayer (n 2).*Loc. Cit.*[76].

⁶ Sornarajah (n 1).*Loc. Cit.*[38].

⁷ *ibid.*

⁸ Sornarajah (n 1).[29-40].

⁹ *ibid.*[40].

Sornarajah citing World Bank documents states:

“The World Bank’s Guidelines on the Treatment of Foreign Direct Investment issued in 1992 encapsulate the philosophy of the classical theory when it recognizes:

..... what is a greater flow of foreign investment brings substantial benefits to the economy in the economies of developing countries in particular, in terms of the long term efficiency of the host through greater competition, transfer of capital , technology and managerial skills and enhancement of market access and in terms of the expansion of international trade”.¹⁰

Proponents of neo-classical economic theory argue that FDI encourages competition in industry through improvement in productivity. Increasing competition can encourage reallocation of resources to be more productive in the economic field. The neo-classical theory of FDI plays a major role in influencing the principles of international law in PMA. Most bilateral investment treaties believe that the flow of foreign investors between parties will encourage their economic development.

The neo-classical theory without hesitation in providing a policy basis for the formulation of several documents relating to international law relating to PMA also influenced arbitral tribunals. in addition, neo-classical economic theory also spawned the whole theory relating to economic development agreements, the basis of the hostage taking on the argument that since PMA agreements with developing countries have benefited, protection must be given through the use of international law.¹¹ The attractiveness of a country as an investment destination for investors is influenced by a number of things which can be described as being a number of factors which are obstacles to the entry of capital and some constraints that drive the entry of capital.

1. Some things that can be obstacles to the entry of foreign capital:
 - a. State policy that once nationalized foreign capital;
 - b. Bureaucracy and costs in managing investment permits;
 - c. The existence of arbitrary and relatively unstable legal policies;
 - d. Unstable state policies regarding taxation and levies by the State;
 - e. Lack of stability in State security;
 - f. Scarcity of raw materials/natural resources (SDA);
 - g. The scarcity of skilled labor.

¹⁰ Manuel R. Agosin and Ricardo Mayer (n 2).*Loc. Cit.*[70]

¹¹ Sornarajah (n 1).[41-42].

2. Some things that can drive the entry of foreign capital:
 - a. Stable State Policy, especially in the areas of licensing and taxation;
 - b. An efficient and open bureaucratic mechanism;
 - c. Guaranteed state security and order;
 - d. Availability of raw materials/Natural Resources (SDA);
 - e. Availability of skilled labor and labor costs are not expensive.

Investment Arrangements in Indonesia

Investment is all forms of investment activities, both by domestic investors and foreign investment to conduct business in the territory of the Republic of Indonesia. The basic policy of investment is to encourage the creation of a conducive national business climate for investment to strengthen national economic competitiveness and accelerate the increase in investment. The objectives of organizing investment include:

1. Creating economic growth;
2. Creating jobs;
3. Creating sustainable economic development;
4. Creating the competitiveness of the national business world;
5. Creating national technological capacity and capabilities;
6. Encouraging the development of people's economy;
7. Processing potential economies into real economic strength; and
8. Creating community welfare.

The government provides equal treatment for domestic investment and foreign investment while taking into account national interests and the Government also guarantees legal certainty, business certainty, and business security for investors from the process of managing permits to the expiration of investment activities in accordance with statutory regulations. and legislation and open opportunities for development and provide protection to micro, small, medium enterprises and cooperatives.

The government gives equal treatment to all investors from any country to carry out investment activities in Indonesia in accordance with statutory provisions. This same treatment does not apply to investors from a country who obtain special rights based on an agreement with Indonesia. Investors in fulfilling labor needs must prioritize the workforce of Indonesian citizens. Meanwhile, investment companies have the right to use foreign experts for certain positions and expertise in accordance

with the laws and regulations. Furthermore, investment companies must improve the competence of Indonesian workers through job training in accordance with the laws and regulations.

