

# Constraints On Legal Protection For Foreigners Investing In Indonesia.pdf

*by : Sarkawi. Ainuddin*

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**Submission date:** 19-Jun-2023 02:16AM (UTC-0500)

**Submission ID:** 2118883091

**File name:** TS\_ON\_LEGAL\_PROTECTION\_FOR\_FOREIGNERS\_INVESTING\_IN\_INDONESIA.pdf (230.65K)

**Word count:** 6720

**Character count:** 36554

## CONSTRAINTS ON LEGAL PROTECTION FOR FOREIGNERS INVESTING IN INDONESIA

**SARKAWI**

Faculty of Law Mataram University, St. Majapahit No. 62 Mataram, West Nusa Tenggara.  
Email: sarkawi@unram.ac.id, Orcid Id: <https://orcid.org/0009-0002-1701-1243>

**AINUDDIN**

Faculty of Law, University of Islam Al-Azhar, St. Unizar No. 20, Turida, Sandubaya, Mataram City, West Nusa Tenggara. Email: drdiens21@gmail.com

### Abstract

Indonesia requires significant investment capital so that national income increases. Indonesia has quite a lot of potential that foreign investors can exploit, but the level of foreign investment still needs to be higher. Therefore, the government seeks to increase the number of foreign investments through various means such as improving legal certainty, procedures, simplification, enhancing information systems, developing Special Economic Zones, expanding opportunities for foreigners to invest, increasing the ease of doing business to stimulate foreign investors' interest in investing in Indonesia. However, investment problems arise in people's lives, so in this article, the author raises issues regarding juridical and non-juridical obstacles in providing legal protection for foreigners investing in Indonesia. The results of the discussion are that Constraints on legal protection for foreigners investing in Indonesia as follows: (a) Juridical constraints, namely laws and regulations related to foreign investment, certificates that do not guarantee legal certainty of ownership, incompatibility with investment regulations, and Agreement Validity; (b) Non Juridical Constraints include Domestic Factors and Foreign Factors and Social Factors.

**Keywords:** Constraints, Legal, Protection, Foreigners, Investing, Indonesia

### PRELIMINARY

The Indonesian nation proclaimed its independence on August 17, 1945, to break away from dependence on other countries that had controlled, exploited and drained the Indonesian people and all the natural wealth that was their right. The aspiration of the Indonesian nation with its independence is the freedom to live independently to build a just and prosperous society in its homeland which is rich in various natural resources to move freely in the world, help based on equality and create a world of peace. The ideals of the Indonesian people are engraved like golden words, as the noble ideals of the Indonesian people which are imprinted in the 4th paragraph of the Preamble to the 1945 Constitution, which states: "By the grace of Allah, the Almighty and driven by a lofty desire to live a free national life, the Indonesian people at this moment declare their independence. Then to form an Indonesian State Government that protects the entire Indonesian nation and all of Indonesia's bloodshed to promote public welfare, educate the nation's life and participate in carrying out world order based on freedom, eternal peace and social justice."

The sound of the Preamble to the 1945 Constitution contains the essence of the ideals of the Indonesian nation, as follows:<sup>1</sup> (1) The desire of the Indonesian people to live freely; (2) The

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desire for independence; (3) Protect the entire Indonesian nation and all of Indonesia's bloodshed; (4) Promote Public Welfare; (5) Educating the Life of the Nation; and (6) Participate in carrying out a world order based on freedom, eternal peace and social justice. The goal of forming the Indonesian state contained noble ideals, creating a just and prosperous society. Meanwhile, justice and prosperity are two inseparable partners in the philosophy of society and are the goal of life. Fairness is the main emphasis and is always mentioned in front of the word prosperous; it is an affirmation and priority that needs to come first.

