1

LEGAL ASPECTS OF FOREIGN INVESTMENT IN INDONESIA

A. Foreign Investment and National Development

Historically the existence of foreign investment in Indonesia is actually not a new phenomenon, given the foreign capital has been made in Indonesia since the colonial era. However foreign investment in the colonial era is different with foreign investment after independence, because the purpose of foreign investment in the colonial era is solely dedicated to the interests of the colonizers and not for the welfare of the Indonesian nation. The history of foreign investment in Indonesia can not be separated from the beginning of international trade in Indonesia around the year 1151, when at that time, European traders, especially the Portuguese began to rule Malacca in terms of the trading of commodity spices that have a very strategic value at that time. The International Trade Activity develops to be an activity of colonialism in the territory of Indonesia, not only by the Portuguese, but also by other nations, the Netherlands (1596-1795 and 1816-1942), France (1795-1811), English (1811-1816) and Japan (1942-1945). In the early days of Dutch colonization the presence of multinational companies such as the *Verenigde Oost Indische Compagnie (VOC)* in spice trade activities in Indonesia also played a very important

role, especially in presenting the interests of the Dutch government.

After the National Independence, foreign investment in Indonesia also continued with various dynamics, from the beginning of independence (1945-1949), the Old Order (1949-1967), the New Order (1967-1998), and from the reform era in 1998 as of now). Foreign investment in Indonesia becomes something inevitable, and even plays a very important and strategic role in supporting the implementation of national development. This is because the national development of Indonesia requires a very large funding in order to be able to support the expected rate of economic growth. The need for funding can not only be obtained from domestic sources, but also from abroad.

The importance of foreign investment in Indonesia's economic development is also reflected in the objectives stated in Law Number 25 Year 2007 concerning Foreign Investment (Investment Law) as the legal basis for investment activities in Indonesia. The Investment Law sets out the purpose of the investment as, among others[1]:

1. Increasing national economic growth.
2. Opening job opportunities.
3. Promoting sustainable economic development.

[1] *See Article 3 paragrap (2) of Investment Law.*

4. Improving the competitiveness of the national business world.
5. Enhancing national technology capacity and capability.
6. Encouraging the development of people's economy.
7. Processing potential economy into real economic power by using the funds originating, both from within and outside the country
8. Improving people's welfare.

The increase in the foreign investment in Indonesia does happen by itself. It requires hard work to create a favorable investment climate. One of the most significant classical issues in creating a favorable investment climate in Indonesia is law enforcement, in addition to other issues, such as limited infrastructure, security, and socio-political stability. In law enforcement, there are three elements that must be considered, namely: legal certainty (rectssicherheit or legal certainty, benefit (zweckmassigkeit or benefit), and justice (gerechtigkeit or justice) that must go along in harmony. If law enforcement only takes into account to legal certainty, its implementation may ignore justice and its usefulness in society, and vice versa if one of the elements is too prioritized, then the implementation may ignore the other elements.

B. The Role of Law in Creating Favorable Foreign Investment Climate.

Foreign investment has a tightly related to law enforcement problem, which is realized in the form of legal certainty over the applicable legal provisions, not only on the regulations governing investment issues in particular, but also other regulations of sectoral and cross-sectoral nature. Therefore, the principles of investment as stipulated in the Investment Law are laden with law enforcement terms, such as[2]:

1. Legal Certainty :the principle of a lawful country that lays down the laws and regulations of the Laws as the basis for policies and measures in the field of investment.
2. Transparency :A principle that is open to the right of the people to obtain proper, honest and non-discriminatory information about investment activities.
3. Accountability : The principles determining that any activity and the end result of an investment shall be accountable to the public or the people as the highest sovereign of the state in

[2] *See Article 3 paragraph (1) of Investment Law and the Elucidation*

accordance with the provisions of legislation.

4. Equal and Non-Discriminatory Treatment –

   Of Country of Origin: Principle of treatment of non-discriminatory services based on the provisions of laws and regulations, whether between domestic investors and foreign investors or between investors of a foreign country and investment from other foreign countries.

5. Togetherness : Principles that encourage the role of all investment together in their business activities to realize the welfare of the people.

6. Fair Efficiency : The principle underlying the implementation of investment by promoting fair efficiency in an effort to create a fair, favorable and competitive business climate.

7. Sustainable : Principles that are planned to allow the development process through investment to ensure welfare and progress in all aspects of life both in the present and the future.

8. Environmentally Aware : The principle which regulates that investment is done with due regard to and prioritize the protection and preservation of the environment.

9. Independence : The principle which regulates that investment is done by prioritizing the potential of the nation and the state by not closing themselves to the incoming foreign capital for the realization of economic growth.

10. Balance Progress and Unity of National Economy : The principle that seeks to maintain the balance of regional economic progress in the national economic unity.

Based on the above description, it is clear that the role of law in creating a favorable investment climate is an absolute requirement, given that foreign investors will not invest in places that have no legal certainty (legal certainty) that can lead to a very high legal risk (regulatory risk or legal risk). Such legal certainty does not only implies the availability of legislation required in investment activities but also those closely linked to the enforcement or

enforcement of legislation required in investment activities but is also closely linked to the enforcement of legislation (law enforcement). In other words, the availability of a comprehensive set of laws and regulations does not necessarily make a country attractive to foreign investors. The important thing to note is whether the existing legislation is effective and whether its implementation is consistent.

Factors affecting law enforcement in the field of foreign investment in Indonesia can also be seen from four factors, namely:

1. Factors of availability of legislation instruments that clearly regulate matters relating to foreign investment issues, both regulations issued by the central government and local governments, such as regulations on foreign investment permit management are therefore required not only comprehensive but also must be compiled systematically so as not to cause problems that are overlapping or conflicting with each other.
2. Factors of law or institutional apparatus that conduct law enforcement in the field of foreign investment such as the Government through the Investment Coordinating Board (BKPM) or local government through its instruments in the region, such as Provincial Region Investment Board (PDPPM) or Regional Device of Regency/City of Investment

(PDKPM).[3] Factors of the law and institutional apparatus that are certainly closely related to the factor of human resources quality, for the development of the existing human resources) is very important to do systematically and sustainably.

3. Factors of facilities and facilities in the field of foreign investment arrangements, such as the availability of facilities and facilities of informatics technology in the management of licensing and non-licensing in the field of investment through one-door integrated service. This is certainly closely related to the coordination between agencies that have authority in the field of licensing and non-licensing of foreign investment, where

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[3] *Article 1 number (7) and (8) of Presidential Regulation no. Law No. 27 Year 2009 on One-Stop Integrated Services in the Field of Investment defines PDPPM as an assistant element of the regional head in the implementation of provincial government, with the form in accordance with the needs of each provincial government, while PDKPM is an assistant element of the regional head in the implementation of local government districts/municipalities, with forms in accordance with the needs of each district/city government, which performs the main function of coordination in the field of investment in district/city governments. Therefore PDPPM or PDKPM in each region has different plantings.*

one of the efforts made is through the Information Services and Electronic Investment Permit (SPIPISE) system. This system is an integrated licensing and non-licensing service between BKPM and the Ministry/LPND which has licensing and non-licensing authority, PDPPM or PDKPM as regulated in Presidential Decree no. 27 Year 2009 on One Stop Service in the Field of Investment juncto Head of BKPM Regulation no. 14 Year 2009 on Electronic Information Services and Investment Permit System. Even though the facilities and infrastructure in the licensing process such as information technology is a problem that can not be ignored, it can not be denied that the procurement of facilities and infrastructure is often hampered due to limited funds, especially for certain regions in Indonesia, which prevent business licensing system online to optimally.

4. Factors of legal culture that support the development of foreign investment. This factor is inseparable from the view or value system prevailing in the society (social) on the importance of the presence and regulation of foreign investment in Indonesia. In this case the society's point of view on the importance of the role of law in the development of foreign investment also needs to be developed so that growing legal culture that supports the creation of law enforcement in the field of foreign investment.

C. Legislatory and Statutory Instrument in the Foreign Investment Sector.

Foreign investment in Indonesia is regulated by Law no. 25 Year 2007 regarding Investment (Investment Law) which is a substitute and the old Investment Law, namely Law No.1 Year 1967 on Foreign Investment (UUPMA) and Law No.6 of 1968 concerning Domestic Investment (UUPMDN). Unlike UUPMA and UUPMDN which distinguish the regulation between foreign investment and domestic investment, it is still done the context of identifying the origin of capital, whether it is berusmber from domestic or abroad or based on the party who do the investment.

The Investment Law does not include investment arrangements in banking, insurance, business, securities (securities companies), and financing institutions. The banking business sector is specifically regulated in Act No.7 of 1992 concerning banking as amended by Act no. 21 of 2008 concerning Sharia Banking and is under the authority of Bank Indonesia. The insurance business sector is specifically regulated based on Law No.2 of 1992 concerning Insurance Business (Insurance Law) and securities business field is regulated under Law no. 8 of 1995 concerning Capital Market (Capital Market Law),[4] both of which are currently under the

[4] *Under the Capital Market Law, securities business is known as a securities company defined as a party conducting*

supervision and review of the Financial Services Authority (OJK) as set out in Law no. 21 Year 2011 on the Financial Services Authority (OJK) which is an Independent institution.

Foreign investment arrangements under the Investment Law are further regulated in a variety of complex and complex instruments of legislation, as they include multidimensional arrangements. The following are some of the implementing regulations of the Capital Investment Law that need to be considered in the initial understanding of the position and arrangement of foreign investment in Indonesia:

1. Government Regulation no. 45 of 2008 concerning Guidelines for Provision of Incentives and Provision of Investment Ease in the Region;
2. Presidential Regulation no. 76 Year 2007 concerning Criteria and Requirements for the Preparation of Closed Business Field and Opened Business Field with Requirements in the Field of Investment;
3. Presidential Regulation no. 36 Year 2010 junto Presidential Regulation no. 44 of 2016 concerning the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment;
4. Presidential Regulation no. 27 Year 2009 on One Stop Service in the Investment Sector;

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business as underwriting, brokerage and/or fund management. See chapter 1 number (21) of the Capital Market Law.

