CHAPTER I

INTRODUCTION

1. Introduction

The flow of foreign direct investment to emerging Asian countries has been binding since the early 1990s, although it declined during the Asian crisis, the flow of water entering these countries has increased again post-crisis message.[1] Long-term and relatively long-term capital flows foreign direct investment flows are intended to help support sustainable investment growth in a country and are preferred over portfolio investment since they are not sensitive to economic turbulence. Therefore, it is important to know the determinants of natural resources in a country so that a policy can be formulated that encourages an increase in the flow of human resources to be more effective and several important roles that influence the interest of foreign investors to invest in the form of themselves in a country.

Investment is a problem that is directly related to the expectation of future income from capital goods. investment is capital expenditure by companies to purchase capital goods and capital equipment in order to increase the ability to produce goods and services in the economy. Meanwhile, according to the Law of

[1] Astrid Mutiara Ruth and Syofriza Syofyan, *"Faktor Penentu Foreign Direct Investment di Asean-7; analisis data panel, 2000-2012"*, Media Ekonomi, Volume 22, No. 1, April 2014, https://media.neliti.com/media/publications/52776-ID-faktor-penentu-foreign-direct-investment.pdf

the Republic of Indonesia No. 25 of 2007 on Investment , investment includes all forms of investment activities conducted by both domestic and foreign investors on the territory of the Republic of Indonesia.[2] Investment or investment is one of the one indicator that greatly affects the level of national income. Investment is volatile, if there is a decrease in the expenditure of goods and services. The rise and fall of investment are caused by several factors, namely labor, inflation, Gross Regional Domestic Product and interest rates. Investment or investment based on the origin of the investment is divided into two, namely domestic investment Based on Article 1 point 2 of Law No. 25 of 2007 Domestic investment is an investment activity to conduct business in the territory of the Republic of Indonesia carried out by domestic investors using domestic capital[3], and foreign investment based on Article 1 point 3 of Law No. 25 of 2007 foreign investment is an investment activity to conduct business in the territory of the Republic of Indonesia carried out by foreign investors, both those who use foreign capital wholly or jointly with domestic investors.[4]

Direct Investment is governed by article 2 of Law No. 25 of 2007, which states that the requirements of this law apply to all sectors of the Republic of Indonesia's territory. It is mean investment that is original and does not include indirect investment of legal character derived from direct investment: [5]

[2] Meria Ulva, “Analisis Realisasi Penanaman Modal Asing Sebelum dan Saat Terjadinya Pandemi COVID-19 di Jawa Timur”, E-Jurnal Ekonomi dan Bisnis Universitas Udayana, Vol. 10 No. 01, January 2021, p. 33-38, <https://ojs.unud.ac.id/index.php/EEB/index>
[3] Article 1 Point 2 Law Number 25 Year 2007
[4] Article 1 Point 3 Law Number 25 Year 2007
[5] Jened Rahmi, “*Teori dan Kebijakan Hukum Investasi Langsung (Direct Investment)*”, Kencana Prenada Media Group, Jakarta, 2016. p. 2

1. The establishment of a company in the host country in accordance with the law,
2. The existence of capital in the form of equity,
3. Investors who carry out direct management and
4. Investors bear the risk directly.

The advantages that we can gain from foreign investment in Indonesia. One of them is the influx of new cash to assist fund various underfunded areas. This foreign investment also creates a large number of new jobs, lowering the unemployment rate. Furthermore, foreign investment is frequently accompanied with technological transfer, as well as an increase in state revenue through taxes. Furthermore, it establishes a more stable economic tie between the two countries.

Investment activities in the form of PMA or PMDN have similarities in their objectives, namely that both must be aimed at supporting the progress of the national economy. However, on the other hand of course there are differences between the two. The difference between PT PMA and PMDN can be seen from the subject of investment, the existence of restrictions in certain business fields, restrictions on the investment sector, labor obligations and technology transfer.

