

## Indonesia Focal Point For Legally Binding Treaty Initiative

### The Human Rights Treaty on TNCs and Other Business: “States Obligations on Trade and Investment Treaty”

The development of international trade and investment agreements requires not only to simply regulating cooperation in a narrow trading (export-import) sense, but also regulating the economic and social aspects widely. The wider regulation of international trade and economic cooperation agreements will create widespread impact on public policy spaces. This is not only related to the potential threat of injustice in economic development, but also to the fulfillment social and economic rights being threatened as a consequence of the narrowing policy space which is taken hostage by the investor state dispute settlement mechanism. In terms of this, the state sovereignty is at stake.

The deepening of economic liberalization regulated in the current Mega-FTA models, both within TPP, RCEP, EU CEPA, and TTIP, is in attempt to maintain the domination position of corporate power which is also strengthened by the monopolistic rules for multinational corporations. At the end, these rules create injustice in development for the host-country.

The establishment of international trade norms have undermined the legitimacy of the State, which led to a normative problem for State responsibility in providing protection and fulfillment for human rights. The role of States in turn has been replaced by the strengthening of global institutions susceptible to multinational corporations' interests.

### Indonesia & ISDS: The State Under Multinational Corporations Control

This investment protection practices lead to the state being held hostage by the corporations and to the loss of democracy. The ability of states to meet its human rights obligation to regulate has been diminishing, especially in drafting policies that prioritize the interests of the people. The agreements of investment protection even makes the state legalize crimes committed by the corporation, particularly in the extractive industries, such as causing pollution and environmental destruction, land, particularly indigenous land, grabbing, and committing violence against environmental, mining and human rights activists.

The case of Newmont Mining vs Indonesia is a powerful example of how investment agreements, particularly Bilateral Investment Treaties (BITs), are used by companies to get exemptions from government regulations and legislation, undermining democracy and development. Foreign company's domination within mining sectors showed how the politic strategy being used to legitimate a foreign big company to maintain its profit and ownership of Indonesia's natural resources through the investment protection agreement. Newmont Nusa Tenggara's case in one of samples of the implementation of this, which can be seen through their action by the time they feel being treated unfairly by the implementation of the Law No. 4 of Coal and Minerals year 2009. (See Box 1)

#### Box 1

#### Newmont Undermining The Indonesian Mining Law

*In July 2014, Newmont Mining Corporation brought a case against Indonesia using the Indonesia-Netherlands BIT at the International Centre for the Settlement of Investment Disputes (ICSID).<sup>1</sup> In making the legal claim, the mining giant argued that the Indonesian Government's plans to implement a ban on unprocessed mineral exports would violate the investment agreement between Indonesia and the Netherlands. The case at ICSID was presented four months after Indonesia announced it would not renew its Bilateral Investment Treaty (BIT) with the Netherlands when it expires in July 2015. After one month, Newmont withdrew its case against Indonesia but only after it had reached an agreement with the Indonesian government, giving the mining company special exemptions from the new mining law.*

*ICSID Arbitration Tribunal issued a decision on Newmont claims to revoke its claims. It turned out that upon the issuance of the decision, the concentrate's export licenses granted to Newmont by Indonesian Government, valid for 6 months, starting from 18 September 2014 until March 18, 2015. The export license granted on the condition that Newmont should sign MoU Contract for renegotiation the Contract of Work and perform the development process of smelter as required under Government Regulation No. 1/2014 and Ministry Decree No. 1/2014.*

*However, until the expiration of the time limit of the concentrate's export license on March 18, 2015, Newmont has not completely show its good faith of smelters' construction. In fact, Newmont has re-apply for an extension for the next 6 months of the export license to the Government. As a result of this, Newmont granted by concentrate's export licenses until 18 September 2015 for its 447.0000 tons of copper concentrates, eventhough smelters' construction and renegotiation process of Contract of Work has not been completely realized.\*\*\**

**Members of Indonesia Focal Point:**  
*INFID - IGJ - IHCS - JATAM - ELSAM - KRuHA - Pusaka - Sawit Watch - Bina Desa - KIARA – WALHI – KontraS –  
TUK Indonesia - PWYP Indonesia – Woman Solidarity - INDIES*

Adverse effects of this dispute mechanism does not stop just there. It also has negative impact on the Country's finance if the government was sued trillion of dollars to replace the losses suffered by the corporation. For example, in 2012 Churchill Mining sued the Government of Indonesia of US \$ 1.2 billion, equivalent to IDR14.4 trillion. The values of the lawsuit is almost equivalent to the allocation of subsidies for food on 2015 State budget that is IDR 18.9 trillion and is higher than the value of IDR 0.9 trillion seed subsidies for farmers, IDR 2.5 trillion interest subsidies for small and medium enterprises and IDR 8.7 trillion public transportation subsidies.

