

Legal Certainty of Investment in Management of Industrial Plantation Forests in Indonesia

Firdaus Firdaus*, Rahmad Hendra

Faculty of Law
University of Riau
Pekanbaru, Indonesia

*firdaus@lecturer.unri.ac.id, b4nk.h3n@gmail.com

Abstract—Legal uncertainty is a major obstacle for investors to invest in Indonesia, especially investment in the management of industrial plantations. Management Permits granted by the government do not guarantee certainty for permit holders to control land. The Industrial Plantation Forests (HTI) concession area is not clear from ownership conflicts with other parties. Agrarian conflicts hinder the certainty of land tenure by investors. This study tries to find answers to the question why there is legal uncertainty in investment in HTI management, even though the company has obtained permits from the government. Normative law study is a method used in this research. Legislation, legal theory, doctrine as secondary legal data are used to find scientific logic of the normative side. Permit as legal certainty should provide protection of the rights and obligations for license holders, but does not guarantee the certainty of tenure for businesses. The synchronization, harmonization and sovereignty of indigenous peoples is an urgent need to create legal certainty.

Keywords: *legal certainty, industrial plantation forests, permits, conflict, land tenure*

I. INTRODUCTION

Legal certainty has long been a major problem for investors to invest in a country (host country), legal certainty is like a mystery, hidden in a black box [1,2]. Not much effort has been made to unlock the mystery of legal uncertainty in the black box. Legal uncertainty is generally described as an inefficient bureaucracy and rules that often change [3]. But what exactly is legal certainty, has not yet been answered. Legal uncertainty raises various legal issues [4], investors shout and threaten legal uncertainty in various countries [5]. Whatever the reason, entrepreneurs need peace and legal certainty in investing their capital, and have the opportunity to develop with their environment [6].

In Indonesia, the Industrial Forests Plantation (HTI) is one of the investment areas that face problems with legal certainty [7]. The management of HTI by companies is sourced from permits granted by the government. However, the permit granted does not guarantee the comfort of the company in conducting business activities. The HTI concession area is not always clean from ownership conflicts with other parties, so the company is faced with an agrarian conflict [8].

Agrarian conflict is the biggest problem of legal uncertainty in the field of HTI. Since independence, in particular the New Order era to the present, agrarian conflict is the biggest contributor of conflict in Indonesia [9]. Agrarian conflicts have become chronic and have a wide-ranging impact [8]. Conflict over agrarian resources is one type of chronic conflict that threatens the countries of the world to become a failed state if they cannot overcome it [10].

The government gave concession permits (HTI) which were quite extensive to several companies [11]. However, in locations where concession permits are cleared of other rights, in many cases, there are rights or control of individuals and even groups within the HTI concession area managed by the company. The Law of the Republic of Indonesia of 1960 concerning Basic Agrarian Law (BAL) which was originally placed as the Umbrella Law, in practice was narrowed to only manage non-forest areas (about 30% of the territory of the Republic of Indonesia), and its principles are ignored [7,8]. Permits do not provide certainty in land tenure for the entrepreneur.

The above problem needs to be sought for the answer, why there is legal uncertainty in investment in HTI, even though the company has obtained permission from the government. A permit is actually a guarantee of legal certainty for anyone to make an investment or business activity. Legal uncertainties not only have an impact on the business world but also affect the economy, social and even politics of a host country.

This study tries to find the root of the problem of legal uncertainty regarding permits granted to HTI businesses. Sources of data obtained from primary legal materials in the form of legislation, jurisprudence and expert opinions that are relevant to the research. These findings will provide an overview effort or steps that must be corrected, amended or deleted to the norms that lead to legal uncertainty in the investment field of HTI.

II. METHODS

Normative law study is a method used in this research. Legislation, legal theory, doctrine as secondary legal data are used to find scientific logic of the normative side. Sources of

data obtained from primary legal materials in the form of legislation, jurisprudence and expert opinions that are relevant to the research.

