

# Dynamics of BMKT Investment Policy: Challenges in Application

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## ABSTRACT

Changes in investment policy choices for Valuable Objects from Sinking Ships (BMKT) in Indonesia are quite dynamic. Starting with foreign freedom in the ownership of BMKT based on Law 5 of 1992 concerning Cultural Conservation, the inclusion of BMKT in the Negative Investment List (DNI) based on Perpresulation 44 of 2016, lastly BMKT investment was opened through Law 11 of 2020 concerning Job Creation and its derivative Perpresulation 10 of 2021 with remove BMKT from DNI. The policy dynamics were born because of the obstacles to exploration costs, risks, and high lifting costs, juxtaposed with the wealth of BMKT, which are cultural heritage objects with high cultural values in them. The policy of removing BMKT from DNI may attract investors' enthusiasm, but there is no legal regulation regarding management in the form of cooperation between the state and investors. It is feared that BMKT will only become objects with high economic value and ignore the dignity of BMKT as cultural heritage objects. The research is legal research that uses a statutory approach, a concept approach, and a comparative approach. This research shows that BMKT, a cultural heritage object, must be protected by the state in the public interest while still paying attention to investors. Strict legal policies in regulating the form of cooperation to the distribution of BMKT gains between the state and investors are a solution to balance the public interest and the interests of investors.

**Keywords:** *BMKT, Cultural heritage, DNI, Investment.*

## 1. INTRODUCTION

Investment is one of the activities that can increase the level of the economy of a country. Countries with high levels of investment will often be directly proportional to the ability of a country's economy. A country will try to increase the attractiveness of investment in its country to be interested.

The investment itself is divided into two categories, namely direct investment, and indirect investment. In direct investment activities, the owner of capital will play a direct role in managing a business activity or company. Meanwhile, in indirect investment, the owners of capital do not participate directly in managing business activities. Furthermore, indirect investment based on the source of capital, Law Number 25 of 2007 concerning Investment (Investment Law) divides direct investment into Domestic Investment (PMDN) and Foreign Investment (FDI).

Regarding FDI, there are several advantages of direct investment compared to indirect investment for a country, including [1]:

1. Provide income in the tax sector (tax)
2. Public saving
3. Balance of payments
4. Transfer of technology

These reasons then affect the host state to compete in attracting investors to invest in their respective countries.

The progress of the investment sector is now increasingly becoming the focus of the Indonesian government, through Law Number 11 of 2020 concerning Job Creation (Job Creation Act) which was promulgated on November 2, 2020. The investment sector has received much attention with the changes in legal regulations in Indonesia, which are considered to hinder the pace of investment and require attention for development. One area of concern for the government is the Negative Investment List.

DNI was previously regulated in Perpresulation Number 44 of 2016 concerning the List of Closed Business Fields and Business Fields Open with Conditions in the Investment Sector (Perpres 44/2016). The Perpresulation 44/2016 was revoked through

Perpresulation Number 10 of 2021 concerning Business Fields Investment (Perpres 10/2021) which was promulgated on February 2, 2021, and effective since March 4, 2021. Then the Perpresulation 10/2021 was amended again through Perpresulation Number 49 of 2021 concerning Amendments to Perpres 10/2021, which was promulgated on May 25, 2021.

The change in business fields due to the amendment of Perpresulation 44/2016 can be seen from the DNI, which previously had 20 closed business fields. Now there are six closed business fields. According to Perpresulation 44/2016, one of the closed business fields is Valuable Objects on the Load of Sinking Ships (BMKT), which is now an open business sector through Perpres 10/2021.

As an archipelagic country, Indonesia is supported by its geographical position, which is located between the continents of Asia and the continent of Australia, and flanked by the ocean, making Indonesia an international trade route. Archaeological discoveries of BMKT in Indonesian marine areas show that the waters in Indonesia are among the areas with the most extensive distribution of sunken ancient ships. The sunken ships sank according to the shipping lanes in the past known as spice and silk routes, and these ships were merchant ships and freighters. [2] At that time, the crowds of water traffic lanes were greatly influenced by the most sought-after needs, namely spices and forest products in the Southeast Asian region, which were classified as rare. In this case, Indonesia is very popular with forest products and spices (camphor, frankincense, nutmeg, coffee, and cloves). Where these needs are rare for people in Europe and the Middle East. [3]

