
Applying Principles of Legal Certainty and Equal in the Implementation of Investment in Indonesia

Ahmad Muliadi¹

Abstract:

Indonesia is a member of the WTO and has ratified the Opportunity of WTO Establishment with Law No.7 of 2004. As a member of the civil society international community, Indonesia has the obligation to harmonize its laws and regulations with international obligations that have been agreed. Law no. 25 Year 2007 is the only law that regulates the investment in Indonesia.

The principle of legal certainty embraced in the Law No.25 of 2007, the development of law is directed at the realization of the national legal system originating from Pancasila and the 1945 Constitution, which includes the development of legal material of the apparatus of law and facilities and infrastructure in the framework of the development of the rule of law, to create Life of a safe and peaceful society.

The protection expected by investors from the country of destination of investment has actually been done by the Indonesian government by making an agreement with the state of the investors (investment guarantee agreement).

Keywords: *applying principles, legal certainty, implementation of investment.*

¹ Lecturer of Law, Faculty of Jayabaya University

1. Introduction

Every country always trying to improve the development, welfare and prosperity of its people. Efforts towards that is done in different ways between countries with one country. "One of the efforts that is always done by the state is to attract as much foreign investment into the country".² The presence of the Domestic Investment Act was greeted with a very sharp divergence of views. Some of them say this act is too liberal, unlike the philosophical foundation of the Indonesian economy and constitutional set forth in the Constitution. This act is "accused" of being a "deposit" of international investors who provide a wider access road to instill its dominance in the Indonesian economy. The same treatment between foreign and domestic investors as the basic principle of capital investment policy is seen as a reckless and non-partisan act of the interests of the people. Indonesia as an independent, politically independent State shall have the right and sovereignty to regulate its economic system by prioritizing the interests of the State and its people and not instead of prioritizing foreign interests.³ Those who support argue that the principle of equal treatment is an unavoidable principle along with the almost limitless global economic development. Avoiding this principle means taking Indonesia away from international relations, and it has become increasingly difficult to restore investor confidence.

Regardless of the debate, Indonesia is a member of the WTO and has ratified the Opportunity of WTO Establishment with Act No.7 of 2004. As a member of the civil society international community, Indonesia has an obligation to harmonize its legislation with its agreed international obligations. No exception the Domestic Investment Act should also be harmonious with the international agreements that Indonesia accepted in its association in various international cooperation. If this is not met, then Indonesia will be brought into dispute resolution by other interested States. Act no. 25 Year 2007 is the only law that regulates the investment in Indonesia, to implement it necessary technical arrangements through government regulations and other implementing regulations in accordance with what is required by the Domestic Investment Act. While waiting for the technical implementation regulations, then in the Transitional Provisions Article 37 of Act no. 25 of 2007 stated: "All the provisions of legislation which is the enforcement regulation of the Act No.1 of 1967 jo No.11 of 1970 and Act No. 6 of 1968 jo Law No.12 of 1970, stated remain valid as long as not contradictory And has not been regulated by the new implementing regulations under this act ".

As a further implementation the government has issued several Presidential Regulations following the enactment of Law no. 25 Year 2007, for example

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

³Yulianti, "UU PM Cermin Hegemoni Aing", <http://reformasihukum.org/>, diakses terakhir tanggal 28 Nopember 2016.

Government Regulation No. 62 Year 2008 on Amendment to Government Regulation No.1 Year 2007 concerning Income Tax Facilities for Investment in Certain Business Fields and / or In Specific Areas, Government Regulation No.45 Year 2008 concerning Guidance on Providing Incentives and Providing Ease of Investment In Region, Presidential Regulation No.90 Year 2007 concerning Investment Coordinating Board; Perpres No.36 of 2010 concerning the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment, Presidential Decree No.112 of 2007 on Amendment to Presidential Regulation No.76 of 2007 on Criteria And Requirements for Preparation of Closed Business Field And Field Open Business With Requirements in Investment and Presidential Decree No.28 Year 2008 on National Industrial Policy.

With regard to efforts to increase the investment itself, then in the provision of Article 3 paragraph (1) of Act no. 25 Year 2007 is known as a foundation in conducting investment in Indonesia.

2. Theoretical, Principle of Legal Certainty in Capital Investment

Legal certainty as the basic principle of general law underlying the rule of law, difficult to formulate specifically, because of the difficulty in determining where the event is applied. Benefits of legal certainty is often considered to have been clear by itself and therefore there is an opinion that the lack of legal certainty is a shortage or not perfection (deficiency) in law. "Certainty has a provision provision whereas, legal certainty has a legal meaning of a state that is able to guarantee the rights and obligations of every citizen",⁴ so that legal certainty is an inseparable characteristic of the law, especially for written legal norms. The law without the value of certainty will lose meaning because it can not be a code of conduct for everyone. Legal certainty is a principle in "a state of law that places laws and statutory provisions as the basis for any policies and actions in the field of investment".⁵

Therefore, the development of law has a very strategic meaning for the overall national development efforts, thus placing the principle of law as one of the principles of national development that in the implementation of national development, every citizen and state organizer must be obedient to the law that berintikan justice and truth, and The state is required to enforce and ensure legal

⁴Anton M. Moeliono, et al, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, 1990, hlm. 652.; Compare with Presidential Instruction No.8 Year 2002 dated. December 30, 2002 concerning Provision of Legal Certainty to Debtors Who Have Completed their Obligations or Legal Actions to Unresolved Debtors

⁵Vide Article 3 Paragraph (1) Sub-Paragraph a and Elucidation of Law No.25 Year 2007; This issue of legal certainty was once disclosed in MPR Decree No.VIII / MPR / 2000 on the Annual Report of State High Institutions at the Annual Session of the People's Consultative Assembly of the Republic of Indonesia Year 2000, stating that Investment of both Foreign Investment and Domestic Investment has not been Showed positive results mainly due to the still disruption of political stability and security and the absence of legal certainty.