5. Regulation of Head of BKPM no. 6 of 2011 on Procedures for the Implementation, Development and Reporting of One-Stop Integrated Services in the Field of Investment;
6. Regulation of Head of BKPM no. 12 of 2009 concerning Guidelines and Procedures for Investment Application;
7. Regulation of Head of BKPM No.13 of 2009 on Guidelines and Procedures for Controlling Implementation of Capital Investment as amended by Regulation of the President. 7 of 2010;
8. Regulation of Head of BKPM no. 14 of 2009 concerning Electronic Information and Investment Permit Service System;
9. Head of BKPM Regulation no. 89/SK/2007 concerning Guidelines and Procedures for Application of Income Tax Facilities for Investment Companies in Certain Businesses and/or in Certain Regions;
10. Regulation of Head of BKPM no. 12 Year 2011 on Guidelines and Procedures for Submission of Application for Exemption or Reduction of Corporate Income Tax.

In addition to the laws and regulations directly governing the investment concerns mentioned above, other legislation in the field also needs to be addressed, such as regulations governing the issue of licensing authority in relation to investment, the environment, employment, customs taxation, land, technology (transfer of technology), fair

business competition, custsomer protection, intellectual property rights, sectoral regulations such as telecommunications, transportation, industry, commerce, mining, plantation, forestry, or even regulations established by local governments. In the context of the international aspect, the instruments of legislation that ratify international conventions or agreements relating to investment matters also need to be considered, among others:

1. Law No.7/1994 on Ratification of Agreement Establishing *The World Trade Organization* which includes agreements on *Trade Related Aspects of Intellectual Property Rights* (TRIPS), *Trade Related Aspects of Investment Measures* (TRIMS) , and *the General Agreement on Trade in Services* (GATS);
2. Presidential Decree No. 31 of 1986 on the Ratification of the *Convention establishing the Multilateral Investment Guarantee Agency*;
3. Presidential Decree No. 34 of 1981 on the ratification of *the Convention of Recognition and Enforcement of the Foreign Arbital Awards*;
4. Law no. 32 of 1968 concerning the Agreement on the *Convention on the Settlement of Disputes between States and Nationals of Other State*; and
5. International Agreements relating to *Bilateral* and *Multilateral Investment Treaty* (Asia Pacific Ecomomic

Cooperation,Asean Free Trade Agreement, Asean China Free Trade Agreement).

2

CONCEPTUAL FRAMEWORK OF INVESTMENT IN INDONESIA

A. Direct Investment and Portfolio Investment

In general, the concept of direct investment often distinguished by the term portfolio investment or portfolio investment. Direct investment is often defined as an investment activity involving: (i) *transfer of funds*; (ii) *long-term projects*; (iii) *the purpose of obtaining regular income*, (iv) *partial transfer of funds*; and (v) *a business risk*. Whereas the portfolio investment is often associated with investments made through the capital market or the stock exchange by securities purchase, so it does not involve the transfer of funds for long-term projects and hence the expected income is also more short-term in the form of capital gains obtained on when the sale of such securities and not the regular income, where the investor is not involved in the management of the company so that it is not directly related to the risk of business activities run by the target company or company where the investment is made, but rather is associated with market risk of securities purchased.

B. Definition of Investment in the Investment Law

To further understand the meaning of the terminology of foreign investment in Investment Law, it is necessary to

describe what is meant by "capital" (capital) and "investor", and "investment" in the context of foreign investment. Understanding of the above conceptual framework is very important to know the juridical framework of foreign investment arrangements in Indonesia.

"Investment" under article 1 number (1) of the Investment Law shall be defined as any form of domestic investment activity or foreign investment to conduct business in the territory of the Indonesian republic, while "foreign investment" in Article 1 number (3) of the Investment Law Capital is defined as an activity of investing to conduct business in the territory of the Republic of Indonesia conducted by foreign investment, whether using foreign capital entirely or which is made jointly with domestic investment. Based on the above description it is clear that the meaning of foreign investment does not mean that the capital is from abroad only, but can also the nature of the joint venture, where there is a merger between foreign capital and domestic capital.

Further Article 1 point (4) of the Capital Investment Law shall regulate the conceptual framework of "investment" as an individual or business entity which carries out investments of both domestic investors and foreign investors. What is interesting from the definition of investor above is that the Capital Investment Law defines the investor as an individual entity or business entity, and does not cover non-business

entities such as foundations. Whereas in reality a non-profit organization or non-commercial entity may conduct investment, for example foundation and pension fund.[5] The definition of investment in the Investment Law also does not explicitly state that a state as a legal entity may also be an investor, as is done by a State-Owned Enterprise (BUMN) or a company

[5] *Foundation is a legal entity consisting of wealth separated and destined to achieve certain objectives in the social, religious and humanitarian fields, which have no members (Law No.16 of 2001 on foundations as amended by Law No.28 of 2004 or Act of the Foundation ") and the Pension Fund is a legal entity that manages and operates a program that promises retirement benefits (Article 1 number (1) of Law No.11 of 1992 on Pension Funds or" Pension Funds Act. "Under Article 7 paragraph (2) Of the Foundation Law, a foundation is allowed to participate in various prospective business entities with the provision of such participation at most 25% of the total value of the foundation's property, while taking into account Article 31 Paragraph (3) of the Pension Fund Act, the actual wealth of pension funds, can be invested in the company's shares as long as there is no stock ownership of the founders, founding partners, and shunters s, the recipient of a warehouse or union whose member is a pension fund participant in the amount of more than 25%.*

that is not a state-owned company but part of its shares owned by the state.[6]

The distinction between foreign investment and domestic investment is clearly linked to the party making the investment and the origin of the capital. Capital is not always in the form of money, but can also in other forms that are not money as long as it has economic value.[7] "Foreign capital" in Article 1 number (8) of the Investment Law is defined as foreign owned capital, foreign citizen company, foreign business entity, foreign legal entity, and/or Indonesian legal entity which is partially or wholly owned by the party foreign. Further Article 5 paragraph (2) of the Investment Law stipulates that foreign capital investment is required in the form of limited liability company under Indonesian law and domiciled in the territory of the Republic of Indonesia, unless otherwise provided by law.[8]

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6 Based on Article 1 number (1) of Law No.19 of 2003 on "State-Owned Enterprises" (BUMN) is a business entity wholly or wholly owned by the state through direct participation derived from state assets.

[7] See the definition of "Capital" in Article 1 number (7) of the Investment Law. Thus the capital can be a technology or Know-how that has economic value.

[8] Therefore, in the case of a foreign investor intending to invest in Indonesia, such activities shall be conducted in the

Should be categorized as foreign capital is capital participation by foreign direct investment directly to PMA company, and does not include foreign equity participation which is indirect. The meaning that foreign capital also includes capital owned by Indonesian Legal Entity which is partially or wholly owned by foreign party (PMA Company) can actually cause confusion in determining the status of a company is a PMA company. Foreign capital inflows into Indonesia should be determined when the foreign capital enters directly into an Indonesian company, not indirectly.

Even if the capital participation of the PMA companies in other companies is categorized as foreign investment, it is preferable to determine the minimum percentage value of capital participation by the PMA company. If the percentage of capital participation of the PMA companies in other companies is very small, then other companies should not necessarily be categorized as "foreign capital".

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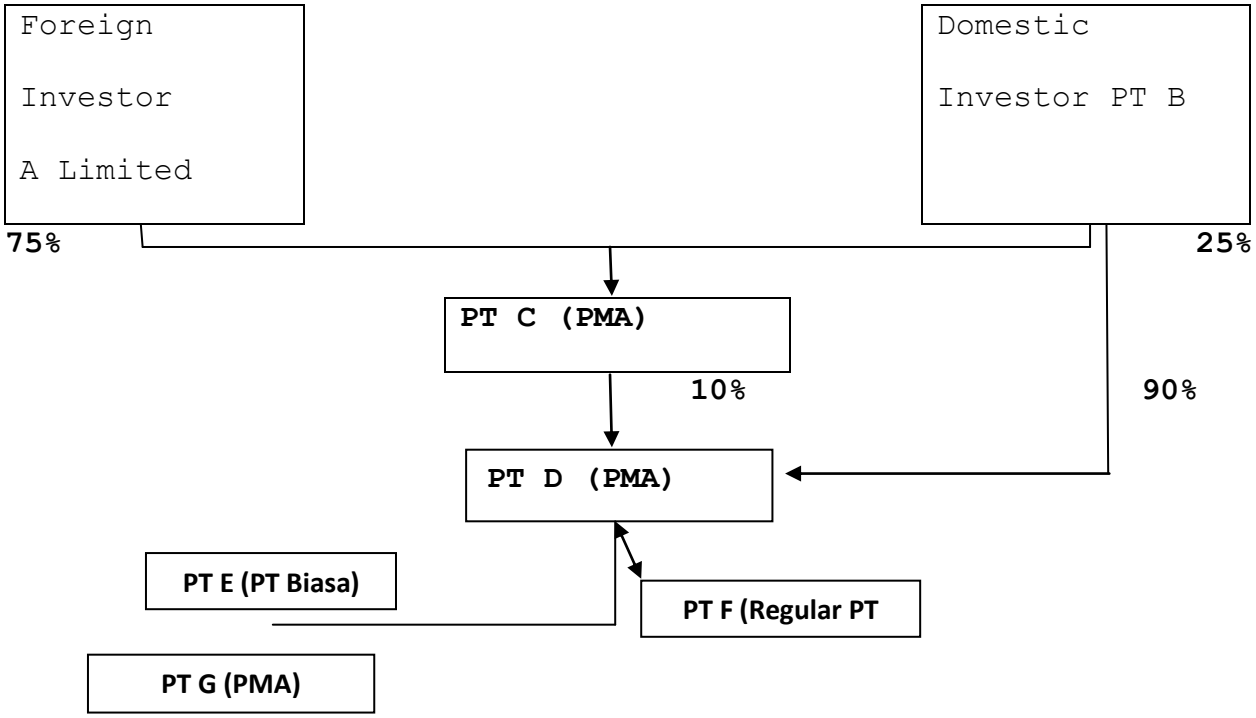
form of a limited liability company pursuant to Law no. 40 of 2007 on limited liability company. However, foreign investment activities may be non-equity or contractual under a specific agreement such as a franchise agreement, license agreement or management agreement with due regard to the prevailing laws and regulations. As explained earlier, the "capital" in the Investment Law may also include assets that are not in the form of money as long as they have economic value.

