

CHAPTER II

LITERATURE REVIEW

A. Overview of Investment in Indonesia

The term of investment comes from the Latin, that *investire* which means wear.⁸ In Indonesian Dictionary, investment is to invest the money or capital in a company or a project for the purpose of getting the profit.⁹ The term of investing can cover a wide range of activities. It often refers to investing money in certificates of deposit, bonds, common stocks, or mutual funds.¹⁰

An investment can be defined as the commitment of funds to on or more assets that will be held over some future time period. The field of investment, therefore, involves the study of the investment process. Beside that, the experts also have different understanding on theoretical concepts about investment.¹¹

According to Kamaruddin Ahmad, investment is putting the money or funds with the hope to get additional or certain profit for money or funds. In this definition, investment focused on the placement of money or funds. The purpose is to get profits. It is closely related to the investment in the capital market.¹² Beside that, according to Tandelilin an investment is the

⁸Salim HS, Budi Sutrisno, 2007, *Hukum Investasi di indonesia*, Jakarta, PT. Rajagrafindo Persada, p. 31.

⁹*Kamu Besar Bahasa Indonesia*

¹⁰Charles P. Jones, 2007, *Investment*, United States of America, John Wiley & Sons, Inc, p. 3.

¹¹*Ibid.*

¹²Salim HS, Budi Sutrisno, *Loc.Cit.*

commitment of a number of funds or other resources to do at this time with the goal of obtaining a number of advantages in the future.¹³

Investment is divided into two kinds, namely foreign investment and domestic investment. Foreign investment is an investment from foreign financing institutions or the capital comes from foreign investors. Meanwhile, the domestic investment is an investment from domestic financing institutions. However, both of them have similar purpose to get profits.

Article 1 point (1) of Law Number 25 Year 2007 about Investment stated that investment means any form of investing activity done by both of domestic investor and foreign investor to do business in the territory of the state of the Republic of Indonesia. Further, Article 1 point (2) of Law Number 25 Year 2007 about Investment stated that domestic investment means an investment activity to do business in the territory of the state of the Republic of Indonesia that is carried out by a domestic investor with the use of the domestic capital. As for in the point (3) which stated that foreign investment means an investing activity to do business in the territory of the state of the Republic of Indonesia that is carried out by a foreign investor by use of all foreign capitals and by engagement in a joint venture with a domestic investor.¹⁴

¹³Michell Suharli, "Studi empiris terhadap dua faktor yang mempengaruhi return saham pada industri food & beverages di Bursa Efek Jakarta", available on <http://jurnalakuntansi.petra.ac.id/index.php/aku/article/view/16446/16438> pages 8, accessed on Sunday, Desember 11th, 2016, 10.59 pm.

¹⁴Amiruddin Ilmar, 2010, *Hukum Penanaman Modal Di Indonesia*, Jakarta, Kencana, p. 52-53.

Investment activities are activities to bring the capitals or investment, for the purpose of conducting business activities. This investment activity is conducted by foreign investors, either using:¹⁵

1. Foreign capital fully; and or
2. Foreign capital is compatible with domestic investors.

Foreign capital is a joint capital which is equal to the investment of Indonesia. Referring to Presidential Decree Number 44 Year 2016 about the List of Business Fields that are Closed and Business Fields that are Open with Requirements in the Field of Capital Investment. In the agricultural sector, such as corn, soybean, peanut, green bean, and other food crops (such as cassava and sweet potato), foreign capital of 49% and more capital from Indonesia investors 51%.¹⁶

According to Prof. M. Sornarajah provides a definition of foreign investment. According to him foreign investment is “transfer of tangible or intangible assets from one country to another for the purpose of use in the country to generate wealth under the total or partial control of the owner of the assets”.¹⁷

The important role of foreign investment in Indonesia’s economic development is also reflected with the objectives mentioned in Law Number

¹⁵Trijojo Aribowo, 2009, “Implementasi Daftar Negatif Investasi terhadap Perusahaan Publik: Studi pada PT. Indosat Tbk-Qtel” (Undergraduate Thesis, Faculty of Law University of Indonesia), p. 25.

¹⁶The Attachment of Presidential Decree Number 44 Year 2016 about List of Business Fields that are Closed and Business Fields that are Open with Requirements in the Field of Capital Investment, p.18.