certainty. It can therefore be stated that "legal certainty does not only include the law of in concreto (at the time of law enforcement and application), but also the rule of law in abstracto".⁶

The principle of legal certainty is also known as *het rechtszekerheids beginsel* or legal certainty which is a principle in a state law that prioritizes the basis of legislation, propriety and justice in every policy of carrying out duties and authorities. "Legal certainty must be safeguarded for the security of the state, then positive law must always be obeyed, even if the content is unfair or also less appropriate with the purpose of law".⁷ The aim is to ensure legal certainty and to prevent abuse of power and to strengthen the application of the Rule of Law. Furthermore, legal certainty is one of the conditions that must be fulfilled in law enforcement, because "it is a fair protection against arbitrary acts which means that a person will be able to obtain something to be expected under certain circumstances".⁸ So the legal certainty provides consequences that always question the legal relationship between citizens and the state, because the legal certainty relating to the rights of members of the community to obtain legal protection. The state is obliged to maintain law enforcement. In this respect, obedience to the law becomes a compulsion, if "the state relaxes its threat, the people will not obey it".⁹

Legal certainty that must be maintained and realized by law enforcement officers to realize the purpose of law, that at least the law must guarantee and protect the three basic values, namely; "Justice, freedom and social solidarity". The law must be intrinsically characterized to be just and definite, that is sure as a standard of conduct and fair because the behavioral guidelines should support a reasonable order. Just because it is fair and sure then the law is obeyed by society. Constitutionally, the 1945 Constitution never states that legal certainty is identical with the certainty of the law, but always uses the word "law and justice" simultaneously, thereby impressed that the meaning of "supremacy or law enforcement" is not merely "supremacy or Law enforcement "only, but more substantive meaning, ie supremacy or enforcement of substantive or material values. In other words, it is not merely a formal or formal legal enforcement, but a "substantive or material certainty" or "substantive law enforcement".

On the contrary, the realization of legal certainty can not be solely dependent on the perfection and completeness of the law, because although the law has properly regulated the activity in human life, but if it is not supported by the quality of human resources and moral quality, it will become useless law Or well-ordered laws. In

⁶Bagir Manan, *Sistem Peradilan Berwibawa (Suatu Pencarian)*, FH UII Press, Yogyakarta, Cet.ke-1, 2005, hlm. 72

⁷Theo Huijbers, *Filsafat Hukum*, Kanisius, Yogyakarta, Cet.ke-3, 1995, hlm. 40

⁸Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, Liberty, Yogyakarta; Ed.-2, Cet.ke-1, 1988, hlm. 145

⁹Theo Huijbers, *Filsafatloc.cit.*

another sense that with a firm guarantee of legal certainty it is stipulated that regulation in law should be simple, firm and consistent. The various endeavors known as deregations are actually intended for this. Deregulation is not the abolition of the arrangement, but more to the effort of debureaasiasi, simplification of procedures and ease of implementation, without removing the main function of the arrangement itself, that is, seek to achieve a legal certainty. This means that any content in the legislation should be able to create order in society through the guarantee of legal certainty. The law should ensure legal certainty. This certainty can be obtained in several ways, for example: (1) the regulation must be formulated clearly and appropriately, (2) the amendment should take into account the interests of the affected person and adequate and adequate transitional arrangements. It added that "there are five components that affect legal certainty, namely legislation, bureaucratic service, judicial process, political chaos and social commotion."¹⁰

When considered in the Elucidation of Article 14 Sub-Article a of Act No. 25 Year 2007, it states "Legal certainty is a guarantee of the Government to place laws and statutory provisions as the main basis in every action and policy for investors".¹¹ This means that the regulation in the law to attract investors to ensure legal certainty, if the law does not guarantee legal certainty, investors will also be hesitant. The element of minimum certainty contains elements of predictability, because it greatly affects the economic development of a country. It is not wrong to start with the assumption that there is an interrelation between law and economic development.

With the principle of legal certainty embraced in the Act No.25 of 2007, the development of law is directed at the realization of the national legal system that originated from Pancasila and the 1945 Constitution, which includes the development of legal materials of legal apparatus and legal facilities and infrastructure in the framework of the development of the state law, To create a peaceful and peaceful society. Legal development is carried out through legal reform by covering efforts to improve legal awareness, legal certainty, legal protection, law enforcement, and legal services that are related to justice and truth in the framework of the implementation of an increasingly orderly and orderly State, as well as the implementation of national development which is more smoothly in the field capital investment.

¹⁰Bagir Manan, *Sistem.....loc.cit.*

¹¹*Compare also with Government Regulation No.45 of 2008 concerning Guidelines for Providing Incentives and Providing Ease of Capital Investment in the Region, particularly Article 2 point a, states that the provision of incentives and granting convenience is based on the principle of legal certainty, namely the principle that lays down the law and the provisions of the law As the basis of local government in every policy and action in giving incentives and giving ease of capital investment. Similarly, in the General Explanation Government Regulation No.1 of 2008 on Government Investment, states: the principle of legal certainty, namely Government Investment must be implemented based on applicable laws and regulations.*

In the matter of determining the open and closed business field of investment, the principle of legal certainty is stipulated: "Determination of closed business field and open business field with requirements using legal certainty principle",¹² namely that the business field which is declared closed and open with the requirements can not be changed except with Presidential Regulation,¹³ which is the implementation of Article 12 paragraph (4) and Article 13 paragraph (1) of Act no. 25 Year 2007. Efforts that are built to attract investment in Indonesia are not followed by legal certainty for investment activities. This problem resulted in investors reluctant to invest in Indonesia. This can be seen from more and more industrial companies that close or move their business to other countries, such as to Vietnam and People's Republic of China. There is even a tendency that those who have been investing for a long time in Indonesia leave Indonesia and move their investment to other countries.¹⁴