As stated in Article 5 Law Number 25 of 2007 concerning Investment, foreign investment is an investment activity by foreign investors conducting business in the Unitary State of the Republic of Indonesia, either individually or in joint ventures with domestic investors. Foreign investment is very beneficial for Indonesia and helps Indonesia achieve its economic development goals. Interest rates are a very important factor for entrepreneurs to consider investment decisions. Interest rates are not the only factor affecting investment

In 2019 Indonesia is ranked 72 in the Global competitiveness report, whereas in 2017 the rank was higher at 52, which shows that even though Indonesia's infrastructure is developing at a high rate, but other nations have grown at a higher rate and thus Indonesia got pushed to a lower rank. For getting a clearer picture let us browse into the Logistics Performance Index.[6] Infrastructure is critical for emerging nations' long-term growth and competitiveness.

Table 4: Market size: Global competitiveness index ranking of Indonesia – 2014-2019

Year	2014	2015	2016	2017	2018	2019
Global rank	15	10	10	9	8	7

Source: Compiled from Global Competitiveness Reports 2014-2019

Table 5: Economic growth of Indonesia - 2014-2018

Year	2014	2015	2016	2017	2018	Average
Growth rate	5.01%	4.88%	5.03%	5.07%	5.17%	5.03%
Global rank	49	45	37	38	40	

Source: Compiled from GlobalEconomy.com, reports 2014-2018

Table 6: Infrastructure: global competitiveness index ranking of Indonesia - 2014-2019

Year	2014	2015	2016	2017	2018	2019
Global rank	56	62	60	52	71	72

Source: Compiled from Global Competitiveness Reports 2014-2019

It contributes to the creation of jobs and the improvement of living standards. Therefore, the government is constantly investing in infrastructure projects and is eager to put in place regulations that encourage private sector entities to spend extensively in infrastructure projects. Only foreign companies that have

[6] Manuel Fernandez, Mariam Mohamed Almaazmi, Robinson Joseph, "Foreign Direct Investment in Indonesia: An Analysis from Investors Perspective", Skyline University College, 2020, https://doi.org/10.32479/ijefi.10330

high productivity can influence the productivity of local companies.[7] This would ensure that the country's world-class infrastructure is built in a timely manner. However, many Asian countries, including Indonesia, continue to face challenges in constructing and funding infrastructure projects.

At this time as in other countries in the world Indonesia is facing a novel coronavirus pandemic covid-19 this virus that attacks the human respiratory system can be transmitted by humans to other humans.[8] Indonesia is the world's fourth most populated country, with a sizable workforce and a wealth of natural resources. As a result, Indonesia is one of the most attractive countries in which to invest. The Government of Indonesia defines investment priority sectors, such as infrastructure, agriculture, industry, maritime, tourism, and Special Economic Zones, based on the 2015-2019 Investment Strategic Plan and Industrial Estates, as well as the digital economy. These sectors are very open to Foreign Direct Investment (FDI) of course with due observance of the investment guidelines contained in Presidential Regulation no. 44 of 2016 concerning List of Business Fields Closed and Business Fields Open with Requirements in the Investment Sector.

There are many factors that influence it, such as the current economic situation, if the rate in the case of high interest rates, investors will continue to invest because the current economic situation is improving and will grow rapidly in the future. If

[7] Lenaerts, Merlevede, "Indirect productivity Effects From Foreign Direct Investment and Multinational Firm Heterogeneity", Review of World Economics, 2018 <https://doi.org/10.1007/s10290-017-0298-9>
[8] Aditya Susilo *et al*., "*Coronavirus Disease* 2019: Tinjauan Literatur Terkini", *Jurnal Ilmu Penyakit Dalam Indonesia*, Volume 7, Nomor 1, Maret 2020, p. 45.

interest rates are low then investors are not investing much, because capital goods in the economy are used at a rate that is much lower than their maximum capacity. Foreign investment in Indonesia during the Covid-19 pandemic has decreased.