The peculiarities of the "foreign capital" conseptional framework as set forth in Article 1 number (8) of the Investment Law can be elaborated more clearly when illustrated by the following diagrams and case samples:



3

INVESTMENT LICENSING IN

DI INDONESIA

A. Complexity of Investment Licening Problems

Under the current regulation, the government coordinates and implements investment policies in Indonesia through BKPM, a non-state ministry headed by a head directly responsible to the president. Coordination of investment policy is carried out: (i) inter-governmental agencies; (ii) between government

and local government agencies; or (iii) inter-regional government.

In order to coordinate the implementation of investment policies and services, BKPM has the following duties and functions:

1. Carrying out the duties and coordination of policy implementation in the field of investment.
2. Reviewing and propose policy of investment service.
3. Establishing norms, standards and procedures for the implementation of activities and services capital investment.
4. Developing opportunities and potential investment in the region by empowering business entities.
5. Creating an investment map of Indonesia.
6. Promoting investment.
7. Developing investment business sector through investment development, among others, enhancing partnership to increase competitiveness, creating healthy business competition and disseminating information as wide as possible in the sphere of investment implementation.
8. Assisting in resolving various constraints to consult the problems faced by investors in carrying out investment activities.
9. Coordinating domestic investors who run their investment activities outside Indonesian territory.
10. Coordinating and completing one-door integrated services.

B. Scope of Investment Service

The Regulation of BKPM 12/2009 is intended as a guide for PTSP organizers in the field of investment, the investors, and the public in understanding the procedures for filing and completing the application process of investment licensing. In general, the types of investment services as regulated in BKPM 12/2009 regulations are divided into two types, namely: (i) licensing services; and (ii) non-licensing services. "Licensing" shall be defined as any form of approval to make investments issued by the government and local governments which have authority in accordance with the provisions of legislation. While "non-licensing" is defined as any form of ease of service, fiscal facilities, and information on investment, in accordance with the provisions of legislation. The types of investment licensing under Article 13 paragraph (2) of BKPM Regulation 12/2009 consist of among others:

1. Investment Registration: also known a registration in a form of preliminary government approval as the basis for starting an investment plan.[9]
2. Investment Principle Permit: also called a principle permit, is a permit of principle, is a license to start investment activities in a business field that can obtain

[9] *Read Article 16, Article 23 Paragraphs (1) and (5), Article 24 Paragraph (1) and (3) and Article 33 of BKPM Regulation 12/2009.*

fiscal facilities and in the implementation of capital investment requires fiscal facilities.[10]

3. Principle Permit of Capital Investment Expansion: also called an expansion principle license, is a license to initiate an expansion plan of investment in a business that can obtain fiscal facilities and in the implementation of its investment requires a fiscal facility.[11]
4. Principle Permit of Investment Changes: also called the change principle permit, is a license to make changes to the provisions stipulated in the principle license/license of the previous expansion principle.[12]
5. Business License: a mandatory permit for a company to carry out production/commercial operations in the production of goods or services as the implementation of

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[10] *Read Article 17, Article 19 paragraph (1) and (3), Article 21 paragraph (5), letter (a), Article 23 paragraph (2), Article 24 paragraph (2) and paragraph (3), Article 26 paragraph 4) letter (b), Article 34 and Article 35 of BKPM Regulation 12/2009.*

[11] *Read Article 21 paragraph (3), Article 26 paragraph (4), letter (b), Article 36, Article 37, Article 38 and Article 42 BKPM Regulation 12/2009.*

[12] *Read Article 37 and Article 42 of BKPM Regulation 12/2009.*

the license/principle approval of its investment, unless otherwise provided for by law.[13]

6. Expansion Business License: License required by a company to carry out production/commercial operations on the addition of production capacity exceeds the production capacity that has been permitted, as the implementation of the principle permit extension expansion/approval owned by the company, unless otherwise specified by sectoral law and regulation.[14]
7. Business License of Investment Company Merger (merger): a license must be owned by a company continuing business (surviving company) after the merger, to carry out commercial production activities/commercial operations of the merger company.[15]

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[13] *Read Article 20, Article 22 paragraph (1), Article 23 paragraph (2), Article 24 paragraph (2), Article 26 paragraph (2) paragraph (4) letter, letter (c), Article 44 paragraph (1), (3), paragraph (6), Article 45 paragraph (1), (2), (3), (7), (8), (10) BKPM Regulation 12/2009.*

[14] *Read Article 26 paragraph (4) letter (c), Article 44 paragraph (2), Article 45 paragraph (1), (2), (3), (7), (8) BKPM Regulation 12/2009.*

[15] *Read Article 26 paragraph (3) and (4) letter (a), Article 44 paragraph (4), Article 45 paragraph (1), (4), (8), (11), BKPM Regulation 12/2009.*

8. Amended Business License: licenses that must be owned by the company to make changes to the provisions that have been specified in the business license/expansion business license previously as a result of changes that occurred in the implementation of investment activities.[16]
9. Location Permit: a permit granted to a company to acquire the necessary land in respect of an investment as well as a permit for the transfer of rights, and to use the land for the purpose of investing its business.[17]
10. Spatial Use Approval.
11. Building Construction Permit (IMB).
12. Nuisance Permit (UUG/HO).
13. Underground Water Extraction Permit.
14. Company Registration Certificate (TDP): a certificate of validation given by the company registration office to a company that has registered the company as regulated in Law No.3 of 1982 concerning Company Registration.[18]

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[16] *Read Article 44 paragraph (5), Article 45 paragraph (1), (5), (6), (7), (9), and (12) BKPM Regulation 12/2009.*

[17] *Regulation of the Minister of Agrarian Affairs/Head of National Land Affairs Agency no. 2 of 1999 concerning Location License.*

[18] *Regulation of the Minister of Trade No. 37/M-DAG/PER/9/2007 concerning the Implementation of Company Registration. Company Registration conducted by the Trade Service and Trade*

15. Right on Land.[19]

16. Other permits for capital investment.

While other types of non-licensing services and other facilities under Article 13 paragraph (3) of BKPM Regulation 12/2009 among others comprise:

1. Import duties facility on machine import.[20]
2. Import duty facility on import of goods and materials.[21]
3. Proposed to obtain facility of Corporate Income Tax (PPh).[22]

Ministry as regulated in Law No.3 of 1982 on Corporate Registration is different from the Company Registration conducted by the Minister of Law and Human Rights as regulated in Law No.40 of 2007 on Limited Liability Company.

[19] *Government Regulation No.40 of 1996 concerning Right to Use of Business, Right to Build, and Right to Use Land.*

[20] *Article 46 up to Article 52 of Regulation of BKPM 12/2009 in conjunction with Minister of Finance Regulation no. 176/PMK.011/2009 concerning exemption of Import Duty on Import of Machinery as well as goods and materials for industrial development or development. As amended by Regulation of the Minister of Finance No.76/PMK.011/2012.*

[21] *Ibid.*

[22] *In connection with the "Tax Allowance" see Article 53 of BKPM Regulation 12/2009 junco Government Regulation No.1 Year 2007 concerning Income Tax Facilities for Capital Investment*

in Certain Business Fields and/or in Certain Regions as amended by Government Regulation no. 62 Year2008 and Government Regulation No.52 Year 2011 juncto Regulation of the Minister of Finance No.16/PMK.03/2007 concerning Provision of Income Tax Facilities for Investment in certain business fields and/or in certain Territories Regulation of Director General of Taxes No.PER-67/PJ/2007 concerning the procedure for granting income tax facility for investment in certain Business Sector and/or in certain areas juncto Regulation of BKPM Head No.89/SK/2007 concerning procedure of Application of Income Tax Facility for Company investors in certain business fields and/or in Specific Areas. In connection with the "Tax Holiday", the Government through the Minister of Finance has also issued the policy as set forth in Article 29 and Article 30 of Government Regulation No.94 Year 20101 on the Calculation of Taxable Income and Redemption of Producer Tax in the Current Year in conjunction with Minister of Finance Regulation no. 130/PMK.011/2011 concerning the Provision of Income or Reduction Facility of Corporate Income Tax, which is further regulated under the Regulation of the Director General of Taxes no. PER-45/PJ/2011 concerning Procedure of Determination at the commencement of Commercial Production of Taxpayer of the Agency entitled to the Juncto Income Tax Reduction or Reduction of Income Tax to the BKPM. 12 Year 2011 on the

4. Manufacturers Importer Identity Number (API-P).[23]
5. Foreign Employment Usage Plans (RPTKA).
6. Recommended Visa for Work (TA.01).
7. Permission to Employ Foreign Workers (IMTA).
8. Regional Incentives.
9. Information services and complaint services.

Types of licensing and non-licensing handled by BKPM as PTSP based on BKPM Regulation as PTSP Based on BKPM Regulation 12/2009 include:

1. Investment Registration.
2. Principle Permit of Investment.
3. Principle Permit of Investment Expansion.
4. Principle Permit of Investment Changes.
5. Business License, Expansion Business License, Business License of Merger, and Change of Business License.[24]

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guidance of Procedure for the Facility Exemption or Reduction of Corporate Income Tax.

[23] *Read article 5 letter (a), Article 54 and Article 55 of BKPM Regulation 12/2009 in conjunction with Minister of Trade Regulation no. 27/M-DAG/PER/5/2012 on Importer's Identification Number (API).*

[24] *Read Article 27 paragraph (3) letter (a) and (b), Article 56 and Article 57 of BKPM Regulation 12/2009 in conjunction with*

6. Import duties facility on machine import.[25]
7. Import duty facility on import of goods and materials.[26]
8. Proposed to obtain facility of income tax (PPh) of body.[27]
9. Producer Importer Identity Number (API-P)
10. Foreign Workers Usage Plan (RPTKA).
11. Recommendation of work visa (TA.01)
12. Permission to hire foreign workers (IMTA)

While the licensing and non-licensing mentioned below handling is done by following the provisions issued by the related technical institution/head of LPND, the governor and regent/mayor in the area concerned:

Minister of Manpower Regulation no. PER.02/MEN/III/2008 challenges the use of foreign manpower.

