

Investment Contracts in The Context of Foreign Direct Investment as One of The Solutions to Achieve The Development of a New National Capital City

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Abstract

Introduction: The development of the new National Capital City is an ambitious project designed to create a modern and sustainable government center aimed at promoting equitable development and economic growth in Indonesia. In this context, the background of the study lies in the challenges faced, particularly the significant financial resources required to realize the development. One identified solution is the enhancement of Foreign Direct Investment (FDI), which can contribute to supporting infrastructure development, technology transfer, and job creation.

Purposes of the Research: This study aims to analyze the role of FDI in supporting the development of the new National Capital City as a sustainable financing strategy.

Methods of the Research: The method used in this research is a descriptive-qualitative approach, analyzing secondary data such as reports, government policies, and related literature to understand FDI's contribution to national development, particularly in the context of the new National Capital City.

Results Main Findings of the Research: The results indicate that FDI has great potential to accelerate new National Capital City development through the provision of foreign capital, technology capacity enhancement, and strengthening of international economic relations. However, the study also identifies challenges, such as the need for attractive investment policies and economic-political stability, to sustainably attract foreign investors. In conclusion, optimizing FDI requires synergy between government policies and adequate infrastructure support to ensure the successful realization of the new National Capital City development plan.

Keywords: Investment; Foreign Direct Investment; Development; National Capital City.

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INTRODUCTION

The relocation of the capital has become an old issue that is almost always discussed by high-ranking Indonesian officials, the initial originator of the relocation of the capital was President Soekarno who on July 17, 1957 discussed Palangkaraya as a strategic area for the new capital but this was never realized¹. Not only that, in the era of President Susilo Bambang Yudhoyono, the discourse on moving the capital began to be echoed because Jakarta was considered no longer worthy as the capital due to the issue of congestion and floods that always came every year², and the peak in the era of President Joko Widodo the discourse on moving the Capital began to resurface and was officially ratified on January 18, 2022 with the issuance of the National Capital Bill which was then promulgated as Law

¹ Wesley Liano Hutasoit, "Analisa Pemindahan Ibukota Negara", *Dedikasi: Jurnal Ilmiah Sosial, Hukum, Budaya*, 39 no. 2 (2018), p. 117.

² *Ibid*, p 120

Number 3 of 2022 concerning the National Capital, with the existence of the State Capital Law, the State Capital officially moved from Jakarta to the archipelago which is located in North Penajam Paser Regency, East Kalimantan Province.³

However, the problem is that the existence of the National Capital Law does not necessarily move the capital instantly, the main problem that still has to be faced by the government is how the source of funding and where the funding comes from. Of course, this is not only a question for the government but also a question for the Indonesian people, especially after the Covid-19 pandemic which made the economy, especially in Indonesia, unstable. Therefore, the government massively markets the National Capital to investors, especially foreign investors, to invest in this project.

Foreign investment itself is one of the keys to the development of a country's economy, especially related to the development of a business, both for a country or entrepreneurs in general. One form of foreign investment is by making direct investments, where individuals or companies invest their capital directly in projects or ventures in other countries.⁴ In Indonesia, the rules regarding foreign investment have been well regulated through Law Number 25 of 2007 concerning Investment and related sectoral laws. The Investment Law provides a clear framework on foreign investment procedures in Indonesia. There are 2 (two) forms of foreign investment known in the Investment Law, namely through the establishment of a Limited Liability Company (Foreign Investment Company) and through Investment Contracts. Each of these types of investments has specific terms and conditions, which can vary depending on the respective industry sector.

Based on this, this study will explore the various types of Investment Contracts in Indonesia in the context of Foreign Direct Investment (FDI) and its relation to the development of the National Capital, with a more comprehensive understanding of this topic, the researcher seeks to identify how foreign investment can contribute as a way out for the government to develop the National Capital. Based on this description, the objectives that the author examines in this study are: What is meant by Investment Contracts in the Foreign Direct Investment contest? How Foreign Direct Investment can be one of the solutions for the development of the National Capital.