III. RESULTS AND DISCUSSION

A. *Legal Certainty Without Tenure Certainty*

Conceptually, permits are truly legal certainty, whoever has obtained a permit, rights and obligations arise [12]. The permit holder has the right to do what has been permitted, carry out obligations for what is inherent from the permit he has. The permit should protect the rights and obligations of the permit holder [13]. The latest facts show that permits as legal certainty does not create conditions of tenure security and does not provide protection for HTI entrepreneurs. Many concession holders (HTI permit holders) cannot control the concession area. Riau Provincial Forestry Office and the Directorate General of Planology and Environmental Management in 2015 and 2016 noted that until 2017 the number of plantations or IUPHHK-HT permit holders was 56 units with an area of 1.7 million hectares [11].

Legal uncertainty raises uncertainty of tenure and causes conflict of ownership or tenure. The research of Prudensius Maring et. al, in four provinces in Sumatra (South Sumatra, Jambi, Riau, and West Sumatra) found that along the stretch of the island of Sumatra there were agrarian conflicts [14]. Since 2010 the distribution of production forest conflict with the public began to spread to almost all districts in Riau [14]. More than 260 thousand hectares of land conflict occurred in production forests [14]. The basic problem lies in the permit granted, because the permit is upstream from the HTI business activities. There are real fundamental problems in the permission granted because the permit is in the upstream of the business activities of HTI. The location or area to be given permission to the entrepreneur does not meet the requirements of being free from disputes, or ownership of other parties, both individuals and communal. Permission does not consider the condition of the surrounding community so that it impacts the social economy and its values [14].

Forests are under state control because the constitution imposes control of a part of natural resources on the state [14,15]. The mandate provides consequences for the state (government) to establish, maintain, and so the government know, understand and appreciate the reality of the forests under their control. Conflicts, overlaps of ownership and disputes over authority show that the government or the licensor does not know or understand the true situation of the area or location the permit is granted. The interests of various parties related to access to forest utilization use have resulted in unclear ownership rights due to overlapping users, forest conversion for oil palm plantations [16]. Uncontrolled access to forest areas also causes degradation and deforestation, different paradigms of state and customary law (Legal pluralism) [16,17].

B. *Slow Agrarian Reform*

We have realized that agrarian needs to be reformed, because there are various complex and widespread problems.

That awareness has been seen in the Decree of the People's Consultative Assembly Number: IX / MPR / 2001 concerning Agrarian Reform and Natural Resource Management. The MPR Decree should be a strategic momentum for conditioning the agrarian reform, so that various problems can be resolved properly. There are 6 (six) directions for agrarian reform policies that are expected to be immediately carried out [18]. Generally, found in; assessment, synchronization of laws and regulations, structuring of land tenure, conflict resolution, strengthening of organizations, and strengthening the financing of agrarian reform. Eighteen years of the MPR Decree has been running, but agrarian problems still revolve around, overlapping ownership, multi-sectoral authority [19]. regulations that are asynchronous and capricious, widespread conflict and limited budget.

Michael Lipton said to make agrarian reform work, there are at least 10 (ten) things that need to be managed by the government in a guided and systematic manner, namely: (1) constitutional mandate; (2) laws and regulations and their enforcement; (3) agrarian reform implementing organizations; (4) agrarian administrative system; (5) court and conflict resolution mechanisms; (6) plan design and evaluation; (7) education and training; (8) financing; (9) regional government; and (10) community participation, especially rural people's organizations [20].

Referring to Lipton's thoughts, agrarian court and agrarian dispute resolution mechanisms, it is important to get priority, the current litigation process is very unlikely to effectively and efficiently resolve disputes. Education and training, organization and administrative system need to be done immediately, the unclear administration system and the weak ability of the apparatus in mastering the constitutional mandate to control the state over agrarian, encourage legal uncertainty in the investment field.

1) *Sectoral authority and rules synchronization*: Law is the invisible infrastructure in facilitating and distributing natural resources [21]. Article 33 verse (3) of the 1945 Constitution places the state in the highest position as the party that is given power over agrarian affairs [22]. Synchronization and harmonization must be sourced from the mandate of Article 33 verse (3) of the 1945 Constitution and directed to regulate the designation, use and maintenance, legal relations and actions of people in the forestry sector [23]. BAL which is an umbrella norm, in practice degrades its broad meaning and basic principles are ignored. The principle of the greatest welfare of the people covered by the exploitative sectoral regulations, economic interest (investments), centralized, sectoral, and lack of human rights protection [24,25].

