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**Interaction Between the Protection of the Rights of Indigenous Peoples and Foreign Investment: Regulation in Indonesia**

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**Abstract**

*Indigenous peoples in Indonesia are still marginalized since most of them are still poor and oppressed due to inequality in their sources of life. On the other hand, it is not uncommon for foreign investment activities to harm the surrounding environment including indigenous peoples. This article discusses the interaction between indigenous people's rights and foreign investment regulations in Indonesia and what the Government of Indonesia must do to balance the need to improve the national economy and protect indigenous peoples. To answer these, the articles explained and mapped the international and national regulations relating to indigenous people and foreign investment. The data then analyzed to show how the Indonesian Government may improve the protection of indigenous peoples' rights in relation to foreign investment activities in Indonesia. It is found that Indonesia has already ratified the International Convention that provides the protection of Indigenous people including relating to foreign investment (economic) activities. To ensure its implementation several steps must be taken i.e.: adopting an international investment agreement (IIA), bilateral investment treaty (BIT) and investment contract that provide assurance for the protection of indigenous people, ensuring the promulgation of Indigenous Peoples' Rights Bill and Amend the Investment Law and Establish Implementing Regulations related to the Job Creation Law which enforce the concept of indigenous community protection in relation foreign investment activities.*

**Keywords:** Foreign Investment, Indigenous People, Omnibus Law, Regulations.

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## A. INTRODUCTION

There are two conflicting interests in the mechanism of foreign investment in developing countries. On one hand, developing countries are trying to build a conducive investment climate to attract foreign investors to invest in their capital. This policy is intended to attract foreign investment hoping that this effort will revive the national economy. On the other hand, developing countries need to protect their national interests.

As known, most developing countries have the following social and economic cultures: high poverty levels, inequality, and unemployment.<sup>4</sup> In addition, the characteristics that can be identified are low per capita income and vast economic inequality in society. Thus, it is not uncommon for the economic situation in developing countries to stagnate. This situation is unfortunate, especially for developing countries who are rich in natural resources. This is where investment is expected to play a role in making this economic potential into real economic power.

Developing countries face competition to attract global capital to realize their potential, so an attractive investment policy basis is urgently needed. Domestic capital and technical capabilities in most developing countries are still lacking, so an open business environment is deemed necessary to enable interaction with world best practices.<sup>5</sup> This is intended to rapidly increase Indonesia's economic growth, which is needed to absorb labor, which in turn impacts in reducing the unemployment rate. In addition, based on the theory of "The Climb to the Top", the

need of foreign investment may result in competition where host countries try to provide the most qualified workforce and infrastructure within their territory.<sup>6</sup>

The economy of most developing countries is usually still dependent on the natural resources sector. Let's look at an example of Indonesia, a developing country with rich natural resources currently actively attracting the foreign investment. The State of Indonesia has an oil palm plantation industry that continues to proliferate as well as its palm oil production and exports. The area of oil palm plantations has almost doubled in 10 years. The area of oil palm plantations in 2011 was 9,132,296 Ha, and almost doubled in 2021 with an area of 14,621,693 Ha.<sup>7</sup>

Indonesia (together with Malaysia) is the main producer of palm oil (CPO). International demand for palm oil is also increasing rapidly.<sup>8</sup> The total export of Indonesian palm oil in 2021 alone is 26,681,293 tons, with the main export destinations to India, Kenya, Italy, the Netherlands and Spain.<sup>9</sup> The development of the palm oil industry is in line with large international demand.<sup>10</sup> This also impacts Indonesia's economic condition and its people. Things that must be considered in the development of the palm oil industry are, for example, deforestation and the possibility of conflict with local communities in oil palm plantations.

<sup>4</sup> [...], *Diverse Structures and Common Characteristics of Developing Nations*, <https://pdfs.semanticscholar.org/9faa/994c1e0215a2de9a19d18fd6b586efb5d97.pdf>, accessed on 13 June 2019

<sup>5</sup> Yose Rizal Damuri, *Untuk Indonesia 2014-2019: Agenda Ekonomi*, Centre for Strategic and International Studies (CSIS), 2014.

<sup>6</sup> The theory that analyzes the relationship between foreign investment and its impact on developing countries. See: Anne Marie Zwegg and Luis Carlos Arango, "The Impact of Foreign Direct Investment on Developing Economies and the Environment" (Universidad EAFIT, 2008).

<sup>7</sup> BPS, "Luas Tanaman Perkebunan Besar Menurut Jenis Tanaman, Indonesia (000 Ha) 2019-2021," Badan Pusat Statistik, 2023, <https://www.bps.go.id/indicator/54/131/1/luas-tanaman-perkebunan-menurut-provinsi.html>.

<sup>8</sup> "Evaluasi Kebijakan Perkebunan Kelapa Sawit" (Jakarta, n.d.), [http://www.kppu.go.id/docs/Positioning\\_Paper/sawit.pdf](http://www.kppu.go.id/docs/Positioning_Paper/sawit.pdf).

<sup>9</sup> Badan Pusat Statistik, "Statistik Kelapa Sawit Indonesia 2021" (Jakarta, 2022).

<sup>10</sup> Rhet A. Butler and William F. Laurance, "Is Oil Palm the Next Emerging Threat to the Amazon," *Tropical Conservation Science* 2, no. 1 (2009): at 1-10.

Indonesia has cultural diversity and is home to 1,331 ethnic groups.<sup>11</sup> These indigenous peoples live across the territory of Indonesia with their way of life and culture. State must protect the rights of its indigenous peoples. The economic development that is expected to result from foreign investment activities must be directly proportional to the welfare of indigenous peoples.

Unfortunately, the condition of indigenous peoples in Indonesia is still marginalized. Most indigenous peoples are still poor and oppressed due to inequality in their sources of life.<sup>12</sup> It is not uncommon for foreign investment activities to harm the surrounding indigenous peoples. For example, the conflict between indigenous peoples in the Manis Mata area, West Kalimantan and a British plantation company.<sup>13</sup> Another case is the conflict between indigenous peoples in Runtu Village, Central Kalimantan with PT. Surya Sawit Sejati, a foreign investment company acquired by United Plantation Berhad (UP) based in Malaysia.<sup>14</sup> Another conflict occurred in South Kalimantan, precisely in Pondok Damar Village, with PT Mustika Sembuluh, a mining company owned by Wilmar International Ltd.<sup>15</sup> Apart from that, there was also conflict between

the indigenous people in Mandailing Natal (Madina) Regency North Sumatra, and the gold mining company PT. Sorikmas Mining, a foreign investment company from Australia.<sup>16</sup> The presence of these companies received strong opposition from the local community and several student groups. The examples above are just a few conflicts between indigenous peoples and foreign investment companies. Data taken from the Indigenous Peoples' Alliance of the Archipelago (AMAN) in West Kalimantan alone, until 2010, there were 200 cases or conflicts between oil palm companies and indigenous peoples.<sup>17</sup> Most disputes, if not all, are concentrated on the occupation of indigenous lands.<sup>18</sup> In the Year-End Report of AMAN, in 2021 the Ministry of Environment and Forestry granted forest tenure permits to 259 IUPH-HA (business license granted to utilize forest products) concessions covering an area of 18.4 million hectares and 295 IUPHHK-HT (Business Permit for the Management of Industrial Plantation Forest Timber Forest Products) concessions covering an area of 11.1 million hectares.<sup>19</sup>