LITERATURE REVIEW

A. Definition of Investment Contract

Investment Contract atau yang lebih dikenal Kontrak Investasi adalah suatu perjanjian yang dibuat oleh investor dan Negara tuan rumah / host state (atau badan usaha milik negara) dengan tujuan mengatur proyek investasi tertentu. Di luar industri ekstraktif, kontrak juga dapat dibuat dengan perusahaan swasta atau pengusaha lokal yang berbasis di Negara tuan rumah.⁵ The provisions of the Investment Contract in Indonesia still refer to the provisions of Law Number 25 of 2007 concerning Investment and are related to the legal terms of the agreement regulated in accordance with the Civil Code, in its application in Indonesia, in order to create certainty of protection for its investors, as referred to in Article 4 paragraph (2) of the Investment Law, the Government guarantees to provide the same

³ Yulius Yohanes, Stephanie Ines M, Virga Tiayana, dkk, "Analisis Potensi Wilayah Provinsi Kalimantan Timur Terhadap Pembangunan Ibu kota Nusantara", *Kultura Jurnal Ilmu Hukum, Sosial dan Humaniora*, 2 no.5 (2024) p. 130

⁴ Raden Mas.T.A.D.W., "Analisis Perbandingan Hukum Penanaman Modal Asing antara Indonesia dengan Vietnam", *Jurnal Al Azhar Indonesia Seri Ilmu Sosial*, 02 no.01 (2021), p 11.

⁵ Lorenzo Cotula, "Investment Contracts And Sustainable Development: How To Make Contracts For Fairer And More Sustainable Natural Resource Investments," *Natural Resources Issues* no. 20 (2010). IIED, London, p. 4.

treatment for foreign investors with permanent pay attention to the national interest and ensure legal certainty, business certainty and business security for investors in accordance with the provisions of applicable laws and regulations.

B. Definisi Foreign Direct Investment

Foreign Investment according to Sornarajah is "foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."⁶ Sornaraja's statement, if roughly translated, can be interpreted as foreign investment is a transfer of capital, both tangible and intangible, through one country to another that aims to be used in that country in order to generate profits or wealth under the full or partial supervision of the capital owner.

According to its nature, foreign investment can be divided into 2 (two), namely indirect foreign investment (Portfolio Investment) in the form of investments made in the money market and usually in the form of shares and foreign direct investment (Foreign Direct Investment).⁷ In this study, the author will only discuss foreign direct investment. Foreign Direct Investment (FDI) is an investment made by a company in another country over a long period of time. The Organization for Economic Cooperation and Development (OECD) provides the following definition of FDI: "Direct investment is a category of crossborder investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The "lasting interest" is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise."⁸ The definition of Foreign Direct Investment in Indonesia can be found in the meaning of Article 1 number 3 of the Investment Law which states that "Foreign investment is an activity of investing capital to conduct business in the territory of the Republic of Indonesia carried out by foreign investors, both those who use foreign capital fully or those who are joint venture with domestic investors." Furthermore, it is clarified in Article 2 of the Investment Law which explains that "the provisions in this Law apply to investment in all sectors in the territory of the Republic of Indonesia". This article states that what is meant by "investment in all sectors in the territory of the Republic of Indonesia" is direct investment and does not include indirect investment or portfolios. FDI in Indonesia is a form of interest and expectation from investors for the growth and development of the Indonesian economy in the future. The positive view of these investors towards Indonesia is manifested by investing in sectors that are considered productive and this will certainly improve the economy.

C. Types of Investment Contracts

One type of Foreign Investment company is Foreign Direct Investment in the form of a corporation referred to as an equity joint venture, which is when foreign investors will invest their capital in Indonesia in the form of a limited liability company based on

⁶ M. Sornarajah, *The International Law on Foreign Investment*, 3rd Edition, (New York: Cambridge University Press, 2010), p. 8.

⁷ *Ibid*

⁸ OECD, *Benchmark Definition of Foreign Direct Investment 4th Edition* (Paris: OECD Publishing, 2008), p. 17

Indonesian law.⁹ Based on Article 5 paragraph 2 of the Investment Law which explains that 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 specified by law. However, the phrase "unless otherwise specified by law" can be interpreted as there are also types of Investment Contracts that are executed without the formation of a limited liability company which must also be based on special laws or sectoral ones, as for the types of:

a. Production Sharing Contract (PSC)