Legal instruments must provide institutional arrangements for forest management that provide a clear picture of the duties and functions of each institution, so as to avoid overlapping roles and authorities [19]. Overlapping of authority is the root of the problem in forest management. Within the HTI area there can be certificates of ownership, community plantations or companies. Synchronization or harmonization of legal norms and including reconstructing the balance of central and

regional authorities must be carried out immediately. Almost every sector or institution makes rules (Laws with all the derivative regulations) relating to forestry areas/.

The main purpose of controlling natural resources - including forests - by the state is as much as the prosperity of the people, therefore the law must be able to realize the objectives of control in a variety of legal subsystems, principles, rules and institutions [26] that are aligned, harmonious, balanced, mutually interacting, facilitate and support forest management both for conservation, business and others in order to use forest resources efficiently, effectively, fairly and sustainably.

2) *Providing justice and prosperity*: The law is not justified as a tool (instrument) for the capitalization of forest resources. Forest management in the economic paradigm needs to be evaluated. Forests are not merely as a commodity and a source of national economy, but they are a gift from God [27]. All God's creatures have the right to access in the forestry field. Utilization and use of forest areas must be carried out appropriately and sustainably by considering ecological, social and economic functions as well as to maintain sustainability for the lives of present and future generations [27].

Nowadays, all people are fighting over and competing for land to gain economic benefits, the socio-cultural value is almost invisible from agrarian policies because it is covered by economic clouds. Is it true that our agrarian in accordance with the values of Pancasila or it has turned us into capitalists? Noer Fauzi Rachman mentioned the expansion of capitalist production systems would force their lives to change. The situation of the villages, fields, rice fields, forests, rivers, and beaches has been, is being and will continue to be changed by the dredging industry (coal, tin, nickel, iron sand, bauxite, gold, cement, marble, etc.), the pulp and paper industry, oil palm plantation industry, housing industry and tourism, manufacturing industry, and so on [28].

Agrarian should not be a commodity capitalist economy, it must provide prosperity for all Indonesian people. The law must ensure agrarian reform in order to maintain the values of Pancasila and restore agrarian in the perspective of Pancasila. The 1945 Constitution and the Forestry Law No. 41 of 1999 (UUK) mandate the best possible management of forest resources in a sustainable manner so that forests can provide optimal benefits for the people and the state [19].

Forest management must not cause the loss of community rights to enjoy natural resources to continue their lives. For the community, forests are not just economic resources, but also have social and spiritual dimensions. Changing the structure of forests from multi-culture to mono-culture is a major factor of conflict and eliminates access for people to obtain natural resources. For people who live in forest areas, the existence of forests is the same as the existence of their own lives. If forests are destroyed and damaged, it is the same as destroying and damaging their lives. Forest management for HTI needs to consider the existence of people in the forest area.

The licensor must have confidence based on in-depth knowledge that granting HTI permits does not harm the

interests of the community and the environment. HTI concession must be in the principle of development that meets the needs of the present without compromising the ability of future generations to meet their own needs [29]. The state must be superior to HTI management entrepreneurs [30], and ensure they obey and comply with legal provisions related to corporate social responsibility [31], so that the existence of the company has a positive impact on society and the environment. The conflict actually occurs because there is a gap in the distribution of wealth in forest management [21]. The law must also provide restrictions on ownership or HTI permits to employers so that there is no capital accumulation and acquisition that causes capitalization or monopoly.

3) *Obscurity between state forests and communal land*: The conflict between indigenous peoples and HTI entrepreneurs is one of the contributors to legal uncertainty in investment. HTI areas, which are managed by entrepreneurs, often have problems in the field, because HTI concessions are in the communal land of indigenous peoples. Reality shows that this conflict poses major problems for entrepreneurs and indigenous peoples. Companies experience or face unexpected business risks, while indigenous peoples lose their rights as indigenous peoples.

There is a conflict between state and customary law. Both are still holding on to their respective paradigms, so they haven't got a meeting point. Agrarian is closely related to legal pluralism, realism cannot be denied as an empirical reality, and the characteristics of every society [32]. The special agrarian national legal system must adopt legal pluralism, because agrarian is a shared social space.