[25] *Read Article 58 of BKPM Regulation 12/2009 in conjunction with Minister of Manpower Regulation No. PER.02/MEN/III/2008 concerning Procedures on the Use of Foreign Workers.*

[26] *Read Article 27 paragraph (3) letters (a), (b), and (c), Article 59 and Article 60 of BKPM Regulation 12/2009 Juncto Regulation of the Minister of Manpower no. PER.02/MEN/III/2008, the procedure for the use of foreign workers.*

[27] *See Article 28 of BKPM Regulation 12/2009 in conjunction with Government Regulation No.45 Year 2008 concerning Guidelines for Incentives and Provision of Investment Facility in the Regions*

1. Location Permit.
2. Approval of Spatial Use.
3. Building Construction Permit (IMB).
4. Nuisance Permit (UUG / HO).
5. Permit to Extract Underground Water.
6. Company Registration (TDP).
7. Rights on Land.
8. Other permits in the framework of the implementation of investment.
9. Regional Incentives.

Based on the description above, in addition to licensing and non-licensing that can be maintained through PTSP BKPM, there are still some licensing and non-licensing that must be handled at the related institution/head of LPND, governor and regent/mayor in the relevant area. Thus the PTSP in BKPM is basically unable to unify all the licensing and non-licensing arrangements required in an investment. Another thing that also needs to be considered in the process of issuing permits in BKPM is still followed by a two-stage licensing process, which prior to the issuance of permanent licenses, then BKPM will issue in advance what is called the principle permit. The fixed business license is basically given there when the commercial operations/production activities of a project have been carried out.

4

LIMITATION OF INVESTMENT AND NOMINEE PRACTICE IN INDONESIA

A. Limitation of Investment as Part of State Sovereignty

In general, foreign investment activities in a country are limited by the rules of the country of origin of the foreign investor (*governance by the home nation*), the host country where the foreign investor invests (the governance by the host nation) and also the relevant international law (*governance by multi nation organizations and International Law*). Arrangements including restrictions on foreign investment by the host country are essentially the authority of the country derived from its sovereignty. However, the host country's sovereignty is also limited by international law, including international conventions in which it is a party, such as the World Trade Organization deals in the field of Trade Related Investment Measures.

Such investment limitation may be made at the time of entry of the foreign investment (*entry requirements*) as well as during the operational activities of the foreign investment (*operational requirements*). In Indonesia, such restrictions are manifested through, among other things, the regulation of a list of closed business fields and open business fields with requirements in the field of investment or often called an

investment negative list or negative list of investments (*negative list*).

To overcome the limitation of foreign capital ownership in an enterprise in Indonesia as defined in the negative list or for other purposes, it is often found that there is a nominale ownership or stock ownership practices in an enterprise in Indonesia. Although the nominal ownership of shares is unknown in the Indonesian legal system, it is even expressly prohibited in Article 33 paragraph (1) and (2) of Law no. 25 of 2007 on Investment (Investment Law), the practice of nominale share ownership is still only found.

B. Regulation of Negative List of Investment in Indonesia

Negative list is generally regulated in Article 12 of the Capital Investment Law whereby paragraph (1) of the said provisions stipulates that all business fields or types of business are open to investment activities, except for business or business activities which are declared closed to the requirements. The explanation of the provisions stipulates further that the business field and type of business is closed and open with the requirements stipulated through the Presidential Regulation, prepared in a list based on the classification of the business sector or the type of business sold in Indonesia, which is classification based on the classification of Indonesian Business Standard (KBLI) and/or *International Standard for Industrial Classification* (ISIC).

Therefore, to be able to further understand what areas of business are applicable in Indonesia, particularly those listed in the negative list, investors before investing in Indonesia need to examine in more detail what is contained in the KBLI Regarding the field of business to be lived. KBLI which is currently valid is KBLI 2015 as stipulated in Regulation of Head of Central Bureau of Statistics no. 95 of 2015 on Indonesia Standard Field Classification (KBLI 2015) as amended by Regulation of the Head of Central Statistics Agency Number 19 of 2017 regarding amendment to the Regulation of the Head of the Central Bureau of Statistics. In the past, to identify and understand a business field that is prohibited or open to investment, investors should also pay attention to technical guidance on the implementation of investment issued by the Investment Coordinating Board (Badan Koordinasi Penanaman Modal/BKPM). The technical guidance of such investment also revised time-to-time according to current economic developments.[28]

Determination of closed business fields for investment is based on the following criteria: (1) health; (2) moral, (3)

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[28] *As an example of the Technical Guidelines for the Implementation of Investment in 1998 and 2002. Previously the technical guidance set by BKPM was named Business Opportunity Information (IPU) which was published in 1995 and perfected by IPU Addendum of 1996.*

culture; (4) the environment; (5) national defense and security; and (6) other national interests.[29] While the determination of open business field with requirements is done based on the criteria of national interest, namely: (1) protection of natural resources, (2) protection and development of micro, small, medium and cooperative (UMKMK);[30] (3) Supervision of production and distribution; (4) improvement and capacity of technology; (5) partial domestic capitalization; and (6) cooperation with a business entity appointed by the Government.[31]

In reality, within a period of less than half a year since the enactment of Presidential Decree No.77/2007, the Presidential Regulation has been amended by Presidential Decree No. 111/2007 on the amendment to Presidential Regulation no. 77/2007 on the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment (Presidential Regulation 111/2007) and the latest by Presidential Regulation No. 44/2016 on the List of Closed

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[29] *Article 12 paragraph (3) of the Investment Law.*

[30] *Micro, Small and Medium Enterprises are regulated in Law No.20 of 2008 on Micro, Small and Medium Enterprises ("Law 20/2008"). While the Cooperative is regulated in Law no. 25 of 1992 on Cooperatives.*

[31] *Article 12 paragraph (5) of the Investment Law.*

Business Fields and Opened Business Fields with Requirements in the Field of Investment.

In determining the closed and conditionally open business fields, the Government shall pay attention to the following basic Principles:

1. Simplification, that the Negative list should apply nationally and be simple and limited to business fields related to the national interest so that it is a small part of the overall economy and a small part of every sector in the economy.
2. Compliance, that negative list is not contrary to the obligations of Indonesia contained in international agreements or commitments that have been ratified.
3. Transparency, that negative list must be clearly detailed can be measured and not multiple interpretations and based on certain criteria.
4. Legal Certainty, that the negative list can not be changed except by Presidential Regulation.
5. Unity of Territories, that the negative list does not impede the freedom of the flow of goods, services, capital, human resources, and information within the territory of the Republic of Indonesia.

However, to understand what is meant by "Indirect investment or portfolio in which transactions are conducted through the capital market", it is necessary to review what is stipulated in Article 37 and 38 of BKPM Chairman Regulation

no. 12 Year 2009 on Guidelines and Procedures for Investment Application. Under this provision, PMA and PMDN companies are required to have a change principle permit if there is a change: (i) business, including type and production capacity, (ii) equity participation in the company; and (iii) the project completion period. In the context of the change in open company capital participation (PT Tbk), the principle change permit is not required if the change is above the ownership of shares in the public shareholders, whereas if the change occurs to the founder/controlling shares owned at least two years and conducted on the domestic capital market, the change principle permission shall be owned by the relevant public company. In a company's stock or investment permit, a shareholder categorized as an investment portfolio is often referred to as a "public shareholder" or often considered a non-return shareholder. In the event of any transfer of ownership of shares in the "public" category in the capital market, the transfer of ownership of shares in such public company does not require the approval of the Shareholders General Meeting (RUPS) and also does not need to be offered to other shareholders as stipulated in Articles 58 and 59 Law No.40 of 2007 on Limited Liability Company (Limited Liability Company Law). Thus, the liquidity of the open company's stock trading in the stock exchange is not interrupted.

C. Nominee Arrangement Practice in Indonesia

In discussing the problem of negative list, it is necessary to discuss the problem of nominee arrangement practice in Indonesia. Considering that such practice is often exploited in the facing restrictions on foreign capital ownership. As known to the law in Indonesia is basically not familiar with the concept of trust and trustee as known in the common law system. In the Indonesian legal system there is no recognition of the difference between the beneficial owner and the legal owner, although in some cases particularly in collective custody as regulated in Article 56 of the Capital Market Law or other Capital Market Practices such as a trustee in the issuance of a bond, the concept of the trustee is already known in legislation in the field of capital market.

The provisions of Article 33 paragraph (1) and (2) of the Investment Law regulate the nominee prohibition as follows:

"(1) Domestic investors and foreign investors who make investments in the form of a limited liability company are prohibited from entering into agreements and/or statements confirming that the ownership of shares in a limited liability company for and on behalf of others."

"(2) In the event that domestic investors and foreign investors enter into agreements and/or statements as referred to in paragraph (1), such agreements and/or statements shall be declared null and void."

MECHANISM OF FOREIGN INVESTMENT THROUGH ESTABLISHMENT OF FOREIGN INVESTMENT COMPANY (PMA)

A. Types of Foreign Investment Business

In general the phases of establishment of PMA companies can be described as follows:

1. Preparation and negotiation/negotiation.
2. Application and issuance of investment registration.
3. Establishment of PMA companies.
4. Arrangement of permits after establishment of PMA company.

B. Preparation/Negotiation Phase

At this stage potential investors must identify what areas of business will be run in their investments. For that we need to study the areas of business as listed in the negative list and KLBI, what are the scope of the business field to be done based on KBLI? Is it required some business field in KBLI to run certain business activity? Are there any restrictions on foreign capital ownership in the business field to be implemented? Are there any special requirements that must be fulfilled on the business field to be run? Is there an obligation to make partnership with MSME with certain pattern to run the field of ysaha in question? Is the location of the business activity specified?

