

Legal Assurance of Investor Dispute Settlement with Indigenous Law Communities in Legal Pluralism Perspective

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Abstract

With the enactment of Law Number 11 of 2020 concerning Job Creation, it has become a positive turning point in the Government's efforts to increase the number and value of investment in Indonesia while at the same time responding to challenges according to current developments with the method of resolving investment disputes by prioritizing deliberation and consensus up to the court mechanism. The purpose of this legal research is to analyze the legal certainty regarding the settlement of disputes between investors and indigenous peoples and to analyze the policies taken by the Government and Regional Governments in the context of resolving disputes in the perspective of legal pluralism. The research method used in this research is the normative legal method. According to the author, this is needed in order to provide guarantees for the basis of legal certainty, namely legal certainty and strengthening as well as the presence of the State in providing policy directions, commitments and joint responsibilities of the Government, Regional Governments in supporting and carrying out the process of forming laws and regulations that are in harmony and balance so that ensure the existence of public law and order in providing legal certainty in investing for investors, the community and the Government as well as the Regional Government in the context of improving regional economic development and community welfare in a fair and equitable manner.

Keywords

law; dispute resolution; infestation; investors; and the indigenous law community



I. Introduction

Regulations regarding the existence and rights of indigenous peoples in Indonesia are contained in the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as UUD NRI 1945), which shows that the existence and rights of indigenous peoples have been accepted within the legal framework applicable in Indonesia. The development of laws surrounding customary law communities is still a central legal issue in the regulation of legislation in Indonesia. An important point in the regulation that intersects with customary law still requires alternative legal solutions to the problems of disharmony in laws and regulations, legal ambiguity and legal vacuum regarding the recognition, existence and rights of indigenous peoples in Indonesia which are still constrained by policies by the Government in the preparation of the Draft Law. -Act as an effort to protect the law for indigenous peoples in the region.

Various regulations ranging from the 1945 Constitution of the Republic of Indonesia to regulations at the regional level, still regulate abstractly related to the existence of indigenous peoples as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, among others (a) as long as they are still alive, (b) in accordance with community developments. (c) The principle of the unitary state of the Republic of

Indonesia and (d) regulated in law. These characteristics do not concretely describe the main legal issues regarding legal protection and certainty as referred to in letter d, because there is no clear and firm legal umbrella for the Law on Indigenous Peoples Law, which is still in the form of a Draft Law.

On the other hand, in the plurality of laws in Indonesia, there are three applicable laws, namely customary law, Islamic law and Western law inherited from the Dutch. These three laws from the beginning lived in the reality of Indonesian people's life. The development of national law is still in progress, so that legal plurality in Indonesia is a condition that is a consequence of the legal choices of people who have different and very plural cultures, ethnicities, customs, and religions. This condition creates a choice of legal norms to be used in addition to the national law established by the state. His philosophy is to find and obtain a legal order that is most suitable, ideal and provides essential justice for society. By placing the laws of society as a complement to state law, it presents a great opportunity for the country to respond and answer the dynamics of society quickly, to realize a progressive law and responsive.

One of the dynamics of law developed today is setting policies through Omnibus Law against the existence of laws and regulations in Indonesia in the investment sector. The legal strengthening applies to the application of local community legal habits, both those that are managed traditionally or by custom or those managed based on the prevailing laws and regulations. As it is known that Indonesia has its own customs and culture, which gives an impact on geographical indications in terms of control and management of the territory both individually and communally. This is shown in the context of the Government's and Regional Government's efforts to contribute and facilitate business licenses in the form of investment in in order to advance development in the region so as to create a positive image impact, but on the other hand in practice there are often disputes between two or more parties arising from activities that have the potential and/or impact on the environment so that it hampers and causes negative side impacts for the advancement of development. In the regions, among others first, the problem of overlapping control/ownership and the problem of overlapping the use/designation of land.

In general, land disputes that occur as a result of overlapping land uses are related to government policies in land use, namely utilization that is not in accordance with the spatial plan. On the other hand, the existence of land ownership in Indonesia is also often a problem. In land law in Indonesia, proof of land ownership is the existence of a certificate. Certificates are strong evidence for land ownership but are not absolute evidence. Uniquely, in Indonesia, apart from the existence of a certificate, the existence of customary property rights is still recognized. In practice, the existence of certificates and customary property rights often overlaps and problems occur in court. To minimize this, legal solutions are needed in order to provide added value in encouraging investment and economic development in the regions that are in line with the demands of community development.

