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BASIC POLICY AND IMPLEMENTING POLICY OF THE CAPITAL INVESTMENT LAW

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ABSTRACT

This article is written to provide a solution regarding the sovereignty-international obligations dilemma known as the regulatory chill caused by the promulgation of the Capital Investment Law. In achieving this purpose, this article implements the normative research method by quoting the basic policy and implementing policy doctrines as the main basis. This article is also supported by the prevailing Indonesian investment regulations, multilateral treaties concerning trade and environment, and public law doctrines. This article consists of two discussions. The first discussion counters the government of Indonesia's dilemma due to the promulgation of the Capital Investment Law by implementing the basic policy doctrine. Meanwhile, the second discussion answers the same issue based on the implementing policy doctrine. From the first discussion, it can be understood that such regulatory chill is caused by the two main purposes of the Capital Investment Law which are economic development and liberalization. Although the basic policy doctrine can find the root cause of such a dilemma, it cannot be applied as the prescription of the regulatory chill phenomenon. Meanwhile, from the second discussion, this article recommends Indonesia revise the prevailing rules concerning expropriation in the Capital Investment Law. By mixing the police power doctrine and the sole purpose doctrine, this article believes that Indonesia may have a balanced investment measure.

Keywords: Basic Policy, Implementing Policy, Capital Investment Law, Sovereignty, International Obligation

1. INTRODUCTION

Globalization is a phenomenon that has changed the world as if it lost national boundaries. (Hermawanto & Anggraini (n.d.)) One of the impacts of globalization is liberalization in the field of investment. (Astriyany & Takahashi (2021)) This liberalization occurs with the presence of individuals and/or legal entities from other countries, which then invest their capital in developing countries either directly or indirectly. (Deng et al. (2022)) The presence of these foreign individuals or entities is needed by developing countries to support their economic development. (Grabara et al. (2021))

Indonesia as a developing country requires foreign investment. In Radi's view, investment is needed to support the economic development of a country, while the investor is certainly entitled to facilities that facilitate the investment process. (Radi (2021b) In order to implement these rights and obligations, Indonesia then enacted Law Number 25 Year 2007 on Capital Investment ("Capital Investment Law"). (Sari (2020)) This law was formed and enacted with the following intentions.

The Capital Investment Law is a legal norm formed to encourage Indonesia's national development, while still paying attention to all types of business activities in Indonesia. (Putri (2022)) This law is not only formed to provide fair and non-discriminatory protection to foreign investors but is also applied to protect domestic investors. (Adi & Syahlina (2020)) On the other hand, the Capital Investment Law was also formed to adjust Indonesia's investment policy with a series of international obligations arising from Indonesia's membership in various economic cooperations, under bilateral, regional, and multilateral agreements. (Law of the Republic of Indonesia Number 25 Year 2007, 2007)

The Capital Investment Law Objective as described above has the potential to create a conflict of interest in the practice of nation and state. This is because, on the one hand, Indonesia wants to prioritize its national interests through its investment policy. This national interest must of course be fulfilled in order to exercise the political and economic sovereignty of the country. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) On the other hand, Indonesia must also implement the contents of the international agreements it has signed based on the Pacta Sunt Servanda Principle. This principle obliges states and international organizations to apply an agreement in good faith (Argent (2021))

The foreign investment regime is known as a regime that exerts a chilling effect (regulatory chill) on a country's government. (Moehlecke (2019)) Due to the request for compensation claimed by foreign investors, this effect arises with the unrest of a country's government in determining the direction and goals of its economic development. (Radi (2021b) These claims are usually made through arbitration that resolves disputes between investors and states (which is also known as the Investor-State Dispute Settlement) through the enactment of a state policy that impedes the rights of the investor. (Choiniere & Maksimov (2022)) Given that this conflict of interest is a legal issue, this article thus seeks to answer it based on the following legal approaches and doctrines.

