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The Use Of Mediation As An Alternative Dispute Resolution In The Settlement Of Investment Disputes

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ABSTRACT

Investment or investment has a very important function regarding will improve the development of the state of the country's economy. This investment is an activity carried out by the business world in order to improve people's living standards. The purpose of this study is to determine how the forms of dispute resolution in domestic investment according to Law No. 25 of 2007 and how the obligations and responsibilities of investors. By using normative juridical research methods concluded: the form of domestic investment dispute resolution according to Article 32 of Law No. 25 of 2007 is through deliberation and consensus; arbitration, Alternative Dispute Resolution, courts, and especially between disputes between governments and foreign investment, disputes are resolved through international arbitration that has been agreed. According to Article 15 of Law Number 25 of 2007, the obligation of investors in Indonesia is to apply the principles of good corporate governance, carry out corporate social responsibility (corporate social responsibility)while the responsibility of investors is regulated in Article 16, namely: ensuring the availability of capital from sources that do not conflict with the provisions of laws and regulations; to bear and settle any liability for losses if the investor ceases or abandons or abandons business activities unilaterally in accordance with the provisions of applicable laws and regulations; to create a healthy competitive business and to prevent practices. Investment mediation is the right choice because mediation is the spirit of local Indonesian stakeholders in resolving disputes and currently the international community is applying it as evidenced by ICSID offering wide access to mediation with countries, State entities or REIOS related to investment.

INTRODUCTION

In relation to legal certainty, the Indonesian legal world is currently facing severe challenges, where rapid developments in the global market have caused many laws to lag behind, whereas ideally economic development and development must be accompanied by adequate laws so that there are no ambiguities in creating a healthy business. In an effort to overcome legal backwardness, the suggestion that must be taken by the government is to issue regulated in various fields of the economy.

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The development of the global market is bound by investment law as seen from asapek regulatory law on foreign investment in Indonesia as a fundamental reference for the use of the law, namely in Article 1 Number 3 of Law No. 25 of 2007, where it is determined that foreign investment is an investment activity to conduct business in the territory of the Republic of Indonesia carried out by foreign investors, both fully using foreign capital and collaborating with domestic investors.

In Article 5 Paragraph 2 where foreign capital investment shall be in the form of a limited liability company based on Indonesian law and domiciled in the territory of the Republic of Indonesia, unless otherwise provided by law.In the implementation of investment activities, including foreign investment, there may be disputes between the government and foreign investors. The dispute can be caused by many things, such as the nationalization of foreign investment companies by the government, divestment processes that do not occur as agreed both on the value and duration of the divestment, termination of the contract period unilaterally by the Indonesian government and so on.

Regulation of government disputes with foreign investors in Article 32 paragraph (1) and Paragraph (4) UUPM provides signs in an effort to resolve disputes between the government and foreign investors. Article 32 paragraph (1) UUPM states that in the event of a dispute in the field of capital planting between the government and investors, the parties first resolve the dispute through consensus. Furthermore, Article 32 paragraph (4) of UUPM states that in the event of an investment dispute between the government and foreign investors, the parties will resolve the dispute through international arbitration which must be agreed upon by the parties.

In Article 32 paragraph (4) in the settlement of investment disputes involving the government with foreign investors will resolve the dispute through international arbitration mechanism submitted to the institution of the International Centre for Settlement of Investment dispute (ICSID). This is because Indonesia joined the ICSID through the ratification of the Convention on the Settlement of Investment disputes between States and National other States Through Law No. 5 of 1968 concerning the settlement of disputes between states and foreign nationals regarding investment. The adjustment of an international agreement into the National Law of a country must be made in order to follow up on the agreement if a dispute is decided. Thus, politically, ICSID ratification by the Indonesian government shows Indonesia's openness in the field of investment, and in the economic perspective, ICSID ratification aims to encourage and increase foreign investment in Indonesia.