Land disputes and conflicts are complex and multidimensional problems. Therefore, efforts to prevent, handle and resolve must take into account various aspects, both legal and non-legal. Often the handling and resolution of land disputes and conflicts is faced with dilemmas between different interests that are equally important. Finding a balance or win-win solution for conflicts that already occur clearly requires effort that is not easy. Legislation that applies to land acquisition does not accommodate the paradigm of community development that is just, prosperous, and prosperous. The discrepancies between the forms of policy regulation often lead to disputes or conflicts. (Isnaini et al, 2020)

This legal impact has consequences in decision-making by the Government and Regional Governments so that alignment and conformity with the provisions of laws and regulations are needed so that they can provide solutions and answers in addressing legal issues regarding investment dispute resolution through a legal pluralism concept approach. In the area of legal pluralism there is state law on the one hand and on the other hand is the law of the people, one of the customary laws. In simple terms, legal pluralism exists as a critique of centralism and positivism in the application of law to the people. On the other hand, the existence of investment involving land acquisition for the public interest related to customary land disputes raises the possibility that there is a method of resolving investment disputes based on customary law. Based on the description above, the authors are interested in raising the title of legal research with the title: "legal assurance of investor dispute settlement with indigenous law communities in legal pluralism perspective"

II. Review of Literature

2.1. Definition of Indigenous Law Community

The definition of Indigenous Law Communities based on Law Number 11 of 2020 concerning Job Creation which regulates the limits of the same definition regarding "Customary Law Community" is contained in Article 1 number 33 of Law Number 27 of 2007 concerning Management of Coastal Areas and Islands Small, which states that "Customary Law Community is a group of people who have lived in certain geographical areas for generations in the Unitary State of the Republic of Indonesia because of ties to ancestral origins, strong relationships with land, territory, natural resources, and have government institutions. Customary law and the customary law order in its customary territory in accordance with the provisions of the legislation."

2.2. Definition of Dispute

The term dispute resolution comes from English, namely dispute resolution. Richard L. Abel defines disputes: "a public statement regarding an inconsistent claim for something of value". The pattern of dispute resolution is a form or framework for ending disputes or disputes that occur between the parties. The pattern of dispute resolution can be divided into two types, namely through: 1) courts, and 2) alternative dispute resolution (ADR)[14]

2.3. Understanding Investors

The term investment is a popular term in the business world, while the term investment is commonly used in legislation. However, basically the two terms have the same meaning, so they are sometimes used interchangeably. Investment has a broader meaning because it can include both direct investment and indirect (investment portfolio investment). direct investment.

2.4. Definition of Legal Pluralism

According to John Griffiths suggests the concept of legal pluralism weak (weak pluralism) and a strong legal pluralism (strong pluralism). Legal pluralism is referred to as weak legal pluralism when the state recognizes the presence of elements of other legal systems outside of state law, but these non-state legal systems are subject to enforcement under state law. Meanwhile, strong legal pluralism exists when the state recognizes the existence of non-state law and the legal system has the same enforcement capacity as state law. Based on this context, customary law and state law have different binding powers, which are constitutionally the same but there are differences in their forms and aspects.

III. Research Methods

In legal research activities there are several elements used by the author, namely the problem approach is the process of solving or solving problems through predetermined stages so as to achieve research objectives. To discuss the problems contained in this research proposal, the author uses a statute approach approach. The type of legal research used is normative legal research, focusing on legal issues regarding legal certainty in resolving investor disputes with the legal community in the perspective of legal pluralism.

IV. Results and Discussion

4.1. Legal Analysis Based on Statutory Regulations on the Values of Legal Certainty in Resolving Investor Disputes with Indigenous Peoples in the Region

One of the main sources of economic growth in Indonesia is the existence of investment or investment activities. What is regulated in investment is the relationship between the investor and the recipient of capital. The relationship between investors and recipients of capital is very close where investors as owners of money/capital will invest in countries receiving capital, and countries receiving capital must be able to provide legal certainty, legal protection and a sense of security for investors in building their businesses.