For these lofty ideals to be realised, the independence that has been won must be filled with various development fields. Because with development, namely development as a whole in all sectors involving all levels of society in effect, the noble goals can be realised. This comprehensive development constitutes national development, a process of change carried out based on a specific plan, deliberately and indeed desired, both by the Government, which is the pioneer of action and by the community. This national development includes, among others, economic, political, demographic, psychological, legal, intellectual and technological aspects, including industry.<sup>2</sup>

The overall national development is a product that prioritises improving people's lives towards independence, creating a just and prosperous society covering all areas of life and encompassing the entire Indonesian nation. Past development only focused on achieving high economic growth, which has increased per capita income, reduced poverty and unemployment, and improved the quality of human life on average. But without being accompanied by the development and strengthening of both public and market institutions, especially financial institutions, which should function to allocate resources efficiently and wisely. The process of economic growth, which is supported by a system of repression and closure, has paralysed various strategic institutions such as the legal and judicial systems to guarantee legal certainty and justice, the political system to create control and balance mechanisms, and the social system needed to maintain a harmonious and peaceful life. So development results are harmful in the form of income gaps.<sup>3</sup>

The economic crisis of 1997/1998 has provided quite an expensive but valuable lesson for the Indonesian people. The situation has forced the Indonesian people to make necessary changes to improve towards a better direction. The economy, politics, society and law undergo changes and improvements towards a new system expected to be more just, reliable and sustainable and guarantee legal certainty. Community social welfare is strongly influenced by the economy's ability to increase income fairly and equitably. Even though, until 2004, macroeconomic stability was relatively stable, the increase in economic stability and growth was insufficient to improve people's welfare.<sup>4</sup> Capital is needed to accelerate economic development towards peace and economic growth, especially money from productive projects. Because if you only expect wealth from foreign aid, then this is very limited and careful. This is because the foreign policy of our country is different from the foreign policy of other countries. After all, the interests of a country are certainly different from those of other countries. The distinguishing factors are geographical location, the wealth of natural resources, population, history of the

struggle for independence, national interests for a certain period and the international political situation.<sup>5</sup>

<sup>1</sup>  
The capital needed by our country to achieve economic development is in the form of investment by making the maximum use of the cultivation and utilisation of domestic and foreign money, which is primarily directed at efforts to rehabilitate, renew, expand and develop new developments in the field of production of goods and services. Service. Therefore, capital from the general public is maximally mobilised. In connection with efforts to accumulate wealth in the form of investment, in 2001-2003, it turned out that the investment incentive for capital formation on economic growth only grew by 3.5% and 2.1% per year. Until 2003 the investment rate had only reached 69.2%. Compared to the volume of investment in 1997. Even though it is expected that economic growth in the next five years will be in the range of 6.3% - 6.8% and will continue to increase to 7% or more if global economic recovery can be achieved more quickly, where Investment is means of capital accumulation which is very influential on the economic growth of the Indonesian nation, even though investment has a significant influence on economic growth, it seems that future investment development will face formidable external challenges. One of them is the trend of reduced global investment inflows. Meanwhile, the attractiveness of investment in several East Asian countries that are competitors to Indonesia, such as China, Vietnam, Thailand and Malaysia, has increased.<sup>6</sup> Even though Indonesia has enormous capital, natural resources, strategic geographical location, an ideal population demographic structure, deep and robust cultural resources, and human beings who have unlimited potential and creativity because they have received a good education, they are getting better over time, where crises and challenges have been turned into opportunities and opportunities.

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The enactment of Law Number 25 of 2007 concerning Investment provides the principles that form the basis of the law and every ongoing investment activity. The Investment Law seeks to achieve living and developing values as an order in society. Theoretically, after the enactment of Law Number 32 of 2004 concerning Regional Government, the Regional Head, in this case, the Regent, is given the authority to manage his area autonomously. From this rationale, local governments have an excellent opportunity to attract investment candidates in the regions. On the other hand, for investors, the regional autonomy policy can compare which parts protease the most options or legal certainty for investment.