Foreign investment companies that employ foreign workers are required to conduct training and conduct technology transfer to Indonesian workers in accordance with applicable laws and regulations. All business fields or types of businesses are open to investment activities, except for business sectors or types of businesses that are declared closed and open with conditions, there are 25 business sectors that are closed to investors including foreign investment, 43 business fields reserved for micro, small, medium and cooperatives, 36 business sectors that must be partnered, 120 business sectors which regulated the value of foreign capital, 19 business sectors which are regulated location, 25 business sectors that must have special permits, 48 business sectors with 100% domestic capital and 22 business fields regulated by the owner of the capital and its location.

The government provides facilities to investments that make new investments as well as those that do business expansion. Investment companies that will receive these facilities must meet the criteria:

1. Absorb labor;
2. Including high-scale priorities;
3. Including infrastructure development;
4. Perform technology transfer;
5. Do a pioneer industry;
6. Located in remote, disadvantaged, border or other areas it is deemed necessary; and
7. Partnering with micro, small, medium or cooperative businesses or industries that use capital goods or machines or equipment produced domestically.

While the form of the facility can be:¹²

1. Reduction of net income to a certain level on the amount of investment made in a certain time;
2. Exemption or loss of import duty on the import of capital goods, machinery or equipment for production purposes that cannot yet be produced domestically;
3. Exemption or loss of import duty for raw materials or auxiliary materials for production purposes for certain periods of time and certain requirements;

¹² Article 18-22 Law no. 25 of 2007 concerning Investment.

4. Depreciation of land and building tax, especially for certain business fields in certain regions or regions;
5. Exemption or reduction of corporate income tax in a certain amount and time with a new investment record is a pioneer industry, an industry that has a broad relationship, has high added value, introduces new technology and has strategic value for the national economy; and
6. For investments that make replacement of machinery or other capital goods may be given relief or exemption from import duty.

Rights in the form of facilities as mentioned above are not given at once but through an extension process and renewal process according to the number of years stipulated. Law No. 25 of 2007 mandates that investment companies that will conduct business activities must obtain licenses in accordance with the provisions of legislation from agencies that have the authority and permits obtained through one-stop service. The one-stop integrated service aims to assist investors in obtaining service facilities, fiscal facilities and information. Regarding investment and integrated one-stop services carried out by institutions or agencies such as BKPM at the Central level or BKPMMD or the like at the regional level. Thus, in the not too distant future, investment licenses throughout Indonesia will be implemented through integrated One Door services.

The Investment Coordinating Board (BKPM), is a Government institution responsible for coordinating investment policies. Under Article 27 of Law No. 25 of 2007 BKPM is led by a Head and is responsible directly to the President. Mandate of Law No. 25 of 2007 is very basic in the sense that the Head of BKPM has direct communication channels to the President both for matters relating to investment policies in general as well as matters of a special nature. To attract foreign capital to Indonesia, the Government of Indonesia applies proactive policies. Prior to this, the Government relied more on traditional marketing investment patterns, namely through organizing conferences, seminars and the like. But now it is far more complete and varied. At this time BKPM has 6 (six) Investment Offices throughout the world, namely in Asia, Europe, Australia and the United States. The BKPM website also displays complete and up-to-date information. Meanwhile, BKPM also publishes magazines with both Indonesian and English editions. This is not counting the holding of exhibitions in various corners of the world.

Law and Development

For decades there was an understanding that government law and policy had an effect on the development of a country. Legislation is a core of the legal system of a country, based on this understanding written regulations are a starting point that must be considered. Meanwhile, there is a vacuum in an effort to harmonize economic principles and people's welfare. This is because economic development tends to overlook the effects it has caused due to economic development in the community and the surrounding environment. These effects often violate fundamental economic rights and the rights of the people to a healthy environment, for example the case of Buyat Bay.

Sustainable development as a mandate of the living system must be a model in the making and objectives of legal development. The balance between legal conditions which have a principle of sustainable development and constitutive elements involving justice. For this reason, coherence is needed as a tool to measure the consistency of the rule of law.

