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NATIONALIZATION OF FOREIGN INVESTMENT COMPANIES IN INDONESIA IN CIVIL LAW PERSPECTIVE

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Abstract

The purpose of this study is to understand the basis of the government action to nationalize foreign investment companies and legal protection of investors as a result of these nationalization actions. The research method used is normative juridical or library research related to normative substance of law, to find truth based on logic of science regarded from normative side by way of researching bibliography or secondary data consisting of primary law material, secondary law material and tertiary law material. The result of the research shows that the basic of nationalization action by the government underlying are due to economic inequality, where foreign capital companies start to dominate the main sectors in the national economy, and the other thing is the politics of nationalization law. Legal protection of investors is focused on preventive law protection, in which investors are given the opportunity to file an objection (inspraak) before a government decision in the definitive form of nationalization action.

Keywords: ***Nationalization, Foreign Investment Company, Foreign Direct Investment.***

1. INTRODUCTION

Every country always strives to improve the development, welfare and prosperity of its people. These efforts are carried out in various ways that differ from one country to another. One of the efforts always made by the State is to attract as much foreign investment as possible into its country. Attracting as much investment as possible into a country is based on a myth that states that to become a prosperous country, national development must be directed to industry. To get there, from the beginning these countries were faced with the problem of lack of capital and technology which were basic elements in the direction of industrialization. The path taken to overcome the problem is to invite the influx of foreign capital from developed countries into the country. The influx of foreign capital for the Indonesian economy is a demand for both the Indonesian economy and politics. The alternative of the Indonesian economic development fund association through direct capital investment is much better than the withdrawal of other international funds such as foreign loans (Amalia et al., 2018).

The FDI policy philosophy is that foreign capital is needed to complement domestic capital that is not strong enough to turn the wheels of the country's economy. But when foreign capital then dominates the national economy, and causes economic dependence, there is often hostility towards FDI. This unfriendly attitude can be manifested in political decisions to nationalize or expropriate foreign capital (Tjandrasa, 2021).

Explained in Article 7 paragraph (1) of Law No. 25 of 2007 concerning Capital Investment, relating to the authority of the Government not to carry out nationalization actions or expropriation

of investors' ownership rights, except by law. The inclusion of the word "except by law", found a vague norm (vague van normen) that gave rise to multiple interpretations, where it can be interpreted that nationalization actions can be carried out by the Indonesian government, but legal certainty is not given about in what cases the nationalization actions can be carried out by the government. The description will be reviewed by the author in terms of what nationalization measures can be carried out by the government and on legal protection for investors in foreign investment (Saputra & Emovwodo, 2022).

2. IMPLEMENTATION METHOD

TheThis research includes normative legal research with a statutory approach (statue approach), concept approach (conceptual approach), analytical approach (analytical approach), and comparative approach (comparative approach). By starting to explain the background of the problem in the perspective of philosophical, sociological and juridical problems. By using a literature review that is relevant to the problems raised. Furthermore, using a literature review used legal principles, relevant legal theories that exist which are supported by technical analysis of legal material description, interpretation, and argumentation.

The type of research is normative juridical, legal research in this case vague van normen related to the regulation of nationalization of foreign investment, in what case the government carries out nationalization actions, and legal protection of investors related to nationalization of foreign investment based on Law Number 25 of 2007 concerning Investment, by using secondary data consisting of primary legal material, secondary legal material and tertiary legal material. The relevant regulation to discuss and analyze the issues raised in this thesis is Law Number 25 of 2007 concerning Investment.

The technique of collecting legal materials in writing this journal uses card system techniques, namely reviewing relevant regulations, books or reading materials or, scholars' scientific papers and the results are recorded with a card system, this is done to make it easier to decipher, analyze, and make conclusions from existing concepts.

