



Indonesia for Global Justice

A Paper of IGJ for The Human Rights Treaty on TNCS and Other Business

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THE TNCS CRIMES IN INDONESIA'S MINING INVESTMENT: “THE NEED OF BINDING TREATY”

INTRODUCTION¹

Indonesia's economy has been depending on its natural resources such as agriculture (food, fishery, forestry, and plantation) and mining (oil, natural gas, minerals and coal). These sectors have given significant contribution to Indonesia's economy. Agriculture sector contributes 14.3% to the country's Gross Domestic Product. Whereas, mining sector contributes 8.0% to the GDP ². This means more than one fifth of Indonesia's economy is supported by the two sectors.

Indonesia's potential natural resources has attracted investment. In 2014, the total investment realization coming from Foreign Direct Investment in agriculture and mining sectors reached US\$ 6.99 billion or about 24.5% of the total FDA in Indonesia ³. Whereas, domestic investment realization in agriculture and mining sectors reached IDR 16.52 trillion or about 10.58% of the total domestic investment realization in Indonesia ⁴.

There are many big multinational and national companies that operate in

1. Taken from the Preliminary Report of IGJ on Deregulation of Indonesia's Investment Policy and Tax Avoidance Practices by TNCs in Natural Resources Sector, Written by Wiko Saputra & Rachmi Hertanti, IGJ, 2016

2. See <http://www.bps.go.id/linkTableDinamis/view/id/828>

3. Foreign Direct Investment Realization in 2014: agriculture and plantation (US\$. 2,20 billion), forestry (US\$. 53,45 millio), Fisheries (US\$. 35,32 million dan Mining (US\$. 4,66 billion). Foreign Direct Investment Realization Data in 2014 (Indonesia Investment Coordinating Board) <http://www.bkpm.go.id/contents/p16/statistik/17#yr2014>

4. Domestic Investment Realization in 2014: agriculture and plantation (IDR 12, 70 trillion), Forestry (IDR. 300 million), Fisheries (IDR 21, 70 billion) and Mining (IDR. 3, 14 trillion). Domestic Investment Realization in 2014 (Indonesia Investment Coordinating Board) <http://www.bkpm.go.id/contents/p16/statistik/17#yr2014>

this sector. In the mining sector, there are Adaro Energy, Bumi Resources, Bayan Resources, Vale Indonesia, Indo Tambangraya Megah, Freeport Indonesia, Harita Group, Arutmin Indonesia, Kaltim Prima Coal, Newmont Nusa Tenggara, Exxon Mobile, Conoco Philips, Petrochina, Chevron Indonesia, etc.

These companies have gained a big profit from these business activities. Adaro Energy, the biggest company in coal mining, for example, successfully gained a net profit of US\$ 183 million. Bayan Resources in 2014 successfully earned a net profit of US\$ 55 million. Indo Tambangraya Megah recorded a net profit of US\$ 200 million in the same year.

There is a great deal of investment in the promising sectors of agriculture, forestry, and mining in Indonesia, particularly mining sector, of which investment realization in the past five years has been growing rapidly, despite of its drop in 2014. It is interesting that the investment in mining sector mostly come from foreign countries. In 2014, US\$ 4,665.1 million or 94.7% of the US\$ 4,926.8 total investment is foreign direct investment. In the agriculture sector 67.6% of the total investment of US\$ 3,265.7 is foreign direct investment. In forestry sector, 100% of the total investment realization is foreign direct investment.

The figures show that the three sectors are attracting a great deal of foreign investment in Indonesia. However, the investment is not commensurate with its contribution to the state's revenues. In fact, it negatively affects the environment and the people; it causes environmental damage, social conflict, and land conflict. As the three sectors are closely related to the environment, land and society.

Mining sector particularly has big impact on environment and land. There are six million acres of mining areas, which disrupt environmental stability, located in protected forests. There are 4,276 non-clean and clear mining operation permits, administration and land allocation wise, cause land overlapping, royalty payment and fixed dues. It obviously causes negative impact.

Indonesia's mining business structure is dominated by upstream sector. Mining commodities are raw materials. There are not many of mining commodities being processed in Indonesia to be commodities with added values. Therefore, the big mining potential has not yet been optimized and could still be utilized to increase value. Downstream policy is the answer to this problem.