ICSID was established in 1965 until June 2014 registered members as many as 159 countries and only 9 countries that have not ratified. The ICSID is an administrative and not judicial body, but is similar to the International Assembly. ICSID is also not a commercial arbitrage body like the ICC (International Chamber of Commerce), but rather an arbitrage body that provides a mechanism for resolving investment disputes between foreign investors and one of the ICSID (contracting state) countries or an ICSID member country that signed an initial agreement called BIT (Bilateral Investment Treaty) to choose ICSID as a dispute institution in the future (Nurnaningsih Amriani, 2016). There are 7 (seven) cases where the Indonesian government has a dispute with foreign investors. Based on ICSID data, the seven Indonesian disputes with foreign investors are Amco Asia Corporation (1981), Camex Asia Holding (2004), Kaltim Prima Coal (2007), Ravat Ali Rizvi (2011), Churchill Mining and Planet Mining Pty Ltd (2012), PT. Newmont Nusa Tenggara (2014), and Oleovest Pte Ltd (2016) (/icsid.worldbank.org, 2016).

The condition of Dispute Resolution apart from arbitration which is often used, there is also another settlement in the form of deliberation or known as mediation and it turns out that ICSID as a dispute institution also has regulatory rules on mediation (Ariman Sitompul, Sabela Gayo, 2022). This can be seen in the ICSID mediation rules adopted by the Central Administrative Council in accordance with Article 7 of the ICSID Convention and administrative and Financial Regulation. The ICSID mediation rules are complemented by the ICSID mediation administrative and financial rules.

Based on the description above, it is considered necessary to conduct continuous, integrated, systemic and systematic research to identify public confidence in the investment climate, while the issues studied are how investment rules and investment responsibilities in Indonesia, how to resolve investment disputes according to law 25 of 2007 and mediation as the main option in resolving investment disputes.

METHOD

Research that is used is juridical normative, where research is done by tracing legal material through

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literature studies. This study is descriptive Analytical that is to analyze the data systematically, factual and accurate about the problem under study. With the nature of the research conducted is the nature of descriptive research analysis is to provide data as thorough as possible research on the level of public trust in the National Police. The data collection tools used, namely: primary, secondary and tertiary legal materials which are then analyzed by Qualitative Analysis and then presented descriptively, namely by explaining, outlining, and describing the problems and solutions related to the formulation of the problem made.

RESULTS AND DISCUSSION

A. Investment law and investment responsibility in Indonesia

In the development of investment activities, in addition to being influenced by many internal factors, be it natural potential, demographics and various deregulations, it is also strongly influenced by external factors. External factors can lead to a decrease in the amount of capital being relocated from developed countries to developing countries. The development of investment in Indonesia is still dominated by East Asian countries. The reduced flow of investment is caused by some developed countries are allocating some of its funds for social properties in addition to that Indonesia is also facing offers from foreign countries.

Investment, especially foreign investment to this day is an important factor to drive and encourage economic growth. Expectations of the influx of foreign investment in reality is still difficult to realize. Factors that can affect the investment taken into consideration by investors in investing, among others: a. The Natural Resources b. Human resources c. Factors of political and economic stability, in order to ensure certainty in trying d. Government Policy e. Factor in licensing. In mid-1997 Indonesia experienced a monetary crisis. This monetary crisis began with the depreciation of the rupiah exchange rate against the United States dollar. The depreciation of the rupiah exchange rate is getting sharper so that the monetary crisis that occurs continues to be an economic crisis whose effects are felt until now. Economic growth is very slow. One way to revive or mobilize the national economy as it was before the economic crisis is the policy of inviting investment in Indonesia. Investment, especially foreign investment to this day is an important factor to drive and encourage economic growth. Expectations of the influx of foreign investment in reality is still difficult to realize. Many factors have caused the reluctance to enter investment into Indonesia at this time. Factors that can support the entry of investment flows into a country, such as security guarantees, political stability, and legal certainty, seem to be a separate problem for Indonesia. Even the regional autonomy that is now applied in Indonesia is considered a new problem in investment activities in several regions. In the reform era, since the government of BJ Habibie, then Abdurrahman Wahid, Megawati, and now President Susilo Bambang Yudhoyono, the government has sought to attract as much foreign investment as possible through a series of state visits abroad, privatization of state - owned enterprises, enforcement of the rule of law, as well as revisions to various laws relating to business and investment taxation, employment and so on. All these efforts are certainly aimed at creating a more conducive domestic business climate in order to increase capital inflow which in turn is expected to improve the welfare of the people.