This legal certainty includes the provisions of legislation which in many cases is unclear even contradictory, and also concerning the implementation of court decisions. These difficulties can be said to be the difficulties faced by developing countries that invite foreign investment to support their economic growth.¹⁵ In relation to the allegation that there is no legal certainty in Indonesia, it should be remembered that investment does not only come due to legal issues but also concerning interest rates, economic growth of a country and other factors. So if the economy develops, then in the field of law there should be predictability, certainty, and fairness.¹⁶ The absence of legal certainty guarantee in investment activity caused the emergence of various problems which resulted in the lack of interest of investors to invest their capital to the region. This can be seen from the many laws and regulations issued by the local government on the grounds that the autonomous rights can create additional burdens for investors. Legal products issued by many local governments are in conflict with policies taken by the central government (higher law). This causes the impression of mutual fight over power authority, for example in the tax and retribution, because the entry of entrepreneurs and investors resulted in significant additional revenue. Foreign investment requires legal certainty, the degree of certainty of government policy as well that is one of the

¹²*Vide Article 5 number 4 Presidential Regulation No.76 of 2007 concerning Criteria and Requirements for Preparation of Closed Business Field and Opened Business Field With Requirements in the Field of Investment*

¹³*Vide Article 6 paragraph (4) of Presidential Regulation No.76 of 2007 on Criteria and Requirements for Preparation of Closed Business Fields and Open Business Fields with Requirements in the Field of Investment*

¹⁴Ridwan Khairandy, "Iklim Investasi dan Jaminan Kepastian Hukum dalam Era Otonomi Daerah", *Jurnal Hukum Respublica*, Vol. 5, No. 2, Tahun 2006, hlm. 14

¹⁵Mochtar Kusumaatmadja, "Investasi di Indonesia dalam Kaitannya dengan Pelaksanaan Perjanjian Hasil Putaran Uruguay", *Jurnal Hukum*, No 5, Vol 3, 1996, hlm. 6

¹⁶Erman Rajagukguk, "Globalisasi Hukum dan Kemajuan Teknologi: Implikasinya Bagi Pendidikan Hukum dan Pembangunan Hukum Indonesia," *pidato pada Dies Natalis Fakultas Hukum Universitas Sumatera Utara Ke-44, Medan, 20 Nopember 2001, hlm.4*

important prerequisites of attracting direct investment for infrastructure projects. In addition, "the judicial system, and corruption will hamper infrastructure investment".¹⁷

The courts in Indonesia, especially the district courts and the high courts often intentionally or do not ignore the contents of the agreement that apply between the parties concerned, including in a number of cases where the transaction has been implemented. The judiciary's lack of respect for the validity of the contract of cooperation gives a negative signal for Indonesia's commitment to implementing law reform and justice enforcement. These conditions have a major impact on Indonesia's risk level in international capital markets and on direct capital flows.¹⁸

Taking into account the basic assumptions of the decentralization philosophy mentioned above (the principles of good governance, people orientation and participatory democracy), it is time for the regional planning system to be complemented by a Regional Development Master Plan with strategic insight. The old pattern of seeing and treating local development policies as an integral part of the national economic planning system with sectoral biases needs to be gradually abandoned, and subsequently replaced by autonomous autonomous regions to plan for regional development.

The influence of investment on economic law, it must first know the parts of economic law that are directly involved with investment, for example "about investment procedures, corporate form, capital traffic, goods traffic, people traffic, employment, Form of approval, loan and guarantee, taxation"¹⁹ as well as land. Thus the step to conduct a review of economic law is completely in line with the principle that law is an agent of modernization and an instrument of social engineering.²⁰ The granting of facilities related to land rights is basically something new because both in Act No.1 Year 1967 on Foreign Investment and Act No.6 Year 1968 on Domestic Investment does not provide similar facilities. Article 14 of Act no. 1 of 1967

¹⁷Todung Mulya Lubis, "Infrastruktur dan Kepastian Hukum", *Kompas*, 14 Juni 2005.; See also In order to create a conducive investment climate, there are three basic things that should be improved by Indonesian officials and rulers. These three things need to be done if Indonesia really wants to compete against other developing countries. The third thing is "3L" (Legal, Labor, Local), in Juwono Sudarsono, "Tiga L Pemikat Investasi di Indonesia", *Kompas*, Rabu, 09 Juni 2004

¹⁸Todung Mulya Lubis, "Infrastruktur....loc. cit.

¹⁹Nugroho, "Penanaman Modal Asing dan Pengaruhnya terhadap Hukum Ekonomi", makalah pada Simposium Hukum Ekonomi Nasional, dilaksanakan BPHN dengan FH UI, di Jakarta, pada 17-19 April 1978, dalam buku BPHN, Simposium Pembinaan Hukum Ekonomi Nasional, Binacipta, Bandung, 1978, hlm. 54.; bandingkan dengan Sanyoto Sastrowardoyo, "Kebijaksanaan Penanaman Modal", Sambutan Pengarahan Ketua BKPM pada Panel Diskusi Beberapa Permasalahan Hukum di Sekitar Penanaman Modal, di Jakarta pada 18-20 Juni 1990, hlm. iii, yang menyebutkan terdapat multi aspek dalam penanaman modal.

²⁰Sumantoro, *Hukum Ekonomi*, UI Press, Jakarta: Cet.ke-1, 1986, hlm. 179.

concerning Foreign Investment only stipulates that for the purposes of foreign investment companies may be granted land with rights to the building, the right to use, the right to use according to the prevailing laws and regulations. Viewed from the point of view of investors who have to bear the risk of investing the time required for the direct investment (investments) usually takes a relatively long time, so the granting of land rights with a relatively long period of time is a necessity. However, by the time the provision was issued it has caused rejection from various circles, especially by non-governmental organizations. The rejection of Act No.25 Year 2007 basically based on the idea that the provision creates investment liberalization in Indonesia. By facilitating capital investment in the law with strong capital with small capital owners, it will lead to the survival of the fittest and will ultimately exclude those who are unable to compete freely.