Furthermore, to answer the problems in this study, it is analyzed by the analysis process through the steps of description, interpretation, and argumentation, then the conclusion of legal material is carried out in a deductive way, namely by drawing a conclusion from general to specific data to get clarity on a truth so as to obtain a clear picture of the matters behind the Government carrying out nationalization actions against Foreign investment companies in Indonesia based on Law Number 25 of 2007 concerning Investment The final part is the conclusion which is a summary of the discussion of the issues raised in this thesis, then continued by providing suggestions and recommendations related to the nationalization of foreign investment companies (Yuniar, 2021).

The research conducted is a type of normative juridical research, or literature research related to normative legal substance, where normative legal research is a scientific research procedure to find truth based on scientific logic viewed from its normative side. Normative legal research is legal research carried out by researching library materials or mere secondary materials. To support the acquisition of actual and accurate data, the research conducted is descriptive,

namely research that only describes facts about the object of research both in the framework of systematization and synchronization based on juridical aspects, with the aim of answering the problems that are the object of research.

In accordance with its type, normative juridical research is legal research carried out by examining library materials or mere secondary data, consisting of preliminary legal materials, secondary legal materials and tertiary legal materials. Research on the nationalization of foreign investment companies was conducted using the Statute Approach, Conceptual approach, and Comparative Approach

3. RESULT AND DISCUSSION

3.1 Definition of Nationalization

Nationalization is often equated with confication and onteigening and disenfranchisement. The term nationalization includes at least three meanings "Confiscation", "Onteigening" and "Disenfranchisement". L. Erades gives the meaning of nationalization, which is a regulation by which the authorities impose all or a certain group to accept (dwingt te godegen), that their rights to all or some certain kinds of things pass to the State. Thus, nationalization is a means of transferring rights from the party to the state by force (Kadir & Murray, 2019).

Nationalization is seen as a "Species" of the "Genus" of disenfranchisement and Onteigening. In relation to the above provisions, it means that any revocation and onteigening in principle must be followed by "compensation". Meanwhile, if it is not accompanied by compensation, it can be called "confiscation". This confiscation is similar to revocation (a kind of onteigening), but with a special complexion without compensation.

The term nationalization includes "expropriation" or "confiscatie". This term nationalization means that an enterprise becomes state-owned. The company in question became "a nation affair". In terms of nationalization that makes the object of enterprises. Kollewijn argues that, "There is said to be nationalisation principally if an expropriation forms part a more or less extensive reform of the social or economie structure of a country", whereas Gouw Giok Siong quotes Wortley as asserting that "nationalitation is not a term of art", but is used to refer to expropriation in the pursuance of some national enterprises, or to strengthen, a nationally controlled industry. Nationalization differin its scope and extent rather than in its judicial nature from other types of expropriation (Yuniar, 2021).

3.2 Purpose and benefits of nationalization

When examined above, there are two benefits of the concept of Nationalization are Benefit and Transfer of control over the running of the company. Looking at the above understanding of the nationalization actions carried out by the Government of Indonesia, we can draw the objectives

of the implementation of Nationalization of Foreign Investment Companies (Fernandez et al., 2020), including:

a. Improve the national economy
b. saving domestic investors
c. Creating a conducive investment climate
d. Increase legal certainty for foreign investors
e. Encouraging national economic development
f. Improve community welfare;

As mentioned above, this nationalization action aimed to provide economic benefits to the Indonesian people and strengthen the security and defense of the country which at that time was in confrontation with foreign investors.

3.3 Regulation of Nationalization of Foreign Investment in International Law

A survey conducted by The Organisation for Economic Cooperation and Development (OECD) found that international law does not prohibit nationalisation of foreign capital by investment recipient countries as long as they meet a number of requirements. It states that "customary international law does not preclude hosts states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner with compensation". The United Nations (UN) clearly recognizes the right of host countries, recipients of foreign investment to nationalize with certain conditions. This recognition is a respect for the sovereignty of the country concerned. Paragraph 4 of United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, No. 1803 of 1962 (Daniel, 2003).