In studies of investment or investment requires a theoretical foundation to find formulas to provide balanced legal protection between the interests of investors in seeking profits on the one hand and the interests of the recipient of capital, on the other. Protection and provision of facilities for investors to the investments made in a country is the main thing to be taken into account when investors decide to invest. Such protection refers to capital not only tangible but also intangible. To protect and harmonize the interests of both parties basically based on the principle of state sovereignty as one of the institutions to regulate the balance of the interests of both parties by taking into account the principles of international law regarding foreign investment.¹³

Legal principles in this case are needed as a basis for establishing legal rules and at the same time as a basis for solving legal problems that arise when the available rules are inadequate. The principle or principle of law is one of the

¹³ Hari Chand, *Modern Jurisprudence* (International Law Book Services 1994).[147].

most important objects in the study of law. Discussion of legal principles is usually juxtaposed with the rule of law to obtain a clear picture regarding the differences.

Dworkin, as quoted by Hari Chand stated that:¹⁴

“Rules and principles are standards but they differ in nature. Rules operate in all or nothing fashion. Either a case falls under a rule or it does not. There is no third way. A rule either determines an issue or it has nothing to say on the issue... a principle does not dictate an answer as does a rule. A principle merely follows a direction, it merely gives a reason”.

Legal rules are needed to answer legal issues that arise in society. But reality shows that not every legal issue can be solved only by relying on the rule of law, which means that there are legal issues that must be found through the legal principle. This is in line with Paton stating that the legal rules formed derive from the principles of law.¹⁵

Laws on foreign investment reflect economic policy on how to encourage foreign investors to invest their capital in the country by providing incentives and guarantees provided by the government through legislation and agreements between foreign investors and the government. Global developments that have entered all aspects of economic life are certainly very influential on changes in legal policy in the field of investment. Ideally, the legal policy should also not conflict with the principles of foreign investment law and national development goals.

If traced the development of legal investment policies from 1967 to the present, it can be concluded that the policy pattern adopted can be classified into two principles, namely the principle of restrictive regulation and an open principle. However, this pattern undergoes alternating changes that are imbued with economic interests and nationalism that seek to provide protection and special treatment for the people's economy. Whereas the principle of open or facilitative arrangements is more colored by climate competing with other countries in attracting foreign investors and global trade flows that emphasize fair and efficient aspects of competition.

¹⁴ G.W. Paton, *A Text Book of Jurisprudence* (Oxford University Press 1964).[5-6].

¹⁵ Jimly Asshiddiqie, *Perihal Undang-Undang* (Raja Grafindo Persada 2010).[248-250].

Legislation in Indonesia no longer distinguishes the legal umbrella regarding Foreign Investment and Domestic Investment. If in the past we were familiar with Law No. 1 of 1967 jo. Law Number 11 Year 1970 concerning Foreign Investment and Law Number 6 Year 1968 jo. Law Number 12 of 1970 concerning Domestic Investment, now foreign investment and domestic investment are fully regulated in Law Number 25 of 2007 concerning Investment (UUPM). In Article 1 number 1, Law Number 25 of 2007 concerning Investment is formulated that “Investment is all forms of investment activities, both by domestic investors and foreign investors to conduct business in the territory of the Republic of Indonesia”. aims to create legal certainty and realize the principle of non-discrimination which is prioritized in the principles of international law, namely to support the implementation of the national treatment principle.

Economic Constitution as a Basis for Formulating Investment Policies in Indonesia

The basis of Indonesia’s economy is Article 33 of the 1945 Constitution which has gone through a pro-contra debate in its amendments. There is a liberal perspective and a high appreciation of the property rights that you want to put in the settings. So that the provisions concerning production branches that are important and control the livelihoods of many people controlled by the state are deemed no longer relevant to existing values.¹⁶ So that finally the provisions in the article added 2 verses with the title of national economy and people’s welfare. The efficiency principle adopted by article 33 after the amendment was balanced with the principle of justice, so that the principle of “efficiency-justice” was obtained.

Pancasila and the Indonesia Constitution require balance in all aspects of state life, including individual interests and the interests of collectivities in social life, between competition and cooperation and between the principles of efficiency and justice. The first paragraph of article 33 is not amended because it is the legacy of the founding father, so that it can be interpreted that the economic ideology or

¹⁶ Susilo Bambang Yudhoyono, *Revitalisasi Ekonomi Indonesia: Bisnis, Politik, Dan Good Governance* (Brighten Press 2004).[13].

understanding of economic democracy held by the founding fathers of the nation continues to be maintained with the additions needed to improve public welfare. The emergence of the concept of an economic constitution in the Constitution is emphasized by the title “national economy”, which means that the 1945 Constitution affirms itself as an economic constitution other than as a political constitution. So that all economic policies as outlined in the form of laws must be subject to and must not conflict with the constitution as an economic constitution. On the other hand, the title of social welfare reflects the role of the state in protecting and contributing to the welfare of the people. This is in line with the principles in neo-liberalism.