As written in the previous discussion, investors in carrying out investment activities must be distinct from business objectives. Therefore, before investing, apart from seeing business opportunities, they also study the rules and conditions of the area where the investment will be made. The regulation in question is whether or not laws govern investment activities in the location. Still, it must be taken into account by policymakers in the area to be manageable for investors and to provide more apparent legal certainty. In the context of increasing investment in the regions, efforts are made to facilitate the provision of investment permit services by increasing the number of service centres for granting investment permits. Rai Widjaya put forward this opinion because it is one of the factors that influence the improvement of the investment climate, including in the regions.<sup>7</sup>

The regions are trying to make this happen with a policy in 2010 to form an Investment Office which seeks to facilitate investment activities in their areas. As for the shortcomings of these agencies, they were immediately found after conducting direct interviews, namely the lack of mastery skills in the field of investment for each worker, poor coordination between licensing offices bearing in mind that the licensing office areas and the Investment Office were established separately so that each investment report often not received in writing by the investment office. Thus, the regional investment office divisions need help to complete each main task.

Investment is one of the keywords in every effort to create new economic growth for expanding job creation, increasing income and reducing poverty. Increasing investment activity in domestic and foreign capital accumulation will become a much-needed leverage factor for a country in moving the economic engine to guard sustainable growth. Increased investment is expected to act as a medium for technology transfer, ultimately contributing to increased production and productivity and a region's economic competitiveness. Economic growth can be described as changing a country's economic conditions to continue to a better state. Investment activities have significantly contributed to driving the performance of economic growth rates, encouraging the emergence of local raw material supply industries, technology transfer and management processes, and benefits for local investors. The most prominent use is the development of mutually beneficial and intertwined collaborations between foreign investors and local business people; component businesses and industries are proliferating, including various export-oriented business activities.

The region seeks to create a good investment climate. However, there needs to be more awareness from the local government to socialise public investment has a majority effect on regional economic growth. Thus, after investors carry out activities, they are not ready to be accepted by the community; this is what has happened in the area due to the existence of the mining company PT. Great Energy Source. The mining business sector is one of the business sectors that received top priority from the government before and after the issuance of the Investment Law, both for foreign and domestic parties. For this reason, the government is trying to be able to direct and manage natural resources that are included in the mining business sector. The mining business has petroleum, natural gas, coal, metals, tin, nickel ore, bauxite, iron sand, silver and copper concentrate. Mining management rights are the right to control the State as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia, paragraphs (2) and (3), which state that paragraph (2): production branches that are important for the state and affect the livelihood of the public are controlled by the country.

The Regional Government must make every effort to create a conducive investment climate by mobilising the Investment Office institutions to carry out the duties and functions of supervising the running of Investment activities. And the most important thing is to conduct outreach to the community to ensure the community's readiness to accept investment. Local investment regulations are also needed that legal support certainty for investors.

Investment is part of the implementation of the national economy.<sup>8</sup> It is placed as an effort to increase national economic growth, create jobs and encourage the people's economy, where the

investment objectives can be achieved if the supporting factors that hinder investment can be overcome, among others, through improving coordination between agencies central and regional governments, creation of an efficient bureaucracy, legal certainty in the field of investment, highly competitive economical costs, a conducive business climate in the area of employment and business security.<sup>9</sup>

Therefore, for the movement of investment or investment to be promising, the government as a regulator makes policies that support (market-friendly) economic activities fairly and equitably without any elements of discrimination in them<sup>10</sup> so that Indonesia can become one of the investment or investment destination countries because, in principle, the investment will have an impact on the country's economy. Although it does not rule out the possibility, investment can also bring negative besides positive results. The chart below describes the effect of investment on economic growth.<sup>11</sup> Thus, based on the lengthy description above, the author discusses Juridical and Non-Juridical Constraints in Providing Legal Protection to Foreigners Investing in Indonesia.

## DISCUSSION

### A. Juridical Constraints

#### 1. Legislation related to Foreign Capital Investment.

Legal or juridical factors are also critical and considered by investors. This relates to the protection provided by the Government for investment activities. The decline in the authority of domestic law will affect investors' interest in investing their capital. The attractiveness of investors to invest their money will significantly depend on the implemented legal system, where the legal system must be able to create predictability, fairness and efficiency. Some regulations are inconsistent with higher regulations, such as regional regulations, ministerial decrees or other regulations that distort investment regulations, such as the Forestry Law No. 41 of 1999, which creates uncertainty in the utilisation of debt areas for the mining industry, thereby influencing foreigners to invest using usufructuary rights.