Efforts that need to be maintained by the Government and Regional Governments with investors who invest in Indonesia certainly hope that their investments can be carried out properly and achieve goals in order to increase national economic growth, increase employment, to improve people's welfare with the principle of not causing disturbances, both from the government and from the surrounding community, and vice versa the Government must provide the same legal protection to the community or customary law communities in the region. However, it is possible that the business carried out will actually cause problems, especially with the community, especially the customary law community. For example, the existence of investment involving land acquisition for the public interest related to customary land disputes raises the possibility that there is a method of resolving investment disputes based on customary law.

Based on this, an explicit approach to resolving problems or disputes between investors and indigenous peoples needs to be resolved in detail by consensus or through legal channels, considering that Law Number 25 of 2007 concerning Investment only regulates between the Government and the Investors, and does not specifically contain the settlement of investor disputes with indigenous peoples. The legal space for the answers to the analysis above can be seen from the perspective of dispute resolution based on the laws and regulations below:

Law Number 11 of 2020 Concerning Job Creation

In general, Law Number 11 of 2020 concerning Job Creation, which regulates investment and dispute resolution between investors and customary law communities which focuses on legal objects in the form of "land" only contains provisions in one Article from the amendment of several articles in Article 8 paragraph (1) to paragraph (4) of Law Number 2 of 2012 concerning Land Procurement for Development in the Public Interest which states that:

- Paragraph (1) The entitled party and the party controlling the object Land acquisition for the public interest must comply with the provisions of this Law.
- Paragraph (2) In the case of a Land Procurement plan, there are Land procurement objects that are included in the forest area, village treasury land, waqf

land, ulayat land/customary land, and/or land assets of the Central government, Regional Government, State-Owned Enterprises, or Regional Owned Enterprises, the settlement of the land status must be carried out until the determination of the location.

Paragraph (3) Settlement of changes to forest area as referred to in paragraph (2) shall be carried out through the mechanism for releasing forest area in accordance with the provisions of laws and regulations in the forestry sector.

Paragraph (4) Changes in the object of Land Procurement that are included in the forest area as referred to in paragraph (2) especially for priority projects of the Central Government are carried out through the following mechanisms:

- a. The release of forest area in the case of land acquisition is carried out by the Agency; or
- b. The release of forest area or borrow-to-use forest area in land acquisition is carried out by the private sector.

The dispute resolution above is mentioned in detail because it involves the Central Government to the Regional Government in efforts to handle dispute resolution. This is then returned again in accordance with the domains, duties and functions and authorities of each field which are the affairs of the Government and Regional Government as stated in several formulations as follows:

1. for the field of environmental management and protection, Article 63 paragraph (1) letter q of Law Number 32 of 2009 concerning Environmental Protection and Management as amended by Law Number 11 of 2020 concerning Job Creation, states that "In the protection and environmental management, the Central Government has the duty and authority to coordinate and facilitate cooperation and settlement of inter-regional disputes as well as dispute resolution; Whereas in Article 2 letter k of Law Number 32 of 2009 concerning Environmental Protection and Management as amended by Law Number 11 of 2020 concerning Job Creation, it is stated that "In environmental protection and management, the Government is in accordance with norms, standards and standards. , procedures and criteria set by the Central Government have the duty and authority to coordinate and facilitate cooperation and dispute resolution between districts/cities as well as dispute resolution". Article 3 letter h of Law Number 32 of 2009 concerning Environmental Protection and Management as amended by Law Number 11 of 2020 concerning Job Creation, states that "in the protection and management of the environment, Regency/City Governments are in accordance with the norms, the standards, procedures and criteria set by the Central Government have the duty and authority to "facilitate dispute resolution".
2. For the field of Investment in Article 25 paragraph (4) of Law Number 25 of 2007 concerning Investment as amended by Law Number 11 of 2020 concerning Job Creation, it is stated that "Investment companies that will carry out business activities are required to fulfill business licenses. from the Central Government and Regional Governments in accordance with their respective authorities based on the norms, standards, procedures and criteria set by the Central Government". If this is correlated with business licensing, there are two regulatory concepts carried out by the Central Government, first related to land acquisition and business licensing for national strategic projects regulated in Government Regulations as referred to in Article 173 paragraph (5) of Law Number 39 of 2009 concerning Special Economic Zones, and secondly, the problem of the agreement of the parties with the principle that the party

who controls state land in good faith in the form of compensation in principle must be submitted directly to the party entitled to compensation to the owner of the land that was previously owned by adat or the legal community.