In business competition laws regulated the freedom of business actors to compete, however, in the investment law it is explained that the government guarantees and provides protection to small, medium and cooperative businesses to try. This is not in accordance with the principle of efficient justice that has been regulated in the Constitution. In terms of regulating the control of natural resources, it is regulated regarding state control and is used for the greatest prosperity of the people. However, furthermore there are provisions regarding the negative list of investments regarding open and closed business fields which stipulate that the private sector may also enter in accordance with applicable regulations.

Indonesia’s Investment Policy: Changes Towards Economic Liberalization

In the 1980s there were developments in the international community which considered that economic liberalization was more promising for economic growth and development than protection of the regional economy. J. Williamson applies several lists of conditions for achieving economic growth, which are then known as “*Washington Consensus*”. Furthermore, the principle of the Washington Consensus is:¹⁷

¹⁷ At the level below the Law there are also many highlighted regulations, including PP No. 36/2005 concerning Land Procurement for the Implementation of Development for Public Interest, and PP No. 2/2008 concerning the Types and Rates of Non-Tax State Revenues Originating from the Use of Forest Areas for the Importance of Development Outside of Forestry Activities Applicable to the Ministry of Forestry. In addition to regulations, there are several government policies divesting important state companies such as PAM Jaya, Indosat, and extension of the cooperation contract with Exxon Mobil in the Cepu Block.

1. Historical discipline - strict criteria for limiting budget deficits;
2. Public expenditure priorities - moving them away from subsidies and administration towards previously neglected fields with high economic returns;
3. Tax reform - broadening the tax base and cutting marginal tax rates;
4. Financial liberalization - interest rates should be market-determined;
5. Exchange rates - rapid growth in non-traditional exports;
6. Trade liberalization;
7. Increasing foreign direct investment (FDI) - by reducing barriers;
8. Privatization - state enterprises should be privatized;
9. Deregulation - abolition of regulations that impede competition (except in the areas of safety, environment and finance);
10. Secure intellectual property rights (IPR) - without costs and available to the informal sector; and
11. Reduced roles for the state.

The Washington Consensus principles still dominate international economic policy. In Indonesia, the New Order's economic development had led to economic progress in the 1980s to 90s. However, in 1997 the world economy experienced a wave of monetary crisis that began in Thailand, South Korea and until it rolled Indonesia and several other Southeast Asian countries. This has an impact on the collapse of economic buildings. Susilo Bambang Yudhoyono (president of the republic of indonesia period 2005-2014) said that the crisis which crippled the Indonesian economy in 1997 was caused by 6 (six) factors, namely:¹⁸

1. Regionally and geo-economic aspects, Indonesia has a chain effect from the economic crisis that occurred in Thailand and South Korea (the contagion effect);
2. As a series of chain effects, there is speculation and panic behavior in the country, followed by capital flight moves very quickly;
3. The policy of the Indonesian government to respond to the monetary crisis, even though the recipe was subsequently drawn up together with the IMF, was considered inappropriate. This policy error is one of the causes of the banking crisis which actually has a weak structure, as well as a trigger for the explosion of foreign debt;
4. Structurally, many consider that the economic crisis is caused by crony capitalism, especially the relationship between the government and unhealthy entrepreneurs, which in turn causes systemic errors and creates structural inefficiencies and dysfunctions;

¹⁸ Privatization is the act or process of transferring trade or industrial affairs from government ownership or control to being a dick or belonging to a private company. In Black 'Law Dictionary, it is stated that Privatization is the act or process of converting a business or industry from government ownership or control to private enterprise. Bryan A Garner, *Black's Law Dictionary* (10th ed, Thompson Reuters 2014).[1234]

5. Another form of unhealthy relationship between rulers and businessmen as mentioned above is cronyism, which preys on our resources and economic output on a large scale;
6. The absence of good governance in the past government, which is actually a derivative of the failure of state institutions in establishing and enforcing the rule of law, also caused structural destruction.

