

Legal Certainty in Foreign Investment Activities of Tourism in North Sumatra Within the Framework of ASEAN Economic Communities

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ABSTRACT

Foreign Investment plays an essential role in both developed and developing countries. The flow of Foreign Investment to developing countries has experienced significant developments in the last 15 years, including Indonesia. Indonesia establishes details of business fields that are open to foreign capital in the order of priority and determines the conditions that must be fulfilled by Foreign Investors in every business. Therefore, the main problems to be examined in this study are: how is the procedure for establishing a Foreign Investment Company within the framework of the ASEAN Economic Community (AEC)?, why is there a need for legal certainty in the foreign investment activities of the tourism sector within the framework of the ASEAN Economic Community?, then what is the process of resolving the Foreign Investment disputes in the tourism sector in North Sumatra in facing the ASEAN Economic Community? The research method used in this dissertation research is normative legal research (normative juridical) with the consideration that the focus of research is to study primary, secondary, and tertiary legal materials related to legal certainty issues for investors who invest their capitals in Indonesia. The normative legal characteristics in this study are also seen from the research objectives which are basically to generate concepts, principles, doctrines that underlie the laws and regulations governing legal certainty for investors who invest their capital in Indonesia. The characteristics will be then developed to obtain clues, inputs, or suggestions on things that must be done to overcome problems of unavailability of investors to invest in Indonesia. The normative research output is expected to contribute to the improvement of existing laws and regulations, especially those relate to the provisions of the ASEAN Economic Community. The results of the dissertation study prove that: firstly, the provisions on Foreign Investment in the tourism sector within the framework of the ASEAN Economic Community have not referred to regional provisions in the framework of the AEC. Secondly, the Foreign Investment Activities of the tourism sector in the face of the ASEAN Economic Community has not shown any legal certainty. It is because the provisions governing foreign investment in the tourism sector in Indonesia are constantly changing, as in the case with law enforcement efforts in the judge's decision to ignore the arbitration decision for reasons of public order. Thirdly, the foreign investment dispute resolution process in the tourism sector in North Sumatra within the framework of the ASEAN Economic Community refers to the choice of law for the parties. On all occasions, the parties choose the dispute resolution process by selecting arbitration after the deliberations have not been achieved. Based on these conclusions, the recommendations are made aligned with the Law Number 25 Year 2007 concerning Investment that needs to be regulated in its article regarding the provisions of Foreign Investment within the framework of the ASEAN Economic Community. There are a needs for the government of North Sumatra Province to improve relevant regulations to attract foreign investment in tourism especially in supporting infrastructure, and also a need to synchronize the provisions of Law Number 25 Year 2007 concerning Investment with the provisions of the North Sumatra province in the form of Regional Regulations. Consequently, the local government should create legal certainty for foreign investors in investing their capital in Indonesia, especially in North Sumatra.

Keywords: *Foreign Investment, legal certainty, dispute resolution*

1. INTRODUCTION

Foreign investment plays an essential role in both developed and developing countries. The flow of foreign investment in developing countries has experienced significant developments in the last 15 years [1], including Indonesia. Indonesia is a developing country, therefore to build capital or a significant investment is certainly needed. Investment activities in Indonesia have been started since 1967, following the issuance of Law Number 1 Year 1967 concerning Foreign Investment and Law Number 6 Year 1968 concerning Domestic Investment [2]. Foreign investment can provide considerable benefits to the growth of national economy, for example providing more job opportunities for the host population and at the same time it may increase income generation and living standards of the people. Similarly, investment activities can create opportunities for local companies to cooperate with, so that they can share benefits, increase exports, and as a consequent, it can increase the country's foreign exchange reserves, and enables technology transfer[3].

The Foreign investment in Indonesia currently faces very complex problems, including labor issues, legal uncertainty, security, and implementation of regional autonomy. One of the most challenging problem is that the investors complained about the problem of law enforcement. Investors urgently need certainty in the legal system that is implemented through a compliance with contracts or collaborations that have been made as well as certainty about investment dispute settlement mechanism. The role of law in encouraging foreign investors is needed to create legal certainty[4]. Foreign investment benefits all parties, not only for investors but also for the economy of the country, where the capital is invested and for the country of origin of the investors. The government establishes business fields that require investment with various regulations that apply. Also, the government needs to determine the amount of capital and the ratio between the national and the foreign capital. It is purposely done so that the investment can be directed, monitored, and therefore the goals can be achieved. Frequently, a country cannot determine its economic politics freely, because of the influence and interference of foreign governments[5].