The data above is only related to one sector, palm plantations, not to mention other sectors such as mining, mineral resources, and others. This condition shows how aspects of foreign investment and the rights of indigenous peoples can interact and even lead to conflict. In this case, the state must present through laws and policies that are expected to balance the implementation of foreign investment activities with national interests to protect

<sup>11</sup> Badan Pusat Statistik, Mengulik Data Suku di Indonesia, available on

<https://www.bps.go.id/news/2015/11/18/127/mengulik-data-suku-di-indonesia.html>, akses pada 19 Mei 2023

<sup>12</sup> Regarding the discussion regarding the marginalization of indigenous peoples in Indonesia in concept and theory See: John Haba, "Realitas Masyarakat Adat Di Indonesia: Sebuah Refleksi," *Jurnal Masyarakat & Budaya* 12, no. 2 (2010), <https://doi.org/https://doi.org/10.14203/jmb.v12i2.112>.

<sup>13</sup> [...], Konflik antara masyarakat dan perusahaan perkebunan Inggris di Kalimantan, available on: <http://www.downtoearth-indonesia.org/id/story/konflik-antara-masyarakat-dan-perusahaan-perkebunan-inggris-di-kalimantan>, Accessed on 1 Oktober 2014

<sup>14</sup> Asep Y. Firdaus, YL. Franky, Fatilda Hasibuan, Edy Subahani dan Andi Kiki, PT. Surya Sawit Sejati, in *Konflik atau Mufakat?: Sektor Kelapa Sawit di Persimpangan Jalan*, edited by Marcus Colchester dan Sophie Chao, 2013

<sup>15</sup> Sophie Chao, Agustinus Karlo Lumban Raja, Fandy Achmad Chalifah dan Ratri Kusumohartono, PT. Mustika Sembuluh, in *Ibid*.

<sup>16</sup> Sihayo Gold Limited, a gold mining company domiciled in Australia, owns 75% of PT Sorikmas Mining's shares. The remaining 25% is owned by PT. Various Mines.

<sup>17</sup> [...], Sekjen AMAN Berpidato di Sidang Plenary Konferensi Masyarakat Adat Sedunia, available on: [http://www.aman.or.id/2014/09/26/sekjen-aman-menjadi-pembicara-di-konferensi-masyarakat-adat-sedunia/#.VCuF\\_2d\\_uFw](http://www.aman.or.id/2014/09/26/sekjen-aman-menjadi-pembicara-di-konferensi-masyarakat-adat-sedunia/#.VCuF_2d_uFw) accessed on 1 October 2014.

<sup>18</sup> Several cases regarding conflicts between indigenous peoples against companies can be seen in: Muhtar Haboddin, *Indigenous Peoples Against Companies: Cases in West Kalimantan, governance*, Vol 2, No. 1, November 2011

<sup>19</sup> AMAN, "Catatan Akhir Tahun 2021 AMAN: Tangguh Di Tengah Krisis" (Jakarta, 2021).

its people.

There are several studies that raise the issue of foreign investment in relation to several other sectors such as human rights, the environment and sustainable development. Hikmatul Ula, et.al's article entitled *Indonesia at the Intersection of Human Rights and International Investment* explains and analyzes the intersection of laws regarding foreign investment and human rights in Indonesia.<sup>20</sup> Research on balancing between the need for foreign investment and the need to protect the interests of the Indonesian Government can be observed in the article entitled *The Indonesian Government Participation in International Investment Law and Its Reform* by Tito Bramantyo.<sup>21</sup>

Some studies that raise issues regarding the interaction between the protection of indigenous peoples and foreign investment, for example:

- a. Dian Cahyaningrum, in its article titled *"Pemanfaatan Tanah Adat untuk Kepentingan Penanaman Modal di Bidang Perkebunan"* explain the existence or presence of customary lands, the state's recognition, and respect for indigenous peoples' rights to customary lands and explaining the process of expropriation of customary lands for plantations in a juridical and empirical manner.<sup>22</sup>
- b. Dissertation of M. Wiman Wibisana titled *"Social Responsibility of Foreign Investment Companies In The Field Of Tourism Accommodation In The*

*Province Of Bali"*<sup>23</sup> explore the conduct of Corporate Social Responsibility (CSR) in Tourism Sector.

- c. Thesis of C. Tulus Broto Hargono titled *"Perlindungan Hukum bagi Masyarakat Hukum Adat Terhadap Pemanfaatan Tanah Ulayat untuk Pembangunan Kawasan Industri dalam Rangka Penanaman Modal Asing"*<sup>24</sup> aimed to explain the efforts to protect the law for customary law communities whose customary land is used for the development of industrial estates by legal entities partially or wholly with foreign capital in the context of foreign investment.

There is a lack of research, at least in Indonesia, exploring how regulations, both internationally and domestically, regulate the interaction between protection of indigenous people and foreign investment. The problems that have been described in the background of this article are formulated as research questions in this article, namely 1) What is the mechanism for protecting the rights of indigenous peoples in relation to foreign investment activities? 2) Have the rights of indigenous peoples been covered in the regulatory framework relating to investment activities in Indonesia? 3) What steps should the Government of Indonesia take to balance the need to improve the national economy and protect its indigenous peoples?

To answer questions above, this article will be organized as follows: first, analysis on the basic concept of foreign investment and protection of indigenous peoples and how international law regulates them. Second, analysis on the legal framework of foreign investment in

<sup>20</sup> Hikmatul Ula, Kevin Sobel Read, and Cahyani Aisyiyah, "Indonesia at the Intersection of Human Rights and International Investment," *Asia-Pacific Journal on Human Rights and the Law* 23, no. 2 (2022): at 124–155.

<sup>21</sup> Tito Bramantyo, "The Indonesian Government Participation in International Investment Law and Its Reform," *Indonesian Journal of International Law* 19, no. 1 (2021): 83–111, <https://doi.org/DOI:10.17304/ijil.vol.19.1.4>.

<sup>22</sup> Dian Cahyaningrum, *Pemanfaatan Tanah Adat untuk Kepentingan Penanaman Modal di Bidang Perkebunan*, *Negara Hukum*, Vol. 3 No. 1, Juni 2012

<sup>23</sup> M. Wiman Wibisana, *Tanggung Jawab Sosial Perusahaan Penanaman Modal Asing Pada Bidang Akomodasi Pariwisata Di Provinsi Bali*, Dissertation in Program Doktor Ilmu Hukum Fakultas Hukum Universitas Gadjah Mada, 2019

<sup>24</sup> C. Tulus Broto Hargono, *Perlindungan Hukum bagi Masyarakat Hukum Adat Terhadap Pemanfaatan Tanah Ulayat untuk Pembangunan Kawasan Industri dalam Rangka Penanaman Modal Asing*, Thesis in Program Magister Ilmu Hukum Fakultas Hukum Universitas Atma Jaya, 2003

relation to the protection of indigenous peoples' rights in Indonesia specifically in International Investment Agreements (IIA), domestic regulations and investment contracts. These data then analyzed to find the answer to the research question i.e. what steps should the Government of Indonesia take to balance the need to improve the national economy and protect its indigenous peoples.