Mining sector is a capital-intensive and high technology sector. Not everybody could enter this industry. Consequently, the mining industry is controlled by corporations that have big capital and control technology. Most of these are foreign corporations and national big corporations.

In the last two decades, business in mining sector has been able to create rich businessmen in Indonesia. Almost half of twenty Indonesia's richest businessmen do business in mining sector such as Low Tuck Kwong (Bayan Resources Group), Kiki Barki (Harum Energy), Garibaldi Thohir and Benny Subianto (Adaro Energy Group), Peter Sondakh (Golden Eagle Energy), Aburizal Bakrie (Bakrie Group), and Arifin Panigoro (Medco Group). Thousands of business unit operate in mining sector. However, economic impact created by mining sector is limited to the capitalist. Mining industry does not generate a trickle-down effect towards the welfare of a wide range of people. Thus, it promotes economic inequality in Indonesia.

The presence of mining companies with big asset even causes controversy in the local region. It creates many problems such as forest damage, indigenous people's land grabbing, land conflict, social conflict, corruption, and tax crimes. It happens due to the poor governance in mining sector in Indonesia. It has been the biggest problem in the country's economy, which should immediately addressed.

THE PATTERN OF HUMAN RIGHTS ABUSES BY TNCS

a. Corporate Crimes Under Mining Investment Activity

Increased cooperation on trade and investment (business) go hand in hand

with increased potential and violations on human rights, as well as the risk of the country losing the ability to govern themselves. Indonesia's Human Rights Commission (KomnasHAM) RI noted, that the complaints it receives are dominated by human rights abuses involving corporations – both private as well as government/state-owned corporations.

Table 1: Complaints of human rights violations by business received Human Right Commision⁵

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| Years | State Enterprises | Private Company |
|-------|-------------------|-----------------|
| 2012 | 246 cases | 1126 cases |
| 2013 | 273 cases | 958 cases |
| 2014 | 410 cases | 1012 cases |
| 2015 | 381 cases | 1231 cases |
| 2016 | 359 cases | 1030 cases |

Looking at specific areas of abuse, the majority of complaints of human rights violations by corporations concern land disputes (41%), followed by labour/employment issues (36%). Another report by Consortium for Agrarian Reform points out that human rights violations by corporate activity in recent years are dominated by the following sectors: plantations, infrastructure, forestry and mining sector⁶. Moreover, the distribution of Foreign Direct Investment (FDI) in Indonesia is highly correlated with the spread of human rights violations. Areas with sizable FDI flow overlap with areas where many human rights violations occur: Jabar, Java, Banten, East Java, Kalimantan Timur, Papua, South Sumatra, North Sumatra and Sulteng⁷.

5. Peraturan Komisi Nasional Hak Asasi Manusia Nomor 001 Tahun 2017 Tentang Pengesahan Rencana Aksi Nasional Bisnis Dan Hak Asasi Manusia, Page-20

6. Annual Report, Consortium for Agrarian Reform, 2013-2014-2015

7. Report Compilations: Indonesia's Human Right Commision and BKPM

Box 1: The Case of PT.Vale Indonesia

The conflict between the indigenous peoples with mining companies has taken place since 1970's. It began when the Central Government gave the exploration rights to the INCO MINE PT tbk (1968) which was later changed to PT VALE. In 1978, Central Government and the company signing the contract of work with an area covering an area of 118 thousand hectares, including a residential area of indigenous people. In the next stage, the company developed many infrastructures that cause the villages of Dongi was converted into a golf course. The company assessing that the village of indigenous people beside the golf field are in the company concession and its considered as a wild settlement. The conditions that cause the Community loses their access to natural resources such as rice fields, plantations.

In 1977, some Dongi people complained to the Local Government about the situations that they dealing with. Unfortunately the Local Government more concern to the company interest. Later in 2010, the Local Government and The Company build 57 homes, number of houses in Dongi Village (beside the golf field). But the facilities is far from what they promised, the house is to small and its located on the side of a hill.

In 2012, the Dongi village got a new electric flow, previously they only use traditional lighting. But the flow of electricity disconnected by PT Vale Indonesia with the reason that the Dongi peoples steal the electricity from tha company. Because of these the peoples complained to local governments, but there is not concret acted. And then the people send the complain trough Indonesia's Commision on Human Rights (KOMNASHAM). KomnasHAM responded with a letter Number 1,997 /K/PMT/2016 16 October 2016 sent to Regent of Luwu Timur, and the letter Number 1998/K/PMT/2016 to the President and CEO of PT. Vale Indonesia. Komnas HAM asked PT Vale to find a solutions related to the electricity flow termination and fulfill the rights of Human Rights.