The tourism industry gives positive impacts on economic and socio-cultural for the host community. It increases people's income and the quality of life of the community. The tourism industry sector in North Sumatra that has been recently discussed with foreign investors is Lake Toba. Lake Toba is the most popular tourist destination in North Sumatra. In the tourism sector, today the government is working on promoting/directing the development in the tourism sector, in order to attract foreign tourists to visit Indonesia, North Sumatra in particular. This agenda was supported by the issuance of Republic of Indonesia's Presidential Regulation Number 81 Year 2014 on the Spatial Planning of the Lake Toba Area and its surroundings. Article 7 states that "the Lake Toba and its surrounding area, from now on referred to as the Lake Toba area. From environmental functions, this

area is considered as a national strategic area, that includes the watershed and its natural resources, as well as the activity center and infrastructure network. Watershed and ground water basin associated with the waters of Lake Toba that supports the development of Lake Toba waters." Article 3 which states that "the Lake Toba Spatial Plan plays an important role as an operational tool for the National Spatial Plan, and as a tool to be used for coordinating the implementation of development of the Lake Toba Region, as a strategy to improve the quality, social culture, and welfare of the community in the surroundings."

The strategy is carried out by the Government of North Sumatra in order to increase the attractiveness for investors to invest in North Sumatra, to spur economic growth in the city of North Sumatra. Realizing the importance of Foreign Investment in economic growth, the government attempts to create a friendly investment climate in challenging regions, as a way to improve the situation where many investors found many problems and obstacles in the region so that they feel discouraged to make any investment in the region. Some of the problems faced such as poor infrastructure, lack of human resources, legal certainty, and economic instability. The North Sumatra Provincial Government should take these issues more seriously into consideration so that should be taken into account seriously so that this can continue to intensify regional promotion and community involvement in order to create a conducive, fast and transparent investment climate. The basic principles of investment law should promote economic values, aligned with internationally accepted values. . These principles apply to all foreign investors [6]. Also, they are considered crucial as it can support the existence of international free markets such as the ASEAN Economic Community. Another positive result of investment is that creating an opportunity to contribute to social welfare of local community.. The ASEAN Economic Community was established to achieve the goal of ASEAN regional economic integration [7].

For Indonesia, the investment agreements at the ASEAN level, , the synergy of the provisions of ASEAN requires provisions on investment in Indonesia in order to provide legal certainty for foreign investors. In order to create a single production-based market among ASEAN Regional Member States, the member of ASEAN leaders agreed on the legal framework as a basis to develop four essential pillars of ASEAN Economic integration.. These four pillars including free flow of goods, free flow of services, free flow of investment, and free flow of capital. Each of four pillars has a legal umbrella that has been agreed on; the ASEAN Trade in Goods Government (ATIGA) regulates the free flow of goods, the ASEAN Framework Agreement on Services (AFAS) regulates the free flow of services, the ASEAN Comprehensive Investment Agreement (ACIA) regulates free investment flows, and Chiang Mai Initiative Multilateralisation (CMIM) regulates more on free capital flows. Through the ACIA, the ASEAN investors and ASEAN-based foreign investors gain more benefits from an improvement of

investment liberalization. A question arises is to what extent the roles of free investment flow in increasing intra-ASEAN investment towards 2015 AEC, and how can the ASEAN Member States, especially Indonesia can prepare themselves and take all appropriate steps to invite foreign direct investment to Indonesia, without affecting negatively towards the Indonesian society.

2. Provisions On The Establishment Of Foreign Investment Companies In The Tourism Sector Within The ASEAN Economic Community Framework

2.1. ASEAN Enters The Era Of The ASEAN Economic Community

In the establishment process of the 2015 ASEAN Community the Blue Print of the three pillars was created and considered as a guideline.. The ASEAN Economic Community Blueprint was adopted at the ASEAN 13th Summit in 2007 in Singapore, in which each ASEAN Member Country shall abide by and implement the AEC by 2015. Furthermore, the ASEAN Political-Security Community Blueprint and the ASEAN Socio-Cultural Community Blueprint were ratified at the 14th ASEAN Summit in 2009 at Cha Am Hua Hin, Thailand. Also, at the Summit the Heads of State / ASEAN Governments signed the Cha Am Hua Hin Declaration concerning the Road Map for the Establishment of the ASEAN Community 2009-2011.

ASEAN's next decisive step in strengthening ASEAN cooperation was the preparation of making a charter as a document for the ASEAN legal framework and institutions (legal and institutional framework for ASEAN). The proposal was to prepare the ASEAN Charter to be presented at the ASEAN Summit in Kuala Lumpur in 2005. The preparation of the ASEAN Charter began in 2006 through the establishment of an Eminent Persons Group (EPG), and was continued by the High-Level Task Force to negotiate the contents of the draft of the ASEAN Charter. The ASEAN Charter was officially signed by the Heads of State / Government of ASEAN at the 13th ASEAN Summit in Singapore, on November 20, 2007.