After the New Order, changes in leadership and changes in various sectors with the spirit of reform took place. At the legal level it culminated in the 1945 Constitution amendment package four times (1999-2002). Changes that add up to 300% of the provisions of the Constitution are in line and followed by changes in the level of law and other policies. In the field of natural resource legislation, there are 12 (twelve) laws made, namely: a). Forestry Law; b). Plant Variety Protection Law; c). Oil and Gas Law; d). Electricity Law; e). Geothermal Law; f). Water Resources Law; g). Plantation Law; h). Law on the Establishment of Perpu No. 1/2004 concerning Amendments to the Forestry Law; i). Fisheries Law; j). Investment Law; k). Law on Management of Coastal Areas and Small Islands; (l) Energy Act.¹⁹

The character of the Law that was born after the New Order, especially with regard to natural resources, in addition to ensuring the sectoralization of natural resources was also followed by a wave of commercialization and privatization²⁰ or privatization of the public sector which should be the direct responsibility of the state. This spirit is rooted in the Washington Consensus which states that a good economic performance requires free trade, macro stability and the application of appropriate pricing policies. It is undeniable that this agreement later triggered the continuity of the market mechanism.

The Washington Consensus is also known as the basic values of economic neoliberalism that sneak in globalization. Globalization in the context of

¹⁹ M. Ridha Saleh, *Ecoside : Politik Kejahatan Lingkungan Dan Pelanggaran Hak Asasi Manusia* (Walhi 2005).[50].

²⁰ International Financial Institutions include: World Bank (WB), International Monetary Fund (IMF), Asian Development Bank (ADB), African Development Bank (AfDB), European Development Bank (EBRD), Inter-American Development Bank (IADB), and Banks Islamic Development (IDB).

spreading neoliberalism shows two (2) dimensions, namely, the first *economic and corporate globalization*. Secondly, the political and state dimensions (*political and state globalization*).²¹ These two dimensions appear in the scenarios and are designed by developed countries that are members of the G8 (*United States, Canada, Italy, France, Britain, Germany, Russia and Japan*) through 3 (three) globalization machines, namely, *first* financial institutions international (International Financial Institutions/IFI's),²² both the World Trade Organization (WTO), and the three multinational companies (Multinational Corporation/MNC).²³ Through the machinery of globalization above, developed countries are increasingly strengthening their hegemony to regulate and control resources in the world. Through the hands of the WTO they regulate world trade policies. Through multilateral financial institutions, they can determine which countries can enjoy the money. Then by borrowing the power of the IMF, they pressured countries to deregulate, privatize, and liberalize.

More specifically, Elizabeth Martinez and Arnaldo Garcia mention there are five basic values of Neoliberalism, namely:²⁴

1. **Market Rules.** Free private companies from any attachments imposed by the government. The maximum openness for international trade and investment. Reducing labor wages through weakening trade unions and eliminating labor rights. There is no price control anymore. Fully total freedom from the movement of capital, goods and services.

²¹ Besides going through these institutions, developed countries create financial institutions to support their investments abroad. These institutions are generally referred to as Export Credit Agencies (ECA) such as JBIC (Japan), Exim Bank (US), EDC (Canada), Hermes Germany). Then they also created a guarantor institution aimed at guaranteeing investments in the country's assets abroad, for example OPIC (US). See Aflina Mustafainah, 'Konspirasi Global : Kejahatan Yang Terorganisir', *Manual Pendidikan Dasar Globalisasi* (debtWATCH Indonesia, JK-LPK, dan Community Development Bethesda 2004).[14].

²² Elizabeth Martinez and Arnaldo Garcia, 'What Is Neo-Liberalism?' (1998) 99 *Third World Resurgence*. [7-8].; Bonnie Setiawan, 'Ekonomi Pasar Yang Neo-Liberalistik Versus Ekonomi Berkeadilan Sosial', *Ekonomi Pasar yang Berkeadilan Sosial* (Forum Komunikasi Partai Politik dan Politisi untuk Reformasi 2006).[4-5].