Policies in the form of several deregulation and de-bureaucratization that the Government continuously carries out to stimulate the investment climate, such as granting several exemptions and concessions in the field of taxation, including several other rights for foreign investors, which are considered incentives. In addition, the Basic Agrarian Law regulates land rights that can be given to individuals or legal entities and governs the period for mastery of land rights as follows. Article 16 paragraph (1) determines the types of land rights, namely: (1) Property Rights; (2) Cultivation Rights; (3) Building use rights; (4) Right of Use; (5) Lease Rights; (6) Right to Open Land; (7) Right to Open Forest Products. The Basic Agrarian Law provides a time limit for mastery of each of these rights. The land rights granted by the Basic Agrarian Law are:

**a. Property rights, regulated in Articles 20 to 27 of the Basic Agrarian Law.**

Property rights, regulated in Articles 20 to 27 of the Basic Agrarian Law, are hereditary, most vital and most fulfilled rights. This means that the holder of property rights or the land owner can act freely because he may alienate his land to other parties by selling, granting, exchanging and bequeathing.<sup>12</sup> Subjects of property rights are 1) Indonesian citizens (WNI); 2) legal entities stipulated by the Government; with the Minister of Agrarian Regulation No. 2 of 1960 jo. Minister of Agrarian Regulation No. 5 of 1960, among other things, the Indonesian Airlines and agencies dealing with food production and opening.

Occurrence of property rights: 1) According to the law regulated by government regulations; 2) According to the Government Decree, according to the method and conditions stipulated by the Government Regulation; 3) According to the provisions of the law. Property rights are lost when the land falls to the state or is destroyed. The land falls to the State if 1) Due to the release or revocation of property rights for the public interest; 2) Because the Owner abandoned it; 3) because of a violation of the prohibition on alienating land to other people; 4) because of the gift from the owner.

**b. Cultivation Rights, regulated in Articles 28 to 34 of the Basic Agrarian Law.**

Cultivation Rights are rights to cultivate land directly controlled by the state for 25 to 35 years. This period depends on the company's nature, up to 25 years.<sup>13</sup> Those with Cultivation Rights are 1) Indonesian citizens (WNI); 2) Legal entities established according to Indonesian law and domiciled in Indonesia. Cultivation rights occur because of the Government's stipulation, and this right can be used as collateral for debt with mortgage rights. Cultivation Rights are deleted because 1) The term expires; 2) they are Terminated before the expiry of the period because one condition is not met; 3) the rights holder releases them before the expiration of the period; 4) they are Revoked in the public interest; 5) The land is abandoned; 6) The land is destroyed; 7) The provisions in Article 30 paragraph (2), namely not having the conditions as a Right to Use Business subject and within one year relinquishing their rights to other people.

**c. Building Use Rights, regulated in Articles 35 to 40 of the Basic Agrarian Law.**

This right is the right to establish and own a building on land that is not one's own, which is granted for a maximum period of 30 years and can be extended up to 20 years. Regarding the subject, who can have this right and how to remove it, like the Right to Use Business? This right can be used as collateral with the Mortgage Right, and the rights can also be transferred to another person.

**d. Right to Use, Regulated in Articles 41 to 43 Basic Agrarian Law.**

This right is the right to use and collect produce from land directly controlled by the state or land belonging to another person who gives rights and imposes obligations specified in the decree passed or in an agreement with the land owner.<sup>14</sup> A usufructuary request is granted for a certain period or as long as the land is used for a particular purpose and for free with payment or provision of services in any form. The transfer of usufructuary rights can only be carried out with the permission of the official who gave it for land directly controlled by the state or, if

possible, in the relevant agreement for private land. Those with usage rights are 1) Indonesian citizens; 2) Foreigners domiciled in Indonesia; 3) Legal entities established according to Indonesian law and domiciled in Indonesia, 4) Foreign legal entities with representatives in Indonesia.