The legal basis of investment provisions for forty years is regulated in two laws, namely the First, Law No. 1 of 1967 on Foreign Investment. And the Second Law No. 6 of 1968 on domestic investment, repealed and replaced by Law No. 25 of 2007 on investment which is declared valid since its promulgation in the State Gazette of the Republic of Indonesia in 2007 No. 67 on april 26, 2007. that the discussion on the renewal of investment provisions takes quite a long time. This is understandable, because what is contained in the investment law adheres to Liberal understanding does not seem to be fully acceptable to various parties. Finally, various inputs submitted by parties who have attention to investment are summarized in the spirit of the Investment Law. The existence of Liberal understanding in investment law is known from the treatment given to investors. In this law, there is no distinction between the treatment of foreign investors and domestic investors. It seems that this is where the difference in viewpoints in seeing the importance of investors. As for the reasons put forward by those who do not agree with the application of Liberal understanding, namely in the current conditions, it is not time to impose Liberal understanding in the investment law.

Prior to the birth of the law of capital designation by 2007 known terminology Foreign Investment Law and Domestic Investment Law. From these two laws, it can be seen that there is a difference in the treatment between foreign investors and domestic investors. In the Foreign Investment Law and the Domestic Investment Law

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there are still many differences, for example in the domestic investment law is much freer than foreign investment. In the Foreign Investment Law, legal guarantees are not nationalized, entitled to transfer profits and capital, Foreign Investment is carried out in the form of foreign exchange, while domestic investment is in rupiah. But more importantly, said this economic expert, namely the problem of national sentiment, whether pro (capital and companies) foreign, anti or ambivalent, do not reject but accept with careful considerations. Foreigners equated with large, very powerful, so easily rivaled the small entrepreneurs natives (M. Sadeli, 1994)

Indonesia has ratified the World Bank convention with Law No. 5 of 1968 on the ratification of the ICISD (International Convention on the Settlement of Disputes) Convention and then strengthened again with Presidential Decree No. 34 of 1981 and regulation of the Supreme Court of the Republic of Indonesia Number 1 of 1990 on procedures for the implementation of Foreign Arbitral Awards. Even in 1999 the government has passed Law No. 30 of 1999 which regulates arbitration and Alternative Dispute Resolution in which one of its provisions, namely in terms of the implementation of international arbitrse decisions refers to the provisions stipulated in the law. The ICSID Convention aims for a clear rule of law and can be used as a basis in the resolution of investment disputes through conciliation or arbitration mechanisms as well as to protect and encourage capital flows between countries (Huala Adolf, 2002).

So that juridically Indonesia is bound by the provisions contained in the convention, so that any dispute resolution or settlement of foreign investment disputes that cannot be resolved in the capital recipient country will be resolved and carried out according to the procedures and procedures stipulated in the International Convention on the Settlement of Dispute (ICSID).

ICSID (International Centre for Settlement of Investment Disputes) is an autonomous international institution created by the World bank. The convention that established ICSID is the Washington Convention which is a multilateral agreement formulated by the Executive Board of the International Bank for Reconstruction and Development (World Bank). This convention regulates disputes between a state and foreign individuals or companies that invest their capital in that state by peaceful means through conciliation or arbitration. The establishment of this convention is as a result of the world economic situation in the 1950-1960s, especially when some developing countries nationalized foreign companies in its territory. These actions result in economic conflicts that can turn into political disputes or even wars. The convention was signed on 18 March 1965 and entered into force on 14 October 1966. ICSID has a membership of one hundred and forty member states including Australia, China, France, and Indonesia. The main purpose of ICSID is to provide facilities for the conciliation and arbitration of international investment disputes (Budi Sutrisno,2021).