According to the buzzfeed report, there was untold story behind the threat of big mining company to Indonesia. Newcrest, an Australian Mining Company, and another four mining companies made a threat to Government of Indonesia under ISDS mechanism when the post-Suharto government enacted a forestry law that forbade open-pit mining in some areas. Newcrest and other four mining companies warned that they would sue Indonesia for billions of dollars in damages if the country tried to make them follow the new environmental law. the potential losses were much bigger — as much as \$22.7 billion if some of the biggest mining companies sued, and it was about half of the previous year's budget for the entire government.

### **Human Rights Obligations**

FTA negotiation processes take place largely behind closed doors with little access for civil society and the millions of people who will be directly affected by these deals, causing a 'democratic deficit' and posing a threat to democracy and the protection of human rights. The closed-door negotiations of FTAs are therefore a stark contrast to the recommendations offered by UN independent experts and special rapporteurs stressing that all current negotiations of bilateral and multilateral trade and investment agreements should be conducted transparently with consultation and participation of all relevant stakeholders.

Human rights cannot be traded off as parts of a trade deal. They are legally binding after a state voluntarily endorses a human rights treaty, and as every state is a party to at least one international human rights treaty, they all have some binding international legal obligations for human rights. Some rights are also non-derogable (i.e. the right to food) as well as absolute rights (*jus cogens*) that are legally binding regardless of ratifications, such as freedom from slavery.

As established by the Vienna Convention on the Law of Treaties, a treaty is void if it conflicts with a peremptory norm of general international law. While the convention provides no further details or a list of such peremptory norms, we can conclude that FTAs should not challenge the protection of absolute and non-derogable human rights. The human rights treaty bodies and special procedures of the Human Rights Council have stressed that a continuous process of impact assessment is required to ensure that all provisions of the treaties are respected, and have occasionally urged individual states to perform assessments of the trade and investment agreements that they conclude. Thus, states are highly recommended, or even legally required, to perform HRIAs in order to comply with their international human rights obligations.

## **Our Proposals**

The State has to be strengthened through the enforcement of human rights instruments as a guarantee of human rights protection from the threat of the corporations using ISDS mechanisms. In this second IGWG session, it is needed to encourage the existence of binding human rights instrument not only for the state but also for the international organizations who are responsible in trade and investment issues.

Indonesia Focal Point for The Legally Binding Initiatives, who also part of The Treaty Alliance and The Global Campaign to Dismantle Corporate Power, would like to encourage some proposals that could be considered to be adopted into the Binding Treaty. In this case, we agreed to encourage the State's obligation to make Human Rights Impact Assessment a legal requirement, with inclusive and transparent processes.

A point that is sometimes forgotten by the public relates to the State's obligation to provide a public complaint mechanism as a tool in the review process on trade and investment agreements which affect the enjoyment of human rights. We refer not only to national regulation, but also want to encourage a framework for the obligation to put provisions about public complaint and the review mechanism into trade and investment agreements, thereby enabling the parties to the agreement to amend or cancel the FTA. Moreover, international organization, such as WTO, also need to adopt the public complaint mechanism.

In relate to the State responsibility in trade and investment agreements, The IGWG should also refer to the norms that have been popularized by The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, so that, this dimension of State responsibility be strengthened.\*\*\*

### **Contact Persons from IFP**

**Rachmi Hertanti** : amie@igj.or.id—**Khalisah**: khalisah@walhi.or.id—**Arieska**: arieska@solidaritasperempuan.org - **Nurudin Achmad**: rambo@sawitwatch.or.id—**Gunawan**: bung.gunawan@gmail.com—**Irhas Ahmady**: irhash.ahmady@gmail.com—**Sigit K.Boediono**: sigit@kruha.org