

Research Article

Legal Protection for Foreign Investors at Normative and Implementation Levels in Indonesia

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Abstract: Foreign direct investment (FDI) has a strategic role in Indonesia's economic development. However, the realization of foreign investment is not free from challenges related to legal certainty and protection. This study aims to analyze legal protection for foreign investors in Indonesia, both in terms of applicable legal norms and from the aspect of implementation in the field. Through a literature review, information was collected from various sources in the form of journals, articles, and relevant laws and regulations to gain a broad understanding of legal protection for foreign investors at the normative and implementation levels in Indonesia. The results of the study indicate that Indonesian laws and regulations, especially Law No. 25/2007 concerning Investment, various Bilateral Investment Treaties (BITs), and FTAs provide a comprehensive legal protection framework for foreign investors. In the field, legal uncertainty still arises due to overlapping regulations, frequent policy changes, and different interpretations between institutions. Slow and less transparent licensing bureaucracy, as well as the risk of extortion practices, reduce the attractiveness of investment. Reform efforts such as simplifying licensing through OSS, establishing BKPM as a one-stop shop, and ratifying the Omnibus Law on Job Creation have shown progress in increasing certainty and ease of investment.

Keywords: Foreign Investors; Legal Protection; Normative Level

1. Introduction

Since the 1998 Reformation era, Indonesia has been actively opening itself to foreign capital flows as one of the main drivers of economic growth. Data from the Investment Coordinating Board (BKPM) noted that the realization of Foreign Investment (PMA) continues to increase from around USD 10 billion in 2010 to more than USD 28 billion in 2023, indicating that global investors still see great potential in the Indonesian market [1]. The sustainability of PMA flows is greatly influenced by perceptions of the business climate, especially guarantees of certainty and legal protection for foreign investors. Indonesia, as a developing country, continues to strive to attract foreign investors to drive economic growth. The success of attracting foreign investment is greatly influenced by legal certainty and protection for investors [2].

Foreign investment is one of the important pillars in national economic development. The presence of foreign investors in Indonesia brings significant benefits, such as increased capital, job creation, technology transfer, and increased competitiveness of domestic industry. Over the years, it has also been proven that foreign investment in Indonesia has succeeded in absorbing mass labor, increasing state revenues, and increasing human resource capabilities due to the transfer of knowledge and technology [3]. To support a conducive investment climate, the existence of legal protection for foreign investors is a must. This protection not only serves to provide a sense of security for investors but also reflects the state's commitment to ensuring legal certainty and the sustainability of investment in the country. Therefore, the

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Indonesian government actively encourages the entry of foreign investment by issuing various policies and regulations that support a healthy and competitive business climate [4].

Normatively, Indonesia has regulated various legal provisions related to foreign investment through various laws and regulations, such as Law Number 25 of 2007 concerning Investment, bilateral and multilateral agreements governing investment protection. These provisions cover the rights and obligations of investors, dispute resolution mechanisms, and guarantees of fair and non-discriminatory treatment [5]. However, the reality on the ground shows that the implementation is often not optimal. Problems arise when there is inconsistency between regulations and their implementation, and legal uncertainty is still a major obstacle. In addition, regulatory inconsistency, overlapping authority between the central and regional governments, and bureaucratic obstacles are some of the main obstacles that reduce the level of legal certainty for investors. This can create legal risks and uncertainty for investors, which can ultimately affect the interest and sustainability of foreign investment in Indonesia [6].

Legal protection for foreign investors is one of the crucial aspects that is highly considered by the global investor community. This protection includes guarantees of ownership rights, fair and equitable treatment, freedom to transfer profits, and reliable dispute resolution mechanisms. Without strong legal protection, investors tend to hold back or even withdraw their investments from a country, regardless of the country's economic potential [7].

Cases of investment disputes between foreign investors and local governments, unilateral revocation of business licenses, and delays in dispute resolution show that normative legal protection is not yet fully reliable in practice. This raises concerns for investors regarding the stability of law and policy in Indonesia, which can ultimately affect investment interest and sustainability [8], [9].

This situation raises concerns regarding the legal certainty and guarantee of investment protection that foreign investors actually receive in Indonesia. In other words, there is a gap between theory and practice, between written law and applicable law. Therefore, this study aims to analyze legal protection for foreign investors in Indonesia, both in terms of applicable legal norms and from the aspect of implementation in the field. This research is expected to contribute to efforts to improve the investment legal system to be fairer, more transparent, and more accommodating to the needs of foreign investors without ignoring national interests.