Based on the geographical location and the explanation above, Indonesia has great potential for BMKT that still exists in Indonesian waters. However, the appointment of BMKT is not an easy and high-risk thing. This then opens up opportunities for cooperation with investors. However, the problem that then arises is the meaning of the BMKT value itself. In some statutory provisions, BMKT is a cultural heritage object with historical and cultural values. So that its utilization is aimed as much as possible for the benefit of the people, this is reflected in the meaning of cultural heritage objects according to Article 1 number 1 of Law Number 11 of 2010 concerning Cultural Conservation which confirms that:

*Cultural Conservation is material cultural heritage in the form of Cultural Conservation Objects, Cultural Conservation Buildings, Cultural Conservation Structures, Cultural Conservation Sites, and Cultural Conservation Areas on land and/or in water that needs to be preserved because they have essential values for history, science, education, religion, and/or culture through the determination process.*

The emphasis on objects in the water shows that BMKT is one of the concrete manifestations of cultural heritage objects themselves.

BMKT is not only related to cultural heritage but also related to tourism and marine affairs. From the tourism aspect, looking at the legislative ratio in the basis for considering Law 10 of 2009 concerning Tourism, it is briefly stated that ancient relics, historical relics, arts, and culture are resources to develop tourism whose ultimate goal is to increase the prosperity and welfare of the people. Meanwhile, concerning marine affairs, based on Article 27 paragraph (4) of Law 32 of 2014 concerning Marine Affairs directs the appointment of BMKT as one of the marine industries which are specifically activated in the field of maritime services and changes to the policy on BMKT come from Perpres 10/2021 which removes BMKT from the negative list, thus enabling investment in the BMKT business sector.

These different orientations on BMKT place inconsistencies in the value of BMKT and void the scheme for the form of cooperation in the management of BMKT. The interests of commercial use and the maximum benefit for the benefit of the people are objects of discussion that continue to be a concern for legal practitioners. So that in this study, the author is interested in compiling a study with two main focuses, namely the characteristics of BMKT and the form of investment cooperation on BMKT.

## **2. METHOD**

This research is normative legal research. Peter Mahmud Marzuki argues that legal research is a process in finding the rule of law, legal principles, and legal doctrines to resolve legal issues at hand". [4]

In this study, there are two sources of legal materials, namely primary legal materials in the form of legislation relevant to the research discussion. The primary legal materials in this study consist of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), the Job Creation Law, the Cultural Conservation Law, the Tourism Law, the Maritime Law, Perpresulation 44/2016, Perpres 10/2021, and Perpresulation 49 /2021. Then secondary legal materials consist of publications on the law in the form of journals, legal dictionaries. The collection of legal materials uses library research, namely the activities of collecting legal materials both primary and secondary, then making an inventory and connecting them with legal issues in this research.

## **3. RESULT AND DISCUSSION**

### **3.1 Characteristics of BMKT**

Indonesia is an archipelagic country, "Nusantara" (Archipelago) stated in the Juanda Declaration on

December 13, 1957. [5] More firmly, Article 25 Chapter IXA of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) affirmed that Indonesia is a state archipelago with archipelagic characteristics. As an archipelagic country at that time, Indonesia became one of the centers of foreign ship routes. Archives reinforce this in Europe and China, where the archives state that there is a trading process in Indonesia that has lasted for hundreds of years. Later, during the trade process, many merchant ships sank in Indonesian territory due to storms, wars, or crew mistakes. [6] This shows that the potential for BMKT to be found in Indonesian marine waters is very high.

BMKT as a cultural heritage object, as described previously, has a relationship with the tourism sector, as stated in the legislative ratio in the basis for considering the Tourism Law, which emphasizes that ancient heritage, historical heritage, art, and culture are resources to develop tourism that is oriented towards increasing prosperity. And the welfare of the people. Then in relation to marine affairs, Article 27 paragraph (4) of the Maritime Law provides business opportunities in the appointment of BMKT, where BMKT is included as one of the marine industries, namely maritime services.

The difference in orientation on the value of BMKT from the Cultural Conservation Law, Tourism Law, Marine Law with the abolition of BMKT from the DNI has led to an antinomy and avoid in norms related to the scheme for the form of cooperation in the management of BMKT due to an inaccurate formulation of the legislation. In this case, Mathias Klatt argues that the juridical implications of not being formulated in a proper legal manner (legal indeterminacy) are caused by several things, namely [7]:

1. Vaqueness of meaning (vaqueness) / vaqueness norm
2. The ambiguity of meaning (ambiguity), namely the confusion of meaning in language. The equation is ambivalence, i.e., the floating state between two actions.
3. Inconsistency (inconsistency), which is not aligned / not appropriate
4. Fundamental concepts contradict each other / there are still concepts that are open to evaluation (evaluative openness).

