Bridging the Gap between International Investment Law and the Environment

Yulia Levashova, Tineke Lambooy & Ige Dekker (Eds.)

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15 Foreign Direct Investments in the Minin Industry in Indonesia: Disputes Concerning Environmental Degradation and Pollution

Tineke Lambooy, Iman Prihandono, Nurul Barizah[*]

Theme: Difficulties in imposing Indonesian environmental and mining legislation up foreign investors contribute to a declining support for the special legal regime instated bilateral investment treaties as the Indonesian government has to fulfil its constitutioı task to realize sustainable development and social justice.

15.1 Introduction

Indonesia has a fast growing population (>250 million) and is the fourth most populc country in the world (after China, India, and the US). Indonesia ranks 15th in the wo: when it comes to land mass. Indonesia occupies position 15 on the list of carbon dioxi emissions from consumption of energy.[1]

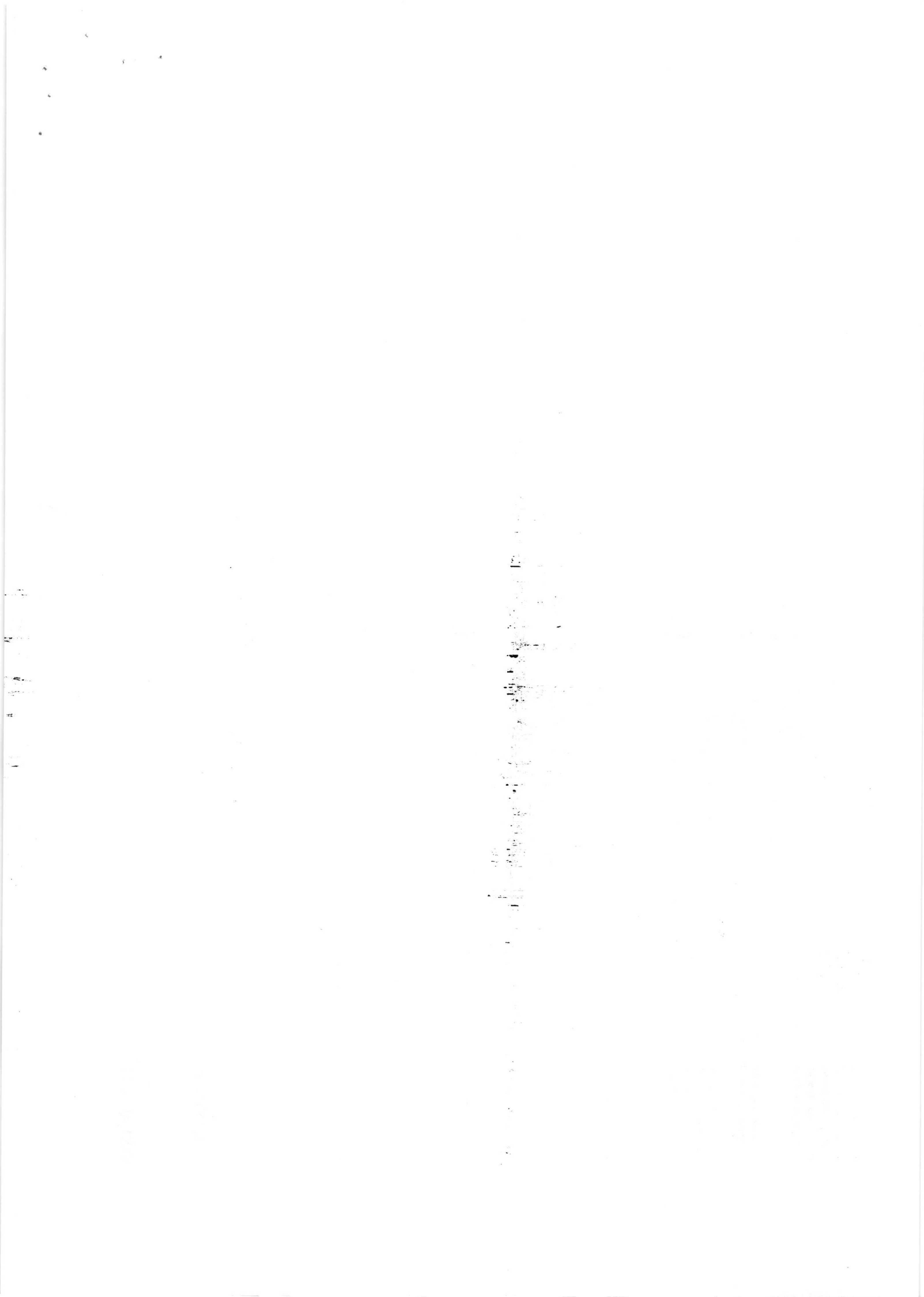
Annual economic growth is high: 5.76% on average during the 2012-2014 time perio thereby outperforming its regional neighbours during the global financial crisis. Desp the steady growth figures, the government still struggles with many topics such reducing poverty and unemployment, putting an end to the unequal resource distributi among regions, and halting corruption.[3]