Van Vollenhoven said that what is meant by indigenous peoples is that *volksgemeen-scapen* has its own social system, has a strong relationship with the land, management of its natural resources, and has the freedom to maintain local values or local wisdom [33]. MK Decision No. 35/PUU-X/2012 which states that customary forests are no longer status as state forests, but rights forests, is a verdict that gives new hope to the sovereignty of indigenous peoples, but not necessarily is able to resolve all problems [34].

There is no exact data related to the number or existence of indigenous peoples. Besides, there are also various legal issues that cannot be answered, including identification of customary law communities, limitations on the authority of customary law communities in managing their customary forests, namely the extent to which customary law communities can transfer or lease their customary forests to other parties and with what mechanisms [34]. The vast lack of clarity of objects and subjects of customary land will certainly remain a problem for investment. The position of indigenous peoples is important to determine legal actions and legal relations over customary lands.

IV. CONCLUSION

Based on the analysis and study conducted above, the researchers found the conclusions in this study as follows:

- Permit as a legal certainty should provide protection for the rights and obligations of the permit holder, but does not guarantee certainty of tenure for business actors.
- Acceleration of Slow Reform is a necessity that must be carried out immediately, especially for laws and regulations that are not synchronous and sectoral in nature.
- The sovereignty of indigenous peoples over customary land needs to be done immediately so that indigenous peoples can determine legal actions and legal relations over customary land