Act No.5 of 1960 recognizes various types of land rights, such as property rights, building rights, use rights, lease rights, land clearing rights, rights to harvest forest products, and other rights. Article 21 of the LoGA states that only Indonesian citizens can have property rights, with the exception that such property rights may be granted to legal and social legal entities as long as the use of such property is purely for the intended social purpose. Thus, the right to land which may be owned by non-Indonesian investment is the right to land outside of the right of ownership, such as the right to use, the right to use the building, and the right to use. Under Act No.5 of 1960, the Right to Use Enterprises (RUE) is granted for a maximum period of 25 years, while the right to use the building is granted for a maximum period of 30 years.

Longer granting of rights to tenure, use rights, use rights, in Article 22 of Act No. 25 of 2007 with a view to providing incentives for investments is actually less appropriate when viewed in terms of legislation. Act No.25 Year 2007 is a *lex specilis* in the field of investment, not a provision that is *lex specilis* in the field of land. Currently, the Law regulating land rights is Act No. 5 of 1960, because there is no new law specifically regulating land rights other than the Act No.5 of 1960. With a view to accommodating the wishes of investors to create increased investment activities in Indonesia, the enactment of the Law has disregarded the principles of law. The principle *lex specialis derogate legi generalis* has been budgeted by the government in granting the term of the right to land in the Act No.25 of 2007 which deviates from the provisions of Act No. 5 of 1960.

In the granting of land rights to the Law No. 25 of 2007 which provides for an advance extension to the right to use, the right to use, the right to use, is essentially contrary to the concept of balance of interests based on Article 33 Paragraph (3) of the 1945 Constitution and Article 2 of Law No.5 of 1960.²¹ The idea of granting Business Use Rights and the Right to Build for a longer period of time or granting

²¹*Maria SW Sumardjono, Kebijakan Pertanahan antara Regulasi & Implementasi, Buku Kompas, Jakarta, 2001, hlm.5.*

property rights to foreign citizens is a resonance of capitalist group thinking. For these capitalist groups, the emerging access to the displacement of people's rights and the diminishing access of the people to the land is seen as a side effect of the acceleration of national development today.²²

Dengan mengambil contoh pemberian kemudahan-kemudahan hak atas tanah sebagaimana yang diatur dalam UU No.25 Tahun 2007, kelihatannya pemerintah kurang menyadari bahwa pembaharuan di bidang hukum yang dapat menunjang terciptanya pembangunan nasional yang berkelanjutan seharusnya dilakukan dengan lebih selektif. Hal ini erat kaitanya dengan kenyataan bahwa bagian-bagian tertentu dari bidang hukum bersifat sensitif karena menyangkut nilai-nilai kultural, dan terdapat pula bidang hukum sifatnya tidak sensitif karena tidak menyentuh nilai-nilai historis dan kultural yang hidup di masyarakat. Hukum penanaman modal termasuk bagian dari hukum administrasi negara tetapi juga merupakan bagian dari hukum bisnis, dan pembaharuan dalam bidang hukum penanaman modal pada dasarnya lebih bersifat netral, sehingga dalam hal ini hukum dapat berfungsi sebagai a tool of social engineering.²³ On the other hand, land law is not neutral and still influenced by customary law. Efforts to renewal in the field of land law through the granting of the land right along with its extension at the same time in the future with a view to appealing to investment in Indonesia is a policy that combines two legal areas into one legislative provision. It is not surprising that Law No.25 of 2007 reaps protest from the public and legal observers because of the liberal rights to the land regulated in the Act, and several community groups such as the Indonesian Legal Aid and Human Rights Association (PBHI) as well as social organizations and non-governmental organizations Community to submit a judicial review of the Act to the Constitutional Court (MK) with the issuance of Constitutional Court Decision No.21-22 / PUU-V / 2007 on the Testing of the Law No.25 of 2007.

Building Utilization Right in Act No. 5 Year 1960 said that the Right to Use is given in 30 years and can be extended 20 years and can be renewed 20 years and renewable 30 years. Government Regulation no. 40 Year 1996, 30 years plus 20 years and can be renewed 30 years. Act No. 25 Year 2007, 50 years and can be updated after being evaluated for 30 years. Use Rights in Act No. 5 of 1960, for a specified period of time or as long as the land is used for a particular purpose. Government Regulation No.40 of 1996, the right of personal use is given 25 years plus 20 years and can be renewed for 25 years at a time. Act No. 25 Year 2007 gives 45 years and can be updated after 25 years evaluation. In addition, there are several other remedial efforts that need to be done immediately. This effort is done both from the legal aspect and from the bureaucratic aspect. These remedial efforts include:

²²*Ibid*, hlm.41

²³Mochtar Kusumaatmadja, *Konsep-Konsep Hukum dalam Pembangunan, Alumni, Bandung, 2006, hlm. 21.*

- a. Improving legal instruments that are more conducive to increased investment include deregulation of investment regulations, including improvements to incentive systems, decentralization of investment licensing authority, and the enhancement of the Investment Law.
- b. Reviewing the negative list of investments periodically in accordance with the development of the situation.
- c. Strengthen the institutional and professionalism of its apparatuses both at central and regional levels to ensure efficient services to investment, including establishing an investment monitoring system and increasing sensitivity to public complaints.
- d. Increasing the promotion of investment at home and abroad.
- e. Increasing various economic partners on a mutually beneficial basis, and
- f. Enhance bilateral and multilateral economic negotiations and cooperation.

With many of the above expected improvement efforts, there are at least three conditions which are the main attraction of Foreign Investment to Indonesia:²⁴

First, the economic opportunity. The existence of an economic opportunity is seen from the availability of raw material resources, the purchasing power of the people towards the production of goods and cheap human resources (labor). Indonesia has a potential economic opportunity to attract the entry of Foreign Investment.

Second, political stability in Indonesia is considered not to disrupt the climate of Foreign Investment. Despite the change of regime, Indonesia is relatively able to maintain its political stability. In the event of a shock, its temporary.