²³ Sjamsul Arifin, *Bangkitnya Perekonomian Asia Timur - Satu Dekade Setelah Krisis* (Elex Media Komputindo 2008).[138].

²⁴ *ibid.*

2. **Cutting Public Expenditures in Terms of Social Services.** This is like the education and health sector, reducing the budget for 'safety nets' for the poor, and often reducing the budget for public infrastructure, such as roads, bridges, clean water - this is also to reduce the role of the government. On the other hand they do not oppose the existence of subsidies and tax benefits for business people.
3. **Deregulation.** Reducing the role of the government in fields that do not need the full role of government without reducing supervision to maintain stability.
4. **Privatization.** Selling state-owned enterprises in the field of goods and services to private investors. Including banks, strategic industries, highways, toll roads, electricity, schools, hospitals, and even drinking water. Always for reasons of greater efficiency, which in fact results in concentration of wealth into a few people and makes the public pay more.
5. **Removing the concept of public goods (public goods) or community.** Replace it with "individual responsibility".

In general, real investment level growth in East Asia at the time before the crisis slowed. According to the Asian Development Outlook 2007, the decline in investment to a lower level than before the crisis was due to the correction of soaring asset prices as the crisis became more realistic. Some other reasons are the decline in the price of capital goods and the shift in the composition of output.²⁵ Although the crisis recovery period of the five crisis-affected countries (ASEAN 4 plus South Korea) differs, there is a similar trend regarding the trends in both forms of investment, both direct investment and portfolios.

In contrast to Thailand, the Philippines and Malaysia, Indonesia experienced a sharp decline beginning with the level of USD 6194 in 1996, slumping to capital flight in 2000 at the level of USD 4550.36. after the crisis recovery process in 2000, the flow of foreign investment began to crawl up to the level of USD 1022. in 2005, as a result of recovering macroeconomic fundamentals in addition to the increasingly attractive Indonesian market for investors. Several policies in order

²⁵ *ibid.*[148].

to strengthen the real sector were rolled out including the success of government programs in privatizing BUMNs and restructuring the banking sector.²⁶

The absorptive capacity of foreign investment of a country is influenced by two things, namely first, the quality of human resources, second, the governance (governance) of a country, both concerning institutions and norms that apply.²⁷ Some dimensions of governance that are relevant to the current phenomenon of financial integration are transparency, control of corruption, legal certainty and supervision of the financial sector.²⁸

This is a major concern when falling markets and economies want to rise again, so that more flexible policies are needed for the development of the business world. The Washington Consensus with neoliberalism offers a solution that is possible to be applied to improve the prosperity of the people. This principle entered Indonesia by being brought by the IMF to overcome deteriorating economic problems. And in fact the provisions of these principles are reflected in various laws and regulations, such as banking laws, business competition, investment along with the implementing regulations and regulations in the capital market sector.

Basic Indonesian Investment Policy

The government stipulates the basic investment policy in article 4 paragraph (1), paragraph (2) and paragraph (3) of Law Number 25 of 2007 concerning Investment (UUPM), namely:

- a. The government establishes basic investment policies for:
 - 1) Encouraging the creation of a national business climate conducive to investment to strengthen the competitiveness of the national economy; and
 - 2) Speed up the increase in investment.

²⁶ *ibid.*

²⁷ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2012).[151].

²⁸ Curtis J. and Mariana Pargendler, 'Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform' (2017) 50 *Cornell International Law Journal*. [121].

- b. In determining the basic policy as referred to in paragraph (1), the government:
- 1) Providing equal treatment for domestic investors and foreign investors while taking into account national interests;
 - 2) Ensure legal certainty, business certainty and business security for investors from the process of managing permits to the expiration of investment activities in accordance with the provisions of legislation; and
 - 3) Open opportunities for development and provide protection to micro, small, medium and cooperative businesses.
- c. The basic policies referred to in paragraph (1) and paragraph (2) are manifested in the form of general investment plans.

The PM Law No. 25 of 2007 can be said to have covered all important aspects (including issues of service, coordination, facilities, investor rights and obligations, employment, and sectors that investors can enter) that are closely related to efforts to increase investment from the government side and certainty of investing in terms of entrepreneurs/investors.