Human rights violations by business activity appears in various forms such as eviction, expulsion, until the death of the man. For example in the mining sector where many children die in a pit mine in Kalimantan⁸. But up to now the response to such cases has been administrative in nature,

8. Lag Lubang Maut Batubara Makan Korban, <https://www.jatam.org/2017/07/05/lagi-lubang-maut-batubara-makan-korban/>, accessed on Oct, 17 2017

e.g. by temporary revocation of permits by the Ministry of environment and forestry. Whereas such cases requires a comprehensive approach including through criminal and civil legal pathways.

Cases of death in the mine pit are closely related to various issues in Indonesia such as corruption and bribery cases granting permission as well as poor governance of mining. In this context it is very important to apply the liability to structure the company both domestic as well as TNC to join the responsible in case of the occurrence of corruption and kickbacks in the management of mining which is correlated with human rights violations. Because the completion on the level of domestic form of revocation while not proven able to make wary companies to improve corporate governance of its activities.

Our Demand Under The Binding Treaty:

STATES' OBLIGATION TO PROTECT HUMAN RIGHTS

The Home State must establish channels for receiving the complaints and concerns of the affected communities in the country of destination of the business activity. These channels must allow concerned individuals to submit complaints while ensuring their safety.

REMEDY FOR THE IMPAIRMENT OF HUMAN RIGHTS BY TNCs

States Parties shall take the necessary steps to ensure that complaints can be filed against TNCs in national and international jurisdictions, including the International Court established in Part V of this Treaty and its auxiliary bodies, which have jurisdiction to receive individual and collective complaints, and investigate and sanction human rights violations related to TNCs' business activities, including those of their respective supply chains. They must guarantee access to justice and due process in accordance with international human rights law, including regional human rights instruments to which States are parties.

States Parties must adopt national laws that regulate territorial and extraterritorial responsibility so as to allow individuals and communities affected by TNCs' practices to file complaints at national courts.

Home and Host States have the obligation to investigate complaints of human rights violations involving TNCs. If the Host State proves it lacks material resources for this purpose, Home States must provide means of cooperation so that the inspection of TNCs' activities can be carried out.

b. TNCs Tax Avoidance

Illegal practice of taxation in the last decade become a global trend that need to be concern all together by each country. The act of tax evasion or tax evasion (tax avoidance) conducted by TNCs in a country led to the loss of state revenue sources. And this is a direct impact on the mobilization of funds for development. This trend is also growing in Indonesia.

Box 2. The Facts of Low Tax Revenues in Extractive Industry Sector⁹

Indonesia's massive economic potential and an increasing GDP every year do not commensurate with an increase in tax revenues. In 2014, Indonesia's tax ratio is only 12.3%. Yet, Indonesia's GDP reaches US\$ 888.5 billion with income per capita of US\$ 3,630. It means according to economic scale, Indonesia is considered as lower-middle-income country. Tax ratio of lower-middle-income countries should reach 17.3%. This indicates there is a problem in Indonesia's tax revenues.

If we see the source of tax revenues based on sector, the biggest tax problem is in agriculture and mining sectors. In 2013, total tax revenues in all sector reached IDR 916.9 trillion. Tax revenues from agriculture sector was only IDR 15.1 trillion or 1.65% of total revenues and that from mining sector was only IDR 96.9 trillion or 10.57% of total. Although, the GDP of agriculture sector reached 14.42% of the country's total GDP; GDP of mining sector reached 11.29%.

Tax ratio of these two sectors are lower than the other sectors. Tax ratio of agriculture sector was only 1.16% and that of mining sector was only 9.45%. This condition has indicated that there has been a non-compliance issue by tax payer in the two sectors in Indonesia.

The Corruption Eradication Commission of Indonesia found that there are many mining companies in Indonesia that do not pay their taxes. Data from the commission coordination with Energy and Minerals Ministry and other related

9. Taken from the Preliminary Report of IGJ on Deregulation of Indonesia's Investment Policy and Tax Avoidance Practices by TNCs in Natural Resources Sector, Written by Wiko Saputra & Rachmi Hertanti, IGJ, 2016.

agencies shows that 24% of 7,834 companies registered at the Directorate-General for Taxation do not have taxation ID number and 35% do not report their taxes. It indicates that there is compliance problem among tax payers. This problem needs to be addressed by government tax agency, especially Directorate General for Taxation¹⁰.

