

Legal Certainty for Investors in the Frame of Special Autonomy of Papua Province

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Abstract

Special autonomy is a special authority that is recognized and given to the Papua Province as governed in the Law 21 of 2001 Concerning Special Autonomy to Papua Province to regulate and manage the interests of the local community according to their own initiative based on the aspirations and basic rights of the people of Papua. Investment, in this context, is important in improving the economy in an area. Therefore, the rule of law is needed to ensure the existence of legal certainty for investors for the sake of improving the standard of living for local communities. The problems to be discussed is how legal certainty for investors in Papua Province and what factors influence investment in Papua. The method used in this study is juridical empirical. The results of this study are the lack of legal certainty of investors in investing, especially in Papua since the enactment of the Law Number 22 of 1999 concerning Regional Government and replaced by the Law Number 32 of 2004.; and the factors influencing investment in Papua are overlapping between central and regional government policies in the investment and policy sectors. It is also lack of conducive labor market, unstable security, and lack of intensive investment in taxation.

Keywords: Legal Certainty, Investors, Special Autonomy of Papua

INTRODUCTION

Indonesia is a very large archipelago country. It has many provinces spread throughout Indonesia. The (center) Government is trying to make all regions in Indonesia feel development and equity in both the economic and social fields. The basic problem related to the Government purposes is the system of government that is a centralized system, which results in all policies starting from the Government. The consequence of the system is the development carried out is not evenly distributed by all groups of society. As it is known, National development has several objectives. One of the objectives is to improve the standard of living of the people in order to become a complete human being based on Pancasila and the Constitution of the Republic of Indonesia 1945. As the ideals of the Indonesian people in a state that is to realize a just and prosperous society. Therefore, the implementation of development becomes very important thing for Indonesia.

In order to realize the development mission to improve community welfare, the Papua Provincial in the domain of Special Autonomy is well aware that investment has a very important role. Investment activities both domestic investment and even more so foreign investment will determine the pace of economic growth in a region which in turn will affect the regional economic performance with the creation of new jobs. it will also enhance regional economic performance and enhance people's purchasing power, as well as suppress Poverty rate. In this context, the legal system and legal regulations can provide protection, will create certainty (predictability), fairness, and efficiency for the investment party.¹

There are various kinds of substance in the legislation and the substance of the contract of work made by the government with mining companies operating in Indonesia.² The most important things that the Regional Government needs to consider is legal and business certainty for both investors, foreign investors and domestic investors. The Law is a very important factor in relation to legal protection provided by a country for investment activities.

The granting of special autonomy for the Papua Province is stipulated in the Law No. 21 of 2001 (hereinafter referred to the Special Autonomy Law).³ This Law has a major impact on investment opportunities in the Papua

¹ Abdul Thalib, , 2005, *Investment Law and Capital Market (Hukum Investasi dan Pasar Modal)*, Pascasarjana Ilmu Hukum UIR, p. 34.

² H. Salim, 2007, *Mining Law in Indonesia (Hukum Pertambangan di Indonesia)*, PT Raja Grafindo Persada, Jakarta, pp.. 401-404

³ The special Autonomy of Papua Province is given by the Government through the Law No. 21 of 2001 (State Gazette 2001 No. 135 and the added State Gazette No. 4151). The Law has been amended to the Government in Lieu No. 1 of 2008 State Gazette 2008 No. 57 and the added State Gazette No. 4843). The Law No. 21 of 2001 has 79 articles that governs the authority of the Papua Province to deal with the special autonomy. The Papua Province remains to use the Law No. 23 of 2014 Concerning the Regional Government that generally enacted to all regions in Indonesia.

Province. Regarding investment in the Papua Province, the regional government is obliged to recognize, respect, protect, empower, and pay attention to the rights of indigenous peoples as a whole, without neglecting or waiving the interests of investors, especially related to the legality of the law.

Some Efforts to spur economic growth in development policies should be carried out by the Regional Government to reform the legal field. The reform is needed because some facts show that almost all investment activities in the Province of Papua are faced with legal uncertainty. The Regional Government regulations in somehow hinder the entry of capital flows such as land acquisition permits for land. The effect of problems of land acquisition permits for land Tin the context overlapping regulations, some investors are afraid to invest in agriculture or natural resources.