It is well known that the impact of the pandemic has not been all bad or uniform. For certain industries it is probably their most challenging scenario in years, if not in decades, whereas certain FDI industries instead are predicted to be able to grow and “benefit” from the COVID 19 crisis. These segments include e-commerce, cyber security, renewable energy, healthcare, and biotechnology. While FDI is expected to create positive impact on economy, it has also brought in certain negative impact on Indian economy during the past few years especially in this Covid -19 situation.[9]

Foreign investment in Indonesia can be seen from state-owned enterprises that inject funds through a foreign direct investment process where the Toll Road Business Entity (BUJT) welcomes the arrival of foreign investors. PT Waskita Karya (Persero) Tbk (WSKT) will receive additional State Capital Participation (PMN) of IDR 7.9 trillion in 2021 and IDR 3 trillion in 2022 to strengthen capital. will divest ownership of shares in two BUJTs, namely PT Waskita Sriwijaya Tol which has concession rights for the Kayu Agung - Palembang - Betung toll road section and PT Trans Jabar Tol which owns the Ciawi - Sukabumi section with a

[9] Shreya Giri, Poorvi Agrawal, "Foreign direct investment and the Indian economy: Pre and post covid-19", Alliance School of Law, Alliance University, 2021, <www.lawjournals.org>

length of 112 kilometers to foreign investors, It is recorded that until June 2021, as many as 3 segments have been released to foreign investors.[10]

There is an investment activity between PT. Wakita Karya and Moroccan Company the investment that will be set up is foreign direct investment because according to the article 5 law number 25 Year 2007 the Foreign investment must be in the form of a limited liability company based on Indonesian law and domiciled within the territory of the Republic of Indonesia, unless otherwise stipulated by law. And it's a public Investment because the investment made by the government, both central government and local government and is official.

Each country has a different legal understanding of this foreign investment contract, which involves international parties. Offer, acceptance, considerations, intent, and bargaining actions are all recognized as contract validity factors in common law jurisdictions,[11] whereas the requirements in civil law jurisdictions are vastly different. Consider the absence of the concept of consideration in civil law countries, which account for the majority of the world's countries.[12]

The first criterion, namely the agreement of the parties who commit themselves in the agreement, is related to the signing of an investment contract that is carried out because of a threat. According to Article 1321 of the Civil Code, an

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[10] Muawwan Daelami, "Pemerintah Beri Waskita Modal Segar Rp 7,9 T dan Adhi Karya Rp 2 T", https://investor.id/business/254728/pemerintah-beri-waskita-modal-segar-rp-79-t-dan-adhi-karya-rp-2-t, 8 July 2021, accesed pada 25 October 2020

[11] Kevin J. Fandl, "Cross-Border Commercial Contracts and Consideration", Berkeley Journal of International Law Volume 34 Issue 2, 2016, p. 3.

[12] *ibid.*, p. 5.

agreement is not legitimate if it was offered by mistake, or gained by duress or fraud. Articles 1324 as the privity of contract and 1325 of the Civil Code define what coercion is and how it is used. If an act may frighten a reasonable person, and if the act can generate fear in the person that he or his property is faced with a clear and real loss, it is considered coercion.

Foreign Direct Investment (FDI) is direct investment or foreign investment, where an investor in the economic sphere of one country takes an interest in a business in the sphere of the economy of another country.[13] As previously stated, a foreign company in Indonesia must be owned by at least two shareholders. The company (PT) itself can be formed through mergers or acquisitions. Merger is the merging of one company with another to form a new company. While the acquisition is the takeover of a company (one company is bought by another company).[14] Foreign investors can set up their companies anywhere in Indonesia.