It can be ascertained if this provision is actually carried out, assuming other factors (such as legal certainty, stability, flexible labor markets, macroeconomic policies, including a conducive trade regime and availability of infrastructure) support, investment growth in the country will experience acceleration. For an investor who wants to invest in an area in Indonesia, the one-stop service is a relief because he no longer has to wait long enough to get his business permit in Indonesia. In fact, he no longer needs to pay taxes or other levies that can swell from official rates due to the length of the bureaucratic path that must be taken to obtain the business license before the existence of a one-stop service. Actually, this has been attempted beforehand through Keputusan Presiden (Keppres) No. 29 of 2004 concerning the implementation of investment, both foreign (PMA) and in the national (PMDN) through a one-stop service system during the era of President Megawati Soekarno Putri.

In the Keppres it was stated that the implementation of investments, especially those related to the services of approval, licensing and investment facilities were carried out by BKPM. This one-stop service includes investment carried out at the

provincial, district and municipal levels based on the authority delegated by the Governor/Regent/Mayor to BKPM. So, the BKPM has the task of coordinating between all departments or other government agencies, including with the district, city and provincial governments that are fostering the investment business.

Second, Chapter III Article 4 No.2b concerning basic investment policies: *guarantee legal certainty, business certainty, and business security for investors from the process of obtaining permits to the expiration of investment activities in accordance with the provisions of the legislation.* Legal certainty that has not existed in Indonesia since the passage of the New Order era is often said to be one of the obstacles to investment, especially FDI, domestically.

Draft of Indonesian Investment Policy

The economic constitution which is affirmed through Article 33 of the Constitution, through these provisions, is determined that the understanding adopted by Indonesia is neo-liberalism. The ideology that adheres to the notion of free markets is accompanied by the role of the government in terms of the welfare of its people. Article 33 as the basis of the economy must underlie legislation related to the economic field. In terms of investment, the operational arrangements of the Investment Law are considered too liberal, so that more stringent restrictions are needed to protect the interests of the people.

Indonesia itself adheres to the Dependency theory in accepting the entry of foreign investors, because investment has a good influence on the economy and increases foreign exchange, reducing unemployment, resulting in the transfer of knowledge. This acceptance must be wary because Indonesia has also accepted the principle of free movement of goods, personnel, and services which are the basic principles of the WTO, so as to bring free competition between labor, commodity trading and professionalism. Indonesian membership in the WTO is the basis for the application of the Free movement principle to be applied in the regulation of the economy in Indonesia and the treaty made with partner countries in implementing their trade policies.

Some Experiences and Problems of Foreign Investment in Indonesia

The history of investment in Indonesia notes that Indonesia in the past has nationalized foreign companies, especially Dutch companies after Indonesia declared its independence, so that all foreign companies owned by the Dutch were nationalized and made State Enterprises (State-Owned Enterprises). In 1974 after the Malari incident (Mala Petaka Fifteen January) which demonstrated the Government's policies that were considered pro-foreign capital, especially Japan, the government set new policies in the economic field, the new policy in the economic field was intended to protect domestic investors. In those years, "Indonesianization" of foreign capital was carried out with the obligation to tighten the entry of foreign capital and limit the addition of foreign investment, there was even a necessity to divest within a maximum of 10 years.

In general, it can be stated at that time that Indonesia reduced foreign investment and also made foreign investors less attractive to invest in Indonesia. This closed attitude continued until 1985, because Indonesia still benefited from the "oil bomb" situation. Indonesia's experience in nationalizing foreign companies and also carrying out the "Indonesiasi" policy on foreign capital shares in Indonesia is a bad record for foreign investors to invest in Indonesia.²⁹

Experience of Other Countries

Developing countries at the time of starting their independence basically want to develop their country independently, especially to avoid the re-entry of investors from the former colonizers of their country. In general, they tried to avoid the entry of foreign investors into developing countries in the Asian region at that time (around 1950 - 1960). The average reject rate of foreign investors was Japan, China and others. Even though China has a very large area and sufficient natural resources and very large human resources, but in the era of 1960 - 1970 China had not developed its industry. But in the era of 1970 - 1980, on average they

²⁹ OECD, *OECD Guideline for Multinational Enterprises* (OECD Publishing 2011) <<http://www.oecd.org/corporate/mne/1922428.pdf>>.