Third, legal certainty is considered a major obstacle to the entry of Foreign Investment. Indonesia is considered not able to realize the legal certainty Foreign Investment.

The problem of nationalization²⁵ "is actually in international law acknowledged for the purpose of decolonization in the economic field, as it is considered the right of a country to prosper its people", and the program of increasing participation of national shares in investment.²⁶ Article 7 of Act No.25 of 2007, the government provides a guarantee that it will not nationalize or take over the ownership rights of investors except by law, which if it remains to be done then must provide

²⁴Erman Rajagukguk, *Hukum Investasi*, FH UI, Jakarta, Cet.Ke-1, 1995, hlm. 19

²⁵Sunarjati Hartono. *CFG, Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia*, Binacipta, Bandung: Cet.ke-1, 1972, hlm. 196.; Compare also with Article 21 and Article 22 of Law No.1 Year 1967 regarding Foreign Capital Investment.

²⁶Sumantoro, *Hukum.....op.cit*, hlm. 143.

compensation whose amount is determined based on market price.²⁷ In the absence of an agreement on compensation or compensation, the settlement shall be by arbitration.²⁸ With another understanding that the settlement of disputes on Foreign Investment is done by Arbitration.²⁹

3. Results and Discussions

3.1 The Equal and Unequal Principles of the Origin of the Country

The same treatment and does not distinguish the origin of the State, namely the principle of treatment of non-discriminatory services under the provisions of legislation, whether between domestic investors and foreign investors or between investors of a foreign country and investors from other foreign countries.³⁰ The same treatment is also termed "equality" is equal treatment of an impartial investor and benefits a particular group, group or business scale.³¹

This act also provides a guarantee of equal treatment (non-discrimination) in the context of investment, ie willingness, willingness to provide equal protection to the demand of services both foreign and domestic, as well as to every person before the law by not discriminating treatment. The rationale for the necessity of applying the principle of non-discrimination is that host countries using legitimate reasons may give different treatment to investors in different ways. While on the other hand, customary international law does not require host country to ensure non-discriminatory treatment of foreign investment wishing to expand its business activities within its territory, or even to those who have established its business activities.

²⁷Elucidation of Article 7 Paragraph (2), states: "Market price" refers to a price determined in a manner that is used internationally by an independent appraiser appointed by the parties

²⁸Elucidation of Article 7 Paragraph (3), states: "Arbitration" means the settlement of a civil dispute outside the court based on a written agreement by the parties to the dispute. See Act No. 30 Year 1999 on Arbitration and Alternative Dispute Settlement; Jo. Law No.5 of 1968 concerning Agreement on Convention on the Settlement of Disputes between Foreign Countries and Citizens Concerning Investment and Presidential Decree No.37 of 1997 on Ratification of Protocol on Dispute Settlement Mechanism (Protocol of Dispute Settlement Mechanism)

²⁹Huala Adolf, *Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO)*, Rajawali Pers, Jakarta, Cet.ke-1, 2004, hlm. 145.; juga dalam Eman Suparman, *Pilihan Forum Arbitrase dalam Sengketa Komersial untuk Penegakan Keadilan, Tatanusa*, Jakarta, Cet.ke-1, 2004, hlm. 50.; dan Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum & Konvensi New York 1958 – Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-Putusan Mahkamah Agung RI dan Pengadilan Asing*, Citra Aditya Bakti, Bandung, Cet.ke-1, 1998, hlm. 113

³⁰Vide Article 3 Paragraph (1) Sub-Paragraph d and Elucidation of Act no. 25 Year 2007.

³¹Vide Article 2 Sub-Article b of Government Regulation Number 45 Year 2008 concerning Guidelines for Incentives and Giving Ease of Capital Investment in the Region.

The same treatment for domestic investors and foreign investors mentioned in this Act is still limited by taking into account the national interest. That the Government does not distinguish the treatment of investors who have invested their capital in Indonesia, unless otherwise provided by the provisions of the law.³² Most Favored Nation Principle (MFN) is one of the fundamental elements of the investment agreement and the WTO system. Under the rules of the MFN, host country should provide treatment to investors of a foreign country, as well as the treatment they have provided to investors from other foreign countries. Of a number of existing investment agreements have shown that the MFN principle has been widely included in almost bilateral, regional and multilateral agreements.

In the old Foreign Investment Act, only foreign parties take the form of a legal entity that can engage in foreign investment (Article 3 paragraph (1)), while the new Foreign Investment Act opens opportunities for States, individuals, business entities, legal entities that all come from outside The country can invest its capital in Indonesia (Article 1 point 6). Because the former Domestic Investment much more free when compared to Foreign Investment. In the old Foreign Investment Act there is no similar treatment statement, whereas in the new Capital Investment Law set forth in Chapter V especially Article 6, with another meaning Foreign Investment is treated similarly to Domestic Investment, as well as to all investors who come from Any country and who engages in investment activities in Indonesia.

In addition, Foreign Investment of any State shall, in principle, be treated equally, except from a Contracting State in accordance with an agreement with Indonesia. In the Elucidation of Article 6 Paragraph (2), it is stated that "privileges" are among others privileges related to customs unions, free trade areas, common markets, monetary unions, similar institutions and agreements between Government of Indonesia and bilateral, regional or multilateral foreign governments relating to certain privileges in the conduct of investment.