In addition, if in the investment activity of the PMA company will be done by joint venture or joint venture, it is

necessary to clarify some matters related to the joint venture pattern that will be done. Things that need to be identified in the inter-joint venture, the capital structure and the composition of share ownership, the composition of the board of directors and the board of commissioners, management or corporate governance, decision making at the board of directors or the corporate approval reserved matters, and even dispute settlement in the event of a dispute or dispute between the parties. All of these will be regulated in a joint venture agreement or shareholders' agreement among shareholders. The terms and conditions contained in the shareholders' agreement are as much as possible reflected or accommodated in the articles of association of the PMA concerned (joint venture company).

The issue of the articles of association is generally made before the notary public often because it can not accommodate certain terms and conditions in the joint venture agreement or shareholders' agreement. It is also a question of how if between the articles of association and the *joint venture agreement* there is a change of content or interpretation, especially if the joint venture agreement or *shareholders' agreement* is made in English or bilingual.

Based on the perspective of the legal provisions governing a limited liability company, the articles of association of a limited company constitute a constitutional document (by-law) of shareholders, directors, board of

commissioners. It should also be noted that the articles of association are strictly regulated in Limited Liability Company Law, while the *shareholders' agreement* or joint venture is not regulated as a basic document of a limited liability company. Even the articles of association are corporate documents that bind third parties relating to the company, in particular the documents must be announced in supplement to state gazette to comply with the principle of publicity, while the *shareholders' agreement* or *joint venture agreement* is not.

However, this does not mean that the shareholders' agreement or joint venture agreement becomes invalid and has no binding legal force. This is because under Article 1338 of the Criminal Code all legally-made agreements act as laws for those who make them (pacta sunt servanda or principle of consensualism). Even in that Article it is stated that the treaties are irrevocable in addition to the agreement of both parties or for reasons which by the law are sufficient and such agreements shall be carried out in good faith. *The shareholders' agreement* or *joint venture agreement* is an agreement that holds the shareholders who are parties to the agreement, and even binds the joint venture company if the joint venture company becomes a party therein. In the event of a dispute between the shareholder's as to the application of *shareholder's agreement* and *the joint venture agreement* with the articles of association, one of the parties may not state

that the applicable provisions are those of the articles of association only, while the *shareholders' agreement* or *joint venture agreement* shall become void. Any party denying the existence or the existence of the *shareholders' agreement and joint venture agreement* may be sued for a breach of contract or default.

C. Phases of Application and issuance of Investment Registration

The next stage in the process of foreign investment in Indonesia is the application for registration of investment by foreign investors to PTSP BKPM, both before and after the status of legal entity limited liability company. In the context of the establishment of the beginning, usually the establishment of PMA companies is done after the registration process is done, where the registration is not followed up with the establishment of the deed of establishment of PT within six months from the date of the issuance of the registration is declared null and void. Another thing to note is that if within the period of six months there is a change in the provisions related to the business field (negative list), then the registration that has been issued is declared null and void if it is against the new provisions. Registration filed after the deed of establishment of PT or after PT is a legal entity status is valid until the company has a principle license or is ready to operate or conduct

commercial activities. If the investment plan covers more than one regency/city or more than one province, the activity plan (business line, local type/production capacity, and investment value) shall be detailed for each business area and/or for each location.

Article 33 Paragraph (1) of Regulation of BKPM 12/2009 stipulates that the application for registration filed by the prospective investor shall be accompanied by a proof of application, such as:

1. Letter from the relevant state government agency or letter issued by the embassy/representative office of the country concerned in Indonesia to the applicant who is a government of another country.
2. Records of valid passport for applicant who is a foreign company
3. Records of articles of association in English or its translation in the Indonesian language from a sworn translator to an applicant in the form of a foreign business entity.
4. Records of valid ID card for applicant who is an Indonesian individual.
5. Records of deed of establishment of company and its amendment along with ratification of Minister of Law and Human Rights.
6. Records of Taxpayer Identification Number (NPWP) for both applicants who are Indonesian corporations and Indonesian

business entities.

7. Applicant whose registration has been signed on a duty stamped paper by all applicants (if the company is not already incorporated) or by the company's directors (if the company is already incorporated).
8. The original power of attorney shall be sufficient for the processing of an application which is not made directly by the investor, where the power of attorney uses the standard power of attorney stipulated by BKPM as regulated in Article 63 of BKPM Regulation 12/2009.

D. Phases of Establishment of PMA Company

The PMA Company must be authorized by the Minister of Law and Human Rights to obtain legal entity status. The application for obtaining the decision of the Minister of Justice and Human Rights must be submitted no later than 60 days from the date of the deed of establishment is signed. If such application is not submitted within such period of time, the deed of establishment shall be void since then and the company which has not obtained the status of the legal entity is dissolved by law and the order is made by its founders.[32] Company data concerning number and date of incorporation and the decision of the Minister of Law and Human Rights in connection with the legalization of the legal entity of the

[32] *Article 10 of Limited Liability Company Law*

PMA company is registered in the Register of the Company which is held by the Minister of Justice and Human Rights[33] announce the deed of establishment and the approval decision on the change of FDI in the Supplemental State Gazette no later than 14 days from the date of issuance of the Ministerial Decree.[34]

Once the PMA company obtains its legal entity status, then some matters relating to the actions of the founders (investors) before the PMA company is established or obtains the legal entity status must be ratified to bind the PMA company. Pursuant to Article 13 of the Company Law, it is stipulated that a legal act by an investor for the interest of an undeveloped PMA company binds the PMA company after it becomes a legal entity if the first RUPS of the company expressly receives or assumes all rights and obligations arising from the law. The first General Meeting of Shareholders shall be held within a period of no later than 60 days after the legal entity's boundaries are obtained by shareholders representing all shares with voting rights and the decision is approved unanimously. If the RUPS is not held within the stipulated period or fails to achieve unanimous resolution, then any investor/prospective founder committing the legal act is personally liable for any consequences arising. However, the RUPS that ratifies the actions of the

[33] *Article 29 of Limited Liability Company Law*

[34] *Article 30 of Limited Liability Company Law*

investor or the founding candidate is not required, if the legal act is committed or agreed in writing by all founders prior to the establishment of the PMA company.

E. Phases of Obtainment of Permits After the Establishment of PMA Company

After the establishment of the PMA company, there are several other licenses which must be maintained by the PMA company in the framework of conducting business activities, including:

1. Taxpayer Identification Number (NPWP).
2. Certificate of Domicile.
3. Company Registration (TDP) in connection with the mandatory listing of companies as stipulated in Law no. 3 of 1982 concerning Mandatory Company Registration.
4. Permit to Employ Foreign Workers (IMTA) in the case that the PMA company will employ foreign workers including other relevant documents, such as the Foreign Worker's Use Plan (RPTKA), recommendations for obtaining a working visa (Recommendation TA.01).
5. Importer Identity Number: General Importer Identity Number (API-U) for importers importing goods importing goods for the purpose of trading activities or transferring goods to other parties; or Producer Importer's Identification Number (API-P) for importers who import goods for their own use as raw materials,

penolog materials and/or to support the production process, whereby the imported goods are prohibited from trading or spelled out to other parties.[35]

6. Customs Identity Number (NIK) granted by the Directorate General of Customs and Excise to importers who have registered to access or connect with customs systems using information technology or manually.[36]
7. Facilities of Import Duty on the Import of Goods and Materials.[37]

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[35] *Read Minister of Trade Regulation no. 27/M-DAG/PER/5/2012 Dated May 1, 2012 regarding Importer's Identification Number (API).*

[36] *See Regulation of the Minister of Finance No.63/PMK.04/2011 dated March 30, 2011 on Customs Registration in conjunction Director General of Customs and Excise Regulation no. PER-21/BC/2011 dated June 13, 2011 regarding Technical Guidelines for Implementation of Customs Registration.*

[37] *Read Minister of Finance Regulation no. 176/PMK.011/2009 concerning exemption of Import Duty on Import of Machinery and Goods and Materials for Development or Industrial Development in the Framework of Capital Investment As amended by Regulation of the Minister of Finance No. 76/PMK.011/2012.*

8. Income Tax Facilities (PPh) for PMA companies engaged in certain business sectors and/or certain areas (Tax Allowence).[38]

9. Business License for companies that are ready to conduct commercial operation or production (commercial operation/production). Article 20 The Regulation of BKPM 12/2009 stipulates that its investment companies are ready to conduct commercial activities/production, shall apply for a business license to PTSP BKPM, PTSP PDPPM or PTSP PDKPM in accordance with their authority.

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[38] *With respect to Tax allowance facility, read Government Regulation No.1 Year 2007 regarding Income Tax Facilities for Investment in Certain Business Fields and/or in certain Areas as amended by Government Regulation no. 62 Thaun 2008 and Government Regulation no. 52 Year 2011 juncto Finance Minister Regulation no. 16/PMK.03/2007 concerning Provision of Income Tax Facilities for Investment in Certain Businesses and/or in certain Areas juncto Regulation of the Director General of Taxation No. PER-67/PJ/2007 concerning the procedure for Provision of Income Tax Facilities for Investment in certain business fields and/or in certain Areas juncto Head of BKPM Regulation no. 89/SK/2007 on Guidelines and Procedures for Application of Income Tax Facilities for Investment Companies in Certain Business Fields and/or in Certain Regions.*

In connection with tax facilities, in addition to income tax facilities (PPh) for PMA companies engaged in certain business areas and/or certain areas or often referred to as tax allowance, in fact the government also issued some related legislation with other facilities or intensive taxation, as follows:

1. Tax and Customs Facility in connection with Technology Development. Government Regulation no. 35 of 2007 concerning the allocation of a portion of the opinion of the Business Entity for the improvement of engineering innovation capability, technological diffusion may be granted intensive taxation, customs and/or technical assistance of research and development.
2. Tax and Customs Facility in connection with Renewable Energy Sources. Regulation of the Minister of Finance No. 24/PMK.011/2010 dated January 29, 2010 concerning Provision of Tax Facilities and Customs for renewable energy utilization activities stipulates that for business activities that utilize "renewable energy sources" can be given facilities taxation and kepabenan facilities: facilities Income Tax, facility Tax Addition Value (VAT), import duty facility, and government borne tax facility. Referred to as a renewable energy source is a source of energy generated from sustainable energy resources if managed properly, including geothermal,

wind, bioenergy, sunlight, flow and waterfall, as well as the movement and differences in sea lining temperature.