2. Proposed Method

This research was conducted using a literature study method, including the type of library research. Library research is a research whose data collection is carried out by collecting data from various libraries [10]. This method involves an in-depth analysis of written documents such as books, journal articles, laws, policies, and research reports related to legal protection for foreign investors at the normative and implementation levels in Indonesia. We search for literature from various sources to get a broad and diverse picture. The process includes searching for relevant literature materials, critical assessment of content, and synthesis of information to build an understanding of legal protection for foreign investors. Our main focus is to analyze the national and international legal frameworks governing the protection of foreign investors, examine the effectiveness of the implementation of legal protection norms, identify problems and obstacles faced in the practice of legal protection for foreign investors, and formulate legal policy recommendations. We also observe the latest technological and regulatory developments to determine possible approaches that are more effective. With this literature study, our goal is to analyze legal protection for foreign investors in Indonesia, both in terms of applicable legal norms and from aspects of better and stronger implementation in the field in the future.

3. Results and Discussion

Analyzing the National and International Legal Frameworks Governing Protection of Foreign Investors

In analyzing the national and international legal frameworks governing protection of foreign investors, there are several theories and approaches that can be used. These theories help understand how the law functions to protect the interests of foreign investors, as well as

how the host country and the investor's home country interact in the context of cross-border investment. The following are some commonly used theories and approaches [11], [12], [13]:

a. Classical International Law Theory

This theory focuses on relations between countries and places the protection of foreign investors as part of the host country's obligations to the investor's home country. In this context, the principles of public international law such as:

- 1) The principle of fair and equitable treatment (FET).
- 2) The principle of non-discrimination. Full protection and security standards.
- 3) Fair compensation for expropriation.

b. Treaty-Based Approach

This approach emphasizes the importance of bilateral or multilateral international agreements, such as:

- 1) Bilateral Investment Treaties (BITs).
- 2) Free Trade Agreements (FTAs) with an investment chapter.
- 3) ICSID Convention (International Centre for Settlement of Investment Disputes).

This agreement creates binding legal obligations between signatory countries and gives foreign investors the right to file claims against the host country through international arbitration.

c. Law and Economics Theory

This approach views legal protection for foreign investors from the perspective of economic efficiency. Strong legal protection is considered to be able to attract foreign investment because it reduces risk and uncertainty. Within this framework, legal instruments are analyzed based on their impact on the investment climate and economic growth .

d. Sovereignty Theory

This theory emphasizes that even though countries make international commitments, they still have the right to regulate within their own territory, including in terms of environmental protection, health, and social rights. The tension between foreign investor protection and the state's right to regulate is a major issue, especially in investment disputes.

e. Human Rights and Sustainable Development Approach

This approach integrates the principles of human rights and sustainable development within the framework of foreign investor protection. This means that legal protection does not only focus on economic benefits, but also on the company's social and environmental responsibilities.

In addition, in the national legal framework, the State usually provides several things, including:

- 1) Investment Law which provides legal guarantees to foreign investors.
- 2) Provisions on taxation, licensing, and land acquisition.
- 3) Access to the national justice system and the possibility of alternative dispute resolution.

Examining the Effectiveness of the Implementation of Legal Protection Norms

Legal Protection Norms in Indonesia

Legal protection norms are a set of rules established by the state to guarantee the basic rights of citizens and provide legal certainty. In Indonesia, these norms are stated in various legal products, both the constitution and sectoral laws. Some of the main relevant norms include [14], [15]:

- a. Article 28 of the 1945 Constitution: Guarantees the right to recognition, guarantee, protection, and fair legal certainty for everyone.
- b. Law No. 39 of 1999 concerning Human Rights: Provides a legal framework for the protection of civil, political, economic, social, and cultural rights.
- c. Law No. 13 of 2003 concerning Manpower: Provides protection for workers' rights.

- d. Law No. 23 of 2004 concerning the Elimination of Domestic Violence, and Law No. 35 of 2014 concerning Child Protection: Specific norms that protect vulnerable groups.

However, the existence of norms alone does not guarantee justice. The main challenge is how these norms are implemented effectively.