Article 4 paragraph (2) of the Investment Act stipulates the equal treatment of foreign investment (PMA) and domestic investment (PMDN) with reference to the national interest. The rule in Article 4 paragraph (2) contains two variables that must be interpreted as a whole, namely the obligation to give equal treatment and refer to the national interest. This same treatment can not be separated with the national interest. This means that the same treatment can not be separated with the national kepentingan. That is, under certain circumstances the same treatment can be applied to foreign investment. Certainly such exceptions must comply with international agreements. If it is comprehensively understood, the actual Investment Act does not provide the same treatment between foreign investment (PMA) and domestic investment (PMDN). Some provisions of the Investment Act impose a number of investment restrictions on foreign investment, one of which is the limitation of business in the PMA. Article 12 of the Investment Act actually does not

³²*Vide Article 4 paragraph (2) a and Explanation of Act no. 25 Year 2007.*

open all fields of business to foreign investors. Business fields that are directly related to the security of the State such as the production of weapons, gunpowder, explosives, and war equipment and fields which are explicitly stated in the law are declared closed, not justified for foreign investment.³³

This article may invite protests from foreign investors due to business restrictions. However, such provisions are not prohibited in international trade opportunities. Agreement on TRIMs is not intended to regulate the disciplinary performance requirement that negatively impacts the smoothness of trade in goods. GATS requires equal treatment of foreign investment with domestic investment, but the selling power of GATS is limited to investment in the service sector and is still limited by the positive list and specific of commitment systems of participating countries.

Therefore, the concern should be not to close the business fields to foreign investors. This is a business field that has been opened by Indonesia based on GATS negotiation. Some international provisions eliminate the adoption of non-discriminatory principles and cross-border capital protection that allows to strengthen the tendency of imperialism of foreign capital. At the same time, however, some principles of the creation of justice in international governance also require the possibility for national governments to apply compensatory strategy and / or corrective measures at the national level, for example by enacting minimum capital adequacy standards, Investors to meet certain criteria, even with the opportunity to enact a policy of expropriation of state assets / nationalization.

The same treatment and does not distinguish the origin of the State, namely the principle of treatment of non-discriminatory services under the provisions of legislation, whether between domestic investors and foreign investors or between investors of a foreign country and investors from other foreign countries.³⁴ The same treatment is also termed "equality" is equal treatment of an impartial investor and benefits a particular group, group or business scale.³⁵

This Act also provides a guarantee of equal treatment (non-discrimination) in the context of investment, meaning willingness, willingness to provide equal protection to the demand of services both foreign and domestic, as well as to every person before the law by not discriminating treatment. The rationale for the necessity of applying the principle of non-discrimination is that host countries using legitimate reasons may give different treatment to investors in different ways. While on the

³³Ahmad Muliadi, *Politik Hukum Pertanahan Dikaitkan dengan Kepentingan Penanaman Modal Agribisnis Bidang Perkebunan Dalam Rangka Tujuan Negara Kesejahteraan, PPs. Disertasi Universitas Padjadjaran, Bandung, 2011, hlm. 123*

³⁴Vide Article 3 Paragraph (1) Sub-Paragraph d and Elucidation of Act no. 25 Year 2007

³⁵Vide Article 2 Sub-Article b of Government Regulation Number 45 Year 2008 concerning Guidelines for Incentives and Giving Ease of Capital Investment in the Region.

other hand, customary international law does not require host country to ensure non-discriminatory treatment of foreign investment wishing to expand its business activities within its territory, or even to those who have established their business activities. The same treatment for domestic investors and foreign investors mentioned in this Law is still limited by taking into account the national interest. That the Government does not distinguish the treatment of investors who have invested their capital in Indonesia, unless otherwise provided by the provisions of the law. Most Favored Nation Principle (MFN) is one of the fundamental elements of the investment agreement and the WTO system. Under the rules of the MFN, host country should provide treatment to investors of a foreign country, as well as the treatment they have provided to investors from other foreign countries. Of a number of existing investment agreements have shown that the MFN principle has been widely included in almost bilateral, regional and multilateral agreements.

Foreign Investment from any State is, in principle, treated equally, unless the State obtains the privileges of Indonesia under the treaty. Elucidation of Article 6 Paragraph (2), stated: The meaning of "privilege" is among others privileges related to customs union, free trade area, common market, monetary union, similar institution and agreement between Government Indonesia and bilateral, regional or multilateral foreign governments relating to certain privileges in the conduct of investment. Foreign capital will always look for investment objects that are attractive, profitable and safe. In such foreign capital operations foreign capital always seeks to obtain protection in accordance with the articles contained in the prevailing laws and regulations, of the country of investment, of its own country, of the international (financial) organization seeking to protect and cultivate its power by Conducting business practices such as those of multinational corporations / transnational corporations.³⁶ Despite the existence of the Capital Market Law, which provides sufficient guarantees for foreign investment in Indonesia, but the state of foreign capital holders deem it necessary to address specific agreements, in order to explicitly protect the investments made by their nationals in developing countries.³⁷ The protection expected by investors from the country of destination of investment has actually been done by the government of Indonesia by way of cooperation agreement on the protection of investment with the state of the investors (investment guaranty agreement), for example between Indonesia and some countries such as by:

³⁶*Presidential Instruction No. 5 of 2003 on the Package of Economic Policy Ahead And After The End of Cooperation Program With International Monetary Fund; Because Indonesia is a member of the IMF under Act No.5 of 1954 on Indonesia's Membership of the International Monetary Fund and International Bank for Reconstruction and Development (International Bank For Reconstruction and Development)*

³⁷*Sunarjati Hartono. CFG, Beberapa.....op.cit, hlm. 111.; bandingkan karena adanya pengaruh kebijakan dan hukum internasional, dalam Mariam Darus Badruzaman, "Ketentuan Hukum Indonesia tentang PMA sebagai Dampak Persetujuan Mengenai Trade Related Investment Measures (TRIMS)", Makalah pada Penataran Sistem Hukum Perdagangan di Sumatera Utara, dilaksanakan oleh Law Firm T. Badruzaman dan Kawil Depperindag Sumut, di Medan, tanggal 20 Nopember – 12 Desember 1996, hlm. 7.*