Daniel Johnston in his book entitled *International Petroleum Fiscal System and Production Sharing Contract* defines PSC as "a contractual agreement between a contractor and a host government whereby the contractor bears all exploration costs and development and production cost in return for a stipulated of the production resulting from this effort,"¹⁰ with the definition of Daniel Johnston, it can be concluded that: a) Production Sharing Contract is an agreement between the Government and the Contractor in this case acting as an Investor; b) The Contractor in his capacity as an investor provides all services and technology needed in the operation of business activities; and c) The Contractor in his capacity as an investor will receive back all operational costs of business activities after the implementation of commercial production. In 1960, Indonesia became the first country to initiate the first PSC in the world whose purpose at that time was to change the concession system that was considered detrimental to the country, of course this idea took into account Indonesia's oil and gas potential at that time. The introduction of this profit-sharing contract aims to overcome the obstacles faced by Pertamina, especially in terms of limited capital, technology, and labor in exploring and exploiting earth's oil and gas resources.¹¹ The long-term goal of the PSC contract is our own venture, it can be done by ourselves. Through production sharing contracts, as an intermediary facility, the Indonesian people can learn quickly to manage oil companies, as well as learn quickly about technology in the petroleum sector.¹² Based on the provisions of Article 6 of Law Number 22 of 2001 concerning Oil and Gas as last amended by Government Regulation in Lieu of Law Number 2 of 2022 (Oil and Gas Law) which fully states that a Cooperation Contract is "A profit-sharing contract or other form of cooperation contract in Exploration and Exploitation activities that are more beneficial to the state and the results are used for the greatest prosperity of the people." Therefore, as described above, the Upstream Oil and Gas Cooperation Contract can be implemented by the Government with a business entity that is a domestic legal entity or with a Permanent Business Form which can be in the form of a business entity that is a legal entity outside the territory of Indonesia. Thus, Foreign Direct Investment in the form of an investment contract through the Upstream Oil and Gas Cooperation Contract is a form of investment that can be carried out without the formation of a limited liability company.

b. Profit Sharing Contract

Foreign Direct Investment in the form of investment contracts can be carried out in the context of profit sharing whose purpose is to utilize Government assets that are cooperated, built, and/or operated by business entities, profits from the use of Government assets will

⁹ Setyo Sardjono, Binoto Nadadap, Bernanrd Nainggolan, "Perlindungan Hukum Terhadap Pemegang Saham Minoritas dalam Undang-Undang Perseroan Terbatas dalam Kaitannya dengan Pelaksanaan Prinsip Good Corporate Governance: Studi atas Perusahaan Penanaman Modal Asing (Kerjasama Joint Venture)", *Jurnal Hukum: Hukum untuk Mengatur dan Melindungi Masyarakat* 1 (2021) p. 171"

¹⁰ Daniel Johnston, *"Potroleum Fiscal System and Production Sharing Contract"* Oklahoma: Price Waterhouse Publishing, 1994. 310.

¹¹ Rudi M. Simamora, *"Hukum Minyak dan Gas Bumi"* Jakarta: Penerbit Djambatan, 2000. p. 93.

¹² Andrian Sutedi, *"Hukum Pertambangan"* Jakarta: Sinar Grafika, 2012, p. 269

be shared by the business entity with the Government. In Indonesia itself, one type of Profit Sharing Contract investment contract is a Cooperation Contract for the Utilization of State Property. Parties who can become partners of Utilization Cooperation based on Article 40 of the Regulation of the Minister of Finance Number 115/PMK. 06/2020 of 2020 concerning the Utilization of State-Owned Property includes: a) State-Owned Enterprises; b) Regionally Owned Enterprises; and/or c) Private, except individuals.

Private as referred to above, is defined through the Minister of Finance Regulation Number 115/PMK. 06/2020 of 2020 as an Indonesian Citizen or Foreign Citizen who has a residence permit and/or creates a business or an Indonesian legal entity and/or a foreign legal entity, other than a State/Regional Owned Enterprise, that carries out business activities to obtain profits. Utilization Cooperation Partners as described above, are also based on Article 42 of the Minister of Finance Regulation Number 115/PMK. 06/2020 In 2020, the operation was selected through a tender conducted to allocate the right to use State Property based on technical specifications that have been determined by the goods manager / goods user to the appropriate Utilization Cooperation partner in order to realize the efficient, effective, and optimal use of State Property. Based on the above description, the Cooperation Contract for the Utilization of State Property can be carried out in the context of the utilization of State Property by the Utilization Cooperation partner which can be in the form of a foreign legal entity. Thus, Foreign Direct Investment in the form of an investment contract through a Cooperation Contract for the Utilization of State Property is a form of investment that can be carried out without the formation of a limited liability company.

METHODS OF THE RESEARCH

The method used in this study is normative juridical by analyzing secondary data or relevant literature materials including related academic literature. This research is descriptive, which is research that provides data that is made in detail by describing and explaining related to FDI in the Development of the National Capital. This research is carried out with the aim of getting to know what an Investment Contract is in terms of FDI, knowing the contribution of FDI in the development and funding of the State Capital, knowing what impacts and risks will occur on the sustainability of the development of the National Capital.