Apart from problems related to the application of the Basic Agrarian Law, there are several other matters in the Investment Law which, in practice, may cause problems, including provisions in Article 12 of the Investment Law, Law no. 25 in 2007:

1. All business fields or types of business are open to investment activities, except for business fields or types of business that are declared closed and open with conditions;
2. Business fields that are closed to Foreign Investors are:
  - a. Production of weapons, gunpowder, explosive devices, and war equipment; And
  - b. Business fields that are explicitly declared closed by law.
3. The government, based on a presidential regulation, determines business fields that are closed to investment, both foreign and domestic, based on the criteria of health, morals, culture, environment, defence and national security and national interests;
4. The criteria and requirements for closed and open business fields with needs as well as a list of closed and open business fields with their respective requirements, will be regulated by Presidential Regulation.
5. The government determines open business fields with requirements based on national interest criteria, namely protection of natural resources, security, development of micro, small, and medium enterprises and cooperatives, supervision of production and distribution, an increase of technological capacity, participation of domestic capital, and cooperation with government-appointed business entities.

The provisions of Article 12 in paragraph (1) of Law no. 25/2007, which is the main principle adopted by legislators and the Government, state "that all business fields or types of business are open to investment activities." From these provisions, there is a tendency that the closed fields are dwindling and limited only to those related to defence and security. However, the telecommunications sector is separate from the immediate area.

Paragraph (3) of Law no. 25/2007 states that to determine which business fields are closed, open or open with conditions that are entirely under the authority of the President based on criteria of health, morals, culture, environment, defence and security and national interests. This differs from the previous period, where the list of business fields closed to foreign investment was quite large. Arrangements regarding open, closed and open business fields with the conditions initially regulated in Presidential Decree No. 96 of 2000 concerning Business Fields That Are Closed And Business Fields That Are Open With Certain Requirements For Investment, then with the issuance of Law no. 25/2007 was later amended by Presidential Regulation No. 76 of 2007 concerning Criteria and Requirements for Establishing Closed Business Fields and Open Business Fields with Conditions in the Investment Sector



(Presidential Decree No. 76/2010) jo Presidential Regulation No. 77 of 2007 concerning List of Business Fields That Are Closed and Business Fields Open With Requirements in the Investment Sector (Presidential Decree No. 77/2007) which was amended by Presidential Regulation No. 111 of 2007 concerning Amendments to Presidential Regulation No. 77 of 2007 concerning List of Business Fields That Are Closed and Business Fields Open With Requirements in the Investment Sector (Presidential Decree No. 111/2007) which was amended by Presidential Regulation No. 36 of 2010 concerning List of Business Fields That Are Closed and Business Fields Open With Requirements in the Investment Sector, Presidential Decree No. 36/2010

The closed fields are specific business fields that are prohibited from being cultivated as investment activities as listed in Appendix 1 of Presidential Decree No. 36/2010, which includes:

**1. Agriculture: Marijuana Cultivation;**

**2. Forestry:**

- a. Catch of Fish Species Listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- b. Utilization (taking) coral/coral from nature for building materials/lime/calcium and souvenirs/jewellery, as well as live or dead coral from the heart;

**3. Industry**

- a. Beverage Industry Containing Alcohol (Liquor, Wine and Beverages Containing Malt);
- b. Chloral Alkali Manufacturing Industry with Mercury Process;
- c. Industrial Chemicals That Can Damage the Environment, such as:
  - Halon and others;
  - Penta Chlorophenol, Dichloro Diphenyl Trichloro Elhane (DDT), Dieldrin, Chlordane, Carbon Tetra Chloride, Methyl Chloroform, Methyl Bromide, Chloro Fluoro Carbon (CFC);
- d. Chemical Industry Schedule 1 Chemical Weapons Convention (Sarin, Soman, Tabun Mustard, Levisite, Ricine, Saxitoxin, VX, ETC);

**4. Relations**

- a. Provision and Implementation of Land Terminals;
- b. Organization and Operation of Weigh Bridges;
- c. Implementation of Motor Vehicle Type Testing;
- d. Implementation of Periodic Testing of Motorized Vehicles;
- e. Telecommunication/Sailing Navigation Aid Facility;

- f. Vessel Traffic Information System (VTIS);
- g. Air Traffic Guidance Services;

#### **5. Communication and Informatics**

- a. Management and Implementation of Frequency Spectrum Monitoring Stations
- b. Radio and Satellite Orbit;