Furthermore, Koch and Rusmann argue that regulations containing vagueness, inconsistency, ambiguity cause the meaning to be unclear. [8] The existence of legal problems over the BMKT investment policy in Indonesia brings the author to a critical idea discussed in this study: legal certainty. The problem of legal certainty can be achieved in one way: trying first to restore the value of the BMKT. The international convention that covers the protection of BMKT is UNESCO's Convention On The Protection of Underwater Cultural Heritage 2001 (UNESCO 2001),

UNESCO 2001 it adheres to the following basic principles [9]:

1. Obligation to preserve underwater cultural heritage
2. In-situ preservation as a preferred option
3. No commercial exploitation
4. Training and information sharing

The principle of no commercial exploitation adopted by UNESCO is a sign that BMKT is not exploited commercially for trade. M. Satria Wibowo said that there were three reasons why Indonesia had not ratified UNESCO 2001[10]:

1. Consideration of the impact of applying the principles adopted by UNESCO 2001
2. Differences in the provisions of the authority in the use of BMKT
3. Indonesia does not need to rely on conventions for cooperation

Regardless of whether or not UNESCO 2001 was ratified by Indonesia, the main focus drawn from UNESCO 2001 and the Cultural Conservation Law related to BMKT is the value contained in BMKT. Where both UNESCO and the Cultural Conservation Law have the same view of the values contained in BMKT, namely cultural, historical, or archaeological character (Article 1 Paragraph 1 UNESCO 2001) and history, science, education, religion, and/or culture (Article 1 number 1 of the Cultural Conservation Law), it is on this basis that provides the basis that BMKT should be prioritized for the benefits of culture, history, education, science.

On the other hand, in the area of BMKT investment policy, the laws and regulations in Indonesia change dynamically over the BMKT line of business itself. It is also feared that these increasingly dynamic changes could decrease investor interest in investing in the BMKT sector. This is in line with Aminuddin Ilmar's opinion, which states that a series of laws and regulations that support stability and domestic politics with a significant market share is one of the main things that increase the interest of investors, especially foreign investors. [11] This can be seen from the changes in the BMKT rules, which were previously included in the DNI, which are now turned into open business fields based on Perpresree 10/2021 while revoking Perpresulation 44/2016.

The consequences that the Government of Indonesia must accept if it intends to direct the value of BMKT not only for the sake of culture, history, education but also for taking advantage of the economic value should be formulated an integrated policy BMKT. The policy starts from the central values taken from the BMKT, the direction to the economic value by taking into account the cooperation scheme that will be carried out. With a firm policy, the public interest in the use of BMKT can remain the main focus, followed by economic value.

### **3.2 Form of Investment Cooperation for BMKT**

Discussion on BMKT at the international level is often a vital discussion, and this is because BMKT does contain not only economic value but also historical and archaeological value. [12] This issue is a debate over which one will take precedence. In this case, the Government of Indonesia's attention to BMKT investment should focus on increasing investment enthusiasm and how to provide guidelines so that the maximum use of BMKT is for the benefit of the people. As explained in the previous sub-chapter that the existence of BMKT is very closely related to the interests of the people related to culture and tourism. The community is the main target that must be prioritized in terms of management and utilization of BMKT. This is in line with Indonesia's economic, democratic system, as confirmed in Article 33 of UUD NRI 1945.

In an economic democracy system, the main foundation used to run the system is mutualism, brotherhood, and cooperative. So that in an economic, democratic system, the government is formulating a policy that will side with the protection of national interests, especially regarding foreign investment. This is in contrast to the liberalist economic system, which opens the way for investment because the liberal economic system operates based on individualism and competition. [13] The principle of economic democracy itself is enshrined in Article 33 of UUD NRI 1945.

Furthermore, the presence of the public interest (the people), which is faced with the interest of increasing investment attractiveness, is one of the main problems a country often faces. In such a case, M. Zaidun conveyed the Principles of Protection of the Balance of Interests (PPKK). The PPKK principle expects equality for the parties involved, namely the host country, the interests of foreign investors, and at the same time embracing international interests. Equality is intended to balance rights and obligations proportionally. [14]

The public interest, as the national interest as the orientation of the management and utilization of BMKT, policies related to BMKT must be prepared based on that foundation. The opening of the BMKT business field, but not yet accompanied by in-depth arrangements regarding the appointment, management, and appointment of BMKT, causes BMKT to lose protection for the values contained in it.