2. Legal Problem Formulation

There is a hypothetical case that happened in these materials that happened based on Toll Road Business Entity (BUJT) welcomes the arrival of foreign investors. PT Waskita Karya (Persero) Tbk (WSKT) will receive additional State Capital Participation (PMN) of IDR 7.9 trillion in 2021 and IDR 3 trillion in 2022 to strengthen capital. Whereas the investment contract was made in the form of

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[13] Foreign Direct Investment, See How to Invest & Its Benefits Here!, https://www.online-pajak.com/about-pph-final/foreign-direct-investment, Accessed on 26 June 2021
[14] Kementerian Investasi/BKPM, "Penanaman Modal Asing di Indonesia", https://www.investindonesia.go.id/id/artikel-investasi/detail/penanaman-modal-asing-di-indonesia, Accessed on 30 July 2021

Memorandum of Understanding and Letter of Intent and the contract wasn't fulfilled because of the Covid-19 Pandemic. Based on the background above, the formulation of the problem that will be discussed in this study are:

1. What is the legal relationship in the stage of Memorandum of Understanding (MOU) or Letter of Intent (LOI) Between PT. Waskita Karya and Moroccan Company in Investment Activities?
2. Is Covid-19 a grounds of Cancellation MOU or LOI Between PT. Waskita Karya and Moroccan Company and it's Legal Consequences in Investment Activities?

3. Objective of the Research

a. To analyze about the obligations of both parties to the investment activities both from the investor and the Host state regarding the MOU or LOI Between PT. Waskita Karya and Moroccan Company made in the event of the Covid-19 pandemic and
b. To analyze the legal consequences of canceling a direct foreign investment contract in the form of an LOI or MOU due to Covid-19 from a host country investor Between PT. Waskita Karya and Moroccan Company, this can be used as the basis for delaying contractual obligations or *force majeure* for foreign direct investment.

4. Benefits of the Research

The writing of this thesis is expected to achieve the purpose of writing and provide benefits, both practical benefits and theoretical benefits:

a. Practical benefits

The results of the research are expected to produce benefits for the development of investment world, especially in the scope of investment contracts. And the benefit of writing this research from a practical point of view is to provide a deeper understanding for various parties in the investment sector related to Pre-contract design and understanding of investment contract provisions if there are events and actions that affect investment contracts during the Covid-19 pandemic and directly add knowledge and insight about pre-contractual in the investment sector.

b. Theoretical benefits

The results of the research are expected to produce benefits for the development of science, especially the science of Investment Law related to Foreign Direct Investment and are expected to produce benefits for further legal research and law. The theoretical benefit that can be obtained from this research is that it is expected to be able to develop legal knowledge regarding the accountability of investment contract organizers in the event of cancellation and postponement of investment agreement obligations due to the Covid-19 pandemic.

5. Legal Method

a. Type the Bachelor Thesis Research

Scientific research with the title "Legal Protection for Foreign Direct Investment Contracts in Indonesia during the Covid-19 Pandemic" in the context of writing a thesis is included in the type of legal research. According to Peter Mahmud Marzuki, Legal Research is a *know-how* activity in legal science, not just *know-about*. As a *know-how* activity, legal research is carried out to solve legal issues faced.[15] Related to the liability of investment contract organizers in Indonesia in the event of cancellation or delay of contractual obligations during the Covid-19 pandemic. Juridical normative by being carried out based on descriptive (juridical normative) with a statutory approach and reviewing legislation and other literature studies, then related to the problem under discussion and *library research*.

b. Research's Approach

In legal research, there are several approaches with this approach, the research will obtain information from various aspects regarding the issue that is being tried to find answers. The approach used in legal research is the statutory approach, the case approach, the historical approach, the comparative approach and the conceptual approach.[16] The statutory approach (*Statute Approach*) is an approach that is carried out by examining all laws and regulations related to the legal issues being handled and studying the relationship between these laws and regulations by understanding the principle of the hierarchy of laws and

[15] Peter Mahmud Marzuki, "*Penelitian Hukum*", Surabaya, Prenadamedia Group, 2019, p.60
[16] Peter Mahmud Marzuki, "*Penelitian Hukum*", Surabaya, Kencana Media Group, 2005, p.32

regulations.[17] With the aim of using this view is to know the ratio logically determining the Covid-19 pandemic as a reason for canceling or postponing investment contract obligations can be justified. A conceptual approach that is carried out when there are legal rules and doctrines that regulate legal issues that develop in legal science that will be faced so that a concept development is needed which is used as a reference.