RESULTS AND DISCUSSION

A. Risk in Dynamics Foreign Direct Investment

One of the risks in FDI arises from changes in political and economic policies in the host state so that these changes will pose threats and anxiety for foreign investors¹³ The right of a sovereign state to regulate investment has no restrictions because it flows from a sovereignty. However, due to these limitations, it has finally caused fear for foreign investors in terms of the lack of protection for investment in the country.¹⁴ Sornarajah divides these risks into nine main factors, namely:¹⁵ a) There is an ideological difference between the host state and the Investor; b) Prone to Nationalism; c) The existence of ethnic

¹³ Shitata, Ibrahim F.I. (1987) "Factor Influencing The Flow Of Foreign Investment And The Relevance Of A Multilateral Investment Guarantee Scheme". *The International Lawyer*, 21, no.3

¹⁴ M. Sornarajah, *"The International Law on Foreign Investment"*, (New York: Cambridge University Press, 2010), p. 88.

¹⁵ *Ibid*

factors; d) Changes in Industrial Patterns; e) Contracts made by the previous regime or government; f) The existence of an incriminating contract; g) Host State Economic Regulation; h) Human Rights and the existence of Environmental Problems; i) The Law and Order Situation in the host state.

To minimize the fear of these investors, in practice there are often negotiations between investors and the host country, this is intended so that the investment contract allows the creation of special rules between the two parties, separate from the general law of the host state. For investors, the main concern of these negotiations is to maintain the stability of the agreement. Agreements in force between the host State and the investor's Home State may set out rules designed to ensure or promote a stable contractual relationship for its citizens, such as umbrella clauses or provisions on fair treatment and fair and equal treatment. However, such rules will not always be in place or may not be as specific as investors would like.¹⁶

Apart from these FDI risks, there is also the concept of Liability of Multinational Company & Home State Measure. In this concept, multinational companies that invest in the host state can basically bring benefits to the host state that is used as an investment destination. One of the benefits that can be obtained from multinational companies is to expand employment, develop worker skills, increase state revenue from taxes, change work culture, foster competition with local entrepreneurs and others. However, this not only brings a positive impact but also a negative impact, as well as the role of this multinational company towards the host state.¹⁷

B. Foreign Direct Investment As one of the solutions for the development of the National Capital

The relocation of the capital has actually been a government debate for a long time, even the idea was triggered in the era of President Soekarno on July 17, 1957 who initiated the relocation of the capital to Palangkaraya¹⁸, However, it was not until 2017 that the effort was again discussed by the Ministry of National Development Planning/Bappenas. On January 18, 2022, the Draft Law on the National Capital City was passed into law by the House of Representatives and the Government,¹⁹ there are several factors explaining why capital transfers need to be accelerated, the first factor is related to Indonesia's vision which in 2045 is estimated to have a Gross Income per capita of US\$ 23,119, the second is related to population density, especially in the Jakarta and Java areas, and the third is the development gap between regions.²⁰ In addition to that reason, Java Island is also considered vulnerable to various natural disasters, especially earthquakes and volcanic eruptions. Another factor is that traffic density and settlements also have a big influence on Jakarta so that it is considered no longer possible as the country's capital, the center of government, and the center of the economy, therefore it is time to make a new capital city as a replacement.²¹

¹⁶ Rudolf Dolzer, Ursula Kriebaum dan Christoph Schreuer, *Principles of International Investment Law* 3rd Edition, (New York: Oxford University Press, 2022) p. 126

¹⁷ Dhaniswara K. Harjono. *Hukum Penanaman Modal: Tinjauan Terhadap Pemberlakuan Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal*, (Jakarta: Raja Grafindo Persada, 2007)

¹⁸ <https://www.djkn.kemenkeu.go.id/kanwil-kalbar/baca-artikel/14671/Urgensi-Pemindahan-Ibu-Kota-Negara.html#:~:text=Tanggal%2018%20Januari%202022%2C%20merupakan,IKN%20yang%20baru%20menggantikan%20Jakarta.>

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Surya Dwi Saputra, Thomas Gabriel J, Mhd Halkis, Analisis Strategi Pemindahan Ibukota Negara Indonesia Ditinjau dari Perspektif Ekonomi Pertahanan (Studi Kasus Upaya Pemindahan Ibu Kota Negara dari DKI Jakarta ke Kutai Kartanegara dan Penajam Paser Utara), *Ekonomi Pertahanan*, 7 no 2, (2021)