For TNCs, practices of tax evasion and tax avoidance is part of tax planning schemes (tax planning) also has become a norm of the company. From tax planning, the company received saving income that later can be used to mobilize capital for business expansion. This is mostly done in the extractive sector, especially coal and palm oil.

Capital mobilization from the scheme of tax evasion and tax avoidance in the form of new land clearing in oil palm plantation sector or getting Mining Permit (IUP) has led to increasing the practice escalation - the practice of human rights violations, especially in the form of land grabbing, the loss of rights - the rights of indigenous, physical and non-physical violence, and other forms of human rights violations. This has caused a great loss for the society and the State.

Then, repressing firmly action (law of enforcement) against tax crimes committed by TNCs is part of an effort in minimize the human rights crimes committed by TNCs in Indonesia in addition of improvements to the governance aspects of the extractive industry. Moreover, losses incurred in the form of loss of State revenues have made the mobilization of funds for the development of people's fundamental rights became limited. Thus, the contribution of the State as a provider of fundamental services became less optimal. And this is part of the human rights violations committed by TNCs.

Our Demand Under The Binding Treaty:

TNCS' OBLIGATION TO RESPECT HUMAN RIGHTS

- *TNCs shall comply with legal and regulatory tax provisions in*

10. Saputra, Wiko (2015). Illegal Cash Flow Estimation and Tax Crimes in Mining Sector in Indonesia. PWYP Policy Review, No. 1/October 2015.

the countries they operate in and contribute to host countries' public finances.

- *TNCs shall not channel their operations towards tax havens.*
- *TNCS from the financial sector shall assume their direct responsibility for funding projects that pose genuine risks to the enjoyment of human rights, are likely to cause environmental damages, or contribute to fraud and tax evasion.*

TNCS' OBLIGATION OF TRANSPARENCY IN RELATION TO RESPECT FOR HUMAN RIGHTS

- *TNCs shall make the identity of the partners with whom their investors carry out business and/or financial activities public in order to prevent tax avoidance and evasion, or intra-firm capital flows that violate human rights.*

Source: Draft Text of The Global Campaign to Dismantle Corporate Power

c. Investors Lawsuit Under Trade and Investment Treaty

Bad investment practice is worsened by the investment protection agreement, both the Bilateral Investment Treaty and investment chapter in a comprehensive Free Trade Agreement, which provides many aspects of protection for investors. Having the Investment Protection Agreement, the host country is obliged to provide protection aspects in accordance to international standards.

This investment protection practices lead to the state being held hostage by the corporations and to the loss of democracy through the inclusion of effective investor-state dispute settlement. The right of state to regulate has been diminishing, especially in making policies that prioritize the interests of the people.

In the report of Alfred De Zayas A / HRC / 30/44 issued on July 14, 2015, he explicitly stated that the implementation of ISDS in ICSID or international arbitration under trade and investment agreement has compromised the function of the State in regulating the public interest through chilling effect or regulatory chill in adopting regulations that

protect the environment, food security, access to cheap medicines, and the implementation of conventions on tobacco control agreed under the WHO¹¹. The impact of the ‘Chilling effect’ of the ISDS application prevents the State from carrying out its obligations to respect, fulfill and protect human rights¹². De Zayas ensures that the loss of the State policy space due to the adoption of ISDS mechanism is contradict with Article 28 of the Universal Declaration of Human Rights and Article 2 of the International Covenant on Civil and Political Rights.

Indonesia has experienced several ISDS lawsuits in International arbitration based on Bilateral Investment Treaty (BIT) which signed by Indonesia with several countries. From the total of incoming cases, 50% are in mining sector¹³, i.e: Churcill Mining, Planet Mining, Newmont Nusa Tenggara, India Metal Ferro Alloys (IMFA).

Box 3: ISDS Case – IMFA VS Indonesia

In the context of improvements in good governance, especially in mining sector, the Government of Indonesia has initiative to improve mining licences standar by creating Clean and Clear (CnC) and Non Clean and Clear (NonCnC). This is a very important steps because lot of problem in this sector related to the licence. The CnC and NonCnC standar uses the multiple categories issue such as administration, finance, environment and mining areas overlap¹⁴. Through this standar, we hope to reduced a number of human rights abuses in mining sector such as the capture of living space, the right to health and a good environment.

