

Implementation of Bilateral Investment Treaty at Joint Enterprise Agreement

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ABSTRACT--Bilateral Investment Treaty is an agreement made between two parties, of which both parties are countries. Bilateral Investment Treaty aims to increase support, as well as to provide legal protection to investors from regime changes or changes in political and economic policy from Host State. Joint Enterprise is an agreement to form a new company by a company form Host State with a company which is an investor. According to law No. 25 of 2007, concerning Penanaman Modal, forming a new company must be carried out based on the Laws in force in Indonesia, by using Law No. 40 of 2007 concerning Perseroan Terbatas. Problem will arise if both parties in the investment have Bilateral Investment Treaty related to the application of the clause contained in Bilateral Investment Treaty to Joint Enterprise Agreement entered into by both parties. The research method used is a research using the normative method with statute approach with regulations which have a related to investment and conceptual approach by the concept of International agreements, especially Bilateral Investment Treaty. Conclusion of this paper is the clause of Bilateral Investment Treaty must be in Joint Enterprise agreement, so that if there is an arrangement in Bilateral Investment Treaty that is contrary to the existing laws and regulations in Indonesia, then the clause in the Bilateral Investment treaty because the regulation must be applied in Joint Enterprise agreement, besides that also article 6 (2) of the investment Law No. 25 of 2007 stipulates that there are exceptions to the investment arrangement for investors coming from countries that have Bilateral Investment Treaty with Indonesia.

Keywords: bilateral investment treaty, joint enterprise, implementation, regulation, international agreement

I. INTRODUCTION

The government needs sufficient and adequate funds to carry out development. However, since the start of the Five – Year Development (PELITA) at the beginning of the New Order era, the government has experienced capital difficulties and sources of development funding, so the way to go is to find sources of funds from abroad, in the form of loans, grants, and of course investments foreigners to Indonesia. [1]

In addition to the benefits associated with the source of funds, there are several other benefits, namely related to the investment, it can absorb labor in the country of origin, create demand for domestic products as raw material, increase foreign exchange, increase state income from the tax sector, transfer of technology, and transfer of knowledge. [2] In addition, the benefit can be obtained is to have multiplied power in the local economy, provide risk, more resistant to fluctuations in interest and foreign exchange, and provide political protection and regional

security because if investors come from strong countries, security assistance will also be provided. [3]

Competition from several countries, especially countries in Southeast Asia to attract foreign investment is certainly worth watching, considering that the involvement of investors in developing countries is important, so there is a need for government action in promoting promotional means to attract interest investor. [4]

Direct investment certainly requires the host country to be able to fulfill the wishes of investor. This can be done with the provision of guarantees and facilities, and the most important thing is the legal certainty of the host country, besides that there is also a healthy climate and the ease and clarity of investment procedures, and the macroeconomic conditions of a country or region. Legal certainty can be provided in the Bilateral Investment Treaty, hereinafter referred to as BITs, which is an agreement that can protect investors from one country in the territory of another by providing clear substantive regulations governing the treatment of the host country towards investment and by establishing mechanisms dispute resolution that can be applied to alleged violations of these regulations. [5]

BITs has legal consequences for two countries where business actors from both countries have the obligation to include the clauses contained in the BITs, given the privilege in implementing the existing legislation in the host country. Of course this has an impact on business actors whose countries already have BITs with the host country.

Joint enterprise is a new joint venture of two companies, it is possible if a joint enterprise occurs between companies originating from the investor country and the host country, then, of course it is requires to follow the clauses contained in the BITs.

II. RESEARCH METHOD

This type of research is a normative legal research with statute approach in the form of Law No. 25 of 2007 concerning Investment, hereinafter referred to as the Investment Law, Law no 40 of 2007 concerning Limited Liability Companies, as well as with the conceptual approach which will be sought from secondary legal material that is derived from books, journals, and other media. Once found, it will be collected using the inventory and categorization method and then normative analysis of all legal materials will be carried out.

III. FINDINGS AND DISCUSSION

BITs according to United Conference on Trade and Development (UNCTAD) is, agreement between two countries for the reciprocal encouragement, promotion, and protection of investment in each other's territories by companies based in either country. Treaties typically cover the following areas, scope and definition of investment, admission and establishment, national treatment, most favored nation treatment, fair, and equitable treatment, compensation, in the event of expropriation or damage to the investment, guarantees of free investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state and investor state, while Henry Campbell Black stated [7], BITs is an agreement establishing the terms and conditions for private investment by nationals companies of one state in another state and this type of investment is called foreign direct investment.

Foreign investment activities in a country are limited by the regulations of the government by the home nation, the host country where governance by the host and also governance by multi nation organizations and international law. [8] It also includes restrictions in the fields of foreign investment.