The Law of the People's Republis of China on Foreign Capital Enterprises, passed by the National People's Congress on April 12, 1986 and later amended by the National People's Congress on October 31, 2000, states in Article 5 that "the state does not nationalize or requisition any enterprise with foreign capital may be requisitioned through legal procedures and appropriate compensation shall be made". The Decree of the President of the Philippines as contained in Executive Order No. 226 of 1987, known as The Omnibus Investments Code of 1987, provides basic rights and guarantees in the form of investment protection to foreign investors in Article 38 point (d) which essentially states that expropriation will not be carried out except in the public interest, for the welfare of the people or for the defense of the State (Lepi, 2022).

United Nations General Resolution 3281 of 1974 on the Charter of Economic Rights and Duties of States recognizes the right of every State to freely exercise its sovereignty, including in the ownership and use of natural resources in its economic activities. The exercise of this right includes, among other things, nationalization measures. Article 2 Paragraph 2 letter c of this Resolution states that every State has the right to nationalize or expropriate it under certain conditions. In the midst of the vacuum of international conventions in the field of foreign

investment, bilateral investment treaties (BIT) play an important role in regulating cross-border investment issues. In relation to nationalization, one of the main objectives of the BIT is to protect foreign investors from illegitimate, arbitrary or discriminatory nationalization that would reduce their interest in investing in other countries. Although the possibility for nationalization will never be closed, if it happens, it will be carried out on strict and fair terms for foreign investors and foreign capital recipient countries (Setiawati et al., 2021).

Halmana confirms with the principle of foreign investment mentioned in the UUPM which states that the principle of certainty in the State of law that lays down laws and regulations as the basis for every policy and action in the field of investment and equal treatment and does not distinguish the origin of the State is the principle of nondiscrimination service treatment based on the provisions of laws and regulations, both between domestic investors and investors foreign or between investors from a foreign country or between investors from one foreign country and investors from another country. Currently, one of the conditions for the validity of nationalization is contained in almost all international agreements on investment, including in the BITs of many countries. The terms used also vary, including public purpose, public interest, public benefit, public purpose related to the internal needs and a purpose which is in the public interest (Hornick & Nelson, 1987).

3.4 Regulation of Nationalization of Foreign Investment in National Law

The regulation on the nationalization of FDI is contained in one of the articles of the UUPM, where the nationalization clause accommodates the general law principles that have been accepted in international law that nationalization must be carried out by law with the provision of compensation. The act of nationalizing FDI, this provision is contained in Article 7 and Article 8 of the UUPM, which are as follows:

Article 7

1. The government will not take action to nationalize or expropriate investors' ownership rights, except by law.
2. In the event that the Government takes an act of nationalization or expropriation of property rights as referred to in paragraph (1), the Government will provide compensation in the amount of which is determined based on market prices.
3. If neither party reaches an agreement on compensation or indemnity as stipulated in paragraph (2), the settlement shall be made by arbitration.

Article 8

1. Investors can transfer their assets to the desired party in accordance with statutory provisions.
2. Assets that are not included as referred to in paragraph 10 are assets determined by law as assets controlled by the state".

A sovereign state may be able to expropriate and even nationalize the company and all investor assets in the name of public interest. This has been the case in Indonesia since 1956, when the Government of the Republic of Indonesia began to nationalize several foreign companies and continued to culminate on December 31, 1958 with the promulgation of Law No. 86 of 1958 concerning the Nationalization of Dutch Companies in Indonesia.

Furthermore, Law Number 68 of 1958 was followed by the issuance of Government Regulation Number 23 of 1958 (PP No. 23/1958) concerning the Placement of Dutch Companies Under the Control of the Government of the Republic of Indonesia. As a result, 90 percent of plantation products passed into the hands of the Indonesian government, 90 percent of foreign trade from Dutch-controlled Indonesia in Indonesia went to the Indonesian government, including 246 factories and mining companies, banks, and foreign ships went to Indonesia. Then issued Government Regulation Number 3 of 1959 concerning the Dutch Company Nationalization Agency (BANAS) which must accommodate the nationalized Dutch companies (Gunanto, 1996).