The investor's obligation is regulated in Article 15 which determines that each investor has an obligation to:

a) Applying the principles of good corporate governance.
b) Corporate social responsibility

The principle of Good Corporate Governance (GCG) which means as an action or behavior that is based on values and that is directed to control, or influence public issues to realize values in actions in everyday life. With GCG, it is expected that the government, business actors, and the community are expected to carry out their functions and roles. So that it can achieve the desired goals of all parties. The principles of Good Governance are: transparency, independence, accountability, law enforcement and equality (Jonker Sihombing, 2009).

In carrying out corporate social responsibility the latest thing contained in Law Number 25 of 2007 which is not explicitly contained in the previous law is the obligation to carry out corporate social responsibility as referred to in Article 15 letter b of the law.

The responsibility attached to each investment company to keep creating a harmonious relationship, balanced and in accordance with the environment, values, norms, and local culture. Regarding environmental social responsibility or better known as CSR (corporate social responsibility) is an obligation that must be carried out by every company.

While the responsibility of investors in Indonesia in Article 16 states that every investor is responsible for:

a) Ensure the availability of capital derived from sources that do not conflict with the provisions of the laws and Regulations Act No. 25 of 2007.
b) Bear and settle all liabilities and losses if the investor stops or abandons or abandons its

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business activities unilaterally in accordance with the provisions of applicable laws and regulations.

c) Creating a healthy competition business, preventing monopolistic practices and other things that harm the state.
d) Maintaining environmental sustainability in carrying out its business activities.
e) Creating safety, health, comfort, and well-being of work.
f) To comply with all laws and regulations.

Regulation of Investor Responsibility is needed to encourage a healthy competitive business climate, increase environmental responsibility and fulfillment of labor rights and obligations, as well as efforts to encourage investor compliance with laws and regulations (Rustanto,2012).

Investors do not fulfill their obligations and responsibilities as written in Article 15 and Article 16 of the investment law, then investors get sanctions as written in Article 34, which are subject to administrative sanctions in the form of: written warnings, restrictions on business activities, freezing and revocation of business activities and/or investment facilities.

In addition to administrative sanctions, investors can also be subject to criminal sanctions, but in Law No. 25 of 2007 on investment is not expressly regulated, but the interpretation can be obtained a condition where criminal sanctions imposed. In fact, a regulation in the form of a law must clearly state the criteria and sanctions imposed and not depend on other laws and regulations, let alone lower - level laws and regulations.

In Article 33 paragraph (3) it is stated that investors who carry out business activities based on work agreements or cooperation contracts with the government commit corporate crimes in the form of criminal taxation, inflating recovery costs and other forms of inflating costs to minimize profits.

B. Settlement of investment disputes under law 25 of 2007

The dispute resolution adopted by the investment law are generally applicable ways of settlement and are widely applicable in several countries. Generally, domestic investment dispute resolution methods are in the form of dispute resolution in the following ways:

a) Alternative Dipute Resolution through deliberation and Consensus.
b) Alternative Dipute Resolution Through Through Arbitration
c) Dispute Resolution Through The Courts
d) Dispute Resolution Through Alternative Dispute Resolution
e) Specifically between disputes between the government and foreign investment, disputes are resolved through international arbitration that has been agreed.

Deliberation and consensus is a way of dispute resolution that can be said to be typical of Indonesia, and in accordance with Pancasila. When this way is taken, then there is no loser and winner. Both parties to the dispute sit down together, discuss the subject of the dispute to produce an agreement that feels fair to both. This is in line with the nature of the Indonesian people who generally tend to avoid open conflict.