Juwana explains that the political dimension of law in Indonesia consists of basic policies and implementing policies. (Juwana (2005)) Basic policy is the basic reason why legislation is held. (Juwana (2005)) Meanwhile, the enactment policy is the reasons and objectives that arise behind the enactment of statutory regulations. (Juwana (2005)) To find a solution to the conflict of interest that may arise as a consequence of the Capital Investment Law, this article applies the concepts of basic policy and implementing policy. These two concepts are applied through the formulation as presented below.

This article translates the problems described in the background above through two problem formulations as follows. The first discussion implements the basic policy doctrine as the solution to overcome the problem of the chilling effect or regulatory chill caused by the enactment of the Capital Investment Law. Meanwhile, the second discussion implements the implementing policy doctrine as the solution to overcome the problem of the chilling effect or regulatory chill caused by the enactment of the Capital Investment Law.

2. RESEARCH METHOD

This article is the result of prescriptive legal research aimed at answering the above problems. The main approach applied in this article is a conceptual approach which is carried out by implementing the doctrine of basic policy and implementing policy supported by legal doctrines from the literature on public international law concerning international trade, foreign direct investment, and environment protection. The approach is also supported by the application of various international agreements at the multilateral level including but not limited to the Agreement Establishing the World Trade Organization and the United Nations Framework Convention on Climate Change. The writing of this article is also based on ISDS cases that have been decided and WTO case law that has been adopted. Finally, the legal material collection technique used in writing this article is to collect primary legal sources consisting of international treaties and case law, as well as secondary legal sources consisting of doctrines and theories from books and journal articles.

3. RESULTS AND DISCUSSIONS

3.1. APPLICATION OF THE BASIC POLICY DOCTRINE IN OVERCOMING THE CHILLING EFFECT OR REGULATORY CHILL CAUSED BY THE CAPITAL INVESTMENT LAW

As explained above, basic policy is the basic reason for the establishment of laws. This doctrine is also known as basic policy. (Juwana (2005)) In demonstrating the example, Juwana explains that the basic policy of the law on copyright is to protect the creator's work. (Juwana (2005)) As another example, the Supreme Court Law was established to legitimize the judicial decisions of institutions under the auspices of the Supreme Court and the Supreme Court itself. (Juwana (2005)) The basic policies of the national measures concerning foreign investment and domestic investment are as follows.

From the first phrase of the law preamble, It can be understood that the main objective of the Capital Investment Law establishment is among others to "realize a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia" (Indonesia Constitution). (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This law is expected to be able to realize sustainable economic development to achieve the country's goals. (Law of the Republic of Indonesia Number 25 of 2007, 2007) With reference to the Preamble of the 1945 Constitution of the Republic of Indonesia, the 4th paragraph states that one out of four of the objectives of the establishment of the Unitary State of the Republic of Indonesia is to promote general welfare. (Republic of Indonesia Constitution of 1945, 1945)

Capital Investment Law is a law established to implement the contents of the Decree of the People's Consultative Assembly (TAP MPR) of the Republic of Indonesia Number XVI/MPR/1998 on Economic Politics in the framework of Economic Democracy. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) In addition to implementing the mandate of the constitution, this law was also formed to implement the TAP MPR. In addition to being formed to realize democracy in the economic sector, this MPR Decree was also formed as the basis for the formation of laws. (Kuntari & Arsil (2020)) From the second paragraph of the Capital Investment Law's preamble, it can be understood that this law was formed as an investment policy based on a populist approach that involves the development

of micro, small, and medium enterprises (MSMEs) and cooperatives. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This law can be seen as an instrument established for MSMEs certainty in order to cooperate with large entrepreneurs, especially foreign entrepreneurs. (Jason & Tan (2022))

In addition, the third paragraph of the Capital Investment Law Preamble among others states that "this law was also established as a tool to accelerate national economic development and realize Indonesia's political and economic sovereignty." (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This policy is expected to increase investment, both from domestic and foreign sources. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The preamble also hopes that "invested capital is expected to be able to process economic potential into real economic power." (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This article argues that this third objective is closely related to the principle of Permanent Sovereignty on Natural Resources (PSNR Principle) in the United Nations General Assembly Resolution Number 1803. (United Nations, 2024a) This principle was originally introduced as a reflection of developing countries' efforts to be fully sovereign over their natural resources, and free from foreign intervention. (Gümplová, 2020) The PSNR Principle is essentially the sovereignty that people have over their natural resources. (Jurkevics (2022)) The government in this case must act as a representative of its people in managing natural resources in a country. (Abraham-Dukuma (2020))