Therefore, the focus of this research is how legal certainty for investors in Papua Province and what factors influence investment in Papua. Those elaboration questions will improve the investment climate in Papua Province.

METHOD

The type in this study is empirical legal research which looks at the rules of law in the field of investment in Papua Province after the existence of special autonomy in Papua. The Site of this study is in Papua Province, which is the population of it is the Papua Integrated Licensing and Investment Agency. The data obtained will be analyzed qualitatively by using normative juridical analysis that is by paying attention to the legal certainty and the factors that affect investment in Papua Province. The empirical data obtained then will be analyzed systematically to obtain a comprehensive description of legal certainty in investment in the special autonomy of Papua.

C. RESEARCH RESULTS

1. Legal Certainty for Investors in Investing in the Frame of Special Autonomy

The term legal certainty has actually been known since the beginning of the development of legal theory and philosophy, especially when a legal ideal (*idée des recht*) developed by Radbruck.¹ The legal ideal consists of 3 (three) aspects, namely, (1). legal certainty (*rechtssicherheit*), (2). Benefit (*zweckmasigkeit*), and (3). Justice (*rechtssicherheit*). According to Martokusumo,² furthermore, legal certainty is the guarantee that the law is implemented. It means that the law is able to obtain their rights and the decisions can be carried out.

Legal certainty is a protection for justice seekers against arbitrary actions. Someone can obtain something that is expected under certain circumstances. The law is responsible for creating legal certainty because its aims to create order in society. In order to create legal order in society, legal certainty must reflect justice and bring benefits to society. According to Otto, the legal certainty is understood as the actual legal certainty when fulfilling 5 (five) conditions, namely:³

1. There are clear, consistent and accessible legal rules for all people issued by or on behalf of the State;
2. The Government institutions apply these rules consistently and obey to these rules;
3. The rules are in accordance with most of the community in principles;
4. The existence of an independent and impersonal judiciary applies these rules consistently in the resolution of disputes;
5. The court's decision can actually be implemented; and
6. Legal certainty actually requires harmony between the State and the people in orientation and understanding of the legal system.

The six conditions as mentioned above show that the legal certainty can only be achieved if the legal substance is in accordance with the needs of the community. Thus, the rule of law that is able to create legal certainty, is born and reflected from the culture of society. Therefore, it fulfills a sense of justice and of course brings benefits to the community.

The legal certainty is an important element in creating an investment climate in an area. It is because it is not related to the investment law alone but how the law works avoids obscurity or uncertainty between which laws

¹ Sudikna Martokusumo, 1996, *Finding of Law; an Introduction (Penemuan Hukum Sebuah Pengantar)*, Liberty. Yogyakarta . p.87.

² Ibid.

³ Kurnia, 2010, *Agrarian Law in Communal Society (Hukum Agraria Dalam Masyarakat Majemuk)*, HUMA, Jakarta, p. 74.

apply when dealing with the existence of law in a society in Papua. As it is known, the land legal system in Papua is still very thick and sometimes makes investors in making investments in Papua lack legal certainty. The reason of the lack of legal certainty not only lies in the certificate of land rights as proof of ownership, but also in the evidence in court regarding the essence of the evidence whether it is legal or not legal acts carried out. In terms of customary land rights (*Hak Ulayat*) in Papua, validity or not is determined by the process of releasing of the customary land.

Some large companies engaged in electronics such as Samsung and Panasonic several years ago closed its company in Indonesia. This is because most foreign investors argue that in Indonesia there is no legal certainty. According to Lee Kang Hyung, General Marketing of Samsung Electronics Indonesia, government control in the field of law is very weak so there is no legal certainty.¹ Furthermore, internal problems occurring in the investment system in Indonesia are a separate issue for the growth of a healthy investment climate. This is because of some legal problems, the difficulty of the company to get the appropriate land or project location, marketing difficulties, and financing difficulties.

Investment is a source of regional development funds. However, many cases of overlapping legal rules in the region become the reason many investors do not dare to invest in agriculture or natural resources. Corruption is also considered to be an obstacle of the investment. It can be said that the success of the investment system in the region is also very dependent on the support of the regional government. In contradiction that there are many regional governments complicate the investment system. It creates an inadequate demand for investors which causes a high cost.