¹⁷Trijojo Aribowo, *Loc.Cit.*

25 Year 2007 about Investment as a legal basis of positive law for investment activities in Indonesia.¹⁸ Article 3 point (2) of Law Number 25 Year 2007 about Investment mentioned the purposes of the conduct of investment, as follows:

1. To increase the national economy growth;
2. To create the job opportunities;
3. To improve the sustainable economic development;
4. To increase the capability of competitiveness of the national business world;
5. To increase the capacity and capability of national technology;
6. To push the development of the people's economy;
7. To manage the economic potential into real economic strength by using the funds derived from both of home and abroad; and
8. To improve the public welfare.

There are three periods of investment development in Indonesia, namely in the early days of independence (1945-1965), during the New Order period, and the order of reform.¹⁹

1. Old Order (1945-1965)

At the beginning of independence or the old order (1945-1965), the flow of investment into Indonesia became absent because all companies have been nationalized for the national interest.²⁰

¹⁸David Kairupan, 2013, *Aspek Hukum Penanaman Modal Asing Di Indonesia*, Jakarta, Kencana, p. 3.

¹⁹Salim HS, Budi Sutrisno, *Op.Cit.*,p. 34.

2. New Order (1967-1997)

The initial momentum of investment flows in Indonesia began during the New Order (1967-1997). This period is marked with the enactment of Law Number 1 Year 1967 about Foreign Investment and Law Number 6 Year 1968 about Domestic Investment. The existence of the two laws provides an opportunity for foreign and domestic investment to invest in Indonesia.²¹ The Government issued Law Number 1 Year 1967 on Foreign Investment to attract foreign investment to build the national economy.²²

The first foreign investment made in Indonesia, is by Philips Company from the Netherlands. Then, the second foreign capital to invest in Indonesia is PT Freeport Indonesia. In New Order, investment flows increased. It is evident that in 1996, FDI experienced positive growth and peaked at US \$ 6.2 billion.²³

3. Reform Order (1998)

At this time the flow of investment to Indonesia has decreased. This is evidenced by the decreasing amount of investment in Indonesia. The year 1997 became the beginning for negative growth of foreign investment. Then, in 1999 incised a bad record for investment with an

²⁰Salim HS, Budi Sutrisno, *Op.Cit.*, p. 35.

²¹*Ibid.*

²²Rowland B. F Pasaribu, 2013, "Investasi dan Penanaman Modal", <https://www.scribd.com/document/258810035/Investasi-Dan-Penanaman-Modal> accessed on Sunday, December 11th, 2016, 11 pm.

²³Salim HS, Budi Sutrisno, *Loc.Cit.*

investment deficit that continued into 2003.²⁴ In 2007, Law Number 6 Year 1968 about Domestic Investment is revoked and it is changed with the existence of Law Number 25 Year 2007 about Investment. Thus, the legal basis of investment today is Law Number 25 Year 2007 about Investment.²⁵

The other regulations related to investment, includes

1. Government Regulation Number 17 Year 1992 about the Requirements of Stock Ownership in Foreign Investment Companies.
2. Government Regulation Number 20 Year 1994 about Stock Ownership in Companies established in the framework of Foreign Investor
3. Presidential Decree Number 44 Year 2016 about the List of Business Fields that are Closed and Business Fields that are Open with Requirements in the Field of Capital Investment
4. Presidential Decree Number 115 Year 1998 about the Amendment of Presidential Decree Number 97 Year 1993 about the Procedures of Investment
5. Presidential Decree Number 96 Year 2000 about Closed Business Field and Opened Business Field with Specific Requirements for Investment
6. Presidential Decree Number 118 Year 2000 about the Amendment of Presidential Decree Number 96 Year 2000 about Closed Business Field and Opened Business Field with Specific Requirements for Investment

²⁴*Ibid.*

²⁵Salim HS, Budi Sutrisno, *Op.Cit.*,p. 18.