The sovereignty of the country is limited by international law including international conventions in which the country is a participant, so it can be concluded if international treaties are one way to limit the application of sovereignty, relating to foreign investment issues, then international agreements in the field of foreign investment can be used to limit host country sovereignty. This is because there is a mutual agreement that agreements between countries cannot be affected by the permanent sovereignty effect of the host country even violators against it may be subject to sanctions. [9] BITs as one form of agreement or investment agreement between two countries where the principle of equal treatment set forth in it has become a habit that is always in the agreements. [10]

BITs as an instrument of binding state relations has binding power for the parties because basically an agreement was born from the agreement of the parties to the agreement. When a country becomes bound, then the general legal principle that applies is that the country must carry out in good faith. [11]

BITs is currently the most dominant source of international law to protect foreign investment in developing countries, this is due to the belief that the host country from developed countries has adequate domestic law and will not discriminate. [12]

Indonesia, making the laws and regulations related to the BITs, starting from the 1945 Constitution, Article 11 of Law No. 37 of 1999 concerning Foreign Relation which provides reinforcement of the importance of foreign relations in the form international agreement, and mechanisms regarding international agreement.

Article 3 of Law No. 24 of 2000 concerning International Treaties determines several ways for the Government of the Republic of Indonesia to bind itself to

international treaties, namely through signing, ratifying, exchanging documents of agreements / diplomatic notes and through other means as agreed by the parties. Article 6 paragraph 2 states that the signing of an international agreement cannot be interpreted at the same time as an agreement that requires ratification, does not bind the parties before the agreement is ratified, and Article 7 paragraph 5 states that the signing of an international agreement involving technical cooperation as the implementation of an agreement that has been applied and the material is within the scope of authority of a state or government agency, both departmental and non-departmental, carried out without requiring a power of attorney.

Article 6 paragraph 2 of the Investment Law states that the same treatment for all investors as stated in Article 6 paragraph 1 of the said Investment Law can be distorted with a country that has special rights based on an agreement with Indonesia, and the agreement with Indonesia can also be interpreted as BITs, so that with the BITs, it can be treated preferentially in accordance with the clause contained in the BITs, even if it deviates from the applicable laws and regulations.

The form of Joint Enterprise is a form of cooperation between foreign investors and domestic investors by way of forming a new company or legal entity. This form is increasingly in demand since there is a clause in the Investment Law, namely Article 5 paragraph 2, which provides obligations for foreign investment in the form of Limited Liability Companies under Indonesian law and domiciled within the territory of the Republic of Indonesia, this can be done by buying shares from domestic investors, together with a joint venture to form a Limited Liability Company.

Some of the reasons underlying the Joint Enterprise are the need for rupiah to pay for goods that are cheaper and easier to obtain in Indonesia, as well as in making payments to employee salaries, do not need to invest in foreign currencies, but can be in the form of machines, machinery or other foreign investment production results, so that foreign investment in Indonesia by foreign investors has had a beneficial effect, namely that not only can imagine being able to gain profits in the future but also when he is allowed to enter the machine -the machinery (capital-goods) to Indonesia with duty free, reduce the risk to a minimum, so that the actual investment in Indonesia is more lending than foreign investment.

BITs' Characteristics that can be said as an international agreement that binds both parties, in this case the country that entered into the agreement, is even able to deviate national law in the host country, in order to carry out legal protection for business actors from the investor country

Legal protection referred to in this case is legal protection from the uncertainty of laws and regulations regarding investment which always changes according to the political situation in the host country, as well as legal protection of the absence of legal rules in the host country, so it will clearly refer to existing arrangements in the BITs, in addition to the expectation of privilege that will be received by investors who conduct BITs.

Article 1.6 The Investment Law regulates that foreign investors are individuals, foreign citizens, foreign business entities, and / or foreign governments that make investments in the territory of the Republic of Indonesia. So it is clear that the Bilateral Investment Treaty does not only have legal force for foreign investors in the form of foreign countries or governments, but also investors in the form of individuals and companies.

Joint Enterprise based on the understanding discussed above, is one of the forms of investment that creates a new company by an investor from a foreign country or a foreign investor and a domestic or host country investor, therefore, of course, if the agreement contained in the Joint Enterprise can BITs agreement, because there are legal characteristics of the BITs that can bind both parties, namely the country concerned, and of course the Bilateral Investment Treaty is also binding on business actors or investors who come from both parties, even though This does not apply to the formation of a Limited Liability Company that still uses the law of the host country, namely Law No. 40 of 2007 concerning Limited Liability Companies. Applicability only to arrangements related to the organization and management of the company when the company has been formed. However, to better provide legal certainty, it is better if it is stated in a clause contained in BITs, and there is also a ratification of the BITs in the form of an Act.

IV. CONCLUSION

The legal characteristics of BITs are actually the same as international treaties in general, namely binding the two parties to the agreement, which in this case the parties are only the state, even giving rise to the privilege of not implementing the laws and regulations concerning investments implemented by the host country . Apart from that BITs can also be used to select media for dispute resolution from the parties to the dispute, another specialty is that BITs can provide facilities in the form of facilities and guarantees, or ease-youth for the investor country which can also be said as a means promotion of host country, provide legal protection for the absence of legal rules and legal certainty from investment arrangements that change according to political conditions.

BITs Treaty that has certain specificities applies to both parties, but when looking at the provisions of Article 1.6 of the Investment Law which states that foreign investors are not only foreign countries or governments, but also foreign individuals or individuals and companies, BITs is also applied to the form of Joint Enterprise investment even though the formation of a company uses Law No. 40 of 2007 concerning Limited Liability Companies.

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