From paragraph four of this investment measure preamble, the basic policy of the Capital Investment Law is "to prepare Indonesia for changes in the global economy and to strengthen Indonesia's position in various international cooperation." (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The Capital Investment Law is hereby expected to create conducive, promotive, legal certainty, equitable, and efficient investment. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The Capital Investment Law is expected to be able to achieve these objectives while taking into account national interests. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This objective can be viewed as a basic policy that has the potential to create a conflict of interest.

The potential for conflict can be seen by understanding two doctrines of international investment law as follows. The first doctrine is the Police Power Doctrine. The Tribunal in Saluka v. Czech Republic explained this doctrine by stating that the state has the right to expropriate the assets of its investors without providing compensation, as long as the action is based on regulations based on good faith. (Ranjan (2020)) Another doctrine is the Sole Purpose Doctrine. Based on the tribunal in the Tecmed v. Mexico case, Radi explains this doctrine by arguing that expropriation can only be valid if it is accompanied by proper compensation to the investors whose assets are taken. (Radi (2021b)) Referring to Article 7(1) and (2) of the Capital Investment Law, it can be understood that this law applies this doctrine simultaneously. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) As for the threat of chilling effect or regulatory chill that is a consequence of the enactment of this article, Article 7 paragraph (3) of the Capital Investment Law obliges the Indonesian government to settle its investment disputes at the ISDS tribunal, without resorting to local procedures first. (Law of the Republic of Indonesia Number 25 Year 2007, 2007)

The final objective of the establishment of the Capital Investment Law is to replace the old rules in the field of investment. The rules referred to are Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment as amended by Law Number 11 of 1970 and Law of the Republic of Indonesia Number

6 of 1968 concerning Domestic Investment. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The last paragraph of the Capital Investment Law's preamble explains that these two laws are no longer in accordance with the needs of accelerated economic development and national legal development. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) (Kusuma & Octarina, 2024)

The preamble of the Capital Investment Law has shown that this law was established to achieve Indonesia's economic development realization and to exercise its political and economic sovereignty in accordance with the PSNR Principle. On the other hand, the Capital Investment Law was also established to attract attention from investors, both foreign and domestic investors. This basic reason is evident from the non-discrimination provisions in the Capital Investment Law, which are explained in the next discussion. This basic policy of the Capital Investment Law has the potential to be classified as a policy that violates the substantive rules to protect and promote foreign investment.

The rules regarding expropriation that Indonesia has the potential to violate are the prompt, adequate, and effective Compensation, a legal principle first introduced in the 1926 Neer Decision by the United States-Mexico Claim Commission. (Simbolon & Simatupang (n.d.)) Radi is of the view that this principle has gained its status as customary international law. (Radi (2021b) This principle requires that compensation provided to foreign investors be made within a reasonable time, in accordance with market value, and convertible. (Alschner et al. (2021)) This principle can be violated by Indonesia considering that Article 7 paragraph (2) of the Capital Investment Law only requires effective compensation. (Law of the Republic of Indonesia Number 25 Year 2007, 2007)

In addition, this basic policy also has the potential to conflict with international law given that the PSNR Principle has not yet fully acquired the status of customary international law. This rejection is raised by developed countries that have the intention to continue intervening in the natural resource management policies of developing countries. (Cheney (2020)) Indonesia adopts this principle by understanding that the General Elucidation of the Capital Investment Law states that this law was formed based on Article 33 of the 1945 Constitution of the Republic of Indonesia, which is the basis for the formation of laws and regulations on the economy. Furthermore, PSNR is very clear in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. (Rafiqi (2024))