3. Tax Holiday. Regulation of the Minister of Finance No. 130/PMK.011/2011 concerning Provision of Income or Reduction Facility of Corporate Income Tax which stipulates that the Corporate Taxpayer may be granted facilities of exemption or reduction of Corporate Income Tax stipulating that to the Taxpayer the Agency may be granted the facility of exemption or reduction of Corporate Income Tax as referred to in Article 18 paragraph (5) of the Capital Investment Law and Articles 29 and 30 of Government Regulation Number 94 of 2010 concerning the calculation of taxable income and the settlement of income tax in the Current Year. Corporate tax exemption may be granted for a maximum period of 10 Tax Year and a minimum of five Tax Year, commencing from the Tax Year commencement of commercial production. After the expiry of the facility is exempted, the taxpayer is given a deduction of corporate income tax of 50% of the income tax payable for two tax years. However, taking into account the importance of maintaining the competitiveness of national industry and the strategic value of a particular business activity, the Minister of Finance may grant the facility of exemption or deduction of corporate income tax over a period of time as mentioned above. A taxpayer may be granted an exemption

facility or deduction of corporate income tax with a term exceeding the period specified above. Taxpayers who may be granted facilities for exemption or deduction of corporate income tax are new taxpayers that meet the following criteria:

a. Is a Pioneer Industry, including: (i) Basic metal industry; (ii) petroleum refining industry and/or basic organic chemicals sourced from Petroleum and Natural Gas; (iii) machinery industry; (iv) renewable resource industries; and/or (v) the communications equipment industry;
b. Have a new investment plan that has been approved by the authorized institution at least Rp. 1,000,000,000,000.00;
c. Depositing funds in Indonesia at least 10% of the total investment plan as mentioned in letter (b), and should not be withdrawn prior to commencement of realization of investment; and
d. Obtaining the Indonesian legal entity status, whose ratification is stipulated no later than 12 months before this Regulation of the Minister of Finance shall come into force or its ratification shall be determined no later than 12 months before this Regulation of the Minister of Finance shall come into force or its ratification shall be established

since or after the enactment of Regulation of the Minister of Finance No. 130/PMK.011/2011.

6

Mechanism of Investment through

Purchase of Shares

A. Purchase of Company Shares

Purchase of shares of a non-PMA or PT. Ordinary by a foreign party or a PMA company may result in the status of the target company whose shares may be acquired (acquisition) or non-acquisition (not a Acquisition). The difference between acquisition and non-acquisition is done by identifying whether the share purchase causes a change of control (corporate control) to the target company or not. Article 1 number (11) of Limited Liability Company Law identifies "acquisition" as a legal act taken by a legal entity or an individual who results in the transfer of control over the company. Thus, the acquisition of shares does not mean that the acquisition of the shares must be partial or total, but is sufficiently proven by the change of control or the target company concerned.

The process of entry of foreign capital through the purchase of shares of a company in general must pay attention to the provisions of Article 58 and 59 of the Company Law which regulates *the right of first offer* (ROFO) and on the

approval of the organ of a limited liability company in the event of transfer of rights to shares in which in this case is usually a RUPS of the target company. Article 58 of Company Law regulates *the right of first offer* (ROFO) such as follows:

(1) In the event that the articles of association require the seller's shareholders to offer their shares firstly to certain classification holders or other shareholders, and within 30 (thirty) days from the date of the offering it turns out that the shareholder does not buy, the seller's shareholders may offer and sell shares to a third party.

(2) Each shareholder of the seller who is required to offer its shares as referred to in paragraph (1) shall be entitled to withdraw the offer, after the expiry of 30 (thirty) days as referred to in paragraph (1).

(3) The obligation to offer certain shareholders or shareholders as referred to in paragraph (1) shall only be valid for 1 (one) time.

Under the provisions of Article 58 of Limited Liability Company Law above, in connection with the purchase of shares of a company by foreign parties or PMA prusahaan, the following things which must be considered:

1. *Right of First Offer* (ROFO) based on Limited Liability Company Law is not mandatory, because it depends on the arrangement in the company's articles of association.

Another thing that should also be considered is ROFO unknown to listed companies listed on the stock exchange.

2. ROFO *may* be owned by a particular classification shareholder based on the arrangements in the articles of association of the company concerned.
3. If the ROFO is regulated in a company's articles of association, the ROFO is valid for 30 days from the date of its offer, whereas if the shareholder receiving the ROFO does not exercise such ROFO, then the shareholder is offering it to another third party.
4. The ROFO submitted to such other shareholders is essentially irrevocable, unless the term of 30 days from the date of the offer has expired.
5. The ROFO shall not apply more than once and is valid only once, where a company's articles of association may not specify ROFO more than once before offering to a third party.

Article 59 of the Company Law further regulates the approval of the organ of a limited liability company, in this case usually the RUPS organ, as follows:

(1) The approval of the transfer of rights to shares requiring the approval of the Company or its rejection must be in writing within a period of 90 (ninety) days from the date the organs of the company receive the request for approval of the transfer.

(2) In the event that the period referred to in paragraph (1) has passed and the company's organs do not provide a written statement, the company's organs are deemed to approve the transfer of the rights to such shares.

(3) In the event that the transfer of rights to shares is approved by the company's organs, the transfer of rights shall be conducted in accordance with the provisions referred to in Article 56 and shall be made within a period of not more than 90 (ninety) days from the date of approval.

From the description of Article 59 of Company Law, the following things need to be considered, namely:

1. Approval or rejection of the organ of a limited liability company, such as RUPS, on a stock transfer plan of a company is essentially absolutely necessary. For public companies listed on the stock exchange, of course the transfer of shares of the company does not require approval from the RUPS.
2. Approval or rejection of a company's share transfer plan shall be provided in writing.
3. Approval and rejection of a share transfer plan by a limited number of individual organs such as a General Meeting of Shareholders shall be submitted no later than 90 days from the date on which the organ receives an

approval request from the shareholder who will transfer the shares.

4. The realization of such share transfer shall be done no later than 90 days from the date of approval of such share transfer. It should also be noted that based on the explanation of article 29 paragraph (3) letter (c) of the Company Law, the transfer of shares, although not categorized as amendment to the articles of association, should be notified to the Minister of Law and Information regarding the change of data in the list of companies.

If among shareholders of a company is a *joint venture agreement* or *shareholders 'agreement*, the ROFO arrangement and approval of the RUPS in a *joint venture agreement* or *shareholders' agreement* shall take into account also the provisions of Articles 58 and 59 of the Company Law. Occassionaly *joint venture agreement* or *shareholders' agreement* also sets out other arrangements such as the provision of tag-along-right or drag along right, where although these things are basically not prohibited in Limited Liability Company Law but must be considered in order not to violate the provisions of Limited Liability Company Law, specifically in connection with the duration of its implementation.

B. Acquisition of closed company

As described above, acquisition of shares is acquired/acquisition and non-acquisition. This section will discuss further the acquisition of a closed company. Before discussing it, it should be pointed out that the use of "closed company" terminology in this discussion is intended to distinguish it from "open companies". This, given the scope and mechanism of the acquisition of open companies is very different from the Acquisition of a closed company.

As previously mentioned, Limited Liability Company Law defines a Acquisition as a legal act by a legal entity or an individual to take over an individual stock resulting in the transfer of control over the company. Article 125 paragraph (1) of the Company Law stipulates that the Acquisition is done by acquisition of shares issued and/or to be issued by the company through the directors of the company or directly from the shareholders. Thus some things that need to be recorded in connection with the Acquisition based on the concept of LIMITED LIABILITY COMPANY LAW among others:

1. ***Corporate Control Transaction***

   Acquisitions resulted in the transfer of control (Corporate control) of the foreclosed company. Thus, there may be acquired shares. Thus, it may happen that shares acquired or purchased by an investor are not substantial or material amounting to less than 50% of the total paid-in capital of the target company, but since the shares are taken over is golden share then the

purchase of shares is categorized as acquisition/acquisition .

For example: PT A, PT B, PT C, and Mr. D are respective shareholders of 25% of Target Company 's paid-in capital. But Mr. D's share is a golden share that grants Mr. D the right to shareholders: (a) to nominate members of the board of directors as president director and finance director as well as 2 members of the board of commissioners; and (b) in the event of a change in the articles of association of Target Company, the RUPS approving the amendment of the articles of association shall involve the approval of Mr. D. If E Limited, a company incorporated under the jurisdiction of Singapore, purchases all of Mr. D's shares, D purchased by E Limited is only 50% then the actual purchase of shares is a Acquisition/acquisition in the context of Limited Liability Company Law. This is because in the purchase of shares there is a transfer of control (corporate control) of Target Company from Mr. D to E Limited.

2. Shares Issued and To Be Issued as Object of Acquisition Transaction

Acquisitions may be made on shares that have been issued by an existing company or on shares to be issued by a target company. Thus the investor in carrying out a Acquisition of a target company can buy stocks rather

than existing shareholders or buy shares to be issued by the target company or even a combination of both.

The consequence of the purchase of shares to be issued by the target company is the increase in the deposit capital of the target company concerned, in which case the pre-emptive right provisions of the shareholders as stipulated in the articles of association and Article 43 of Company Law should be considered. If approved by shareholders, such pre-emptive rights may not be used by shareholders or be waived, however such shall be expressly stated.

3. Acquisition from Board of Directors and Acquisition from Shareholders

Acquisitions can be made through the Board of Directors of the target company or directly from the target company's shareholders. In the event of a Acquisition through the directors of the target company, in addition to the provisions contained in Government Regulation no. 27 of 1998 on Merger, Consolidation, and Acquisition of Limited Liability Company (PP 27/1998) must also be considered. Judging from Limited Liability Company Law and PP 27/1998 in general the process of taking over a company through directors can be described as follows:

1) Delivery of of Acquisition Intention and Proposal of Acquisition Plan.