7. Ministry of Investment/Head of Investment Coordinating Board Decree Number 38/SK/1999 about Guidelines and Procedures of Investment Application established in the framework of Domestic Investment and Foreign Investment
8. Head of Investment Coordinating Board Decree Number 38/SK/1999 about Guidelines and Procedures of Investment Application established in the framework of Domestic Investment and Foreign Investment

B. Foreign Investor

Investors play the most important role in investment activities. It can be said that the one of the important indicators in investment is the existence of investor. The development of capital investment can not be separated from the needs and influence of investor. Based on Indonesian Dictionary, investors are people who invest their money in a business to get profit.²⁶

Article 1 point (4) of Law Number 25 Year 2007 about Investment stated that an investor means an individual or a business entity that makes an investment, who may be domestic investors and/or foreign investors. From these definition, indicating that investors who are involved in investment in Indonesia are domestic investors and foreign investors.

Domestic investors mean an Indonesian national, an Indonesian business entity, the state of the Republic of Indonesia, or a region that makes

²⁶See Indonesian Dictionary.

an investment in the territory of the state of the Republic of Indonesia.²⁷ Based on the Article 1 point (5) of Law Number 25 Year 2007 about Investment, “A domestic investor means an Indonesia nation, an Indonesia business entity, the state of the Republic of Indonesia, or a region that makes an investment in the territory of the state of the Republic of Indonesia”.

An Indonesian is a person/human or Indonesia society who invest the capital in business fields are open for domestic investment. Then, according to Agus Ngadino in his journal entitled of “*Orang Bangsa Indonesia Asli dalam Perspektif Hukum Kewarganegaraan*”, based on Law Number 12 Year 2006 about Citizenship indigenous Indonesian people are Indonesian citizens since their birth and never accept other citizenship of their own free will.²⁸ However, according to Amey Yunita Luntungan, the Constitution of the Republic of Indonesia gives opportunity for a foreigner to become a Citizen Indonesia through a process.²⁹

The Indonesian business entity is a business entity that is established under the Indonesia law. Article 33 of 1945 Constitution has mentioned the division of the form of business entity. In Indonesia, there are three business entities, namely State Owned Enterprise (BUMN), Cooperation (*Koperasi*) and Private Owned Enterprises (BUMS).³⁰ According to Endra Murti Sagoro,

²⁷Article 1 point (5) of Law Number 25 Year 2007 about Investment.

²⁸Agus Ngadino, “Orang Bangsa Indonesia Asli dalam Perspektif Hukum Kewarganegaraan”, *Simbur Cahaya*, VIII, (Januari, 2009), p. 12.

²⁹Amey Yunita Luntungan, “Naturalisasi Warganegaraan Asing menjadi Warganegara Indonesia menurut Undang-Undang Nomor 12 Tahun 2006 tentang Kewarganegaraan”, *Lex et Societatis*, I, (September, 2013), p. 41.

³⁰Endra Murti Sagoro, “Bentuk Badan Usaha”, accessed in [http://staffnew.uny.ac.id/upload/198504092010121005/pendidikan/Materi+Bisnis+\(Bentuk+Badan+Usaha\).pdf](http://staffnew.uny.ac.id/upload/198504092010121005/pendidikan/Materi+Bisnis+(Bentuk+Badan+Usaha).pdf) accessed on Friday, September 8th, 2017, 6.25 am.

State Owned Enterprise is a part or all business entity of which its ownership is owned by the Republic of Indonesia.³¹ The examples of State Owned Enterprise, are PT. Kimia Farma Tbk, PT. Tambang Timah Tbk, Perum Pegadaian, Perum Antara, and the others.

Beside that, according to Endra Murtti Sagoro Private Owned Enterprises is a business entity owned by the private sector.³² Then, there is also opinion from Arifin and Halomoan (2001:13) which stated that cooperatives contain the meaning of cooperation, which can be interpreted as to help each other. Cooperation are concerned with functions namely, social functions, economic functions, political functions and ethical functions.³³

Based on Article 1 point (6) of Law Number 25 Year 2007 about Investment, foreign investor is a foreign national, a foreign business entity, and/or a foreign government that makes an investment in the territory of the state of the Republic of Indonesia. These components are foreign investors that make investment in the territory of the Republic of Indonesia. The foreigners are non-permanent residents who are non-citizen who stay in a certain country.³⁴

³¹*Ibid.*

³²*Ibid.*

³³Anonymous, <http://repository.widyatama.ac.id/xmlui/bitstream/handle/123456789/6709/Bab%202.pdf?sequence=10> accessed on Friday, September 8th, 2017, 7 pm.