3.5 Matters Underlying the Nationalization of Foreign Investment

Some of the things that underlie the government's actions to nationalize PMA companies include:

a. Economic Inequality

The period of Indonesian rule in the early 1950s was marked by an imbalance between expectations and the reality faced. The hopes of realizing economic sovereignty as a result of political sovereignty that have been achieved cannot be realized immediately. The welfare level of the population has actually decreased. In 1951, the per capita income of Indonesians was 28.3 guilders, which was lower than the per capita income during the Dutch East Indies malaise (1930), which was 30 guilders. Thus, economic development programs such as the Economic Urgency Plan (RUP) and the Fortress Program have been implemented in economic conditions with low levels of prosperity. Another problem is the lack of experience of the state apparatus in implementing and supervising the plan bureaucratically. Although every successive government tried to realize the structure of the national economy as soon as possible, it was clear that in the period of Parliamentary Democracy the way of change in the economic structure was more evolutionary than revolutionary (Fernandez et al., 2020).

The failure to bring about a national economy was largely interpreted by Indonesian leaders as a failure to overcome the dominance of Dutch companies. The Round Table Conference signed by the leaders of the republics in The Hague in 1949 contained guarantees that the rights granted to foreign capital would be respected. This meant that Dutch companies located in Indonesia continued to dominate the central national economy. Economic development after the transfer of sovereignty has not changed from the colonial period of the Dutch East Indies. That means Dutch companies keep control of key sectors of the economy. The indigenous entrepreneurs are only in the field of handicraft industry. While the processing industry for export purposes is controlled by foreign capital, especially the Netherlands.

Such is the breadth of business fields engaged in by Dutch companies, it is not surprising that the large trade sector which includes export and import activities is almost entirely controlled by them. While in the field of transportation, it is very difficult for the government shipping company PELNI (Indonesian National shipping) to overcome the monopoly of Koninkljke Paketvaart Maatschappij (KPM), a Dutch-owned shipping company In the field of export production, there is no different picture.

Based on the description above, it appears that almost all sectors of the modern economy in Indonesia until the end of 1957 still had economic inequality mostly owned by Dutch companies. This economic inequality is causing frustration for most Indonesian leaders. Efforts to realize the national economy will always be hindered as long as foreign capital, in this case the Netherlands, is still operating in Indonesia. These things underlie the government's nationalization actions, and culminated on December 31, 1958 with the promulgation of Law No. 86 of 1958 concerning the Nationalization of Dutch Companies in Indonesia.

b. The Politics of Nationalization Law

The issue of nationalization is closely related to the sovereignty of the State. The sovereign State is certainly the main protector of the public interest in the State concerned, including its welfare. Foreign companies residing in the territory of a sovereign State may be nationalized if the interests of this State so desire. Internationally, this has also been recognized in UN resolution No. 1803/XVII of 14 December 1982 and also by international court/arbitration decisions.

The government's policy in carrying out nationalization actions against foreign companies is one of the government's efforts to reduce people's anger, and aims to minimize the occurrence of people's economic disparities. The act of nationalization is a political legal act which in the practice of state law is often referred to as legal politics. The government took this step because it aims to limit foreign investors who invest domestically, and domestic investors are able to improve the stability of the national economy which has declined due to the existence of foreign investment. One of the solutions thought of to end the domination of Dutch companies was to nationalize. To nationalize requires a strong reason that can be used as a basis for legitimacy. There was one major issue that united all Indonesian leaders throughout the 1950s, namely the issue of West Irian As a result of the Round Table Conference in 1949 Indonesia received sovereignty from the Netherlands (Kadir & Murray, 2019).