#### **6. Culture and Tourism**

- a. Government Museum;
- b. Historical and Archaeological Relics (temple, palace, inscriptions, remains, ancient buildings, etc.);
- c. Traditional Settlements/Environment;
- d. Monument;
- e. Gambling/Casino;

Thus, juridical constraints are significant in changing the behaviour of foreign investors. The Investment Law is intended to provide legal certainty and transparency and does not discriminate against domestic and foreign investors.<sup>15</sup> although investment approvals increased throughout 2006, from January to November 2006, PMA approvals reached US\$ 13.88 billion, and PMDN was Rp. 157.52 trillion, but this figure is only an approval number. But the realisation came a different number. In the same period, FDI realisation was only US\$4.68 billion, and PMDN was valued at 16.91 trillion.<sup>16</sup>

#### **2. Certificate Does Not Guarantee Legal Certainty of Ownership.**

Article 19 paragraph (2) point c of the Basic Agrarian Law states that a certificate of proof of rights is valid as a vital means of evidence. Even though it has received recognition in the Loga, owning a certificate does not yet guarantee legal certainty of ownership because the regulations themselves provide an opportunity where as long as other parties feel they own the land, they can sue the party whose name is listed in the civil certificate to the General Court, sue the Ministry of Agrarian Affairs and Governance, National Land Space/Agency to the State Administrative Court, or lawsuits related to technical administrative issuance. This is because the land registration system in Indonesia adheres to a negative publication system, meaning that the state does not guarantee the accuracy of the data presented. This means that the state does not guarantee the correctness of the physical and juridical data in the certificate so that other parties who feel they have rights over the land can sue. The existence of a certificate is as strong evidence, not definitive evidence. In resolving ownership disputes, the General Court has competence in resolving civil disputes. The right decision in a Civil Decision is Amar declarator which means that the decision is only explanatory and confirms the legal situation solely.<sup>17</sup>

### 3. Discrepancies in Investment Regulations

Regulatory discrepancies (Legal Factors) Law Number 25 of 2007, concerning Investment in Indonesia, regulates the rights and obligations of investors, as well as facilities for investors. The facilities include ownership of land rights for investors to build businesses in Indonesia. Many factors cause foreign investors to be reluctant to invest in Indonesia. The Government answered the complaints of these investors by facilitating licensing services, offering various incentives and legal certainty being answered by the passing and promulgation of Law No. 25 of 2007 concerning Investment which is very pro to investors and provides many guarantees from the Government to entrepreneurs/investors, both domestic and foreign investors. So, it is not surprising that the existence of this Investment Law has received opposition from various parties.

Many of the incentives provided by the Government are considered to violate the people's economic and socio-cultural rights and open up too much space for foreign investors. In the long term, it has the potential to erase the opportunity for society to develop because of the long-time limit for investors to invest in Indonesia. Many criticisms have been rolling since the discussion of the Investment Bill was carried out, including saying that the Government's political will was not firm by equating Domestic Investment and Foreign Investment, the lack of a comprehensive linkage of the Investment Law with other laws and regulations and too general formulation in the Law. Investment is a result of needing to distinguish between foreign investment and domestic investment.

The conditions as these criticisms show that in its implementation, the Investment Law will face many obstacles in its application. The most obvious is regarding the arrangement and ease of land rights, where the granting of land rights is relatively long and very much contrary to the Basic Agrarian Law. Under the Investment Law, usage rights can be granted for 70 years, business use rights for 95 years, and building use rights for 80 years. And what is very contradictory is that these rights can be extended in advance at once.

Even though to obtain these land rights, investors must meet certain conditions, granting them still needs to be revised to the laws and regulations in the agrarian sector. According to the Basic Agrarian Law, Law no. 5 of 1960, Article 2 paragraph (1), at the highest level, earth, water and space, including the natural wealth contained therein, shall be controlled by the state as the authority of all the people. The right to control the country, according to Article 2 paragraph (2), is the authority to:

- a. Regulate and administer the allotment, use, supply and maintenance of the earth, water and space;
- b. Determine and regulate the relationships between people and the earth and others (in other words, determine and regulate the rights that can be owned over the earth and others);
- c. Determine and regulate legal relations between people and legal actions concerning earth, water and space.