Another problem concerning the investment system is stated by economic observer of Gajah Mada University Revisond Baswi. He states that actually investors have been spoiled and facilitated by the rules of the investment system, but the contribution of investors to community welfare development is still lacking, with many people poor around investment projects or centers of business activities. Therefore, Revisond wants all parties to see and hold on to the 1945 Constitution of the Republic of Indonesia in addressing issues related to investment and also improving people's welfare.

The implementation of regional autonomy since the enactment of the Law No. 22 of 1999 concerning Regional Government and replaced by the Law No. 32 of 2004 has been implemented. The substance of the Law on Regional Government is to give authority to regional governments to implement regional autonomy. This causes each region to have the authority to issue Investment Regulations. It is therefore causing overlapping of regulations between regional and central authorities, as well as the diversity of Regional Regulations issued by each region. This has resulted in the emergence of legal uncertainty.

To accelerate the implementation of regional development in Papua province, the Law No. 21 of 2001 concerning Special Autonomy for the Province of Papua applies. This Law appears in line with the ideals and goals of the Republic of Indonesia which is to build a justice and prosperity for Indonesian society based on Pancasila and the 1945 Constitution of the Republic of Indonesia. The purpose of the Law No. 21 of 2001 is to regulate and manage the interests of the community based on the aspirations, needs and basic rights of the people of Papua.

The granting of special autonomy for the Papua Province is stipulated in the Law No. 21 of 2001. This Law has a major impact on investment opportunities in the Papua Province. Regarding investment in Papua Province, the regional government is obliged to recognize, respect, protect, empower, and pay attention to the rights of indigenous peoples as a whole, of course, without neglecting the interests of investors. To improve the welfare of the Papuan people, the regional government is making development plans and one of which is making an investment development program directed at the short and long term that has been initiated and launched in 2003.

Strategic implementation on increasing investment both domestic and foreign in Papua Province is divided into 3 (three) periods - from 2011-2015, from 2016-2020 and from 2021-2025. The form of activities in support of the program is a one-stop licensing service, the increase in revolving fund assistance in community business groups and some regional regulations issued so that the investment climate develops well in order to realize the

¹ Anonim, *South Korea Investors Adjust the Cooperation between the Governemnt and the Regional Government is Weak (Investasi Korsel Menilai Kerja Sama Pemerintah Pusat Daerah Lemah)*, Kompas , 3 May 2007.

programs as mentioned above. Therefore, to realize the programs, the policy and intensive innovations of the regional government are improved through the establishment of an Integrated Licensing or Investment Agency of Papua Province, which is expected by the establishment of this body, investment activities are easier in handling permits, based on the Government Regulation No. 38 of 2007 concerning the Distribution of Functions of the Central and Provincial Governments. The Regency / municipality Governments is the authority of the Regional government, but in its implementation, there are still regional authorities that are still handled by the Central Government, even though the region has been able to handle it. This happens because not all sectoral regulations are covered by the Papua Special Autonomy Law.

To improve investment licensing services, the Papua Province government has determined the steps in the process and procedures for granting investment licenses with the system - called Establishment of One Stop Service in order to facilitate licensing for investors who are interested in investing in Papua. Implementation of investment licenses in Papua Province after the implementation of the One Stop Service (PTSP) in the field of investment is based on the Presidential Regulation Number 27 of 2009 concerning One Stop Services in the field of investment and the Minister of Internal Affairs Number 20 of 2008 concerning Organization Guidelines and Unit Work Procedures PTSP in the regions. In terms of Papua Province, the organization of PTSP is based on the Governor of Papua Decree Number 1 of 2010 concerning the Implementation of One-Stop Integrated Services.

With the formation of PTSP, it has helped many investors / potential investors simply come to the Papua Province Integrated Licensing and Investment Agency with the increase of investment from 2010-2017. The investment business in Papua Province is currently dominated by mining products. that is 52.46%.¹

Even so, legal certainty for investors provides security, certainty, and predictability of their investment, the better the legal conditions are increasingly considered conducive to the investment climate of the country. Overlapping central and regional policies in the field of investment and policies between sectors is due to the lack of stability in the implementation of decentralization programs resulting in confusion of authority between the central government and regional governments in investment policies. One example of overlapping policies between sectors is the prohibition of open mining activities in protected forest areas. In addition to the government being able to face a lawsuit from investors who have obtained mining licenses which are more concerning is the lack of deep understanding between long-term interests and short-term interests that are actually closely related to each other.