The target of solving the West Irian problem set by KMB was given a period of one year, but it was not achieved. This problem eventually develops into a confrontation that at any moment has the potential to break out into open conflict. To gain greater support, both Indonesia and the Netherlands then took the issue of West Irian to the level of international forums. Prior to the vote on the resolution on West Irian, President Sukarno had warned that Indonesia would take steps that would shake the world if it failed. It turns out that President Soekarno was not just bluffing. On 1 December 1957 the Indonesian government officially announced a 24-hour strike against Dutch

companies in Indonesia .It was this action that initiated the massive nationalization of Dutch companies.

c. Guarantee Against Nationalization of Foreign Direct Investment Companies (PMA)

Due to the provisions in the UUPM and the experience of nationalization that Indonesia has carried out, it is estimated that in the future Indonesia will not nationalize foreign companies, based on the following reasons:

1) Since the Indonesian government opened up to foreign capital with the birth of Law Number 1 of 1967 concerning Foreign Investment which has been replaced by UUPM, there is no indication or sign that the government is planning to nationalize.
2) Indonesia's socioeconomic situation still has a large amount of unemployment and damage to infrastructure such as roads, ports, power plants, extraction of new natural resources, requiring a lot of foreign capital.
3) Indonesia's membership in international trade organizations and bilateral agreements on the promotion and protection of investment with various countries make it unlikely that the Indonesian government will nationalize foreign companies. In addition, Indonesia has also signed investment security agreements with 60 countries.

Protection practices Investment in the form of guarantees is not Nationalization is an international practice. The conditions for nationalization that apply internationally are very strict, that is, they must be carried out through a law, there must be compensation for nationalized companies according to market prices and nationalization must not be based on political reasons, but purely economic reasons.

d. Legal Protection of Investors Against Nationalization Actions by the Government

According to Philipus M. Hadjon, 2 (two) types of legal protection are distinguished, namely: preventive legal protection and repressive legal protection. Legal protection for investors is focused on preventive protection, where investors are given the opportunity to raise objections (inspraak) or opinions before a government decision gets a definitive form of nationalization action against PMA companies. Thus, preventive legal protection aims to prevent disputes from occurring. Preventive legal protection is very significant for government actions based on freedom of action because with preventive legal protection the government is encouraged to be cautious in making decisions to take over or nationalize PMA companies based on discretion. Legal protection provided by the Indonesian government to further increase the confidence of foreign investors in investing their capital, one of which is making bilateral agreements with various countries of origin of investors, this investment agreement gives birth to several principles that are commonly applicable in international relations (Tambunan, 2013). These principles include:

1) principle A national treatment clause, meaning that each party will provide equal treatment for the parties, namely the host party and the investor.

2) Second, the principle of A most favoured nation clause, meaning that the host party or foreign investment party, will not get less treatment than other parties.

Another action of the Indonesian government is to ratify the convention The Convensional Establishing the Multilateral Investment Guarantee (MIGA), based on Presidential Decree Number 1 of 1986. This gives a positive view to Indonesia by foreign investors, because with this the Indonesian side has provided a guarantee of legal protection for foreign investors against the risk of foreign investment in Indonesia. In addition, the issuance of Law No. 25 of 2007 has provided a guarantee for legal protection and certainty for investors against takeover of foreign companies as stated in Article 7 of the Law.

4. CONCLUSION

Nationalization arrangements for foreign investment companies in both national and international law are realized through: Nationalization According to Law Number 25 of 2007 concerning Capital Investment (UUPM). The regulation of PMA nationalization measures in the UUPM is contained in articles, namely Article 7 and Article 8. The Nationalization Clause accommodates the common law principles accepted in international law that nationalization must be carried out by law (Article 7 paragraph (1) and accompanied by compensation (Article 7 paragraph (2). Currently, one of the conditions for the validity of nationalization is contained in almost all international agreements on investment. However, each State uses different terms related to the purpose rather than act of nationalization such as public interest, public purpose, public benefit, etc.

The things that underlie the government's action to nationalize PMA companies are due to economic inequality and nationalization politics. Attempts or avenues to nationalize PMA companies due to fear of being threatened by the national economy. In nationalization politics, the act of nationalization is a political legal act which in state law practice is often referred to as legal politics. The government took this step because it aims to limit foreign investors who invest domestically, and domestic investors are able to improve the stability of the national economy which has declined due to the existence of foreign investment.

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