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The authority originating from the rights of control of the country is used to achieve the maximum prosperity of the people in the sense of nationality, prosperity and independence in society and the legal state of Indonesia, which is independent, sovereign, just and prosperous (Article 2 paragraph (3) of Law No. 5 years 1960). Based on these provisions, even though the state has the authority to regulate these rights, they must be used for the prosperity and welfare of all the people. They may not eliminate the right of the people to develop in the utilisation of these land rights due to the granting of rights to other parties that take too long as the purpose of the Basic Agrarian Law, namely prosperity, justice and happiness for all the people so that the interests of society and individual interests must be balanced.

Subsequent Article 7 of the Basic Agrarian Law stipulates that in order not to harm the public interest, the Basic Agrarian Law does not allow (prohibit) excessive land ownership and control. The principle of Agrarian Law emphasises the prohibition of ground beset, the growth of land in the hands of certain groups only. Therefore, the policy of the Investment Law, which provides for land rights that are pretty long and can even be extended in advance, is contrary to the Basic Agrarian Law.

Investment and land law have a close relationship and cannot be separated because investment activities are supported by statutes where land has a vital role in investment activities. Land is one of the capitals for the development of investment activities, so legal certainty is needed regarding granting land rights. Conversely,<sup>18</sup> land law can also change in line with investment needs; namely, the law can be made according to the investment needs to attract foreign investors. So, there must be a conducive investment climate to attract fresh funds from investors, especially foreign investors. The current arrangement for granting land rights in the context of investment refers to Law Number 25 of 2007.

On the other hand, several regulations do not allow foreign parties to acquire land rights. So the dilemma regarding this matter often strikes investors. On the one hand, the rules provide investors with the right to purchase land rights; on the other hand, some laws prohibit investors, especially foreigners, from not obtaining land rights. So this becomes a severe obstacle for foreign investors to acquire land rights in Indonesia. This kind of case occurred in one area in Indonesia, namely Yogyakarta, through its local government, which issued instructions to prohibit non-indigenous citizens from owning land there. In line with what was conveyed by the head of the National Land Agency, Sony Harsono said that the right to own land could only be owned by an Indonesian citizen (WNI); for example, apart from the most vital and most fulfilled requests, this right is hereditary.<sup>19</sup>

#### **4. Validity of the Agreement**

The validity of the nominee agreement and the judge's consideration of foreign nationals' ownership of usufructuary rights also affect foreign investment. Likewise, authentic deeds by a Notary can be used as proof before the court if a dispute occurs between the parties. In this dispute, it is possible to involve a notary who did an authentic deed, and for his involvement, the notary must be held responsible for his actions. If a foreigner buys, exchanges receive a grant or inherit a piece of land controlled by ownership rights. The legal action underlying the

transfer of ownership rights becomes null and void because the law and the land become state land (Article 26 paragraph (2) Basic Agrarian Law). Besides that, if a foreigner acquires land controlled by ownership rights due to a mixture of assets, the said ownership rights must be relinquished within 1 (one) year of obtaining said rights. If this is not implemented, the ownership rights to the land will be nullified by law, and the land will become state land (Article 21 paragraph (3) Basic Agrarian Law).

As an example of the judge's consideration in the decision of the District Court Number 787/Pdt.G/2014/PN.DPS that the deed of acknowledging debt using collateral, the Deed of Statement and Power of Attorney, and the Deed of Granting Mortgage Rights are inseparable from the Deed of Leasing Land, where the object of the deeds is the same, namely the Certificate of Property Rights Number 1022/Desa Prerenal on behalf of the Plaintiff, so it is contrary to Basic Agrarian Law Article 16 letter e. The objective requirement for the agreement's validity is that the legal cause is not fulfilled because it is contrary to law, decency or public order. Therefore, the deal is null and void, per Article 1335 of the Civil Code. Furthermore, the court decision with permanent legal force shows that the deeds made before a Notary related to land tenure by foreigners have failed to become authentic deeds with perfect evidentiary power. These deeds were declared contrary to the law, so they did not have the force of law.<sup>20</sup>

## **B. Non-Juridical Constraints**

Based on the factors in the description above as a whole, the aspects of non-juridical constraints that affect investment can be grouped into:

### **1. Domestic Factors**

#### **a. Political stability**

The political factor determines when investors want to invest their capital. This factor determines a conducive business climate for investment efforts, especially foreign investment. Indonesia's political condition, which has recently been less stable and uncertain, has decreased enthusiasm for investment.