By understanding the content of the Preamble of the Capital Investment Law, it can be understood that the following investment measure has conflicting objectives in its implementation. While the above objectives are well-intentioned, political and economic sovereignty is inevitably an exercise that sometimes conflicts with the implementation of international obligations. Referring to Henkin's application of Social Contract Theory under international law practice, it can be understood that the willingness of a state to become a member of an international treaty has the consequence of creating a corridor that regulates the sovereignty of that state. (Matthew et al. (2022)) The limitation of the exercise of sovereignty certainly brings benefits in the form of access to rights arising as the normative consequence of the implementation of an international agreement. (Matthew et al. (2022))

This article applies Hart's view that humans have limitations in the legislative process. (Adolf & Chandrawulan (2019)) This limitation is caused by the inability of humans to predict events that can occur in the future, which is a consequence of the promulgation of a rule. (Escher (2023)) Hart explains this phenomenon as an open texture that can lead to conflicts of interest. (Escher (2023)) Referring to Kelsen's view that norms are orders, and actions are predicates, (Adolf & Chandrawulan

(2019)) The preamble of the Capital Investment Law must be implemented because it is part of the law that contains orders, regardless of whether there are witnesses or not. (Asshiddiqie (2020)) This article thus argues that the concept of basic policy cannot provide a solution to the potential conflicts of interest that arise as a result of the enactment of the Capital Investment Law.

3.2. APPLICATION OF THE IMPLEMENTING POLICY DOCTRINE IN OVERCOMING THE CHILLING EFFECT OR REGULATORY CHILL CAUSED BY THE CAPITAL INVESTMENT LAW

Unlike the basic policy, the enactment policy can be found outside the text of a law. Juwana explains that implementing policy is the reason behind the enactment of a law. (Juwana (2005)) This doctrine consists of internal factors and external factors. Internal factors usually consist of philosophical factors and sociological factors in the formation of laws. (Juwana (2005)) Meanwhile, external factors are a form of Indonesia's dependence on other countries or international organizations. (Juwana (2005))

Furthermore, the Capital Investment Law is a law that is applied to implement the contents of various international agreements at both the multilateral and regional levels. This law can be classified as a rule that aims to implement the Agreement Establishing the World Trade Organization (WTO Agreement). The provisions of Article XVI.4 of the WTO Agreement require the national rules of its members to conform to all WTO rules. (World Trade Organization. (2023b)) (Simbolon & Allagan (2024)) Although it does not regulate investment directly, the WTO has an international agreement that requires its members not to establish investment policies that result in discriminatory trade practices or quantitative barriers. (World Trade Organization. (2024)) (Simbolon & Allagan (2024)) This provision is stipulated in Article 2.1 of the Agreement on Trade-Related Investment Measures. (World Trade Organization. (2024))

The alignment of Indonesia's investment policy with the WTO Agreement can be found in the World Bank's review of Indonesia's Investment Policy. (Ahmed et al. (n.d.).) The results of the World Bank Review in 2019 show that Indonesia's Investment Policy is based on the following international agreements:

1) WTO General Agreement on Trade in Services which regulates the establishment of businesses in the services sector;
2) WTO Agreement on Trade-Related Investment Measures which regulates business establishment and incentives;
3) WTO Agreement on Subsidies and Countervailing Measures which regulates incentives for investors;
4) WTO Trade-Related Aspects of Intellectual Property Rights which regulates the protection of intellectual property rights of investors;
5) 19 Agreements or bilateral agreements that contain provisions regarding the protection of investors or investment actors;
6) 42 Bilateral Investment Treaties which, among other things, regulate the establishment of businesses, protection of investors, and incentives for such investors;
7) International Center for Settlement of Investment Disputes (ICSID) Convention which regulates the protection and settlement of disputes in the field of investment;

8) Convention on the Recognition and Implementing of Foreign Arbitral Awards (New York Convention) which regulates the protection and settlement of disputes in the field of investment;
9) International Monetary Fund Articles of Agreement (Article VIII - Acceptance) which regulates investor protection; and
10) 68 Double Taxation Avoidance Agreements that regulate the taxation of investors. (Ahmed, n.d.)