Dispute resolution in the field of investment through arbitration is a popular way of dispute resolution in the field of investment and almost all countries choose how to resolve investment disputes through arbitration. This is because settlement through arbitrage is perceived as more practical, fast, cheap. In addition, because arbitration has advantages or advantages that the General Court does not have, namely freedom, trust, and security, which gives very wide autonomy to business people (parties to disputes) and provides security against uncertainties or certainties with respect to different legal systems and against the possibility of biased decisions. The second advantage is the expertise of arbitrators, that is, arbitrators are people who have great expertise on disputed issues. The third advantage is that it is fast and cost-effective, that is, the decision-making process is quick, not too formal and the decision is final and appealed. New problems arise if the losing party does not want to implement the arbitral award voluntarily.

Furthermore, the settlement of investment disputes through the court is carried out if the dispute resolution method through deliberation and consensus is not reached. The way of dispute resolution through the court is less perceived as fair and less trusted by investors. Investors tend to find the way of settlement through the courts ineffective and efficient, causing dissatisfaction.

Through Alternative Dispute Resolution methods according to Law No. 30 of 1999 is a dispute resolution institution or differences of opinion through a procedure agreed upon by the parties, namely settlement out of court by way of consultation, negotiation, mediation, conciliation, or expert assessment. ADR is an alternative dispute resolution conducted outside the court (ordinary court) through the process of negotiation,

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mediation, conciliation, and arbitration (Ariman Sitompul,2020).
Settlement of disputes between governments and foreign investment, disputes are resolved through international arbitration that has been agreed in accordance with Article 32 of the UN Charter there are several methods used to resolve disputes related to foreign investment, namely through negotiation, investigation, mediation, conciliation, arbitration, national and international courts, regional bodies, and other peaceful means that the parties agree (Huala Adolf,2011). That the National Court is the most appropriate forum in resolving disputes. Developing countries generally hold that the authority to adjudicate economic disputes (including investment) rests with the National Court of the country concerned (Ariman Sitompul ,2023).

C. Mediation As An Alternative Dispute Resolution In The Settlement Of Investment Disputes

Mediation is said To Be An Alternative Dispute Resolution in the settlement of Investment Disputes in accordance with law 25 of 2007 precisely on the choice of Dispute Resolution through Alternative Dispute Resolution (Alternative Dispute Resolution), namely through procedures agreed by the parties, namely settlement out of court by way of consultation, negotiation, mediation, conciliation, or expert assessment. ADR is an alternative dispute resolution conducted outside the court (ordinary court) through the process of negotiation, mediation, conciliation, and arbitration (Sabela Gayo,2023).
If you look at the existing rules in Law No. 30 of 1999 it is clear that mediation is part of one form of dispute resolution that can be applied to investment disputes.
In 2022 ICSID introduced mediation rules designed specifically for investment related disputes, mediation is a voluntary process in which an independent and impartial third party assists the disputing parties to resolve all or part of their dispute amicably (Sabela Gayo,2023). It is an efficient and cost-effective process that aims to identify solutions that are mutually acceptable to both parties. For more information on investment mediation.
ICSID mediation can be applied to investment-related disputes involving States or regional economic integration organizations (REIOS), and the parties agree in writing to submit to ICSID (mediation Rule 2 (1)). Therefore, ICSID mediation rules offer broad access to mediation with states, state entities or REIOS relating to investments.
There are two distinct features of the scope of mediation rules to note: i) there is no nationality requirement for the parties, and therefore ICSID mediation may involve investors and nationals of states parties to the dispute; and ii) there is no requirement for either party to connect with a member state of the ICSID Convention.
Mediation is considered the oldest and newest form of dispute resolution. The treaty has long been an effective means of resolving cross-border commercial disputes, and is increasingly recognized as a tool for resolving international investment disputes. Mediation is a flexible process in which an independent and impartial person actively helps the parties to reach a negotiated agreement to resolve their dispute, and the parties are in full control of the settlement decision and the terms of the settlement. Investment mediation can be understood as mediation that deals with investments and involves a country, a state body or a regional economic integration organization (REIO). Mediation requires the consent of the parties, which may be provided for in a contract (e.g. concession or license), agreed on an ad hoc basis between the parties to the dispute, or under the terms of an international investment treaty or domestic law.
The purpose of organizing out-of-court dispute resolution is to protect the civil rights of the parties to the dispute in a quick and efficient manner. This is because dispute resolution through litigation tends to take a long time and costs relatively little. This is due to the slow dispute resolution process, the cost of litigation in court is expensive, the court is considered less responsive in the settlement. cases, so that the decision is often unable to resolve the problem and the buildup of unresolved Supreme Court cases.
Several attempts to resolve investment disputes and arbitrage have been carried out through the courts and the results are disappointing, because the decisions are not satisfactory, cost a lot and take a long time to see the slowness of the judiciary to resolve the issues that arise , it can be understood when criticism is directed at the slowness of this judicial institution. Lawrence S15 quoted T.M Lutfi Yasid said that the cost of the trial may exceed the value or result of the victory. The same thing was stated by Tony Mc Adam16 that " that ligition cost may actually be doing damage tothe nation's economy" and Achmad Ali1 stated that a chronic disease that has long been suffered by the Supreme