Furthermore, after the instruments of ratification of each country were submitted to the Secretary-General of ASEAN, the ASEAN Charter was officially enacted on 15th of December 2008. With this charter, the ASEAN transformed from loose associations into a rule-based organization that has legal personality. The inauguration of the ASEAN Charter was implemented by President of Republic Indonesia, Susilo Bambang Yudhoyono, at the ASEAN Secretariat. The implementation of the ASEAN Charter was confirmed at the 14th KIT of ASEAN in Hua Hin, Thailand, on February 28 – March 1, 2009.

2.2. Benefits Of Investment In The Tourism Sector In Indonesia

Investment activities that will absorb funds derived from the community or companies and then are channelled into more productive activities, such as creating production, industrial, distribution, and other trade services, that will produce goods and services, and will ultimately increase the production of goods to be sold at home country and abroad. With the increase in production and sales, it will also increase the market demand for the products. This situation will have an impact on the community around; a more opportunities for employees in order to be able to meet an actual increase of customer demand.. In a wider scope, the increase of production and sales will also have an impact on boosting state revenues in the form of taxes and other levies[8].

In addition to that, the improvement of infrastructure where the investment activities take place is another benefit for the local community. For example, the road condition around Factory X is severely damaged, thus inhibiting the productivity of the factory, so that the factory management decides to repair or rebuild the road. Having new roads does not only benefit the factory but also the surrounding community. There are a wide range of benefits from having the foreign investors in a country. The investment activities can contribute to the growth of domestic economic, increase of production due to injections investment funds, create more job opportunities and at the same time reduce unemployment and poverty rates within the society, increase people's purchasing power, increase state revenues, technology and knowledge transfer, and improve infrastructure assets in the location of investment[9].

3. Foreign Investment In North Sumatra And Its Relation To The ASEAN Economic Community

3.1. Challenges Of Foreign Investor towards Indonesia's Readiness In The Investment Liberalization Of The ASEAN Economic Community

Based on Law Number 25 Year 2007 concerning Investment, the investment legal system generally consists of legal fields related to licensing, capital, business forms, status of the perpetrator (investor), location, environment, object, and so on [10]. Supporting factors that hinder the climate of investment must be overcome by improving coordination between central and regional government agencies, creating efficient bureaucracy, legal certainty in the field of investment, and a comfortable business climate associated with labor and security. . With the improvement of various supporting factors, it is believe that investment realization is more effective and can go beyond expected. Equally important to consider is the

commitment and guarantee of legal certainty from the Government, especially from the Investment Coordinating Board (BKPM) for the continuity of business and operational activities by foreign investors, in the tourism sector for instance.

3.2.No legal certainty for Foreign Investment in Tourism Sector in North Sumatra

The implication of the ASEAN Economic Community on the tourism sector is that competition does not only involve domestic elements, but also foreign services. In 2013, HSBC Bank released a survey that states Indonesia ranks 6th as a favorite country for expatriates to look for work: Switzerland was in the first position, then followed by China, and then Qatar. As the largest population in the ASEAN countries with approximately 242 million people or 42.64 percent of the total population of 11 ASEAN countries, followed by the Philippine with 15.23 percent, and Vietnam with 14.52 percent, Indonesia is optimistic to be able to deal with regional competition. Therefore, it is necessary to continuously prepare domestic human resources that are skillful and trained in order to meet the needs of domestic, ASEAN, and global challenges.

Additionally, legal certainty should be provided for foreign investors in order to successful and sustainable investment and business in Indonesia.. Also, the escort towards the foreign investors should be done by the Capital Investment Coordinating Board not only at the beginning of the company establishment but also during the company operation. This is to likely the Capital Investment Coordination Board to encounter with any complains that foreign investors may experience during operational activities in Indonesia.

4. Dispute resolution process in foreign investment activities in tourism in North Sumatra related to the ASEAN Economic Community

4.1.Development of Provisions for Settlement of Disputes

In 1976, the Chief Justice of the United States Supreme Court Warren Burger pioneered this idea at a conference in Saint Paul, Minnesota, United States [11]. This idea was based on the various factors occurred during the reform movement of the early 1970s, in which many observers in the field of Law, and other people within academic community began to concern about the the increase of adverse effects of litigation before a court.