In addition to the above international agreements, Indonesia is also part of the Regional Comprehensive Economic Partnership Agreement (RCEP) and has the potential to become a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP). (Permana (2022)) (Simbolon & Simatupang (n.d.)) This mega-regional agreement does not only contain regulations regarding trade but also contains provisions regarding the foreign investors' promotion and protection. (Ministry of Trade of the Republic of Indonesia, 2023) (Trade (n.d.).) These provisions can be seen in Chapter 10 of RCEP which, among others, regulates substantive rules regarding the protection of foreign investors, transfer of funds, expropriation, and investment facilities. (Australian Government, 2020) Furthermore, Chapter IX of the CP-TPP regulates the protection and promotion of foreign investment, as well as the obligation for members to become members of the ICSID Convention and the New York Convention and implement the legal substance of these agreements. (Trade (n.d.))

Being a member of the above multilateral, bilateral, regional, and plurilateral agreements have serious consequences for Indonesia. The serious consequence is the obligation for Indonesia to comply with the contents of the agreement based on good faith. (Argent (2021)) (Schmalenbach (2018)) The applicability of the Pacta Sunt Servanda Principle as found in Article 26 of the Vienna Convention on the Law of Treaties can be seen in the content material of the Capital Investment Law. (Schmalenbach (2018))

The non-discriminatory provisions in the Capital Investment Law are as follows. Article 3 paragraph (1) letter d. The Capital Investment Law states that investment in Indonesia is based on the principle of equal treatment and does not distinguish national origin. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This basic principle is further regulated in Article 4 paragraph (2) of the Capital Investment Law which, among others, states that investment policy in Indonesia provides equal treatment to foreign investors and domestic investors while taking into account national interests. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) This regulation is a form of National Treatment that requires the government to provide non-discriminatory treatment to foreign investors vis-a-vis domestic investors. (Hasan (2021)) Furthermore, the above policy also embodies the Most Favored Nations Treatment which requires the state to treat foreign investors from one country in a non-discriminatory manner and/or measure vis-a-vis foreign investors from other countries. (Kusnowibowo (2019)) These two principles are substantive rules recognized by the international investment law regime. (Radi (2021b)

It should be emphasized that the material rules as mentioned above are different from the Most Favored Nations Treatment and National Treatment in Articles I: 1 and III: 4 of the General Agreement on Tariffs and Trade in the WTO legal regime. (World Trade Organization. (2023c)) Explanation of the differences between the non-discrimination rules in IIL and WTO law. (Bossche & Prévost (2021)) Referring to Bossche and Zdouc's explanation, GATT Articles I:1 and III:4 are non-discriminatory rules that every WTO member must apply unconditionally.

(Bossche & Zdouc (2022)) Thus, this provision has an absolute nature. Meanwhile, Most Favored Nations and National Treatment arrangements in international investment law are relative. (Radi (2021b) This nature is inherent because this non-discriminatory treatment is applied with reference to the treatment of domestic investors and other investors from third countries. (Radi (2021b)

In addition to these relative standards, the Capital Investment Law was also established to realize the absolute standards of Fair and Equitable Treatment and Full Protection and Security. Fair and Equitable Treatment is a rule that generally requires the government to treat its foreign investors fairly and equitably. (Simbolon & Allagan (2024)) (Kusnowibowo (2019)) Meanwhile, Full Protection and Security is a rule that requires the government of a country to provide protection and security to its investors from non-state actors. (Simbolon & Allagan (2024)) (Hasan (2021)) These two provisions can be seen in Article 3 of the Capital Investment Law which, among others, states that investment in Indonesia is carried out based on the principles of legal certainty, openness, accountability, and efficiency with justice. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) Article 4 paragraph (2) letter b. of the Capital Investment Law further states that the Government must implement investment measures or policies in line with legal certainty, business certainty, and business security for domestic and foreign investors. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The application to investors must be applied from the process of obtaining licenses, conducting business, and ending business according to the prevailing regulations. (Law of the Republic of Indonesia Number 25 Year 2007, 2007)

The application of Fair and Equitable Treatment and Full Protection and Security is stated based on the results of the World Bank review as follows. The results of this review show that arrangements for Fair and Equitable Treatment can be found in various Indonesian BITs including the BIT between Indonesia and Singapore implemented since 2018, the Indonesia-Korea Comprehensive Economic Partnership Agreement, and the Regional Comprehensive Partnership Agreement. (Philip (n.d.)) These three bilateral and mega-regional provisions also require Indonesia to implement Full Protection and Security arrangements for its investors. (Philip (n.d.)) Thus, it is clear that the policy of enacting the Capital Investment Law is to adjust Indonesia's investment policy with the prevailing international rules.