The idea of the relocation was not necessarily received positively, there were also negative responses and great resistance from various levels of society. For example, the issue that attracts the most attention is the question of the source of financing. According to Deputy IV of the Presidential Chief of Staff, the development of the National Capital as a whole requires funds worth Rp 466 trillion but not entirely from the State Revenue and Expenditure Budget.²² In addition to the State Revenue and Expenditure Budget, the financing plan for the State Capital is listed in Attachment II of Law Number 3 of 2022 concerning the State Capital, the funding used is: a) Budget / State Revenue and Expenditure Budget obtained through budget allocation and/or financing; b) Government-Commercial Agency Cooperation Program to support the National Capital; c) All or part of its capital is owned by the State, including state-owned or purely private business entities, among others; First, state-owned companies through investment that can collaborate with the private sector in its implementation; Second, State-Owned Enterprises through government allocations in accordance with the provisions of laws and regulations; d) International Funding. International Funding Funding/Support is a program to facilitate the provision of funds, including from bilateral/multilateral institutions, who wish to participate in the development of an environmentally friendly and smart National Capital, through grants and/or the provision of rescue equipment; e) Other forms of financing (creative financing), such as crowdfunding and philanthropic funds. Expressly Indonesia opens the option to obtain sources/schemes of development financing from foreign investment (FDI), as the researcher has explained before, the Government can also take advantage of types of FDI that do not need to form companies such as production sharing contracts and profit sharing contracts.

Based on data displayed by the Ministry of Investment/Investment Coordinating Board as of quarter 1 (January-March 2023), there was an increase in the percentage of FDI in Indonesia from 53.8%, which increased year-on-year by 20.2% with the largest sectors, namely industrial building materials of IDR 46.7 trillion, transportation and communication of IDR 36.1 trillion, mining of IDR 33.5 trillion, and housing, office construction amounting to Rp 27.9 trillion.²³ From January to mid-2023, Indonesia recorded foreign investment of 363 trillion rupiah (US\$23 billion), when compared to 2022 Indonesia recorded foreign investment of around US\$43 billion, an increase of 44 percent from 2021 and the highest figure in the country's history. When combined with domestic investment, the total amount reached US\$80 billion, an increase of 34 percent from 2021.²⁴

This indicates that FDI in Indonesia can be one of the sources of funding that will support the development of the National Capital. However, what needs to be noted is that as per the data submitted by the Investment Coordinating Board, the top five cities that will be the realization of investment in Q1 2023 are only Central Sulawesi, West Java, DKI Jakarta, Banten, and Riau²⁵, while Kalimantan as the location for the relocation of the National Capital still looks not too optimal. This is a challenge and a homework for the government to maximize programs that can attract the interest of para-investors in the context of FDI as a hope to help funding in the National Capital City.

²² <https://www.ikn.go.id/en/ksp-pembangunan-ibu-kota-baru-perlu-anggaran-rp-466-tak-semua-ditanggung-apbn>

²³ <https://bkpm.go.id/storage/file/pdf/1682655133.pdf>

²⁴ [https://www.aseanbriefing.com/news/investing-in-indonesia-the-2023-mid-year-investment-report/#:~:text=During%20the%20first%20half%20of,%2420.4%20billion\)%20in%20domestic%20investments.](https://www.aseanbriefing.com/news/investing-in-indonesia-the-2023-mid-year-investment-report/#:~:text=During%20the%20first%20half%20of,%2420.4%20billion)%20in%20domestic%20investments.)

²⁵ *Op. Cit*

CONCLUSION

Foreign investment as in the Investment Law can be in the form of a limited liability company and also without the formation of a limited liability company, but based on a special law or sectoral one, the types are FDI in the form of production sharing contracts and profit sharing contracts. FDI should have an important role if maximized because FDI has great potential in supporting the development of the National Capital, with the stimulus from foreign investment, it will be able to provide the necessary financial resources, technology, and management experience for infrastructure development projects in the National Capital, especially because one of the largest sectors of FDI in Indonesia includes industrial building materials and even more so in the real estate development sector and Offices where this can be used by the government to create the vision of the National Capital City as a capital with advanced technology. The Determinants in this study identified factors influencing the decision of foreign companies to invest in the new National Capital, including political stability, investment policies, infrastructure, and market potential. Understanding these factors is important for attracting significant FDI. Moreover, the positive implications of FDI on the economy can have a positive impact on the economy of the new National Capital City in the form of economic growth, increased employment, technology transfer, and improved management capabilities. However, while FDI can provide benefits, there are also associated challenges and risks, such as dependence on foreign capital, global economic uncertainty, and environmental concerns. Careful management is required to address these risks. Therefore, to successfully attract FDI and make optimal use of it, governments must formulate policies and regulations that support foreign investment, while taking into account national interests and environmental sustainability.

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