The affirmation of the limitations and regulations above is still in line with the provisions in Article 3 of the Basic Agrarian Law, stating that "in view of the provisions of Article 1 and Article 2, the implementation of ulayat rights and similar rights of customary law communities, as long as the reality is still must be in such a way that it is in accordance with national and state interests, which are based on national unity and must not conflict with other higher laws and regulations.

Because basically, the conception of legal pluralism requires a diversity approach in law because the diversity of the context of plurality of society in the form of ethnicity, culture, race, religion, class, and gender in the territory of Indonesia is different. As a limitation, the conception of legal pluralism asserts that society has its own legal way that is in accordance with their sense of justice and their needs in regulating their social relations, so that legal pluralism is different from the legal hierarchy approach that is characteristic of legal positivism and legal centralism. Legal pluralism views that all laws are the same and must be applied equally.

The important thing in an effort to analyze the law based on statutory regulations on the values of legal certainty in resolving investor disputes with indigenous peoples in the region is the placement of problem solving based on Pancasila as the source of all sources of state law in accordance with the Preamble to the 1945 Constitution of the Republic of Indonesia, paragraph Fourth, namely Belief in One Supreme God, just and civilized humanity, Indonesian Unity, Democracy led by wisdom in Deliberation/Representation, and social justice for all Indonesian people. Because basically the national legal system is the law that applies in Indonesia with all its elements that support each other in order to anticipate and overcome problems that arise in the life of society, nation and state based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

4.2 Policies that Need to be Taken By the Government and Local Governments in an Effort to Resolve Disputes Between Investors and Indigenous Peoples in the Concept of Legal Pluralism According to Customary Law

Indonesia is a developing country that still requires investment to achieve sustainable economic growth. The term investment comes from the Latin, namely investire (to use), while in English it is called investment, which is placing money or funds in the hope of obtaining a certain profit on the money or funds. For sustainability, a conducive investment climate is needed. According to Strun, the investment climate is all policies, institutions and the environment, both ongoing and expected to occur in the future which are expected to occur in the future that can affect the level of risk taking of an investment.[27]

In developments since the enactment of Law Number 11 of 2020 concerning Copyrights, there have been many different perceptions between the Government and indigenous peoples in providing services and access to investment facilities for business actors. In its 2020 Final Notes Report, the Alliance of Indigenous Law Communities in its closing provisions explained that:[28]

“The year 2020 finally ended without significant progress in the process of recognizing and protecting the constitutional rights of Indigenous Peoples. Not only has recognition been left trapped in a process that has long been sectoral, overlapping, and convoluted, the various policies that were born in 2020 even pose a more serious threat to the survival of Indigenous Peoples and the environment through the Minerba and CILAKA Laws. The year 2020 is also the year when

arrogant powers without shame show actions of confiscation of customary territories, criminalization and violence against Indigenous Peoples in the midst of the pandemic *Covid-19*.”

If referring to the report above is a point of view that needs to be respected, but every legal opinion needs to be guided by the law of positivism or positive law in Indonesia which is based on Pancasila, then Indonesia as a state of law provides legal certainty and protection for the parties, including in the settlement efforts. Disputes between investors and indigenous peoples. In Law Number 11 of 2020 concerning Job Creation, the Government and Regional Governments have carried out their obligations in coordinating and facilitating dispute resolution, it's just a matter of how the settlement efforts can be implemented and carried out by consensus or mediation to legal channels without harming the parties (*win-win solutions*). One of the policies adopted in addition to the use of positive law is the settlement of customary law which of course upholds the principles and values of Pancasila and the 1945 Constitution of the Republic of Indonesia, as legal pluralism values that need to be adhered to jointly by investors and indigenous peoples in the region. The balance between customary law and positive law cannot be implemented if it has not been contained in the form of a policy formulation that regulates the scope of dispute resolution. This is carried out in order to fill the legal vacuum in dispute resolution that has not been technically regulated in the laws and regulations in Indonesia because it is only limited to resolving disputes between the Government and Investors as regulated in Law Number 25 of 2007 concerning Investment as amended by Law -Law Number 11 of 2020 concerning Job Creation.