In the latest development, Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation as enacted by Law Number 6 of 2023 (hereinafter abbreviated as "Job Creation Law") has amended several provisions of the Capital Investment Law. (PERPU No. 2 Year 2022 on Job Creation [JDIH BPK RI], n.d.) The Job Creation Law is a provision established with the aim of simplifying licensing and attracting foreign investors to invest in Indonesia. (PERPU No. 2 Year 2022 on Job Creation [JDIH BPK RI], n.d.) One of the amended provisions is Article 12 of the Capital Investment Law which regulates Indonesia's negative list. This provision initially only prohibited the manufacturing of weapons or guns, gunpowder, explosive devices, and war equipment. (Law of the Republic of Indonesia Number 25 Year 2007, 2007) The amendment of the provision states that:

"(1) All business fields are open for Investment activities, except for business fields that are declared closed for Investment or activities that can only be carried out by the Central Government.

(2) Line of business closed to Investment as referred to in paragraph (1) includes:

a. cultivation and industry of class I narcotics;

b. any form of gambling and/or casino activities;
c. the capture of fish species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
d. utilization or collection of corals and utilization or collection of corals from nature that are used for building materials/lime/calcium, aquariums, and souvenirs/jewelry, as well as live corals or reentering death corals from nature;
e. chemical weapons manufacturing industry; and
f. industrial chemical industry and ozone layer depleting material industry."(PERPU No. 2 Year 2022 on Job Creation [JDIH BPK RI], n.d.)

Referring to the regulation in paragraph (2) of the article above, it can be understood that Indonesia is implementing its obligations under Article II of CITES which restricts international trade in prohibited fish. (Simbolon (2023)) The prohibition certainly aims to provide protection to endangered flora and fauna, especially fish as mentioned in Appendix I of CITES. (Simbolon (2023)) Given that this policy intersects with international trade practices, this article needs to explain that the ban is justified under Article XX of the GATT and the WTO jurisprudence below.

In the prominent environmental dispute case known as the United States - Shrimp, it is understood that the WTO does not prohibit the application of conservation policies to endangered species as stipulated in CITES. (World Trade Organization. (2023a)) The Panel in this case applied the method of interpretation based on Article 31 of the VCLT by linking the provisions of the WTO Agreement with the provisions of Principle 12 of the Rio Declaration which prohibits the application of environmental policy practices that constitute disguised protection of international trade. (Nations (n.d.)) (World Trade Organization. (2023a)) The Panel and Appellate Body in this case held that the United States' action could not be justified by Article XX paragraphs (b) and (g) of the GATT. (Simbolon (2023)) This view was expressed because the United States had forced WTO members who complained about its actions to implement policies similar to the shrimping techniques outlined in Section 609 of the Public Law. (Leonelli (2023)) Thus, the US policy based on CITES violates the prohibition of quantitative barriers in Article XI: 1 of the GATT. (World Trade Organization. (2023a)) (Dewi & Azzahra (2022))

By understanding that the above provision contains a prohibition on the establishment of businesses that produce ozone-depleting substances, the regulation in Article 12 of the Capital Investment Law is also carried out by complying with the provisions of the United Nations Framework Convention on Climate Change (UNFCCC). Article 2 of the UNFCCC states that the purpose of this agreement is to stabilize the concentration of the greenhouse effect at atmospheric levels in order to prevent interference with the climate system. (Kornek et al. (2020)) In addition, Article 4 paragraph 8 of the UNFCCC states that member states with high levels of air pollution should take the necessary measures to implement funding and technology transfer mechanisms. (United Nations. (2024b)) Therefore, it can be understood that the policy of enacting the Capital Investment Law is not only related to agreements in the field of international trade but is closely related to the rules of international environmental law.