## B. FOREIGN INVESTMENT CONCEPT

The law on foreign direct investment has developed internationally, even beyond the flow of trade.<sup>25</sup> More than three thousand international treaties regarding foreign investment regulate the mechanism and provide investors with direct access to international arbitration. Investment treaties provide considerable protection to protect the rights of foreign investors in a country that aims to develop foreign investment flows and accelerate global economic development.

The positive impacts of foreign direct investment (FDI) are systematically outlined by William A. Fennel, Joseph W. Tyler, and Eric M. Burt (as cited in Huala Adolf, 2004:6). These positive impacts include:<sup>26</sup>

1. Providing working capital.
2. Attracting expertise, managerial skills, knowledge, capital, and market connections.
3. Increasing foreign income through export activities by multinational enterprises (MNEs).
4. Foreign direct investment does not result in new debts.
5. The host country does not have to worry or face risks if a foreign investor entering their country does not generate profits from the received capital.

6. Assisting in the development efforts of the recipient countries' economies.

Foreign investment can have ripple effects on businesses and industries. Technical improvements improve production efficiency and business performance. An important feature of foreign investment is technological progress. Foreign investment contributes to knowledge expansion and integration into the organization's global network.<sup>27</sup> After the 2007 FDI Law Reform, it is proven that there is a positive impact on Indonesia's economy.<sup>28</sup> The positive impact is shown mainly in employment and tax contributions.<sup>29</sup> A study by OECD also shows how foreign companies contribute directly to some of Indonesia's Sustainable Development Goals.<sup>30</sup> They are more productive, have higher employment rates, and pay higher wages than Indonesian companies.

However, what needs to be remembered is that the realization of the free market concept through national policy must remain in line with the national interests of developing countries. This means that policies that provide legal certainty to foreign investors and guarantee equal treatment with domestic investors must align with national economic interests. National regulations regarding investment must also consider aspects of sustainable development. Characteristics of investment policies that are aligned with sustainable development, i.e.:<sup>31</sup>

<sup>27</sup> Nauval Hafiluddin and Arianto Arif Patunru, "The Impact of Foreign Investment on Firm Performance: Indonesia After the 2007 FDI Reform," *Economics and Finance in Indonesia* 68, no. 1 (2022): 37–50, <https://doi.org/http://dx.doi.org/10.47291/efi.v68i1.969>.

<sup>28</sup> Hafiluddin and Arianto Arif Patunru.

<sup>29</sup> *Ibid.*

<sup>30</sup> OECD, *OECD Investment Policy Reviews: Indonesia 2020* (Paris: OECD Publishing, 2020), <https://doi.org/https://doi.org/10.1787/b56512da-en>.

<sup>31</sup> United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, Switzerland: United Nations Publication, 2012, at.6

<sup>25</sup> Theodore Cohn, *Global Political Economy* 280–82 (2008), in Valentina S. Vadi.

<sup>26</sup> Salim HS and Budi Sutrisno, *Hukum Investasi di Indonesia*, Jakarta, PT RajaGrafindo Persada, Cetakan 4, 2014, at.87.

1. Recognition of the role of investment as the main driver of economic growth and that investment policy has a significant role in development strategy.
2. The desire to realize sustainable development through responsible investment, where social and environmental aspects have an essential position in regulations regarding investment.
3. Promoting investment policies that resolve long-standing problems related to policy effectiveness and legal certainty for investors.

Ida Bagus Wyasa Putra, et al., put forward the legal definition of investment as "legal norms regarding the possibilities for investment, investment requirements, protection and most importantly directing investment to realize people's welfare."<sup>32</sup> Every investment measure must be directed to the welfare of society. That is, with the investment made by investors, they can improve the quality of Indonesian society.<sup>33</sup>

Foreign investment in Indonesia is carried out based on the principles regulated in Article 3 paragraph (1) of Law Number 25 of 2007 concerning Investment. These principles reflect the need of Indonesia, a developing country, who needs the balance on foreign investment activity and its national interest. For example, The principle of togetherness is the principle that encourages the role of all investors jointly in their business activities to realize people's welfare. The principle of sustainability is the principle that in a planned manner seeks to carry out the development process through investment to ensure prosperity and progress in all aspects of life, both for the present and for the future. The principle of environmental awareness is the principle of investment that is carried out while still paying attention to and prioritizing the protection

and maintenance of the environment. Almost all the principles of investment go back to ensure the prosperity of its people and national interest.

### C. PROTECTION OF INDIGENOUS PEOPLES RIGHTS

No official definition is adopted by the United Nations agencies for Indigenous Peoples. On its website, the United Nations defines Indigenous Peoples as the inheritors and practitioners of a unique culture and way of relating to people and the environment.<sup>34</sup> Furthermore, the United Nations developed a system to provide an understanding of the term "indigenous" based on the following points:<sup>35</sup>

- a) Self-identification as indigenous peoples at the individual level and acceptance by the community as their members
- b) Historical continuity with pre-colonial and pre-settlement societies
- c) Strong connection to the surrounding area and natural resources
- d) Distinctive social, economic or political system
- e) Distinctive language, culture and beliefs
- f) Forming non-dominant community groups
- g) Have an agreement to maintain and reproduce their environment and ancestral systems as a distinctive society and community.

An essential point in the Rights of Indigenous Peoples is their capacity to claim the Right to Self-Determination. Indigenous Peoples protection standards are based on legal instruments and customary international law.<sup>36</sup> Related to

<sup>32</sup> Salim HS and Budi Sutrisno, *Supra* Note 26 at .9.

<sup>33</sup> *Ibid.* at 10.

<sup>34</sup> UN, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>

<sup>35</sup> Who are indigenous people, UN Fact Sheet, [https://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)

<sup>36</sup> Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, Max

this, S. Wiesner stated that the rights attached to Indigenous Peoples are as follows:

- a) Indigenous peoples have the right to maintain and develop their distinctive cultural identity, spirituality, language, and traditional way of life.
- b) Indigenous peoples have the right to political, economic, and self-determination including the right to autonomy and to maintain and strengthen their own justice system
- c) Indigenous peoples have the rights of demarcation, ownership, development, control and use of the lands that they have traditionally owned.
- d) Governments must respect and always pay attention to their contractual commitments to treaties related to indigenous peoples.

In the book *State of the World's Indigenous Peoples* published by the United Nations in 2009 it was explained that the concept of indigenous people developed from the experience of colonialism, where indigenous peoples experienced marginalization due to colonialist invasions.