Based on data, the customary area that has received legal product recognition at the regional level reaches 5,175 hectares with the details: the customary area that has been established through Regional Regulations reaches 1.157 million hectares and there are 4,018 million hectares that have been regulated through the customary community regulation. From this data, the Government has just established customary forests with a total area of 56,903 hectares which was achieved in 5 years, with the number of decrees issued as many as 75 Customary Forest Decrees. These figures show that the average annual customary forest designation is only 11,380 hectares. A very low achievement with this low speed, it will take 591 years to determine the customary forest that has been indicated. Of the 75 customary forest units that have been established, 47 units or almost 65% are customary forests which are partly or wholly outside the forest area (APL). Although in general, customary forests located in forest areas are wider, reaching 54,986.83 hectares or reaching 96%. [30]

If the data is correlated with the National Documentation and Information Network related to the types of dispute resolution documents between Investors and Indigenous Peoples, there are no arrangements regarding the dispute resolution. So to answer these problems, in order to protect indigenous peoples from bad access and support the investment climate in the era of the Asean Economic Community (MEA) which results in higher welfare, the State must provide legal protection to indigenous peoples, namely:

- ✓ *First, the ratification* of the constitution for the Recognition and Protection of Indigenous Peoples in Indonesia, where this is evidenced by the Constitutional Court Decision Number 35/PUU-X/2012 concerning the Review of Law Number 41 of 1999 concerning Forestry which provides indications for all Regional Governments to seek protection and development of customary forests and the rights of customary forest communities to be managed by indigenous peoples wisely and responsibly in accordance with the provisions of laws and regulations; [31]
- ✓ *second*, to encourage the Government to identify the recognition of customary law

communities and maps of customary territories confirmed by Regional Regulations and registered with the National Land Agency. In addition, the State is also obliged to provide awareness to indigenous peoples to register their customary rights with the National Land Agency;

- ✓ *third*, placing indigenous peoples as the subject of development by applying free, prior and informed consent, regulating it in the constitutional nomenclature, and increasing the government's role as a mediator and facilitator between indigenous peoples and investors[32];
- ✓ *fourth*, the efforts of the Government and Regional Governments to increase investment in various fields should continue to pay attention to the recognition and respect for customary law community units and their rights including rights to customary lands; and
- ✓ *Fifth*, is law enforcement by law enforcement officers including judges in court proceedings in realizing legal certainty and legal justice as well as meeting legal needs and presenting substantive justice for the community.

Based on this, the Government has a role in fostering, regulating and supervising efforts to provide services to the community, so that the desired goals in efforts to reduce conflict or create agreements in community life can take into account the role and status [33] in an effort to establish policies which are decisions government. Because it is the government that has the authority or power to direct the community and is responsible for serving the public interest, and on the other hand that the essence of resolving disputes over customary land rights or customary land with customary law can be resolved through positive law mechanisms and customary law mechanisms.[34]

On the other hand, it is good to formulate policies that will later be determined by the Government and Regional Governments, it is necessary to involve the participation of the community accompanied by legal awareness of each party in efforts to resolve disputes between Investors and the Indigenous Law Community guided by the provisions of laws and regulations and the importance of building shared commitment is the key to the success of the community legal pluralism approach in various investment fields with an approach to legislation and a historical approach as well as a sociological approach to the community based on consensus deliberation and legal mediation in order to create justice and legal certainty in the investment sector with the principle of upholding values. the values of customs and laws that apply based on Pancasila and the 1945 Constitution of the Republic of Indonesia as a form of positive legal pluralism in Indonesia.

V. Conclusion

1. Legal certainty in dispute resolution efforts from the perspective of legal pluralism which is examined from the aspect of the analysis of legislation is a shared part and responsibility between the Government, Regional Governments in supporting and organizing the process of establishing regional legal products as the basis for legal protection and certainty as well as the implementation process and mechanism. granting business permits in accordance with the designation of national strategic programs and economic development at the center and regions and in its implementation it is hoped that it will be right on target in the process of administering the customary rights of the Customary Law Community Units over land in its territory as long as in reality it still exists and is carried out by the Customary Law Community Unit which concerned according to the provisions of local customary law by referring to the provisions of the legislation.

2. The policy direction in an effort to resolve disputes between investors and indigenous peoples in the concept of legal pluralism according to customary law can be done *first*, establishing regulations for the formation of regional legal products as an effort to resolve disputes between investors and customary law communities by prioritizing legal needs and local wisdom that applies in the community. and local indigenous peoples by referring to the applicable laws and regulations in order to fill the legal vacuum, *secondly*, making policies and decisions that take sides fairly and equitably for the parties, and law enforcement that is responsive and has real implementation in dispute resolution through deliberation and consensus. or legal channels by law enforcement officers based on justice, expediency, legal certainty based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

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