Some experts define ADR differently. For example, Stanford M Altschul argues that ADR is as a trial of a case before a private legal agreement that avoid publicity, and lengthy pre-trial delays [12]. ADR allows for an informal, voluntary dispute resolution to be carried out with direct cooperation between the two parties on the dispute and the

achievement of the needs and interests of both parties through as a win-win solution. As a result, many of these business people intended civil disputes that arose between them to be resolved with a win-win solution. It was a reason why ADR has arisen in order to address the needs of these business people. However, in its development, ADR was not only used by business people, but also has been used by people in general, to respond to disputes that occur within the community, such as horizontal conflicts among social community groups.

A problem arises, why parties prefer the ADR method in resolving disputes among them, to other methods. A group of managers in the United States assume that instead of resolving disputes effectively in accordance with the contracts made by their respective lawyers, they tend to renegotiate the solution in order to settle new agreements. This study provides an explanation that in a country that is legally minded like the United States shows that dispute resolution through a non-litigation mechanism is preferred rather than using formal law.

4.2.Settlement and Procedure for Settlement of Investment Disputes

It is not known how long it will take to settle a case at an Indonesian Court. For example, a the case that deals with a housing dispute; a house that was occupied by another party without rights. The examination of the case was undertaken in the Jakarta District Court, starting from 1972 to 2002, and had not yet received a final verdict after 30 years later. It was decided that to execute it was difficult to do as it was highly costly and very time consuming. It can be potentially resolved and not becoming burden on the judges in Indonesia. That previous description of the judicial process that took place in the USA as a developed country in the field of law and others is a good example of dispute resolution. These facts are as a strong reason why many countries today tend to choose Alternative Disputes Resolution.

The law began to develop, and there was a division of tasks where the law can be applied more appropriately. It appears that the law not only to protect the weak people against the strong ones but also to give alternative solution for unfortunate group to obtain compensation if necessary, and is needed by legal provisions. All efforts are usually carried out through the court by the state legal system. Whenever someone is involved in a dispute, they rarely pay attention on the possibilities that might happen or never think about the causes until it is too late. In a dispute, before someone is doing an action, the person needs to identify the main problem. First, he or she needs to determine which party or who will take a responsibility on the entire process Then she or he needs to examine whether there is an agreement or contract between parties, and is there rules that regulate the conflict. It is also necessary to consider, which specific regulations can be applied to resolve the dispute, even though the agreement does not stipulate which laws and regulations are related to

the dispute. Then finally the person have to consider and determine what actions and forms of attitude that should be prepared.

4.3. Dispute resolution process in foreign investment activities in North Sumatra is associated with the ASEAN economic community

The creation of a conducive tourism investment climate needs to be improved in a sustainable manner, one of alternative strategies is by increasing coordination between agencies across-sectoral manner that cannot be separated from the support of the business community and the wider community. In article 30 of Law Number 25 Year 2007 on Investment, the Investment Law is mandated that regional governments be more empowered, both in developing potential opportunities in each region, and terms of making coordination of promotions regarding tourism and investment services. Similarly, it is mandated in Law Number 10 Year 2009 concerning Tourism in article 23 paragraph (1 a), contains: "The Government and Regional Government are obliged to provide information on tourism, legal protection, security and safety information to tourists."

The use of ADR both inside and outside the country has given an impression that there is a group of people that work on the development of the ADR process, and is seen as a range of businesses taken from different resources. Each of them has a philosophy, culture and a particular application method. With the development of the times, business people were seeking to develop the ADR mechanism as a solution to litigation at courts. Now, with the enactment of Law Number 30 Year 1999, business people realized that the win and lose decisions through litigation channels were not necessarily the best solution, and such decisions made the overall goals of the business they did not reach. The solution to litigation through a district court that likely one party to win and another party to loose, this can be said as a method of dispute resolution that can harm a person's business. The provisions in the Foreign Investment Law cover the possibility of resolving disputes between foreign investors and the local government.

5. CONCLUSION

From the analysis in the previous chapters, there a view conclusions can be highlighted. Provisions on foreign investment in the tourism sector within the framework of the ASEAN Economic Community (AEC) have not been referred to regional provisions within the framework of the AEC. In the tourism sector, there is no clear legal certainty towards foreign investment activities in the face of the ASEAN Economic Community. It is because the provisions governing foreign investment in the tourism sector in Indonesia are constantly changing, similarly with law enforcement efforts in the judge's decision to disregard

the arbitration decision on the basis of public order. The process of resolving foreign investment activities in the tourism sector in North Sumatra within the framework of the ASEAN Economic Community refers to the preferences of law that the parties have chosen. The parties commonly choose the dispute resolution process by arbitration after the deliberations have not been reached.

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