*"The concept of indigenous peoples emerged from the colonial experience, whereby the aboriginal peoples of a given land were marginalized after being invaded by colonial powers, whose peoples are now dominant over the earlier occupants. These earlier definitions of indigenusness make sense when looking at the Americas, Russia, the Arctic and many parts of the Pacific. However, this definition makes less sense in most parts of Asia and Africa, where the colonial powers did not displace whole populations of peoples and replace them with settlers of European descent."*<sup>37</sup>

Article 3 of the CESCR states that the state must ensure equal rights between

men and women to enjoy all forms of economic, social and cultural rights.<sup>38</sup> Implicit recognition of cultural rights can be extracted from this article. Cultural sovereignty means the freedom of each country to choose its cultural model, which has traditionally been within the domestic jurisdiction of a country.<sup>39</sup>

Prof. Vadi in his article mentions the term "indigeneity," which is related to the articulation of authenticity.<sup>40</sup> Unfortunately, no definite and precise definition can explain the meaning of "indigeneity". Even the UNDRIP does not provide a definite definition. However, two instruments provide ideas about indigeneity, namely in the International Labor Organization (ILO) Convention 169 and the Martínez-Cobo Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities.<sup>41</sup> The ILO provides criteria for defining "indigeneity" by considering the heredity of the population that inhabited a country or geographical area at the time of conquest or colonization, where some or all of their social, economic, cultural and political institutions were still maintained.<sup>42</sup> Within the ILO, emphasis was placed on the population inhabiting an area that was being conquered or colonized at the time. Meanwhile, in the Martínez-Cobo Report, the emphasis is on historical continuity in societies that developed before the invasion and colonialism.<sup>43</sup>

In the Background Paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues outlining the definition

<sup>38</sup> Article 3 of International Covenant on Economic, Social and Cultural Rights: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

<sup>39</sup> Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, And Indigenous Heritage In International Investment Law*, Columbia Human Rights Law Review, Volume 42 Number 3, 2011.

<sup>40</sup> a term of art in the politics and philosophy of cultural rights and the rights of First Peoples

<sup>41</sup> Valentina S. Vadi, *Ibid.* at 804

<sup>42</sup> Indigenous and Tribal Peoples Convention, 1989, no. 169, adopted 27 June 1989

<sup>43</sup> Valentina S. Vadi, *Ibid.*, at. 805

Planck Yearbook of United Nations Law, Volume 11, 2007 at 233 - 263

<sup>37</sup> United Nations, *State of the World's Indigenous Peoples*, New York, 2009.

of "indigenous communities, peoples and nations" it is stated that:

*"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."*

This paper also mentions several factors that must be considered in terms of "historical continuity" that this sustainability includes:

- a. Position of ancestral land or part thereof.
- b. Common descent of the original inhabitants of a territory;
- c. Culture in general, or in more specific manifestations such as religion, tribal systems, indigenous communities, livelihoods, lifestyles, and so on.
- d. Language;
- e. Residing in a certain area of a country or a region in the world;
- f. Other relevant factors.

The concept of Indigenous People (Indigenous Peoples) is well known at the national level. This is evidenced, for example, by the regulation of the idea of protecting the rights of indigenous peoples in Law no. 39 of 1999 concerning Human Rights, which is the primary basis for the development of customary law community policies. Law Number 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is proof of Indonesia's

international commitment to recognize indigenous peoples' rights.<sup>44</sup>

Aliansi Masyarakat Adat Nusantara (AMAN) defines indigenous peoples as communities that live based on ancestral origins from generation to generation on a indigenous territory, which has sovereignty over land and natural resources, socio-cultural life, which is governed by customary law and indigenous institutions that manage the continuity of community life.

Several international conventions that govern the protection of indigenous people's right, namely:<sup>45</sup>

**a. United Nations Declaration on the Rights of Indigenous Peoples 2007-UNDRIP**

This Convention was formed out of the urgent need to respect and promote the rights inherent to indigenous peoples, stemming from their political, economic, social and cultural structures, their religious traditions, histories and philosophies, in particular their rights to their lands, territories and resources, and control of indigenous peoples over developments affecting them and their lands, territories and natural resources, will enable them to maintain and strengthen their institutions, cultures and their traditions, and to promote their development in accordance with their aspirations and needs. By paying respect to traditional knowledge, culture, and customary practices, it contributes to sustainable and equitable

<sup>44</sup> Available on <http://www.aman.or.id/wp-content/plugins/downloads-manager/upload/Pedoman%20Inventarisasi%20MHA%202022.pdf> – accessed on 12 Desember 2022

<sup>45</sup> Ahmad Syofyan, "Perlindungan Hak-Hak Masyarakat Adat Menurut Hukum Internasional," *Fiat Justitia Jurnal Ilmu Hukum* 6, no. 2 (2015), <https://doi.org/https://doi.org/10.25041/fiatjustisia.v6no2.326>.

development and proper management of the environment.<sup>46</sup> Indigenous peoples have rights to the lands, territories, and resources which they have traditionally owned or occupied or otherwise used or acquired lands, territories and resources. Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources which they own by virtue of traditional ownership or other traditional occupation and use, as well as other lands, territories and resources. power possessed by other means. States will legally recognize and protect these lands, territories, and resources. This recognition must be carried out in line with respect for the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>47</sup>

**b. Convention No.107 Concerning Protection and Integration of Indigenous and other Tribal and Semi-Tribal Population in Independent Countries**

Protection and respect for the rights of indigenous peoples in Article 2 of this convention states that:

*“Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.”*

This means that the government is primarily responsible for the development and systematic action to protect the population in relation to the advancement of

integration in respecting indigenous peoples.

Then in Article 3 paragraph (1) reads:

*“So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labor of these populations.”*

Meanwhile, Article 6 states:

*“The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the overall economic development of areas inhabited by these populations. Special projects for economic development of the areas in question shall also be so designed as to promote such improvement.”*

**c. ILO Convention 169 of 1989 Regarding Indigenous Peoples**

This convention defines what is meant by indigenous peoples as "peoples living in independent countries where their social, cultural and economic conditions distinguish them from other parts of society in that country and whose status is regulated, either wholly or partly, by indigenous peoples and traditions of the indigenous peoples or by special laws and regulations".<sup>48</sup>

With the participation of the indigenous peoples concerned, the government has the responsibility to construct coordinated and systematic actions to protect the rights of these indigenous peoples

<sup>46</sup> Ahmad Syofyan. *Ibid.*

<sup>47</sup> Art 26 (Par 1, 2, & 3) UNDRIP, as cited in Ahmad Syofyan. *Ibid.*, at 15

<sup>48</sup> Art 1 ILO Convention No. 169/1989, as cited in Ahmad Syofyan, *Ibid.*, at .11

and ensure that their integrity is respected. Such action includes steps for:<sup>49</sup>

- a) ensure that members of these indigenous and tribal peoples benefit equally from the rights and opportunities afforded by national laws and regulations to other members of the population of the country in which they live.
- b) strive for the full realization of the social, economic and cultural rights of these indigenous and tribal peoples with respect for their social and cultural identity, customs and traditions, and institutions.
- c) assist the members of the indigenous and tribal peoples concerned to eliminate the socio-economic disparities that may occur between natives and other members of the national community, in a manner that is in accordance with their aspirations and way of life.