In the Acquisition process involving the directors of the target company, the party that will take over will first convey the purpose of the Acquisition to the target company's directors.[39]

The target company and the respective party will take over each of the proposed Acquisition plans that are required to obtain approval from the board of commissioners of the target company and the party who takes over the target company. The proposed Acquisition plan is the material for drafting a take-over draft compiled jointly by the directors of the target company and the party taking over.[40]

2) Preparation of Acquisition Draft.

The directors of the target company and the companies that will perform the take over with the approval of the respective Board of Commissioners shall draw up a draft of a Acquisition which containing:[41]

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[39] *Article 26 paragraph (1) PP 27/1998 in conjunction with Article 125 paragraph (5) Limited Liability Company Law.*

[40] *Article 26 paragraph (2) and Article 27 PP 27/1998*

[41] *Article 125 paragraph (6) Limited Liability Company Law in conjunction with Article 28 PP 27/1998.*

1. The name and place of domicile of the company that will take over and to be taken over.
2. The reasons and explanations of the Board of Directors of the company that will take over and to be taken over.
3. The financial statements as referred to in Article 66 paragraph (2) letters (a) LIMITED LIABILITY COMPANY LAW for the last fiscal year of the company to take over and to be acquired.
4. Procedures for the valuation and conversion of shares of the company to be acquired against the shares of redemption when the Acquisition is paid by a share swap.
5. Number of shares to be acquired.
6. Readiness of funding.
7. Proforma consolidated balance sheets of the targeted company after acquisition prepared in accordance with generally accepted accounting principles in Indonesia, as well as estimates of matters relating to profit and loss and the future of the enterprise based on the results of independent expert judgments.
8. How to settle the rights of shareholders who disagree with the Acquisition.

9. How to settle the status, rights and obligations of members of the board of directors, board of commissioners and employees of the target company.
10. Expected period of Acquisition, including the period of authorization of transfer of shares from shareholders to company directors.
11. The draft amendment of the company's articles of association of expropriation if any.

3) Announcement of Acquisition Draft

The board of directors of the company that will takeover announces a summary of the takeover draft at least in one newspaper and announces it in writing to employees of the company which will takeover within 30 days prior to the call of the RUPS.[42] The above announcement is intended to enable the parties concerned to acknowledge the existence of the plan and submit an objection if they feel their interests are harmed and make also notice that interested parties may obtain a takeover plan of the office of the company from the date of the

[42] *Compare the provisions of Article 127 paragraph (2) and (3) Limited Liability Company Law with the provisions of article 29 PP 27/1998.*

announcement of the RUPS until the date of the General Meeting of Shareholders convened.

In the context of the interests of employees or workers, it is necessary to consider the provisions of Article 61 paragraph (3) of Law no. 13 of 2003 on employment (Law 13/2003) which regulates as follows:

"In the event of a transfer of enterprise, the rights of the worker/laborer shall be the responsibility of the new entrepreneur, unless otherwise provided in the transfer agreement which does not diminish the rights of the workers/laborers."

To understand what is meant by the workers/laborers' rights as mentioned in Article 61 Paragraph (3) of Law 13/2003 above it is necessary to review the provisions of Article 163 paragraph (1) and (2) of Law 13/2003 which regulate as follows:

(1) Employers may terminate the employment of workers in the event of a change of status, merger, consolidation or change of ownership of the enterprise and workers/laborers are entitled to severance pay amounting to 1 (one) time in accordance with the provisions of article 156 paragraph (3) and compensation pay in accordance with the provisions of article

156 paragraph (3) with compensation pay in accordance with the provisions of Article 156 paragraph (4).

(2) Employers may terminate the employment of a worker/laborer due to a change of status, merger or consolidation of an enterprise, and the employer is unwilling to accept workers in his company, the worker shall be entitled to severance pay twice 2 (two) times of Article 156 paragraph 3), and compensation pay according to the provisions of Article 156 paragraph (4).

The provisions of Article 163 paragraph (1) and (2) of Law 13/2003 in practice are often the questions of foreign investors intending to invest through the purchase of shares of a company in Indonesia. Special paragraph (1) of that article is often a question of why employers who terminate their employment if the employer is not willing to continue the employment relationship is the worker in relation to the change of ownership in the company? If the worker is not willing to continue the employment relationship then the employee should voluntarily resign as regulated in Article 162 of Law 13/2003, so that the

employer does not have to pay the severance and gratuity fee to the resigned worker.

The provisions of Article 163 paragraph (1) and (2) of Law 13/2003 in practice are often the questions of foreign investors intending to invest through the purchase of shares of a company in Indonesia. Khsusus verse (1) of that article is often the question of why the employer who terminates the employment if the employer is not willing to continue the work is the worker in connection with the change of ownership in the company? If unemployed workers continue the employment relationship then the employee should voluntarily resign as regulated in Article 162 of Law 13/2003, so that the employer does not have to pay the severance and gratuity fee to the resigned worker.

The things that are often being questioned is the definition of employers who must make termination of employment and pay severance debts for the award of employment, and money compensation. In theory of employment relations, the termination of employment and payment of those rights should be made between the parties who have a working relationship and

the payment of those rights should be made between the parties who have a working relationship, ie the employer and the worker concerned. In the context of a takeover if a foreign investor wants to buy shares of a target company from the shareholders of the company, where there are some jobs from the target company who are unwilling to continue work with the target company in case of a change of ownership in the target company, pay the rights of the worker is the target company concerned as the employer. However, in terms of Article 61 Paragraph (3) of Law 13/2003, in the event of a transfer of enterprises, workers' rights shall be the responsibility of the new entrepreneur, unless otherwise provided in the transfer agreement which does not diminish the rights of the workers/laborers. The notion of "new entrepreneur" is in fact interpreted as the party who takes over the target company. Therefore, in an agreement governing the acquisition of a target company, it should be clearly regulated who will be responsible for severance pay, gratuity and other compensation benefits entitled workers in the event of a

dismissal in connection with the acquisition transaction in the context of Law No. 13/2003.

4) Proposition of Director’s Objection

Within a period of not later than 14 days after the aforementioned announcement, the creditor may file an objection to the company, where in the event that there is no objection laid aside by the creditor then the creditor may be deemed to approve the acquisition. Article 33 paragraph (2) of PP 27/1998 stipulates that the creditor may file an objection in connection with the exercise of the takeover not later than seven days prior to the convention of the RUPS.

However, of course, this provision does not reduce the rights (contractual right) of the creditor under a loan agreement, underlying his/her right of claim to the company. For example if in a debt agreement it is mentioned that the change of ownership of shares or acquisition of the company concerned must be approved in advance of the creditor, then at its base the acquisition can only be made if the creditor's agreement has been obtained. Should such matter be breached, the execution of such takeover shall result in the company’s breach of contract on the debt agreement.

If such time period is up to the date of the RUPS of the objection of the Creditor can not be resolved by the Board of Directors, the objection must be submitted to the General Meeting of Shareholders in order to obtain a settlement, which if the settlement has not been reached. It will be different if there is an objection from minority shareholders, where article 126 Limited Liability Company Law stipulates that minority sham holders who do not agree with the takeover exercise may exercise their rights as regulated in Article 62 of Limited Liability Company Law and the takeover exercise may exercise its right as regulated in Article 62 of Company Law and the exercise of the right it can not block the implementation of merging or consolidation. Article 62 of Company Law provides that each shareholder is entitled to request the company to have its shares purchased at a fair price if the party does not approve the company's actions that harm the shareholders, in the form of: (a) the amendment of the articles of association; (b) the transfer or underwriting of a company's assets transfer or guarantee of corporate wealth of more than 50% or (c) merger, consolidation, acquisition or segregation. In the event that the shares requested to be purchased exceed the limit of the

terms of the share repurchase in the company as referred to in Article 37 paragraph (1) letter (b), the company must make sure that the remaining shares are bought by a third party. Based on Article 37 Paragraph (1) of Company Law, the company must make sure that the remaining net worth of the company becomes less than the amount of the issued capital plus the mandatory reserves that have been in disposal, and (b) the total nominal value of all shares repurchased by the company and the pledge of shares and fiduciary security of shares held by the company itself/or any other company whose shares are directly not directly owned by the company, does not exceed 10% of the total paid-up capital deposited in the company, unless otherwise provided for in another legislation in the field of planting capital.

5) Notice of RUPS

Notice of RUPS in connection with the acquisition is made 14 days before the General Meeting of Shareholders is held by not counting the date of the summons and the date of the RUPS by means of a registered letter and/or newspaper advertisement containing the date, time, place and agenda of the RUPS with notice that the RUPS material is available

at the company office concerned since the date of the invitation of the RUPS up to the date of the RUPS. The resolutions of the RUPS remain valid even though the invitation of the RUPS is not in accordance with the above provisions if all shareholders with voting rights are present or represented in the RUPS and the resolution is approved unanimously.

6) GMS (General (eeting of Shareholders)

Article 89 Limited Liability Company Law provides for matters relating to the GMS in respect of acquisition, in which the quorum to the RUPS is at least 3/4 of the total number of shares with voting rights, which, if not achieved, the second RUPS may be held by a quorum agreement of 2/3 part of the total number of shares with voting rights. The number of inner quorums is determined to be greater in the company's articles of association. Furthermore, if the quorum in the RUPS can be thirdly unachievable pursuant to Article 85 Paragraph (5), (6) and (7) Limited Liability Company Law the Company may apply to the head of the district court in its jurisdiction including the place of domicile of the company to set a quorum for the third RUPS where such determination is final and

has a permanent legal force. Paragraph (6) of Article 86 of the Company Law stipulates that the call of the 3rd GMS must state that the second RUPS has been held and does not reach the quorum and the third RUPS will be issued and the quorum set by the head of the district court. The GMS decision in connection with the acquisition of a company, either in the first GMS or in the second GMS, is valid if it is approved by 3/4 of the votes cast in the RUPS, unless the articles of association determine a much larger number of votes.