³⁴Anonymous, <https://www.scribd.com/doc/27909320/Menurut-Austin-Ranney-Orang-Asing-Adalah-Orang> accessed on Friday, September 8th, 2017, 3.20 pm.

According to Michael Wisnoe Barata, the right of exploitation granted to the business entity, which are partly or wholly foreign capital.³⁵ This matter is based on Article 55 point (2) of Law Number 5 Year 1960 about Basic Regulation on Agrarian Principles. The example of this case, is the PT Carrefour comes to the Indonesia to bring the capital market. PT Carrefour came to Indonesia for investing. In this case the PT Carrefour as the foreign business entity obtain the right of exploitation. Then, this case is known as foreign investment. Because the capital comes from foreign capital.

Basically, the countries that are developing are in dire need of investment, especially of foreign investment. The purpose of this investment is to increase the rate of development in the country. In general, the state who have capital or investment are developed countries that invest in the developing countries.³⁶ Indonesia is one of the developing countries.

In investment activity, both domestic and foreign investors have rights and obligations. Based on Article 14 of Law Number 25 Year 2007 about Investment, every investor is entitled to:

1. Certainty of right, law, and protection;
2. Transparency information about business sectors engaged;
3. The rights to services; and

³⁵Michael Wisnoe Barata, 2012, “Kepemilikan Hak atas Tanah bagi Warga Negara Asing dan Kewarganegaraan Ganda” (Postgraduate Thesis, Faculty of Law University of Indonesia), p. 26.

³⁶Salim HS, Budi Sutrisno, *Op.Cit.*, p. 157.

4. The various forms of simplified facility consistent with provisions of laws and regulations.

In addition, Article 15 of Law Number 25 Year 2007 about Investment stated that every investor shall have obligations:

1. To apply the principle of good corporate governance;
2. To implement corporate social responsibility;
3. To make a report on investment activities and submit it to the Investment Coordinating Board;
4. To respect the cultural traditions of the community around the location of investment business activities; and
5. To comply with all provisions of laws and regulations.

C. The Granting of Land Title

Land law has always been important to people. From the beginning of civilization, people have needed to regulate land ownership and use. Although land law has its roots in ancient times, it is still important in today's world. Although they may not realize it, everyone, every day, comes into contact with various rules related to the ownership, occupation, and use of land.³⁷

Land is part of the earth which is called as the earth's surface. Land is one of the objects managed in the Agrarian Law. The land that managed by

³⁷Sandra Clarke, Sarah Greer, 2014, *Land Law*, United States of America, Oxford University Press, p. 4.

Agrarian Law, is not the land in its various aspects, but the land from its juridical aspects that are directly related to the land titles. It is part of the earth's surface as regulated in Article 4 paragraph (1) of Law Number 5 Year 1960 about Basic Regulations on Agrarian Principles stated that "on the basis of the state's right of control referred to in Article 2, it is necessary to determine the types of rights to the surface of the earth, which is called land, that can be granted to, and held by persons, either individually, jointly with others as well as corperates bodies".

The definition of land according to Indonesia Dictionary the land is:³⁸

1. The surface of the earth or the earth layer above all;
2. The condition of the earth somewhere;
3. The surface of the earth given boundary;
4. The materials of the earth and the earth as materials (sand, sandstone, marls and so on).

According to Arbain in his book entitled *Hukum Agraria Indonesia*, the word of land in juridical sense refers to the surface of the earth, while the land title is the right to a certain part on limited surface of the earth, two-dimensional with length times width regulated by the land law. Land is given to and owned by people with the rights provided by Law Number 5 Year

³⁸Indonesian Dictionary, 1994.

1960 about Basic Regulations on Agrarian Principles which is used and exploited.³⁹

The granting of land title is the government decision that gives a state land title, extension of period of right, renewal of right and change of right. The granting of land title is one of the facilities. The government shall grant facilities to investors who make investment. In addition, the granting of land title should be based on Article 33 of the 1945 Constitution.⁴⁰

Article 4 paragraph (2) of Law Number 5 Year 1960 about Basic Regulations on Agrarian Principles, determined that “the land title referred to in paragraph (2) of this article gives authority to use the land in question as well as the mass of the earth and the water existing under its surface and the space above it to a point which is essentially required to allow for the fulfillment of the interests that are directly related to the use of the land in question, such a point being within the limits imposed by this Act and by other legislations of higher levels”.