Special efforts are determined as appropriate to maintain and protect the safety of the citizens, institutions, property, workforce, culture and environment of the indigenous peoples concerned. Such special efforts must not conflict with the freely expressed expectations of the indigenous peoples concerned. The enjoyment of general rights as citizens, without discrimination, must not be sacrificed in any way by such special efforts.<sup>50</sup>

Established policies aimed at reducing the difficulties experienced by these indigenous peoples in dealing with new

conditions in life and work, with the participation and cooperation of the indigenous peoples who are experiencing these new conditions.<sup>51</sup>

In applying the provisions of this Convention, governments:<sup>52</sup>

- a) consult with the indigenous and tribal peoples concerned, through appropriate procedures and especially through their representative institutions, whenever consideration is being made of legislative or administrative measures that may directly affect them.
- b) define how these indigenous and tribal peoples can freely participate, at least on the same level as other sectors of the population, at all levels of decision-making in electoral and administrative institutions and other bodies take responsibility for policies and programs that concern their interests.
- c) establishes means of fully developing these peoples' own institutions and initiatives, and in appropriate cases, providing the necessary resources for this purpose.

The indigenous and tribal peoples concerned have the right to decide on their own priorities for the development process when it affects their lives, beliefs, institutions, and spiritual well-being as well as the lands they occupy or otherwise occupy, use and exercise control over, as far as possible, towards their own economic, social and cultural development. In addition, they participate in the formulation, implementation and evaluation of national and regional development plans and programs that can

<sup>49</sup> Art. 2 ILO Convention No. 169/1989.

<sup>50</sup> Art.4 ILO Convention No. 169/1989.

<sup>51</sup> Art. 5 ILO Convention No. 169/1989.

<sup>52</sup> Art.6 ILO Convention No. 169/1989.

make them directly affected. The improvement of living and working conditions and the health and education levels of the indigenous and tribal peoples concerned, with their participation and cooperation, should be given priority in the overall economic development plans of the areas in which they live. Special projects for the development of the areas they live in must also be designed in such a way as to encourage the realization of the intended improvements. Governments must take measures, in cooperation with the indigenous and tribal peoples concerned, to protect and preserve the environment of the territories they inhabit.<sup>53</sup>

International law governing the guarantee of indigenous peoples' rights places obligations on the state to ensure its implementation. Indonesia as a member state of the three conventions is no exception. The Indonesian government must ensure that every activity, including economic activity, is carried out while taking into account the welfare of indigenous peoples. The involvement of indigenous peoples is also needed in every activity that can affect their environment.

#### **D. LEGAL FRAMEWORK OF FOREIGN INVESTMENT IN RELATION TO THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS**

Investment will inevitably have an impact on indigenous peoples. It is known that investment does have its own dilemma. On the one hand direct investment activities (usually in the plantation, agriculture, mining, fisheries and other sectors) have the potential to disrupt the traditional life of local Indigenous Peoples, mostly in the issue of land ownership. But on the other hand, it is also inevitable that investment is needed in the context of economic development, especially for developing countries. Therefore, it is necessary to have

an intervention from the government so investment can still be carried out without disturbing the lives of local peoples. Moreover, the Government should ensure that foreign investment activities would promote development for Indigenous Peoples. The issue raised is what is the legal basis so that a company investing in an area is obliged to develop the local community.<sup>54</sup>

In general, the legal sources of foreign investment which form the basis for investment implementation are divided into 3 (three) categories:

#### **1. International Investment Agreement (IIA)**

International Investment Agreement (IIA) is a type of international agreement between countries whose substance is related to cross-border investment. The provisions contained in IIA usually cover foreign direct investment and portfolio investment. The countries that are members of the IIA are committed to implementing specific standards regarding the treatment of foreign investment within their country's territory. In this case, IIA also further regulates the dispute resolution procedure if this commitment is not implemented.

International agreements that are multilateral in nature related to foreign investment mainly refer to the WTO regulatory framework, namely the General Agreement on Tariffs and Trade (GATT). The Agreement on Trade Related Investment Measures (TRIMS) is part of the GATT legal framework which promotes free trade in the investment sector. TRIMS is structured with the aim of:

“The expansion and progressive **liberalization of world trade** and to **facilitate investment** across international frontiers so as to increase the economic growth of all

<sup>53</sup> Art 7 ILO Convention No. 169/1989.

<sup>54</sup> Salim HS dan Budi Sutrisno, Supra note 26 at 377.

trading partners, particularly developing country members, while ensuring free competition.”

To achieve this goal various general principles have been regulated, for example National Treatment, Most Favored Nation, Exhaustion of IPR and Transparency. Even though it has the main goal of realizing global trade based on free competition, in its implementation, the WTO has made efforts to regulate it while taking into account national interests, especially for developing countries. On this basis, various initiatives have been formed which aim to assist developing countries in implementing GATT provisions called Special and Differential Treatment (SDT).<sup>55</sup>

In the regional scope, the ASEAN Comprehensive Investment Agreement (ACIA) regulates investment freedom in the ASEAN region. The goals of the ACIA are set out as follows:

“to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint”

As a form of IIA, ACIA also regulates principles almost the same as the general principles set out in TRIMS. However, ACIA as a Regional Agreement in the ASEAN region, regulates several other principles which can be the entry point for the concept of Protection of Indigenous Peoples:

- a) Permitting expropriation through compensation if directed against the public interest (Art 14)
- b) The principles in the ACIA can be set aside in the interest of protecting public morals or public order (art 17:a)

c) ACIA principles can be set aside in the interest of protecting national treasures that have artistic, historical or archaeological value (art 17:e)

d) The principles in ACIA can be set aside in the interest of natural resource conservation (art 17:f)

In this case, public interest, public order, state cultural assets, and conservation are the keywords in regard to the protection of indigenous peoples in foreign investment activities.

Furthermore, the more common form of IIA is called the Bilateral Investment Treaty (BIT). UNCTAD defines a BIT as an Agreement that establishes terms and conditions for investments by nationals and companies of one country within the jurisdiction of another. Several things become a substance in most BITs, for example, concepts related to Fair and Equitable Treatment, protection of investors from the potential for expropriation by the host country, the concept of Free Transfer of Means and providing protection and security for investors in the territory of the host country. In this case, BIT is formulated with the aim of increasing the quantity of foreign investment in a country. The idea is that with a BIT, investors can feel safe to invest in the host country. Based on UNCTAD data,<sup>56</sup> currently there are a total of 2,914 BITs in the world, of which 2,354 BITs are still valid. With that amount, the implementation of foreign investment will more or less be influenced by the regulatory substance stipulated in the BIT.

Indonesia has signed approximately 74 BIT. However, with the various conflicts that occurred in

<sup>55</sup> Fatma Muthia Kinanti, World Trade Organization, Negara Berkembang dan Special and Differential Treatment, 2015, Pandecta, 10:1, at .48 - 59

<sup>56</sup> Indonesia's BIT database available on: <https://investmentpolicy.unctad.org/international-investment-agreements>

2015, Indonesia terminated several BITs and there were 13 BITs that had been signed but not yet valid. In some BITs, several forms of provisions provide legal instruments for the state to ensure protection for indigenous peoples. This provision is regulated in an article that provides guarantees for the host country to make domestic regulations relating to the interest of the nation such as protection of health, education, security, environment, cultural diversity. Several variations of this provision can be found, for example, in:

- a) BIT between Indonesia – Singapore 2018 Article 11 paragraph 1 regulates:

The Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.