Pursuant to Article 86 Paragraph (8) and (9) of Company Law, the second and third General Shareholders' General Assembly shall be held within seven days before the second or third RUPS is held and the second and third GMS are held within 10 days and no later than 21 days after the preceding RUPS was held.

Beyond what has been stipulated in the Company Law and the articles of association of the company concerned, what is stipulated in the joint venture agreement aha shareholders' agreement (if any) should also be considered. The provisions stipulated in the joint venture agreement or shareholders' agreement shall apply to the shareholders and

companies concerned as long as what is regulated is not contrary to the Company Law and other Laws.

The draft of the acquisition which has been approved by the General Meeting of Shareholders is set forth in the deed of takeover made before the Notary in the Indonesian language. A copy of the deed of such expropriation shall be attached to the delivery of notification to the Minister of Justice and Human Rights concerning the amendment of the articles of association.

7) Person taking car of Registration or Licensing in PTSP BKPM or PDPPM/PDKPM

Article 23 of Regulation of BKPM 12/2009 stipulates that domestic investment companies that will make changes in capital participation Due to the entry of foreign capital resulting in all or part of the capital of the company into foreign capital which resulted in part or all or part of the capital of the company into foreign investment conducts the followings:

a. Investment registration as a result of changes occurring in PTSP BKPM, if the company concerned does not have a principle license and does not have a business license or does not have a license of principle. BKPM will publish

the registration of apabia in the field of business and the percentage of foreign ownership in compliance with the provisions of the law or the rejection of registration (as set forth in annex VIIB of BKPM Regulation 12/2009).

b. Application for a principal license or business license for investment of capital as a result of the port of PTSP BKPM if the company has a license of principle or business license. However, if the business field of the company is the authority of the provincial government and/or the district/city government, prior to applying for a business license or a principal license to PTSP BKPM is required to attach a letter of introduction from PTSP PDPPM or PTSP PDKPM concerning the planned capital inflows as set forth in annex VIIA of BKPM Regulation 12/2009. In the case of a letter of introduction of PTSP PDPPM or PTSP PDKPM not yet published within 10 working days, the company may attach the receipt of the application.

Another thing to be considered is that based on Article 37 of BKPM 12/2009 regulations, PMA and PMDN companies are obliged to apply for a

change principle permit submitted to PTSP BKPM, PTSP BKPM, PTSP PDPPM or PTSP PDKPM, (under the authority), if the relevant company make a change in:

a. Terms of business field, including type and production capacity.
b. Equity participation in the company.
c. Project completion period.

Those listed in the principle permit or the expansion principle permit. Based on Article 42 Paragraph (3) of Regulation of BKPM 12/2009 Permission of Principle of Change of Capital Investment shall be issued not later than five working days from receipt of complete and correct application.

Amendments to the provisions contained in the registration or the principle permit other than those mentioned above shall be reported by the company concerned to the PTSP issuing the registration or the principle permit by using the form as set forth in annex VIIA of Regulation BKPM 12/2009.

The application for change principle permit as regulated in Article 37 of BKPM Regulation 12/2009 is filed by using the form as contained

in Attachment IX of Regulation BKPM12/2009 with the following requirements:

a. Records of license of investment principle applied for the amendment.
b. Records of deed of establishment and amendment, completed with the approval of the Minister Law and Human Rights.
c. For changes in business (type/production capacity) is furnished with:
   - Description of the activity plan, a description of the production process that includes the type of raw materials and is equipped with flow chart (flow chart).
   - Recommendations from relevant government agencies, when required.
d. For a change of revelation in the company's capital (percent) of foreign ownership) is completed by:
   - Shareholders' agreement on percentage change of shares between foreign and Indonesia in the company as set forth in the form of recording of minutes of RUPS or circular decisions signed by all shareholders and has been recorded (warmerking) by a notary or a recording

of a decision statement of meeting or minutes of the meeting in the form of deed Notary, which meets Article 21 and CHAPTER VI OF LIMITED LIABILITY COMPANY LAW, and supplemented with proof of new shareholder.

- Chronological participation in the company's capital from establishment until the last application.
- Especially for an open company, the application is furnished with the requirements in accordance with the provisions of the capital market regulations.

e. For the change of project completion period comes with the reason for the change.

f. Investment activity report (LKPM) for the last period.

g. A request for a principle permit for changes in capital investments whose applications are submitted by the directors of the company or if they are represented is based on a power of attorney set forth in article 63 of BKPM Regulation 12/2009.

8) Notice to the Minister of Law and Human Rights

Certain acquisitions change the ownership of the target company's shares, in which the relevant company's articles of association may change or remain unchanged. If in the takeover only change the composition of shareholders, then the company's articles of association. In this case the change in the shareholder structure is sufficiently notified to the Minister of Law and Human Rights in connection with changes in corporate data. However, a change of the company's articles of association may occur in a takeover, be it a change of articles of association requiring the approval of the Minister of Law and Human Rights Article 131 of the Company Law stipulates that a copy of the deed of acquisition shall be attached to the notification to the Minister of Law and Human Rights.

9) Announcement of Result of Acquisition

In accordance with Article Limited Liability Company Law the directors of the target company shall collect the proceeds in one or more newspapers within 30 days from the date of entry into force of the takeover. The 30 day calculation shall commence from the date of notification in connection with such transfer of shares or changes to the said company's articles of association (if any amendment

of the articles of association as a result of expropriation) is accepted by the Minister of Law and Human Rights. This arrangement is slightly different when compared to Article 34 of Government Regulation 27/1998 which requires that the announcement be made in two daily newspapers and only applies to companies that undertake acquisitions with certain value of wealth determined under the Decree of the Minister of Law and Human Rights. Conflict or Contradiction of this arrangement when viewed from the concept of lex superior derogate legi inferiori, then in this case that apply is the provisions of Article 133 LIMITED LIABILITY COMPANY LAW, such Decree of Minister of Law and Human Rights mentioned in Article 34 paragraph (3) PP 27/1998 does not exist.

As has been explained earlier that the takeover of the company can be done directly from the shareholders without involving the directors of the target company. In fact, when observed a direct takeover from shareholders is widely used in practice, because the implementation mechanism is simpler. If the acquisition is made directly from the shareholders, then the party to take over does not need to submit its intentions as the target company's director and prepare the takeover plan as

described in description (1) and (2) above. However, in the process of the acquisition of shares directly from the shareholders, the matters as described in the above description (3) to (9) above mutatis mutandis remain in force and must be considered.

In relation to the deed of acquisition, it is practically impossible for the party to take over, the shareholder whose shares will be acquired and the target company in question has previously entered into a share sale and purchasase agreement or the acquisition agreement, prior to the drafting of the takeover design is conditional (conditional sale and purchase agreement or conditional acquisition agreement) or an agreement on the terms of respite as provided for in Article 1253 up to Article 1264 Civil Code, whereby all procedures that must be pursued under the legislation is one of the conditions (conditional precendent) that must be met first shall apply effectively.

In the concept of takeover of target company by Foreign Party, of course agreement made usually use English or bilingual. However, it should be noted that under the applicable laws and regulations, the deed of acquisition must be made in the Indonesian language and in the form of a notarial deed. Regarding the use of English in the document of

takeover transactions, it should be noted that under Article 31 of Law no. 24/2009 on Flags, Languages and State Symbols and National Anthems (Law 24/2009) stipulating that the Indonesian language shall be used in a memorandum of understanding or agreement involving state institutions, government agencies of the Republic of Indonesia, private Indonesian institutions or individual Indonesian citizens , whereby if it involves a foreign party, the documents are also written in the national language of the foreign party and/or English. The provisions of Article 31 of Law 24/2009 do not clearly set the prevailing language and what languages are the status of being engaged. The question also arises whether if a document is made of more than one language, does the translation have to be official, and translated by a sworn translator? Article 40 of Law 24/2009 stipulates that further provisions on the use of Indonesian language shall be governed by a presidential regulation, where in Article 73 of Law 24/2009 it is stipulated that the implementing regulations necessary to implement this Law shall be resolved no later than two years from the year following the enactment of this Law. However, as of this writing is made, the presidential regulations as mentioned above still do not exist.

In practice, a deed of acquisition is often made and signed after all conditions precedent in relation to such acquisition are fulfilled, whereby by the signing of the deed of acquisition the takeover or closing of the takeover transaction will be made. In sequence there are still things that need to be done after the signing of the deed of acquisition so that the transaction is completely valid, that is the process of notification to the Minister of Justice and Human Rights and the process of announcement about the acquisition result.

Another thing to be considered is that based on Article 125 paragraph (4) of Company Law, in the case of a takeover by a legal entity in the form of a limited liability company, the board of directors prior to committing a legal act of expropriation shall be based on the resolutions of the General Meeting of Shareholders meeting the quorum of attendance and provisions concerning the decision-making requirements of the RUPS as intended in Article 89 of Limited Liability Company Law.

C. Acquisition of Public Company

If the target company to be bought by a foreign party is a public company, then the legislation in the field of capital market, especially issued by BAPEPAM-LK should also be

considered. Basically, if the purchase of the target company's shares by the foreign party is done in order to portfolio investment (portfolio investment) conducted through the capital market, then in the transfer of shares:

1. Approval of the GMS of the target company is not required.
2. The transfer of such shares shall not be offered to other shareholders first (first refusal right).
3. The transfer of shares does not require a licensing process in BKPM or PTSP in the region as regulated in Article 23 of Regulation BKPM 12/2009, so if the target company is originally a non-PMA company, then the target company does not need to change the status of a PMA company.
4. The transfer of such shares shall not be notified to the Ministry of Law and Human Rights as regulated in Article 29 paragraph (3) letter (c) Limited Liability Company Law.

The elaboration of the acquisition of a closed company and the acquisition of an open company that the use of the term "closed company" in this discussion is intended to distinguish it from an "open company". Taking stock is different. This, given the scope and mechanism of the acquisition of public companies is very different from the takeover of a closed company.