Referring to the background of this article, it should be reiterated that this article applies the concept of implementing policy to overcome the problem of the chilling effect or regulatory chill caused by the applicability of the legal regime

known as the international investment law. Therefore, the final part of this discussion does not provide solutions on how the Capital Investment Law can apply international trade and international environmental rules harmoniously. This article only explains those international environmental rules to explain the implementing policy of the Capital Investment Law after the promulgation of the Job Creation Law.

This research argues the rules on expropriation in Article 7 paragraphs (1) and (2) of the Capital Investment Law. Amendments to these provisions can be made by transposing the Police Power Doctrine and the Sole Purpose Doctrine together. The formulation offered by this article is as follows:

"(1) The government will not take action to nationalize or expropriate investment ownership rights, except based on a clear statutory basis, the expropriation is carried out to realize the public interest and is carried out in a non-discriminatory manner.

(2) In the event that the Government carries out nationalization actions to take over ownership rights as referred to in paragraph (1), the Government will provide compensation carried out at a reasonable time, in accordance with market value, and can be converted."

By amending the formulation in Article 7 of the Capital Investment Law, Indonesia can balance its national development interests with international obligations as stipulated under various international agreements concerning trade, investment, and environmental protection applicable to Indonesia. The chilling effect of international arbitration under the regime regarding international investment can thus be overcome by Indonesia. If Indonesia's investment policy is sued by foreign investors through ISDS, this aspired law or ius constituendum will be able to become a strong foundation for Indonesia not to lose at the arbitration tribunal. Through a series of analyses in this second discussion, it can be understood that the concept of implementing policy can provide solutions to conflicts of interest that may arise as a consequence of the enactment of the Capital Investment Law.

4. CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSIONS

This article needs to emphasize that the basic policy doctrine is not a concept that can overcome the problems that arise as a result of the enactment of the Capital Investment Law. Nevertheless, this doctrine has a significant role, namely being able to find the intent or purpose of the establishment of the Capital Investment Law. In another sense, the basic policy doctrine can comprehensively understand the causes of the chilling effect or regulatory chill of the Capital Investment Law based on the doctrine of international investment law. This article can conclude that the Capital Investment Law is generally formed to realize Indonesia's economic development on the one hand, but on the other hand, it is intended to adjust Indonesia's investment policy with international rules.

By applying the implementing policy doctrine, it can be understood that Capital Investment Law was established to implement various primary obligations arising from trade and investment agreements at the multilateral, regional, and bilateral levels. In addition, the Capital Investment Law was also established to implement international environmental obligations. Indonesia's commitment can be seen in various provisions in the body of the Capital Investment Law. By applying the implementing policy legal doctrine, the solution can be found to overcome the chilling effect or regulatory chill of international investment law. This effect can be

overcome by applying the Police Power Doctrine and the Sole Purpose Doctrine in reformulating the regulations in Article 7 paragraphs (1) and (2) of the Capital Investment Law.

4.2. RECOMMENDATIONS

This research suggests that the House of Representatives and the President of the Republic of Indonesia should revise the provisions of the Capital Investment Law under discussion. By applying the above international investment law doctrine, the rules of expropriation in Indonesia will be in line with the substantive rules of the international investment law regime. The changes in Article 7 paragraphs (1) and (2) of the Capital Investment Law will minimize the losses that Indonesia experiences as a result of involvement in ISDS. Last but not least, the amendment of this provision is also able to realize the balance between Indonesia's national development interests and Indonesia's international obligations to implement various agreements in the field of investment at multilateral, regional, and bilateral levels.

Given the limited scope of this article, it also suggests further research as follows. Since the above discussion does not address the issue of the Capital Investment Law's compatibility with Indonesia's international trade obligations and international environmental obligations, this article suggests further research on this issue. The research can be started by first discussing the regulation in Article 12 of the Capital Investment Law as amended in the Job Creation Law. Thus, this article has accounted for the entire discussion described and contributed to the development of international economic law.

CONFLICT OF INTERESTS

None.

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