- b) BIT between Indonesia – Qatar 2000:

This Agreement shall not preclude the application by either Contracting Party of measures necessary for the maintenance of public order and morals, the fulfillment of its obligation with respect to the maintenance of restoration of international peace and security, or the protection of its own essential security interests.

It is important to note that some of the BITs that are still in force have no such articles, e.g., BIT between Indonesia and Russia 2007, BIT between Indonesia and Iran 2005, and BIT between Indonesia and Saudi Arabia 2003. This issue is one of the reasons Indonesia reviewed some of its BITs in 2014 because there are

indications that the substances are burdensome to Indonesia.<sup>57</sup>

## 2. Domestic Law

Foreign investment is made in certain countries. For this reason, the implementation must refer to domestic law. In relation to Indonesia, the main provisions regarding Foreign Investment are regulated in the legal framework of Law Number 25 of 2007 concerning Investment (UUPM).

UUPM contains provisions regarding investment in Indonesia, including domestic and foreign investments. As a sectoral regulation related to Investment, UUPM is the main reference in answering the question whether Indonesian regulations related to investment have implemented protection for indigenous peoples. Article 15 letter b Law Number 25 of 2007 concerning investment regulates the obligations of investors, namely carrying out social responsibility. Corporate social responsibility is the responsibility attached to every investment company to continue to create relationships that are harmonious, balanced and in accordance with the environment, values, norms and culture of the local community.

The obligation of the investment company is to continue to create a harmonious and balanced relationship between the company and the local community. This harmonious and balanced relationship must be in accordance with:

- a) Environment
- b) Value
- c) Norm And
- d) Local community culture.<sup>58</sup>

Article 17 of Law Number 25 of 2007 concerning Investment regulates the investor's obligation to allocate funds

<sup>57</sup> Arif Havas Oegroseno, "Revamping bilateral treaties, The Jakarta Post, 7 July 2014, accessed on 20 Mei 2023

<sup>58</sup> Salim HS, Budi Sutrisno, Supra note 26 at. 378-379.

in stages for site restoration that meets environmental eligibility standards, the implementation of which is regulated in accordance with statutory provisions. The Formal Explanation states that this provision is intended to anticipate environmental damage caused by investment activities. This article specifically regulates the obligations of companies, especially mining companies, to prepare funds for environmental improvement.<sup>59</sup>

Further acknowledgment can also be found in Sectoral Law. For example Law no. 41 of 1999 concerning Forestry regulates the rights of indigenous peoples are recognized in terms of collecting forest products to fulfill the daily needs of the customary law community concerned, Carrying out forest management activities based on applicable Customary Law and not contradicting the law and obtaining empowerment to improve their welfare.<sup>60</sup>

Law No. 22 of 2001 concerning Oil and Gas contains at least 17 main provisions that must be included in a cooperation contract made between the Implementing Body and a Business Entity or Permanent Establishment. One of these obligations is the development of the local community and guaranteeing the rights of indigenous peoples (letter p). The development of the local community is an effort to advance the community around the mine, and also allow them to carry out the customary values that live and develop in that community.

Law No. 39 of 2014 concerning Plantations regulates several articles that have an impact on Indigenous Peoples, for example Article 1 contains

the definition of Ulayat Rights and Customary Law Communities. Article 12 stipulates that plantation business land located in Ulayat Land must go through deliberations for approval and compensation. Article 17 (1) regulates the prohibition of Officials to issue permits for plantation cultivation in Ulayat Land. Article 55 (b) regulates prohibitions on working, using, occupying, controlling Ulayat Land. Article 81 regulates that Research and Development is carried out by respecting local value. Articles 103 and 107 even regulate criminal sanctions for the violations of Articles 17 and 55 of the Plantation Law.

Law No. 7 of 2019 concerning Water Resources as a regulatory framework in the management of water resources also regulates several provisions related to Indigenous Peoples. Article 1 regulates the definition of Indigenous Peoples and Ulayat Rights. Article 3 regulates the purpose of regulating Water Resources, one of which is to guarantee the protection and empowerment of indigenous peoples. Article 9 (2) stipulates the control of Water Resources by the central government and regional governments with recognition of Ulayat Rights. Article 9 (3) regulates the recognition of customary rights over water resources.

Some academics consider that the Law on Foreign Investment and other laws governing the management of natural resources adheres more to the ruler's paradigm with a repressive legal style.<sup>61</sup> This is understandable considering many implementations of the provision regarding the protection

<sup>59</sup> *Ibid.*, at 379.

<sup>60</sup> Article 67 Par. (1) Law No. 41 Year 1999 regarding Forestry

<sup>61</sup> Josina A.Y. Wattimena, "Prinsip-Prinsip Penanaman Modal Asing Dan Implementasinya Pada Masyarakat Hukum Adat," in *Kompilasi Pemikiran Tentang Dinamika Hukum Dalam Masyarakat (Memperingati Dies Natalis Ke -50 Universitas Pattimura Tahun 2013)* (Maluku: FH Unpatti, 2013).

of indigenous rights still relies on government action. In this case, the biggest problem lies in monitoring and implementation.

The promulgation of Law Number 11 Year 2020 concerning the Job Creation Law is the latest regulation that provides a legal framework for foreign investment activities. As the name implies, it is hoped that the Job Creation Law will encourage increased investment, especially foreign investment in Indonesia, which will positively correlate with an increase in the availability of jobs.<sup>62</sup> The main objective of this regulation is the simplification of licensing requirements. Job Creation Law implements risk-based licensing, simplifying basic requirements for business and investment.<sup>63</sup>

Provisions regarding business licensing in the Job Creation Law have included provisions as a legal framework for protecting indigenous peoples. For example:

- a. Article 31 of the Job Creation Law, which amends Law Number 22 of 2019 concerning the Sustainable Agricultural Cultivation System, contains provisions that amend Article 86 paragraph (2), namely "The Central Government is prohibited from issuing Business Permits related to Agricultural Cultivation Businesses as referred to in paragraph (1) above customary rights land of an indigenous community".
- b. Article 29 of the Job Creation Law, which changes several provisions in

Law No. 39 of 2014 concerning Plantations, contains provisions that amend Article 17 paragraph (1), namely that authorized officials are prohibited from issuing permits to undertake plantations on above customary rights land of an indigenous community. This article is even followed up by a criminal provision that stipulates that every official who issues a Business Permit in relation to plantations on customary rights land of an indigenous community, as referred to in Article 17 paragraph (1), shall be punished with imprisonment for a maximum of 5 (five) years or a fine of up to a maximum Rp. 5,000,000,000. - (five billion rupiahs).