-
- (1). The United States of America, regulated in Presidential Decree No.97 of 1967 and has been renewed by Presidential Regulation No.48 of 2010
 - (2). Denmark, regulated in Presidential Decree No.90 of 1968 and has been renewed by Presidential Decree No.33 of 2009
 - (3). Kingdom of Norway, regulated in Presidential Decree No.7 Year 1970 and has been renewed by Presidential Decree No.55 Year 1994
 - (4). The Kingdom of Belgium, governed by Presidential Decree No.42 of 1972
 - (5). The Republic of Canada, regulated in Presidential Decree No.30 of 1973
 - (6). The Republic of France, regulated in Presidential Decree No.10 Year 1975
 - (7). The Government of Switzerland, regulated in Presidential Decree No.9 Year 1976
 - (8). The United Kingdom and Northern Ireland, regulated in Presidential Decree No.3 of 1977
 - (9). Organization of Islamic State (OIC), regulated in Presidential Decree No.57 of 1983
 - (10). Multilateral Investment Guarantee Agency, regulated in Presidential Decree No.31 of 1986
 - (11). ASEAN Cooperation (Kingdom of Brunei Darussalam, RI, Kingdom of Malaysia, Republic of Philippines, Republic of Singapore, Kingdom of Thailand), regulated in Presidential Decree No.22 of 1988
 - (12). The Republic of Tunisia, set out in Presidential Decree No.52 of 1992
 - (13). The Republic of Hungary, regulated in Presidential Decree No.53 of 1992
 - (14). The Kingdom of Sweden, regulated in Presidential Decree No. 68 of 1992
 - (15). The Republic of Poland, regulated in Presidential Decree No.13 of 1993
 - (16). The Government of Australia, regulated in Presidential Decree No.36 of 1993
 - (17). The Socialist Republic of Vietnam, regulated in Keppres No.115 of 1993
 - (18). Republic of Korea, arranged in Presidential Decree No.8 Year 1994
 - (19). The Government of Malaysia, regulated in Presidential Decree No.34 of 1994
 - (20). The Kingdom of the Netherlands, set out in Presidential Decree No.58 of 1994
 - (21). The Republic of Italy, regulated in Presidential Decree No.60 of 1994
 - (22). Arab Republic of Egypt, regulated in Presidential Decree No.61 of 1994
 - (23). People's Republic of China, regulated in Presidential Decree No.5 of 1995
 - (24). The Lao People's Democratic Republic, regulated in Keppres No.15 of 1995
 - (25). The Kingdom of Spain, set out in Presidential Decree No.53 of 1995
 - (26). Kyrgyz Republic, regulated in Presidential Decree No.80 of 1995
 - (27). Republic of Suriname, regulated in Presidential Decree No.22 of 1996
 - (28). Islamic Republic of Pakistan, regulated in Presidential Decree No. 63 Year 1996
 - (29). Ukraine, regulated in Presidential Decree No.66 Year 1996

- (30). The Republic of Finland, regulated in Presidential Decree No.82 of 1996 and has been renewed by Presidential Regulation No.29 of 2008
- (31). Republic of Uzbekistan, regulated in Presidential Decree No.83 of 1996
- (32). The Democratic Socialist Republic of Sri Lanka, set out in Presidential Decree No.6 of 1997
- (33). The Kingdom of Thailand, set out in Presidential Decree No.90 of 1998
- (34). The Republic of Turkey, regulated in Presidential Decree No.107 of 1998
- (35). The Government of Mongolia, regulated in Presidential Decree No.108 of 1998
- (36). The Republic of Yemen, regulated in Presidential Decree No.109 of 1998
- (37). Republic of Mauritius, regulated in Presidential Decree No.110 of 1998
- (38). Syrian Arab Republic, regulated in Presidential Decree No.159 of 1998
- (39). Republic of Bangladesh, regulated in Presidential Decree No.00 Year 1998
- (40). The Kingdom of Jordan, set out in Presidential Decree No.5 of 1999
- (41). Cuban Republic, regulated in Presidential Decree No.45 Year 1999
- (42). The Republic of Zimbabwe, set out in Presidential Decree No.46 of 1999
- (43). Czech Republic, regulated in Presidential Decree No.50 of 1999
- (44). Turkmenistan, regulated in Keppres No.60 Year 1999
- (45). Romania, regulated in Presidential Decree No.61 of 1999
- (46). The kingdom of Morocco, regulated in Presidential Decree No.170 of 1999
- (47). The Kingdom of Cambodia, set out in Presidential Decree No. 2000/2000
- (48). Republic of Chile, regulated in Presidential Decree No.55 of 2000
- (49). The Republic of Argentina, regulated in Presidential Decree No.167 of 2000
- (50). The Democratic People's Republic of Korea, set out in Presidential Decree No.29 of 2001
- (51). The People's Democratic Republic of Algeria, set out in Presidential Decree No.44 of 2001
- (52). Republic of Sudan, stipulated in Presidential Decree No.24 of 2002
- (53). Republic of the Philippines, regulated in Presidential Decree No.77 of 2002
- (54). The Republic of India, regulated in Keppres No.93 of 2003
- (55). The Federal Republic of Germany, regulated in Presidential Decree No.68 of 2004
- (56). The Republic of Bulgaria, regulated in Presidential Decree No.78 of 2004
- (57). The Republic of Singapore, regulated in Presidential Decree No.6 of 2006
- (58). The State of Qatar, regulated in Presidential Regulation No.84 of 2007
- (59). Islamic Republic of Iran, regulated in Presidential Decree No.66 Year 2008
- (60). The Russian Federation, regulated in Presidential Regulation No.7 Year 2009
- (61). IMF, regulated in Presidential Decree No.14 of 2010
- (62). ASEAN with the Republic of Korea, regulated in Presidential Decree No.18 of 2010

In addition to bilateral protection from both countries, in order to invest their capital in Indonesia, investors need legal certainty in their business. Therefore, the government should pay attention to the rules relating to foreign investment, especially those related to the protection of foreign investors in the business and how to treat them fairly on the expenditure of policies concerning business activities and also about the security of business in Indonesia.

4. Conclusion and Recommendations

Legal certainty for investment when associated with the legal system of land can be done by providing legal certainty of the granting of land rights by completing the issuance of decree granting rights. Likewise for the extension and renewal of land rights can reach the period of the Rights of Business to a total of 120 years consisting of 35 years of first grant + 25 year renewal + 35 year renewal rights and 25 years renewal renewal. This arrangement is also part of the continuity of agribusiness activities in the field of plantation.