(China, Japan, Vietnam, etc.) began to open up to foreign investors even though they had different ways and strategies, but the point was to allow foreign investors to enter their country, because they needed capital and technology to build the country. China for example began to open up the entry of foreign investors in the field of economic and industrial activities. However, for the Agriculture sector until a certain time, it is still limited (closed). In addition, in the field of investment and trade, it is only permissible to invest in certain areas starting with being allowed to enter only in 4 cities (Shenzhen, Zhuhai, Shantan, Xiamen) in 1979. In general, countries need foreign investment because the economic condition of the country is not yet developed, domestic investors are very limited due to limited capital, the development of industrial technology that is still lagging behind, because it requires a policy to be able to invite foreign investors into the country as an effort to create transfer of knowledge and technology to host country.³⁰

Steps to Anticipate Overcoming the Investment Dilemma

Every country in general wants to make its country able to be independent enough to fulfill all the needs of its population and to export its country's products to other countries, although in reality almost all countries depend on each other. Because there are countries that are advanced in investment and technology but have limited natural resources. There are also countries that are rich in natural resources but do not have advanced technology and do not have capital.

Many developing countries require the entry of foreign capital/foreign investors, but in economic and legal policies, they do not consider the interests of foreign investors to choose a country as an investment destination. Their main interest is that the investment in a country gains profits and guarantees protection for investments and investors. On the other hand, the countries that impose the entry of foreign investors also have their own interests, which in essence is that the State can be more developed, domestic investors are protected and the domestic

³⁰ Kevin S. Haeberle, 'Information Asymmetry and the Protection of Investors' (*SSR*, 2019).

economy is also developing and protected from the influence or impact of foreign investment. So that it appears from the two interests that must be equally protected so that both parties benefit from each other and do not mutually kill or harm each other. So that it appears from the two interests that must be equally protected so that both parties benefit from each other and do not mutually kill or harm each other. Therefore, there needs to be a structuring of state policy in the legal and economic fields, especially in the field of foreign investment so that both parties obtain balanced protection.³¹

Based on the research dissertation by Muchammad Zaidun in 2005, the theory of Protection of Interest of Interest was found. The theory basically seeks to harmonize the protection of 2 (two) of these main interests, namely the interests of the host country (the recipient of capital) including domestic investors and the interests of the investor country (foreign investors) and also international interests. These interests must be based on considerations of legal certainty, justice and benefit for parties who are mutually interested in obtaining benefits and benefits fairly and obtaining legal certainty from each other.³² All protection of these interests must be carried out proportionally in accordance with the contribution of each role or function related to the investment being made. If these various things can be done openly and transparently, the opportunities to develop and mutually beneficial investments will develop well.

Conclusion

Investment policy in Indonesia is based on economic policy regulated through Article 33 of the 1945 Indonesian Constitution. The direction of investment policy is harmonized with the regulation of economic activities in Indonesia which has experienced several developments when viewed from several existing legislation.

³¹ Lucian A. Bebchuk, 'Investor Protection and Interest Group Politics' (2010) 23 *Review of Financial Studies*. [1089-1119].

³² Markus Krajewski, 'Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective' (*SSR*, 2014).

From these arrangements it can be seen that the characteristics of Neo Liberalism dominate the legislative arrangements in the economic field. This has an effect on policies in the field of investment; however, regulation in the field of investment must consider the principles that apply in *customary international law*, because there are differences in the origin of the jurisdiction of the actor's arrangement in investment activities. The viscosity element of public interest in regulating investment law makes the principle of protecting the balance of interests as the basis for providing protection to the parties in investment activities. The government can apply the principle of interest and legal certainty to better guarantee the security of investors and Indonesia as the recipient of capital in the implementation of standards of care in the BIT made by the parties both in the investment cooperation agreements required. Furthermore, it is applied to join the interpretation of the clause to guarantee the principle of understanding that has been agreed by both parties.

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