- c. Article 123, which amends Law No. 2 of 2012 concerning Land Acquisition for Development for Public Interest Article 8 paragraph (2) In the case of a Land Acquisition plan, there are Area Procurement Objects that are included in forest areas, village treasury Area, waqf Area, ulayat Area /customary Area, and/or land assets of the Central Government, Regional Government, state-owned enterprises, or regionally-owned enterprises, the settlement of the status of the land must be carried out until the location is determined. This provision changes the Law on Land Acquisition to make communal or customary rights land one of the objects of land acquisition.<sup>64</sup>

However, the enactment of this law was not free from criticism. In its report, AMAN stated that the Job Creation Law needs to be scrutinized because it will impact the protection

<sup>62</sup> Syarif Hidayatullah and Ditha Wiradiputra, "Menimbang Efektivitas Undang-Undang Cipta Kerja Terhadap Peningkatan Investasi Asing," *Jurnal Surya Kencana Satu: Dinamika Masalah Hukum Dan Keadilan* 12, no. 2 (2021), at 112–25.

<sup>63</sup> Januari Nasya Ayu Taduri, "The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia," *Lex Scientia Law Review* 5, no. 1 (2021) at 119–138, <https://doi.org/10.15294/lesrev.v5i1.46286>.

<sup>64</sup> R. Yando Zakaria, "Nasib Masyarakat Adat Dalam UU Cipta Kerja," *Forest Digest*, 2021, <https://www.forestdigest.com/detail/988/omnibus-law-uu-cipta-kerja-masyarakat-adat>.

of indigenous peoples. Article 35 of the Job Creation Law, for example, regulates changes to the Forestry Law, which are claimed to make it easier for the public, especially business actors, to obtain business permits in the forestry sector.<sup>65</sup> The phrase "especially business actors" is allegedly a marker of the direction of forestry sector policies.<sup>66</sup> It may not be to provide convenience to indigenous peoples in returning their forests to their status as state forests. Apart from that, some experts also criticized the absence of a provision that deletes/amends article 67 of the Forestry Law which requires that indigenous community recognition must go through regional regulations, which many see as the incorporation of indigenous people rights into the political process.

In addition, it should be noted, the provisions prohibiting the granting of business on customary rights land, for example in the agricultural and plantation sectors, provide loopholes that allow customary rights land to be granted concessions. In the amendment to article 86 paragraph (3) of Law Number 22 of 2019 concerning the Sustainable Agricultural Cultivation System it is stipulated "The prohibition provisions as referred to in paragraph (2) are excluded in the event that an agreement has been reached between the customary law community and business actors". It is necessary to pay attention to the implementation of this provision so that the intended "agreement" is not misused.

### 3. Investment Contracts

As a business activity, an investment contract will be drawn up in

accordance with the industrial sector and business sector to be carried out. An investment contract is basically a contract agreement or business agreement that is long term (long term business contract) between the parties in the investment.<sup>67</sup>

As a business agreement, like commercial agreements in general, investment contracts not only regulate the allocation and distribution of risks, but also contain the basic rules of the rights of each party, the authorities and responsibilities agreed by both parties.<sup>68</sup> In addition, it also regulates the applicable law for the project and the choice of forum in the event of a dispute at a later date, force majeure, the principle of good faith and changes in circumstances. Another thing that is often seen as the most complex and a difficult problem is to include clauses governing the behavior of the parties (conduct of the parties) in the event of political changes in the host country and changes in the economic balance (economic equilibrium) between the host country, home and foreign investors.<sup>69</sup>

In this case, the example of the Contract of Work between the Government of Indonesia and PT Newmont Nusa Tenggara (PT NTT) was taken. Article 27 of the Contract of Work between the Government of Indonesia and PT NNT states that:

"Companies must, as long as this is feasible and economically feasible, bearing in mind the nature of the goods and services concerned, promote, support, encourage and assist Indonesian citizens who wish to establish companies and businesses that will provide goods and services. for companies and local residents, and

<sup>65</sup> AMAN, "Catatan Akhir Tahun 2021 AMAN: Tangguh Di Tengah Krisis."

<sup>66</sup> *Ibid.*

<sup>67</sup> Kusnowibowo, *Hukum Investasi Internasional*, Cetakan 4, Bandung: Pustaka Reka Cipta, 2013. at . 32.

<sup>68</sup> Rudolf Dolzer and Christoph Schreuer sebagaimana dikutip dalam Kusnowibowo, *Ibid.*, at 33.

<sup>69</sup> *Ibid.*

in general promote, support, encourage, and assist the development and local business activities in the mining area.

Based on the construction of this article, there are two main obligations of mining companies, namely:

- a) Promote, support, encourage and assist Indonesian citizens who wish to establish companies and businesses that will provide goods and services to companies and local residents; And
- b) Promote, support, encourage and assist development and local business activities in the mining area.<sup>70</sup>

#### **E. MEASURES TO IMPROVE THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS CONCERNING FOREIGN INVESTMENT ACTIVITY IN INDONESIA**

##### **1. The Need to Include the Principles of Protecting Indigenous Peoples in International Investment Agreements**

The importance of foreign investment in Indonesia is given the lack of domestic capital. For developing countries foreign investment is related to domestic economic development. For this reason, countries compete to provide the best investment climate for foreign investors in their region. One of the determining factors is protection for foreign investors while carrying out their activities in the host country's territory. Investor protection is provided through domestic investment regulations, investment contracts, and international investment agreements.

Various principles of protection for investors are regulated in regulatory frameworks, especially in international frameworks, such as equal treatment, non-expropriation, flexibility of profit

transfers to countries of origin and dispute settlement mechanisms. One of the most widely used international investment treaty mechanisms is the Bilateral Investment Treaty (BIT). BIT itself has become an indicator for investors to invest in one country. However, at present, there has been a view that the formulated BIT is considered too protective of investors so that it ignores the national interests of the host country. In this case, the existence of BIT becomes questionable. One issue was that the BIT provided too much protection, causing conflict with the local community.<sup>71</sup>

Criticism from various countries regarding this matter emerged simultaneously as the global community's awareness of the importance of responsible business practices. This aroused enthusiasm to reform the IIA regime that existed at that time. For example, developed countries such as Canada and the United States have established a new BIT model that aims to clarify the scope and obligations of investment, including minimum standards of treatment and indirect expropriation. In addition, this new model contains regulations to make it clear that: the objectives of protecting investment and liberalization of the IIA should not be carried out at the expense of protecting health, safety, the environment and promoting internationally recognized labor rights.<sup>72</sup> For example, the latest BIT Model published by Canada in 2021 incorporates the principles of Responsible Business Conduct, which aims to promote responsible business behavior. This BIT also explicitly states that investors must comply with the OECD Guidelines for Multinational Enterprises and the United Nations Guiding

<sup>71</sup> Example of case: *Hupacasath First Nation v Canada* (Minister of Foreign Affairs) in 2013 which created an obligation for the government to carry out consultations before signing a BIT with China.

<sup>72</sup> World Investment Report 2015: Reforming International Investment Governance, <https://www.tralac.org/images/docs/7605/wir2015-chapter-4-reforming-the-international-investment-regime.pdf>

<sup>70</sup> Salim HS and Budi Sutrisno, *Supra* note 26 at .382.