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Court of the Republic of Indonesia is the accumulation of tens of thousands of Cassation cases. The problem of stacking cases in the Supreme Court is more caused by the mechanism of the judicial process in Indonesia, especially with regard to the authority of the Supreme Court.".

Mediation is the main option in the settlement of investment disputes, because it is considered more effective. According to Moore quoted 18 a negotiation process through mediation, said to be ideal, because it meets 3 (three) conditions of satisfaction. The first is substantive satisfaction, which is satisfaction related to the special satisfaction of the parties to the dispute, for example the fulfillment of monetary compensation or providing satisfaction because the negotiation process can be completed in a timely manner. Procedural satisfaction.

Settlement of investment disputes is organized to reach an agreement on the form and amount of compensation and/or on certain measures to ensure that there will be no occurrence or recurrence of negative impacts on the environment. In the settlement of investment disputes outside the court can be facilitated through the services of third parties, both those who do not have the authority to make decisions or who have the authority to make decisions, to help resolve environmental disputes, such as the government and/ or the community. The community in this case can form an institution that provides environmental dispute resolution services that are free and impartial.

However, the good intentions of the Environmental Management Law makers to overcome the weaknesses of the justice system in Indonesia by providing opportunities for environmental settlement arrangements through non-litigation channels are not accompanied by sufficient institutional factors. Considering that until now it is not clear how the settlement of environmental disputes outside the court (non-litigation) through third party services can be resolved. This institutional factor has an important role related to the effectiveness of law enforcement and application. According to Soerjono Soekanto, the factors that can affect the functioning of law in society or the effectiveness of law enforcement and application are influenced by several factors, namely : the law itself, law enforcement factors, facilities and facilities and community factors, namely the environment in which the law is applied. These four factors are interrelated, because it is the essence of law enforcement and also a measure of the effectiveness of law enforcement (Soerjono Soekanto, 1983).

So that investment mediation is an investment dispute resolution process that is relatively cheap and does not take time when compared to litigation in court or arbitration. The result of mediation in the form of an agreement is a settlement pursued by the parties themselves, so that the parties will not object to the results of their own work and are morally responsible for implementing the agreement.

CONCLUSION

Mediation as an appropriate investment dispute resolution option and is known as the five basic philosophies of mediation. The five principles are; the principle of confidentiality (confidentiality), the principle of voluntary (volunteer) the principle of empowerment (empowerment), the principle of neutrality (neutrality), and the principle of a unique solution (a unique solution). Investment mediation as a business dispute resolution option is a form of settlement that is based on the good faith of the parties,and is not bound by procedural law formalism as is the case in Civil Procedure Law. Mediation as an environmental dispute resolution institution is in accordance with the concept of dispute resolution that lives in society, namely prioritizing dispute resolution in deliberation for consensus. Indonesia has implemented it in accordance with law No. 30 of 1999 and of 2022 ICSID offers broad access to mediation with states, state entities or REIOS relating to investments.

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