The investment climate will grow when there is synergy between the government, business actors and the community in designing an integrated, comprehensive and sustainable investment strategy in all regions of Indonesia, especially in Papua Province, which is a very potential region of in eastern Indonesia. The rule of law and the certainty of an investment business focusing on accelerating development through the development of economic growth centers can open the isolation of an area. It is often not integrated with the interests of the people who have a way of life, values, norms and socio-economic needs in the management of different natural resources with business actors. So that at the level of implementation raises gaps between the goals set by the government, the interests of investors and the needs of the community.

Papuan indigenous people basically still uphold customs, especially in the management of natural resources and the variety of primordial ties involving indigenous peoples in relation to customary rights. This is other issues that must be faced by investors to enter the Papua Province. The existence of legal recognition of communal land by the State is a strong basis for indigenous peoples to control, regulate and utilize *ulayat* lands,² but in its implementation of course requires a legal certainty. It is usually that the management of adat is handed over to indigenous groups. This certainly complicates investors in invest because the customs between one tribe and another tribe in Papua Province are different. Therefore, the regulation of *ulayat* is also diversity to follow the rules made by the tribe to control the *ulayat* land.

This is a separate problem for investors who invest in Papua Province. As an illustration of the Dani, Moni, and Lani tribes, these three indigenous Papuan tribes have similarities in perspective and legal basis regarding the existence of communal land and the absolute right to retain their customary land, but there also the difference in

¹ Badan Koordinasi Penanaman Modal Provinsi Papua, 2013 *Book on Development of Foreign and Domestic Investor operated in Papua Province until in the End of 2013 (Buku Perkembangan Penanaman Modal Perusahaan PMA/PMDN yang beroperasi di Provinsi Papua sampai dengan Akhir Tahun 2013)*, BKPM Papua, p.1.

² See Article 3 the Law No. 5 of 1960 Concerning Basic Agrarian Rules.

the system of release of communal land of each tribe as mentioned above.¹ The legal nature of it includes aspects of legal protection for investors when carrying out investment activities. It is expected that the existence of legal certainty in the field of investment in the frame of Papua Province special autonomy will increase legal uncertainty. It makes investment constraints in Papua because of:

- a. There are still overlapping regulations in the investment sector;
- b. The unfinished preparation of the Papua Province Spatial Plan (RTR) so that new applications that use large-scale areas / lands have not been processed;
- c. Regulatory arrangements are still in transition and the implementing rules are still in process;
- d. There are still claims made by customary / ulayat landowners;
- e. Difficulty in obtaining permits for forest area release for investment activities because it still has to be processed in the Ministry of Forestry in Jakarta even though Papua Province is a special autonomous region; and
- f. The low awareness of investors in reporting the realization of activities to the regions.

2. Investment and Strategies Factors to Improve the Investment Climate in Papua Province

Investment activities are always related to risk factors that can lead to loss of capital value. Therefore, before investing activities are needed, it is important to consider certain factors that can affect investment activities in order to produce optimal benefits and minimize losses experienced. In general, there are several domestic factors that hinder the investment climate in Papua Province, as followings:

- a. Overlapping central and regional policies in the field of investment and policies. This takes place due to the lack of stability in the implementation of decentralization programs resulting in confusion of authority between the central government and regional governments in investment policies. One example of overlapping policies between sectors is the prohibition of open mining activities in protected forest areas. Aside from that the government is being able to face a lawsuit from investors who have obtained mining licenses, the most concerning is the lack of deep understanding between long-term interests and short-term interests that are closely related to each other.
- b. The legal certainty is very low. It is reflected in the many overlapping policies between the center and the regional governments and amongst sectors. The lack of stability in the implementation of the decentralization program has resulted in the unclear regional authority in investment policies. The diversity of investment policies between districts has caused a decrease in investment interests. Some regulations at the central level have high legal ambiguity that raises doubts in the area for its implementation and instead creates major obstacles to investment development.²
- c. Inadequate Labor Market. It means that it decreases employment per year to indicate the level of economic growth. In brief, there are two labor issues that affect investment interest - namely the tendency to increase the minimum wage and the large non -UMP costs and the uncertainty of industrial relations between the company and the workforce. These two problems result in not only high costs associated with labor, but also difficult to estimate.
- d. Security is less stable. Although national security stability has relatively improved since 2001, investment activities in Indonesia are still very sensitive to security disturbances in the regions. So that capital investors tend to avoid areas prone to conflicts such as Aceh, Maluku and Papua. Increasing security disturbances, although local, can affect investor perceptions of the national investment climate which in turn will cause investors to worry about investing in Indonesia or delay the realization of their investment plans this also affects domestic investment by investing in conflict-prone areas so security is less stable.
- e. Lack of investment incentives, including tax incentives compared to other countries in attracting investment in Indonesia. Taxation in Indonesia is relatively lagging behind, and also associated with slow service due to convoluted bureaucracy creating high costs and contrary to business philosophy that requires speed and accuracy.
- f. The issue of ownership of Ulayat land. Until now, it has not been fully overcome by the regional government. The effect of this Ulayat land, the provision of land to investors still requires a long process of agreement.
- g. The existence of a forest clearance moratorium policy, which relates to the permit to release the area which is still under the authority of the Ministry of Forestry, which requires a long time.
- h. Low support for facilities and infrastructure of investment activities.