Principles on Business and Human Rights. Article 16 of the New BIT Model also stipulates that investors and their investments must comply with the host country's domestic laws and regulations, including "laws and regulations on human rights, indigenous peoples' rights, gender equality, environmental protection and labor."

The Indonesian government realizes that although BITs are still needed to attract foreign investors, many regulations within them can potentially harm Indonesia's interests. For this reason, Indonesia currently needs to formulate a BIT model that can be used in BIT negotiations with other countries. The model formulated is expected to answer the weaknesses of the previous BIT, one of which is the need to provide flexibility for the host country, in this case Indonesia, to protect the welfare of its people through non-discriminatory regulations for the purposes of public welfare, public health, safety, environmental friendliness, public morals or order.<sup>73</sup> This arrangement is expected to be an entry point for the host country to protect the interests of its indigenous peoples.

## 2. Provisions for the Protection of Indigenous Peoples' Rights in Investment Contracts

Provisions in the national regulations regarding foreign investment as described in the previous sub-chapter will not mean anything if they are not effective at the implementation stage. In foreign investment activities, private law works in the context of binding business actors and the state as civil entities. In this case, both parties are in an equal position and are legally bound through an investment contract. As a form of implementation of

the principles of protecting indigenous peoples in national regulations regarding investment, the government should ensure that these values are also included in contracts with business actors.

But keep in mind that the provisions written in the agreement sheet mean nothing without effective implementation. For this reason, it is the Government's duty to ensure that the provisions stipulated in investment contracts, especially those related to national interests, in this case the protection of indigenous peoples, are properly implemented by investors.

## 3. The Need to Pass the Indigenous Peoples Bill as an Enhancement of Guarantees for the Protection of the Rights of Indigenous Peoples in Foreign Investment Activities

With so many tribes and indigenous peoples living in Indonesia, it is very unfortunate that until now there has been no specific law that regulates the protection of indigenous peoples. As a result, all arrangements related to Indigenous Peoples are scattered in various other sectoral laws. Codification efforts have been made since 2013 when the Customary Law Community Bill was included in the National Legislation Program (prolegnas). The DPR formed a Special Committee for the Customary Law Community Bill with the Chairman of the Special Committee Himmatul Aliyah.<sup>74</sup> Unfortunately, until now, after almost three periods of government, the Law on Indigenous Peoples has not yet been ratified. For this reason, in this section, the author will examine the Indigenous Peoples Bill which was initiated by the DPR RI.

The main principles adopted in the Indigenous Peoples Bill are Recognition, Protection and Empowerment which are based on:

<sup>73</sup> Sefriani, The New Model of Bilateral Investment Treaty (BIT) for Indonesia, *Journal of Legal, Ethical and Regulatory Issues*, Research Article, 2018, <https://www.abacademies.org/articles/the-new-model-of-bilateral-investment-treaty-bit-for-indonesia-7521.html>

<sup>74</sup> Fadiyah Alaidrus, Pembahasan RUU Masyarakat Adat Mandek, Hak Warga Terabaikan, <https://tirto.id/pembahasan-ruu-masyarakat-adat-mandek-hak-warga-terabaikan-de5s>

- a) participation;
- b) justice;
- c) Gender equality;
- d) transparency;
- e) humanity;
- f) national interest;
- g) harmony; And
- h) sustainability and sustainability of environmental functions.

This bill<sup>75</sup> has also regulated the Protection of Indigenous Peoples which is linked to business activities. It is stated that Indigenous Peoples have the right to manage and utilize the natural resources in their Indigenous Territories in accordance with their local wisdom. However, in the case of indigenous territories where there are resources that play an important role in meeting the needs of the wider community, the state will manage them with the approval of the Indigenous Peoples. For this management, Indigenous Peoples are entitled to state compensation and receive benefits from the implementation of corporate social responsibility.

Furthermore, the rights of Indigenous Peoples are also regulated even in the planning stage. In Article 25 paragraph 1 it is stated that Indigenous Peoples have the right to participate in the development programs of the Regional Government in their Customary Territories from the planning, implementation, to supervision stages. In addition, Indigenous Peoples are also given the right to reject business plans and/or activities that may impact the surrounding environment.

In the Empowerment section, Indigenous Peoples are also given access to be able to carry out production activities, this is regulated in Article 31 paragraph 1 which stipulates that Empowerment of Indigenous Peoples is carried out through:

- a) Improving the quality of human resources;
- b) preservation of traditional culture;
- c) facilitation of access for the benefit of Indigenous Peoples;
- d) productive business; And
- e) cooperation and partnership.

Regarding cooperation and partnership, the facilities provided are in the form of:

- a) facilitating cooperation between Indigenous Peoples and other parties;
- b) developing patterns of cooperation and partnerships that are mutually beneficial; And
- c) placing Indigenous Peoples as equal partners

This facility provides the potential for Indigenous Peoples to generate their economic strength with cultural insights to carry out productive activities, including cooperating with foreign investors. With the various arrangements contained in the bill which can support the position of Indigenous Peoples in investment activities, the promulgation of the Indigenous Peoples Bill is an important priority for the current Government.

## F. CONCLUSION

The interaction between Foreign Investment and Protection of Indigenous Peoples is regulated in the relevant international legal framework, namely the Convention No.107 concerning Protection and Integration of Indigenous and other Tribal and Semi-Tribal Population in Independent Countries, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, United Nations Declaration on the Rights of Indigenous Peoples 2007. Even this interaction has been implemented in the Indonesian National Regulatory Framework, namely Law no. 25 of 2007 concerning Investment and the CIPTAKER Law.

However, the existence of conflicts between indigenous peoples and

<sup>75</sup> Regulatory references in this paragraph refer to the Indigenous Peoples Bill document which can be accessed on: <http://www.dpr.go.id/doksileg/proses2/RJ2-20171106-094054-7086.pdf>

investment companies shows that there is still a conflict of interest between the protection of indigenous peoples and the economic use of natural resources in their territories by foreign investors. For this reason, steps are needed from the Government of Indonesia to overcome this problem. First, Developing an International Investment Agreement (IIA)/Bilateral Investment Treaty (BIT) and Investment Contract Model by incorporating principles that provide flexibility for the state to provide protection for Indigenous Peoples. This BIT model expected to answer the weaknesses of the previous BIT, one of which is the need to provide flexibility for the host country, in this case Indonesia, to protect the welfare of its people through non-discriminatory regulations for the purposes of public welfare, public health, safety, environmental friendliness, public morals or order.

Second, codify regulation regarding the protection of Indigenous Peoples through the ratification of the Indigenous Peoples Bill. With the various arrangements contained in the bill which can support the position of Indigenous Peoples in investment activities, the promulgation of the Indigenous Peoples Bill is an important priority for the current Government. As a form of implementation of the principles of protecting indigenous peoples in national regulations regarding investment, the government should ensure that basic value of indigenous peoples right are also included in contracts with foreign investors. Third, amend the Investment Law and Establish Implementing Regulations related to the Job Creation Law which enforce the concept of indigenous community protection in foreign investment activities.

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