#### **b. Economy.**

Economic factors are also very decisive in the desire of investors to invest. Political and economic factors will influence each other and have a close relationship. The heated political temperature in the country, of course, will reduce the business climate and decrease economic performance. So, if a country's economy is very worried, investors will be apprehensive about investing their capital. As part of the economy, the monetary aspect also greatly influences investors' interest in investing their money.

#### **c. Natural Resources**

This factor needs to be improved for foreigners in obtaining raw materials or raw materials for company production. Difficulties in obtaining raw materials or raw materials for production if

the availability of natural resources is running low the availability of abundant natural resources such as oil, gas, minerals and forest products in Indonesia.

**d. Climate and geographic location**

Difficulties for foreigners to obtain suitable land or project locations are also obstacles. Indonesia's climate, geographical location, culture and natural beauty are attractions for chemical, timber, paper and hospitality (tourism) projects.

**e. Natural Resources**

**f. Finance**

**g. Product marketing.**

**h. Dispute**

**2. Foreign Factors**

- a. Currency appreciation from countries with high investment in Indonesia, such as Japan, South Korea, Hong Kong and Taiwan.
- b. Increase the cost of production abroad.
- c. Factors in the business environment, both nationally, regionally or globally, that do not support and are less attractive to investment incentives or facilities provided by the government;
- d. Security, including, in this case, the stability of foreign policy relations, is an essential indicator for investors to ensure the capital invested.
- e. World economic conditions are among other signs that there will be an economic recession throughout the world.

**3. Social Factors**

Obstacles faced at the implementing level, for example, understanding of investment rules both by the Investors themselves, as well as by government officials in the Regions, both Provincial and City District Governments as well as Officials at the Office of the National Land Agency including Land Deed Officials (Notaries).

It starts with people's limited thinking towards foreign nationals who want to invest in Indonesia. The Indonesian government has indeed issued the rules, but the form of implementation is in direct contact with the community. So, no matter how good the rules are, the authorities' performance can't work correctly when people don't accept them. Law Number 25 of 2007 is an administration considered relevant to attract foreign investors to invest in Indonesia. However, several problems, such as incentives and restrictions, have become controversial in implementing this law. Foreign capital will receive prospective incentives, but some elements of society consider it as reducing rights for local interests. So, the investment provisions are small for foreign investors who invest in Indonesia. So, tax policy is very influential on investment.<sup>21</sup>

This indicates a need for more trust from the local community towards foreign investors who invest in Indonesia. Therefore, if there are investors who want to buy land from the community, this will result in the community not giving their land to foreign investors. And vice versa, because the imposition of tax costs is too heavy for foreign investors, it becomes an obstacle in making land rights certificates.

## CONCLUSION

Constraints on legal protection for foreigners investing in Indonesia as follows: (1) Juridical Constraints, like (a) legislation related to foreign capital investment; (b) certificate does not guarantee legal certainty of ownership; (c) non-compliance with investment regulations; and (d) agreement validity. (2) Non-Juridical Constraints, like (a) political stability; (b) economy; (c) natural resources; (d) climate and geographic location; (e) human resources; (f) financial; (g) product marketing; (h) disputes; (i) appreciation of currencies from countries with high investment in Indonesia; (j) increasing production costs abroad; (k) factors in the business environment, both nationally, regionally and globally that do not support and are less attractive to incentives or investment facilities provided by the government; (l) security, including, in this case, the stability of foreign political relations which is an essential indicator for investors to ensure the capital invested; (m) world economic conditions, among others, are signs of impending economic recession throughout the world; (n) social factors.

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