REFERENCES

- [1] J.R. Maxeiner, "Legal Certainty: A European Alternative to American Legal Indeterminacy?," *Tul. J. Int'l & Comp. L.*, vol. 15, no. 541, p. 543, 2007.
- [2] P.J. Nagy, *Country Risk, How to Assess, quantify and monitor*. London: Euromony Publications, 1979, p. 54.
- [3] A. Sopandi and N. Nazmulmunir, "Pengembangan Iklim Investasi Daerah," *Jurnal Kybernan*, vol. 3, no. 1, 2012.
- [4] V.R. Johnson, "Causation And "Legal Certainty" In Legal Malpractice Law," *ST. Mary's J. Legal Mal. & Ethics*, vol. 8, no. 374, 2018.
- [5] C.A. Rodriguez, "Enhancing Legal Certainty In Colombia: The Role Of The Andean Community," *Mich. St. J. Int'l L.*, vol. 17, no. 407, 2008.
- [6] Suroto and Gunarto, "Mining Investment Legal Certainty Under The Terms of Act No. 4 Of 2009 Concerning Mineral and Coal Mining and Act No. 25 of 2007 on Investment," *Jurnal Daulat Hukum*, vol. 1, no. 3, pp. 665 – 672, 2018.
- [7] Government Regulation Number 7 of 1990 concerning The Right of Industrial Plantation Forest Concessions.
- [8] N.F. Rachman, "Rantai Penjelaras Konflik-Konflik Agraria Yang Kronis, Sistemik, Dan Meluas Di Indonesia," *Bhumi*, no. 37, 2013.
- [9] M.N. Salim, "Membaca Karakteristik Dan Peta Gerakan Agraria Indonesia," *Bhumi*, no. 39, 2014.
- [10] L. Mulyani, "Kritik Atas Penanganan Konflik Agraria Di Indonesia," *Bhumi*, no. 39, 2014.
- [11] S. Suprpto, A. Maryudi, and W. Wardhana, "Implikasi Perizinan Sektor Berbasis Lahan Terhadap Kondisi Kawasan Hutan Di Provinsi Riau," *EnviroScientiae*, vol. 15, no. 1, pp. 95-106, 2019.
- [12] D.A. Rumokoy and F. Maramis, *Pengantar Ilmu Hukum*. Jakarta: Rajawali Pres, 2014, p. 140.
- [13] E. Fernando and M. Manullang, *Menggapai Hukum Berkeadilan: Tinjauan Hukum Kodrat dan Antinomi Nilai*. Jakarta: Kompas, 2007, p. 29.
- [14] M.N. Salim, "Menjarah" Pulau Gambut: Konflik Dan Ketegangan Di Pulau Padang," *Bhumi*, no. 37, 2013, p. 97.
- [15] Article 33 Verse (3) Constitution of the Republic of Indonesia 1945 (UUD 1945)
- [16] J.P. Napitu, A. Hidayat, S. Basuni, and S. Sjaf, "Mekanisme akses pada hak kepemilikan di kesatuan pengelolaan hutan produksi meranti, Sumatera Selatan." *J. Penelit. Sos. dan Ekon. Kehutan*, vol. 14, no. 2, pp. 101-118, 2017.
- [17] A. Mutolib, Y. Yonariza, M. Mahdi, and R.H. Ismono, "Konflik agraria dan pelepasan tanah ulayat (Studi kasus pada masyarakat suku melayu di Kesatuan Pemangkuan Hutan Dharmasraya, Sumatera Barat)," *e-Jurnal Penelitian Sosial dan Ekonomi Kehutanan*, vol. 2, no. 3, pp. 213-225, 2016.
- [18] Article 5 paragraph (1) TAP MPR:
- [19] A. Maryudi, "Arahan Tata Hubungan Kelembagaan Kesatuan Pengelolaan Hutan (Kph) di Indonesia," *Jurnal Ilmu Kehutanan*, vol. 10, no. 1, 2016.
- [20] A. Wicaksono and Y. Pubawa, "Hutang Negara Dalam Reforma Agraria Studi Implementasi Mandat 9 Juta Hektar Tanah Indonesia," *Bhumi*, vol. 4, no. 1, 2018..
- [21] C. Fleissner, "Inclusive Capitalism Based on Binary Economics and Positive International Human Rights in the Age of Artificial Intelligence," *Wash. U. Global Stud. L. Rev.*, vol. 17, no. 201, p. 206, 2018.
- [22] Y.I. Setiawati, "Harmonisasi Hak Pemanfaatan Sumber Daya Alam oleh Masyarakat Adat dalam Sistem Hukum Indonesia," *Indonesian State Law Review*, vol. 1, no. 1, p. 20, 2018.
- [23] Article 2 paragraph (2) of the Republic of Indonesia Law No. 5 of 1960 concerning Basic Agrarian Law.
- [24] Article 33 paragraph (3) UUD 1945
- [25] W. Nugroho and A. Surono, "Rekonstruksi Hukum Pembangunan Dalam Kebijakan Pengaturan Lingkungan Hidup Dan Sumber Daya Alam," *Jurnal Hukum Lingkungan*, vol. 4, no. 2, 2018.
- [26] M. Priyanta, "Pembaharuan dan Harmonisasi Peraturan Perundang-Undangan Bidang Lingkungan Hidup dan Penataan Ruang Menuju Pembangunan Berkelanjutan," *Hasanudin Law Review*, vol. 1, no. 3, p. 343, 2015.
- [27] Considering Letter A Law of the Republic of Indonesia Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction (UUPPPH)
- [28] N.F. Rachman, "Memahami Reorganisasi Ruang Melalui Perspektif Politik Agraria," *Bhumi*, vol. 1, no. 1, p. 37, 2015.
- [29] B. Ledewitz, "The Constitutions of Sustainable Capitalism and Beyond," *B.C. Envtl. Aff. L. Rev.*, vol. 29, no. 229, p. 229, 2002.
- [30] J. Chaisse, "State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment," *Minn. J. Int'l L.*, vol. 27, no. 339, p. 346, 2018.
- [31] Article 74 Law Number 40 of 2007 concerning Limited Liability Companies
- [32] J. Ubink, "Introduction: Legal Pluralism in A Globalized World," *UC Irvine L. Rev.*, vol. 8, no. 141, p. 148, 2018.
- [33] S.S. Nugroho and Hirman, "Harmonisasi Hukum: Sebuah Dialektikinteraksi Norma Adat Dan Hukum Negara Dalam Pengelolaan Konservasi Sumber Daya Alam," *YUSTISIA MERDEKA*, vol. 2, no. 2, p. 32, 2016.
- [34] D. Cahyaningrum, "Implikasi Putusan Mahkamah Konstitusi Mengenal Status Hutan Adat Sebagai Hutan Hak," *Kajian*, vol. 20, no. 1, pp. 1-16, 2015.