¹ If there is one party to use Ulayat land for the sake of investment, the land must be dealt with the Adat laws. In terms of it, it is needed further discussion to create the essence of legal certainty.

² Ngurah Suryawan, 2011. *Land of Papua in Border Line (Tanah Papua di Garis Batas)*, Setera Press, Malang, p. 92.

- i. The low quality of micro, small and medium scale investors.
- j. The high level of economic costs that must be borne by the authorities.

According to the Coordination Regional Investment Agency (BKPM), there are two obstacles faced in moving investment in Indonesia - namely internal and external problems. internal constraints include

- a. Difficulties of the company to get suitable land or project location;
- b. Difficulties in obtaining raw materials in production;
- c. Difficulties in terms of funding or project financing;
- d. Product marketing difficulties; and
- e. Disputes between shareholders in the company¹

While internal constraints include:

- a. Factors in the business environment are national, regional or globally that do not support and less attractive incentives or investment facilities provided by the government;
- b. Legal regulation problem;
- c. Security including in this case political stability which is an important indicator for investors to ensure the capital included;
- d. There are inconsistent regulations between higher regulations and the lowest regulation such as regional regulations with ministerial decrees, or other regulations that distort regulations regarding investment;
- e. The existence of the Law Number 41 of 1999 Concerning Forestry, which caused uncertainty in the use of forest areas for the mining industry.

Based on some of the weaknesses as stipulated above, the strategies effort to improve a conducive investment climate in Papua province are:

- a. To revise the Papua Governor's Regulation Number 1 of 2010 dated June 18, 2010 concerning the Organization of One-Stop Integrated Services (PTSP) in the Investment Sector in Papua Province, especially concerning the types of permits underwritten by PTSP.
- b. To establish investment institution – called SKPD - in all districts/municipalities of Papua Province.
- c. The regional governments are proactive in helping to find solutions to problems faced by investors.
- d. The existence of Regional Regulations on capital investment, investment incentives and regulation on the use of customary rights in the context of protecting the community.
- e. Protection of investment activities in Papua with clear rules or legal certainty in the field of investment.
- f. Creation of good relations between local governments and investors.
- g. Availability of facilities and infrastructure to support investors' business activities by opening access to regions that have economic opportunities such as roads, bridges, weathering and airports.
- h. Maintaining security in this area aims to ensure security for investors

D. CONCLUSION

1. Legal Certainty for Investors in the frame of special autonomy is not optimal enough. It is because the central government's intervention in the direction of investment policy in Papua Province. This causes overlapping regulations between center and regional government. For example, there is a case of banning mining activities to be opened in protected forest areas..
2. The barriers investment in Papua Province are the lack of legal certainty due to overlapping central and regional policies in the investment sector; lack of conducive labor market; unstable security; lack of investment incentives; and the ownership of customary land do not overcome by the regional government. So that the provision of land to investors still requires a long process of agreement, the existence of a moratorium on forest clearing, the low support of facilities and infrastructure to support investment activities, the low quality of micro, small and medium scale investors Including cooperation.

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¹ Rahayu Hartini, 'Legal Analysis of the Law No. 25 of 2007 Concerning Investment (Analisis Yuridis UU NO. 25 Tahun 2007 tentang Penanaman Modal)', **Jurnal HUMANITY**, Vol I, Nomor 1. September 2009, p.50.

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