Analysis of Implementation in the Field

The implementation of legal protection still faces many obstacles. In practice, many cases show that legal protection has not been implemented optimally [16].

- a. Cases of violence against women and children are often not handled sensitively by law enforcement officers, so that victims experience re-victimization.
- b. Access to legal aid is still very limited, especially in remote areas or for poor groups. In fact, Law No. 16 of 2011 concerning Legal Aid has guaranteed this right.
- c. Migrant workers and informal workers often do not receive adequate legal protection, both in terms of work contracts and when rights violations occur.
- d. Human rights violations such as the seizure of customary land, discrimination against minority groups, and violence by state officials still often occur without clear law enforcement.

Factors Inhibiting the Effectiveness of Implementation

There are several main factors that inhibit the effectiveness of the implementation of legal protection norms in Indonesia [17]:

- a. Weak law enforcement: Lack of integrity and professionalism of law enforcement officers, and rampant corruption in the justice system.
- b. Overlapping regulations: Many rules are contradictory or unsynchronized, causing confusion in implementation.
- c. Socio-economic inequality: Poor or marginalized communities often do not have the resources to fight for their legal rights.
- d. Weak legal culture: Low public legal awareness, and distrust of the legal system.
- e. Lack of policy monitoring and evaluation: Lack of transparency and accountability in the implementation of laws and legal protection policies

Identifying Problems and Obstacles in the Practice of Legal Protection for Foreign Investors

Legal Uncertainty

One of the main obstacles is legal uncertainty, which is caused by:

- a. Inconsistency between national laws and regional regulations.
- b. Frequent changes in investment policies without adequate socialization.
- c. Weak or discriminatory law enforcement.

This uncertainty makes investors hesitate because they find it difficult to predict legal risks that may arise in the future.

Weak Law Enforcement

Although formal regulations may support investors, implementation in the field is often ineffective due to:

- a. Corruption in law enforcement agencies or bureaucracy.
- b. Slow and non-transparent judicial processes.
- c. Difficulty in executing international arbitration decisions at the domestic level.

Unequal Treatment

Foreign investors sometimes experience discrimination compared to local investors. This can occur in the form of:

- a. More complicated licensing bureaucracy.
- b. Restrictions on foreign ownership in certain sectors.
- c. Unwritten protectionist practices.

Overlapping Regulations

The existence of many institutions that regulate the investment sector can cause overlapping regulations, for example:

- a. Between national laws and regional regulations.
- b. Between central institutions such as BKPM and technical ministries or regional governments. This causes confusion and increases the cost of legal compliance for foreign investors.

Lack of Effective Dispute Resolution Mechanisms

Although there are international arbitration forums, many investors experience difficulties due to [18]:

- a. Lack of access or high arbitration costs.
- b. International arbitration decisions are not recognized or are difficult to enforce in the host country.
- c. Dispute resolution through domestic courts is less independent or biased towards local parties.

Non-Legal Barriers

Some obstacles that are not directly related to the law but greatly affect the legal protection of foreign investors include :

- a. Unstable politics.
- b. Socio-cultural conditions that do not support foreign investment.
- c. Lack of infrastructure that supports investment activities.

Legal protection for foreign investors still faces many challenges, especially in developing countries. The main problems include legal uncertainty, weak law enforcement, discrimination, overlapping regulations, and the lack of effective dispute resolution mechanisms. Improvement efforts need to be focused on regulatory harmonization, legal transparency, and judicial system reform to make the investment climate more conducive [19].

Formulation of Legal Policy Recommendations

The formulation of legal policy recommendations usually includes a systematic process carried out to compile suggestions or policy proposals in the legal field based on existing problems, academic studies, and empirical analysis. The following is the general structure of the discussion [20]:

Identification of Legal Problems

The first step is to understand and formulate the legal problems to be resolved. This includes:

- a. Actual situations or social conditions that give rise to legal problems
- b. Gaps between applicable laws and their implementation
- c. Legal challenges or obstacles in practice

Legal Review

Conducting studies or reviews of:

- a. Applicable laws and regulations
- b. Relevant court decisions
- c. Legal literature and doctrines from experts
- d. Legal practices or policies in other countries (comparative)

Stakeholder Analysis

Assess the interests and views of stakeholders such as:

- a. Government institutions
- b. Business actors
- c. Civil society
- d. Academics
- e. Legal practitioners

Determination of Policy Alternatives

Formulate several legal policy options that may be taken. Each alternative needs to be analyzed based on:

- a. Legality aspects
- b. Effectiveness
- c. Efficiency
- d. Social, economic, and political impacts
- e. Feasibility of implementation

Formulation of Policy Recommendations

From the existing alternatives, the most appropriate legal policy recommendations are prepared. These recommendations must be:

- a. Clear and specific
- b. Based on empirical data and evidence
- c. Equipped with strong legal arguments
- d. Have implementation steps

Preparation of Recommendation Documents

The final result of this process is a written document in the form of:

- a. Background of the problem
- b. Purpose of the recommendation
- c. Study and analysis
- d. Alternative solutions
- e. Final recommendations
- f. Implications and follow-up

Discussion

Legal protection for foreign investors in Indonesia has been regulated in several legal instruments, both national and international. Several important rules that provide a normative basis include [21]:

1. Law No. 25 of 2007 concerning Investment

This law guarantees fair and equal treatment for foreign investors. Articles 6 and 14 regulate investor rights, including legal certainty, protection of property rights, and ease of licensing.

2. Bilateral and Multilateral International Agreements (BITs and FTAs)

Indonesia has entered into various Bilateral Investment Treaties (BITs) and parts of free trade agreements that contain clauses on protection for foreign investors, such as the investor-state dispute settlement mechanism (ISDS).

3. Other Legal Protection Instruments

Legal protection also includes guarantees against nationalization and expropriation, as well as the right to transfer assets and profits in foreign currency.

Implementation of Foreign Investor Protection in the Field

Although normative regulations appear quite progressive, implementation in the field still faces various obstacles, including:

1. Overlapping Regulations and Legal Uncertainty

Differences in interpretation between institutions and frequent changes in regulations result in uncertainty for investors. This raises concerns about legal risk in investing in Indonesia.

2. Slow and Less Transparent Bureaucracy

Although the OSS (Online Single Submission) has been established, in reality many investors still experience obstacles in obtaining permits, either due to slow service or illegal levies (pungli).

3. Inefficient Dispute Resolution

Resolving disputes between investors and the government often takes a long time, and not all disputes can be resolved through national courts that are considered neutral by foreign investors.

4. Indirect Expropriation Cases

Several cases show actions by local or central governments that hinder the operations of foreign companies, even though they do not directly take over assets. This kind of practice is included in the form of indirect expropriation which often becomes an international dispute.

Efforts and Reforms Undertaken by the Government

The Indonesian government has taken several steps to improve protection for foreign investors, including:

1. Establishment of Special Institutions and Regulatory Reform

For example, the establishment of BKPM as the vanguard of investment services, and licensing reform through the OSS system.

2. Preparation of the Omnibus Law on Job Creation (Law No. 11 of 2020)

This law is intended to simplify regulations and strengthen legal certainty for investors.

3. More Effective International Arbitration and Dispute Resolution Mechanisms

Indonesia is also increasing its capacity to handle international arbitration to make it more competitive and fair.

Conclusions

Based on normative studies and implementation reviews in Indonesia, it can be concluded that:

1. Strong Normative Foundation, Yet Dynamic

Indonesian laws and regulations, especially Law No. 25/2007 on Investment, various Bilateral Investment Treaties (BITs), and FTAs provide a comprehensive legal protection framework for foreign investors. These instruments guarantee the right to legal certainty, non-discriminatory treatment, protection against expropriation, and a dispute resolution mechanism through ISDS.

2. Gap between Regulation and Field Practice

In the field, legal uncertainty still arises due to overlapping regulations, frequent policy changes, and different interpretations between institutions. Slow and less transparent licensing bureaucracy, as well as the risk of extortion practices, reduce the attractiveness of investment. In addition, national dispute resolution has not fully met the expectations of effectiveness and neutrality of foreign investors.

3. Credit Reform Directors

Reform efforts such as simplifying licensing through OSS, establishing BKPM as a one-stop institution, and ratifying the Omnibus Law on Job Creation have shown progress in increasing investment certainty and ease. Increasing the capacity of international arbitration institutions also strengthens dispute resolution mechanisms.

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