Unfortunately, the regulation of Indonesian Government’s which is a part of efforts to improve the way they fulfil their responsibilities over human rights got a challenge from the mining companies (TNCs and domestic). For example, IMFA the mining company from India sued Indonesia’s related to the CnC and NonCnC licence status. IMFA cases started from the action of IMFA acquired PT Sri Sumber Rahayu in 2010. PT Sri have licence of 3600 acres coal mining

11. Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, in the 30th Human Rights Council A/HRC/30/44, 14 July 2015, Pg.6

12. Op.cit. A/70/285. Pg.12

13. Info IGJ, 2015, downloaded from <http://igj.or.id/info-grafis-3-langkah-mengenal-isds-di-indonesia/>

14. Ini Kriteria Agar Izin Tambang Berstatus Clean and Clear, <http://www.hukumonline.com/berita/baca/lt569781b558c88/ini-kriteria-agar-izin-tambang-berstatus-clean-and-clear>

in Central Kalimantan, East Barito that published by the local government on 2006. It turns out that the licence overlap with other licence owned by seven other companies so that why it gets the status of the NonCnC¹⁵. Actions taken by IMFA sued the Government of Indonesia certainly imposes on Government action in do the reform efforts which means it also inhibits the Government effort in doing the fulfillment of the human rights of its citizens.

The protections for foreign investors are highly enforceable through the inclusion of effective investor-state dispute settlement. But in the context of trade and investment agreements the need for access to remedy for victims of corporate abuses – as recognized in the UN Guiding Principles on Business and Human Rights – continues to be overlooked and in some cases undermined.

Any trade and investment treaty **should include a public complaints mechanism where civil society** stakeholders can bring complaints regarding the human rights impacts of the treaty's implementation. Such complaints should be independently assessed. Alternatively, this could be left to the domestic legal system, whereby, in Indonesia, the Constitutional Court could take up this role. In Europe, this would be the European Court of Justice.

Should the trade and investment agreement be found to structurally hinder the international human rights obligations of the signatory parties, remedy must also include amendment of the treaty, in respect of human rights as jus cogens, the fundamental principles of international law, accepted by the international community of states as norms from which no derogation is permitted.

Another aspect, there has been a growing demand for Governments to conduct HRIAs prior to adopting and implementing trade and investment agreements to identify, predict, and respond to potential human rights impacts. HRIAs is ideally carried out not just ex ante, but also

15. Gugat RI Triliunan, Perusahaan Tambang India Dinilai Salah Alamat, <https://finance.detik.com/energi/3607768/gugat-ri-triliunan-perusahaan-tambang-india-dinilai-salah-alamat>

periodically ex post, to evaluate and remedy any adverse human rights impacts occurring as a result of trade and investment agreements after their implementation. Another key aspect of conducting a comprehensive HRIA is to ensure that all stakeholders are involved and fully informed. This requires equality and non-discrimination, inclusive participation and the interdependence of rights.

Our Demand Under The Binding Treaty

Part IV. Obligations Of International Governmental Organisations And Obligations In Trade And Investment Agreements

Before entering into international obligations, States shall carry out a Human Right Impact Assessment (HRIA). These assessments must meet at least the following requirements:

- *They shall be carried out before authorizing an activity to begin or continue or before approving any change to the activity's characteristics or dimensions and influencing each phase or action.*
- *The informed participation of the population in the elaboration of the assessment must be guaranteed.*
- *It should be performed in good faith and in due time, without undue delays.*
- *All important information on the process and the conclusions drawn from the process shall be made public.*
- *The affected persons' right to appeal the HRIA's conclusions or to question any aspect of the process of elaborating the HRIA before independent, impartial judicial or non-judicial bodies whose competence in the matter is established by the law must be guaranteed.*

States Parties shall give priority to compliance with the obligations established by the present Treaty and international human rights law over obligations established by trade and investment agreements or national rules.

States Parties shall reject the inclusion of arbitration clauses that give international arbitration bodies jurisdiction over state-investor dispute resolution processes.

Source: Draft Text of The Global Campaign to Dismantle Corporate Power

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