Land title is the right to give the authorities to the right holder for using and taking advantage from the land. The word of “using” means the land title can be used to build the building, while the word of “take a

³⁹M. Arba, 2015, *Hukum Agraria Indonesia*, Jakarta, Sinar Grafika, p. 38.

⁴⁰Article 33 of the 1945 Constitution, “Investment should be a part of the implementation of national economy, to increase the national economy growth, to create the jobs, to promote the sustainable economic development, to enhance the capacity and national technology, to encourage the development of economy community, as well as to create the public welfare in the economic system, especially for competitiveness”.

advantage” means that land title can be used for agricultures, fisheries, livestock and plantations.

Land title may be either registered or not yet registered (unregistered). The appropriate rules for determining whether a particular interest binds the present owners of the land depend on whether the land is registered or unregistered.⁴¹

Land title is the right referred to in Law Number 5 of 1960 about the Basic Regulations on Agrarian Principles. In the Article 16 paragraph (1) of Law Number 5 Year 1960 about Basic Regulations on Agrarian Principles has been regulated about the various of land title/right. As for the various of land title/right, namely:

- a. The right of ownership
- b. The right of exploitation
- c. The right of building
- d. The right of use
- e. The right of lease
- f. The right of opening-up land
- g. The right of collecting forest product
- h. Other right not included in the above mentioned right which shall be regulated by law and right of a temporary nature as mentioned Article 53.

⁴¹Joe Cursley, Mark Davys, 2011, *Land Law*, London, Palgrave Macmillan, p. 25.

As for the granting of the land title consist of the right of ownership, the right of exploitation, the right of building, the right of use on state land and the right of management.⁴²

D. Investment Coordinating Board (BKPM) and National Land Agency (BPN)

1. Investment Coordinating Board (BKPM)

Based on Article 27 of Law Number 25 Year 2007 about Investment, the investment activity in Indonesia is held by the Investment Coordinating Board (BKPM). The Investment Coordinating Board is an independent non-departmental agency. The Investment Coordinating Board is led by a head that is responsible directly to the President. Then, the president enacted the Presidential Decree Number 90 Year 2007 about the Investment Coordinating Board on September 3rd, 2007. In accordance with Article 28 of Law Number 25 Year 2007 about Investment⁴³ and Article 2 of Presidential Decree Number 90 Year 2007 about Investment Coordinating Board⁴⁴.

⁴²Article 2 of Minister Regulation of State/Head of National Land Agency Number 9 Year 1999 about the Procedures and Cancellation for the Granting of the Land Title and the Right of Management.

⁴³Article 28 of Law Number 25 Year 2007 about Investment, “(1) In regard to coordination of the implementation of investment policies and services, the Investment Coordinating Board shall have the following duties and functions: a. to perform duties and coordinate the implementation of investment policies; b. to study and propose investment service policies; c. to establish values, standards and procedures for the implementation of investment activities and services; d. To enhance investment opportunities and potentials in regions by empowering business entities; e. to make an Indonesian investment map; f. to promote investments; g. to enhance investment business sectors through investment guidance, by, inter alia, increasing partnership, increasing competitiveness, creating fair business competition, and disseminating as widely as possible

BKPM has an ideal vision of “Realization of Indonesia as an attractive investment destination”. To achieve that vision, BKPM has a number of missions which in the forms of technical implementation of visions. The missions of BKPM, consist of;

- a. To encourage the creation of a conducive investment;
- b. To improve the effectiveness of promotion and investment cooperation;
- c. To improve the facilities, services, and advocacy related to the implementation of the investment; and
- d. To improve the role of institution and information system investment.⁴⁵

Besides that, based on the legislation and policies on foreign investment, BKPM has ideal functions and authorities. The functions of this agency are, as follows:

- a. Reviewing, preparing and formulating the policies and investment development planning on a national scale;

information on the conduct of investment activities; h. to help contain various obstacles and give consultation on problem investors face in the conduct of investments; i. to coordinate domestic investors that conduct their investment activities outside the territory of Indonesia; and j. to coordinate and implement one-stop integrated services. (2) In addition to coordinating duties as intended by Article 27 section (2), the Investment Coordinating Board shall have a duty to perform investment services based on provisions of laws and regulations”.