From the side of commercial salvors (investors), they assume that time is money. Artifacts are valuable objects that must be found and sold immediately to return their investment immediately. [15]

The vacancy in the BMKT arrangement can be resolved by taking into account economic democracy and PPKK. So that in this case, the government can formulate a policy of cooperation with foreign investors but still pay attention to national interests, for example, conducting

exploration cooperation with foreign investors. However, in terms of the distribution of BMKT, the state has priority in selecting BMKT objects. This aims to restore the value of BMKT both in terms of cultural heritage and revive tourism in the BMKT field.

The absolute control of the state over BMKT here is a form of application of the law of salvage. The law of salvage has two aspects contained in it, namely private and public. The private aspect is related to the proportional reward given for the rescue, while the public aspect is related to the rescue mechanism. [16] So, when referring to these provisions, the concept of cooperation that is most likely to be carried out is to carry out public-private partnerships (public-private partnerships) by paying attention to aspects of saving BMKT and providing proportional benefits to private organs that assist in saving BMKT. The form of cooperation between the public and the private sector regarding the management of BMKT is often not explicitly explained and only in the form of an arrangement that such actions can be taken. As in America, for example, in Section 4 a, number 2 point c Abandoned Shipwreck Act, which stipulates that "allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites. In other words, when referring to these provisions, the United States of America also provides an opportunity for cooperation between the public and private sectors in the management of BMKT. However, even though it is not explicitly regulated, standards such as maintaining historical values still exist.

Furthermore, related to the form of cooperation, the Indonesian government has launched a cooperation model for the use of BMKT through concessions. In the draft Perpresulation on the Management of Submerged Vessels, [17] the BMKT utilization model is divided into several types:

1. First in situ, namely the utilization model by accommodating BMKT as part of a tourism object—through marine tourism.
2. The second model of BMKT utilization is carried out by declaring BMKT as part of the state collection that cannot be commercialized. However, with the condition that the BMKT is only one of one type. If there is more than one number for one type, then only one is the country collection.
3. Third, through an auction, the auction can be requested by a private company that assists in the appointment of the BMKT and the implementation of the auction so that the profit from the sale is divided by 50% for the state and 50% for the company.
4. Lastly, through concessions. Concessions must be made if the auction does not produce results. The form of concession can be rental,

exhibition, or borrow-to-use, which can be done overseas or domestically, with certain conditions. From these concessions, the government gets 2% per year of the concessions per year and will increase by 3% per year.

The problem in the form of BMKT collaboration launched by the government lies in the standards that will be used to distinguish whether a BMKT is a state collection or not. When referring to the draft Perpresulation, the only standard used is the number per type of BMKT that can be commercialized. As a reference, the American shipwreck explorer organization (proSEA) provides three essential standards for distinguishing cultural artifacts and trade goods, namely [18]:

1. Number of BMKT of the same kind. Indonesia uses this requirement to distinguish BMKT, which is a collection of the state and which can be commercialized. However, the conditions determined by proSEA are at least 5% of the total amount (if there are more than one).
2. It is easy or not to document or duplicate the BMKT. In this standard, when the BMKT is easy to document and publish, it is allowed to be commercialized as long as it meets the quantity requirements.
3. Consideration between archaeological value and commercialization value. In this standard, the number does not always determine whether the BMKT can be commercialized or not. For example, there is a BMKT in the form of a thousand gold coins. Just because of this amount, it does not mean that leaving just one coin can get the maximum archaeological value. This is because the number of artifacts must be investigated in total to be useful for archeology. Therefore, if we refer to numbers only, the possibility of not finding the archaeological value of the BMKT will be unknown.

Although some of these points are not official rules but are in the form of ethics and knowledge of BMKT, at least provide a new perspective on the characteristics of BMKT as objects with archaeological value.

The form of cooperation launched by the Indonesian government through the draft Perpresulation has met the investment requirements described previously. For example, regarding the distribution of results that can accommodate the interests of the parties proportionally. It is just that, what needs to be considered from the form of cooperation, must also pay attention to the object of the cooperation.

Indeed, commercial exploitation, including the sale of artifacts, which combines archaeological and economic values, has been used—at least in America. However, the division between a collection of the state (cultural artifacts) and BMKT that can be commercialized (trade

goods) must be done correctly before commercialization occurs.

Thus, according to the author, the most appropriate model of cooperation in utilizing BMKT can be done by auction or concession as stated in the draft regulation. However, in addition, the process must be preceded by identifying a BMKT that meets the three standards described previously. Thus, economic or commercial use of BMKT will not affect the archaeological value of BMKT itself.

#### **4. CONCLUSION**

Based on the discussion, it can be concluded that the policy on the orientation of the BMKT is still in conflict, but this can be resolved by establishing an integrated legal rule. In addition, clear rules regarding the form of cooperation and grouping of BMKT are essential for the government to pay attention to.

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