The political perspective of capital investment law in Indonesia must be linked with the welfare state's objective is that the land ownership of the Right to Use of Business, the Right to Build and Use Right for investment purposes has been quite clearly stipulated in the LoGA which is used as the reference of every land policy aimed at achieving prosperity Society, because land should be a source of prosperity and prosperity of the people in economic and cultural perspectives, land should have a clear contribution in creating a just life order.

This research give to recommandation, In the provision of land rights for investment, synchronization must be made between the laws and regulations of the land and investment, in particular with the current system of autonomy so as to avoid overlapping or minimize different interpretations of land between the various fields in the regulation The same way by stratification, and in order that the legal policy of investment in the field of plantation is not interpreted in accordance with the needs of land use but is seen as a unified whole with the purpose of using and utilizing the land for the welfare of the people. The renewal efforts to be implemented can be developed based on the MPR Decree. No.IX / MPR / 2001 on Agrarian Reform and Natural Resource Management which should refer to the principles of democracy, justice and sustainability and be carried out in a comprehensive and fundamental way in maintaining relations between countries.

References:

- Ahmad Muliadi, 2011. Politik Hukum Pertanahan Dikaitkan dengan Kepentingan Penanaman Modal Agribisnis Bidang Perkebunan Dalam Rangka Tujuan Negara Kesejahteraan, PPs. Disertasi Universitas Padjadjaran, Bandung.
- Anton, M., Moeliono, *et al.* 1990. Kamus Besar Bahasa Indonesia, Balai Pustaka, Jakarta.

- Bagir Manan, 2005. *Sistem Peradilan Berwibawa (Suatu Pencarian)*, FH UII Press, Yogyakarta, Cet.ke-1.
- Eman Suparman, 2004. *Pilihan Forum Arbitrase dalam Sengketa Komersial untuk Penegakan Keadilan*, Tatanusa, Jakarta, Cet.ke-1.
- Erman Rajagukguk, 2001. *Globalisasi Hukum dan Kemajuan Teknologi: Implikasinya Bagi Pendidikan Hukum dan Pembangunan Hukum Indonesia*, pidato pada Dies Natalis Fakultas Hukum Universitas Sumatera Utara Ke-44, Medan, 20 Nopember.
- Huala Adolf, 2004. *Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO)*, Rajawali Pers, Jakarta, Cet.ke-1.
- Juwono Sudarsono, 2001. *Tiga L Pemikat Investasi di Indonesia*, Kompas, Rabu, 09 Juni.
- Maria, S.W. Sumardjono, 2001. *Kebijakan Pertanahan antara Regulasi & Implementasi*, Buku Kompas, Jakarta.
- Mariam Darus Badruzaman, 1996. *Ketentuan Hukum Indonesia tentang PMA sebagai Dampak Persetujuan Mengenai Trade Related Invesment Measures (TRIMS)*, Makalah pada Penataran Sistem Hukum Perdagangan di Sumatera Utara, dilaksanakan oleh Law Firm T. Badruzaman dan Kawil Depperindag Sumut, di Medan, tanggal 20 Nopember – 12 Desember 1996.
- Mochtar Kusumaatmadja, 1996. *Investasi di Indonesia dalam Kaitannya dengan Pelaksanaan Perjanjian Hasil Putaran Uruguay*, *Jurnal Hukum*, No 5, Vol 3.
- Mochtar Kusumaatmadja, 2006. *Konsep-Konsep Hukum dalam Pembangunan*, Alumni, Bandung.
- Nugroho, 1978. *Penanaman Modal Asing dan Pengaruhnya terhadap Hukum Ekonomi*, makalah pada Simposium Hukum Ekonomi Nasional, dilaksanakan BPHN dengan FH UI, di Jakarta, pada 17-19 April, dalam buku BPHN, Simposium Pembinaan Hukum Ekonomi Nasional, Binacipta, Bandung.
- Ridwan Khairandy, 2006. *Iklim Investasi dan Jaminan Kepastian Hukum dalam Era Otonomi Daerah*, *Jurnal Hukum Respublica*, Vol. 5, No. 2, Tahun.
- Sanyoto Sastrowardoyo, 1990. *Kebijaksanaan Penanaman Modal*. Sambutan Pengarahan Ketua BKPM pada Panel Diskusi Beberapa Permasalahan Hukum di Sekitar Penanaman Modal, di Jakarta pada 18-20 Juni.
- Sudikno Mertokusumo, 1988. *Mengenal Hukum (Suatu Pengantar)*, Liberty, Yogyakarta; Ed.-2, Cet.ke-1.
- Sumantoro, 1986. *Hukum Ekonomi*, UI Press, Jakarta: Cet.ke-1.
- Sunarjati Hartono, 1972. *CFG, Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia*, Binacipta, Bandung: Cet.ke-1.
- Theo Huijbers, *Filsafat Hukum*, Kanisius, Yogyakarta, 1995. Cet.ke-3.
- Tineke Louise, Tuegeh Longdong, *Asas Ketertiban Umum & Konvensi*, 1998. *Sebuah Tinjauan atas Pelaksanaan Konvensi pada Putusan-Putusan Mahkamah Agung RI dan Pengadilan Asing*, Citra Aditya Bakti, Bandung, Cet.ke-1.
- Todung Mulya Lubis, 2005. *Infrastruktur dan Kepastian Hukum*”, Kompas, 14 Juni.
- Yulianti, 2016. *UU PM Cermin Hegemoni Aing*”, <http://reformasihukum.org/>, diakses terakhir tanggal 28 Nopember.
- Yulianto Ahmad, 2003. *Peran Multilateral Investment Guarantee Agency (MIGA) dalam Kegiatan Investasi*”, *Jurnal Hukum Bisnis*, Vol. 22, No. 5, Tahun.