⁴⁴Article 2 of Presidential Decree Number 90 Year 2007 about Investment Coordinating Board, “Investment Coordinating Board has the primary task of coordinating policy and services in the field of investment under the provisions of legislation”.

⁴⁵Badan Koordinasi Penanaman Modal (BKPM) – Indonesia’s Investment Coordinating Board, This information was gathered by order of the Ministry of Foreign Affairs in the Netherlands, available on <http://english.rvo.nl/topics/international/private-sector-development/developing-your-business/economic/technical/bkpm>, accessed on Wednesday, November, 30th, 2016, 8.45 pm.

- b. Coordinating the preparation and planning the capital investment program in the region scale;
- c. Coordinating the improvement and development of resources in the field of investment;
- d. Coordinating the implementation and planning of investment promotion activities;
- e. Coordinating the international cooperation in the field of investment;
- f. Serving the licensing and investment facilities;
- g. Facilitating and controlling the technical implementation of the investment;
- h. Establishing the education, development and training of human capital investment;
- i. Establishing and managing data and information on investment systems;
- j. Conducting the functional guidance to the institutions which handle the investment; and
- k. Conducting the management and administrative services in the field of administration, general planning governance, organization, staffing, record keeping, financial, legal, equipment, household, and coding.

In order the functions above can be implemented optimally, BKPM is equipped with some authorities. The authorities are in the matters of:

- a. Preparation of investment planning on national scale (macro);
- b. Formulation of policies on investment that can support the development of macro;
- c. Development of information systems in the field of investment; and
- d. Approval and control of strategic investment using sophisticated technology as well as high-risk in its application.

2. National Land Agency

National Land Agency (BPN) is a non-ministerial government institution in Indonesia, which has the task of carrying out government duties in the field of land in accordance with the provisions of the legislation. In previous, National Land Agency known as the Office of the Agricultural. National Land Agency is set through Presidential Regulation Number 20 Year 2015 about National Land Agency. National Land Agency is an institution that has authority to issue land titles containing information about the ownership and technical of the land.⁴⁶

There are vision and mission of National Land Agency. The vision of National Land Agency is to be an institution that is able to realize land and agrarian for the welfare of the people, as well as fairness and sustainability of social systems, nationhood and statehood of the Republic of Indonesia. Besides that, the missions are to develop and organize the political and land policy in the matters of:

⁴⁶Jonaedi Efendi, Ismu Gunadi Widodo, Fifit Fitri Lutfiningsih, 2016, *Kamus Istilah Hukum Populer*, Jakarta, Kencana, p. 86.

- a. Improving people's welfare, creating new sources of prosperity of the people, reducing the poverty and income inequality, and strengthening food security;
- b. Improving the fair and dignified living order in relation to the ownership, use, and exploitation of land;
- c. Embodiment of the harmonious living order by overcoming disputes, conflicts and cases, agrarian in the whole country and arrangement of the legal system and land management system, in order not to create disputes, conflicts and cases in the future; and
- d. Sustainability of social systems, nationhood and statehood Indonesia by providing the widest access to the generations to come to land as a source of public welfare. Strengthen the institution of land in accordance with the soul, the spirit, principles and rules embodied in the Basic Agrarian Law and aspirations of the people.

National Land Agency has a duty to carry out government duties in the land sector in accordance with the provisions of the legislation. In performing its duties, National Land Agency performs functions for:

- a. The arrangement and establishment of policies in the land sector;
- b. The formulation and implementation of policies in the field of surveying, measurement and mapping;
- c. The formulation and implementation of policies in the field of the determination of land title, registration and empowerment;

- d. The formulation and implementation of policies in the field of regulation, arrangement, and control of land policy;
- e. The formulation and implementation of policies in the field of land procurement;
- f. The formulation and implementation of policies in the field of control and the handling of disputes and cases of the land;
- g. The supervision on the implementation of tasks in the National Land Agency;
- h. The coordination tasks, coaching, and providing administrative support to all organizational units within the National Land Agency;
- i. The implementation of management the information of
- j. The implementation of research and development in land sector; and
- k. The implementation of human resource development in the land sector.⁴⁷

⁴⁷Presidential Regulation Number 20 Year 2015 about the National Land Agency.