c. Primary and Statutory Legal Material

Sources of legal materials used in this study are primary legal materials and secondary legal materials and primary legal materials consist of statutory regulations and official records of making legislation. Primary legal materials are legal materials that are authoritative, meaning they have authority.[18] In this study, the primary legal materials used are Law number 11 of 2020 concerning work procedures, Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, government regulation number 20 of 1994 concerning share ownership and companies established in the context of investment. Law Number 40 of 2007 concerning limited liability companies. In addition to primary legal materials, there are also secondary legal materials, which are legal materials used to provide guidance and support regarding primary legal materials, which can consist of legal books, including theses and legal dissertations and legal journals and the opinions of scholars in literature. about the law and comments or court decisions, especially with regard to the problems discussed in this thesis, secondary sources of legal

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[17] Peter Mahmud Marzuki, "*Penelitian Hukum Edisi Revisi"*, Jakarta , Kencana Prenada Media Group, 2005, p.137
[18] *Ibid*, p. 213

material which in this case is obtained from the income of legal experts, literature, internet lecture notes and journals related to the legal issues to be discussed.

d. Analysis of Legal Materials

The analysis of legal materials used in this study is by using descriptive analysis methods, analytical descriptive methods are carried out by examining applicable laws and regulations in relation to the formulation of the problem being studied, and then the legal materials obtained are carried out discussing examinations and grouping of each section which is then processed into a writing to complete the formulation of the problem in this study. The author also uses a systematic interpretation, namely by connecting and interpreting language (*grammatikal interpretatie*), which means interpreting the legal provisions in the related article to be interpreted as the meaning of these provisions with grammar or habits.[19]

6. Design or Systematic Research of Bachelor Thesis

To understand more clearly about the eyes of the materials listed in this study, systematics of writing in this study, it is divided into 4 chapters, each chapter will consist of several sub-chapters, the systematic description of the writing of this research is as follows:

[19] H Enju Juanda, "Penalaran Hukum (*Legal Reasoning*)", Galuh justisi, Volume 5, Nomor 1, Maret 2017, p. 163

Chapter 1 as an introductory chapter which consists of the background of the problem formulation, research objectives, benefits of research and research methods,

Chapter 2 discusses the formulation of the first problem, namely that the legal relationship in the stage of Memorandum of Understanding (MOU) or Letter of Intent (LOI) Between PT. Waskita Karya and Moroccan Company in Investment Activities which will be divided into two sub-chapters, the first sub-chapter discusses the existence of economic investment pre-contracts that consist of two another sub-chapter that discuss about the form of MOU or LOI and the next sub chapter about the rules and Concept, sub-chapters the second discusses the characteristics of foreign direct investment in the form of MOU or LOI, which also consist of two sub chapter that the first will discusses about the use of LOI and the second sub-chapter discuss about legal position and the purposes of MOU.

Chapter 3 discusses the formulation of the second problem, namely the basis of Covid-19 as grounds of Cancellation MOU or LOI Between PT. Waskita Karya and Moroccan Company and it’s Legal Consequences in Investment Activities. In this chapter there will be two sub-chapters, the first sub-chapter discusses the Covid-19 as the grounds of the cancellation of investment activities, and the second sub-chapter discusses the Justification of the Cancellation and the legal consequences in Investment activities Between PT. Waskita Karya and Moroccan Company.

Chapter 4 as a closing which consists of conclusions and suggestions for conclusions in response to the formulation of the problems discussed in Chapter 2 and Chapter 3 which are compiled briefly referring to the formulation of the problem being analyzed and suggestions which are recommendations that are operational in nature referring to the conclusions drawn from the analysis or formulation of the problem, as well as useful suggestions for providing solutions to the laws discussed in this study and suggestions for various parties.