* Prof. Dr. Tineke Lambooy LL.M. (Nyenrode Business University/Utrecht University), Dr. Iman Prih dono LL.M., and Dr. Nurul Barizah LL.M. (Universitas Airlangga). The authors are grateful to K Bovend'Eerdt for assisting them with the final part of the research and checking all the data. They thank the editors, Dr. Felix Zaharia for their constructive peer review comments and Kees Hooft, LL.M., the English editing. The research for this chapter ended by mid May 2015.

1 The World Factbook 'Indonesia' (*The World Factbook*, 30 April 2015) <www.cia.gov/library/publicatio the-world-factbook/geos/id.html> and <www.cia.gov/library/publications/the-world-factbook/rankorc 2254rank.html>, accessed 10 May 2015.

2 *Ibid.*

3 Indonesia ranked 107th out of 175 countries on the Transparency International 'Corruption Percepti Index 2014: Results' (*Transparency International*), <www.transparency.org/cpi2014/results>, accessed May 2015. See for an overview of problems in the field of corruption in Indonesia Henk Addink, Shi Augustina, Tineke Lambooy, Aikaterini Argyrou, Yuliandri and Saldi Isra (eds), *Eradicating Corruptior Indonesia: Legal Developments and Inter-disciplinary Approaches* (Konstitusi Press, 2015) (forthcoming



During the last decade, the government made many economic advances, introducing significant reforms in the financial sector, including tax and customs reforms and capital market development.[4] It has a fiscal deficit below 3% and, until the summer of 2013, low rates of inflation. National income is based on agriculture (14.2%), industry (45.5%), and services (40.3%).[5] In view of the heavy industrial component, the Indonesian government considers foreign direct investments (FDIs) crucial to economic development.

Part of the FDIs is directed at the mining sector. Notwithstanding the fact that Indonesia has an elaborate set of environmental and mining laws which stipulate good environmental practices, as well as laws which impose Corporate Social Responsibility (CSR) specifically on investors in the mining sector, many mining companies still cause severe environmental degradation. Recently, more and more conflicts between mining companies and local communities have come to light, in which the latter claim that the environmental impact negatively affects their livelihood (see section 15.4). These conflicts are the focal point of this chapter. The authors will demonstrate that the special legal regimes instated by Contracts of Work (concession agreements, hereinafter 'CoWs') and Bilateral Investment Treaties (BITs), according to which foreign investors can bring any dispute with the Indonesian authorities to an international (investment) arbitration tribunal, are one of the reasons why the Indonesian government struggles with imposing environmental and mining legislation upon foreign investors. At the same time, however, the Indonesian government has to live up to its Constitutional task to promote sustainable development and social justice and thus to prevent environmental degradation and conflicts with communities.

In Indonesia, the basic standards for living together, applicable to all – government, companies (including foreign investors) and communities – are captured in the *Pancasila*,[6] which is the official philosophical foundation of the Indonesian state, and the Indonesian Constitution.[7] Both the *Pancasila* and the Constitution oblige the government to promote sustainable development and social justice. The conflicts in the mining sector raise the question how the government can ensure that FDIs also align with these goals. Another challenge for the government is finding appropriate ways to solve existing and future disputes with multinational mining companies with regard to their environmental and social performance in Indonesia, especially when local communities and non-governmental organizations (NGOs) are involved. Regarding solutions found through settlements, the question has been posed on how transparent the processes and outcomes are. With respect to disputes that are dealt with through legal proceedings, the question

4 *Indonesia: Economic and Development Strategy Handbook* (volume 1 strategic information and programs, 2013 edn, International Business Publications, 2013), 15.

5 The World Factbook, 'Field listing: GDP – composition, by sector of origin' (*The World Factbook*, 2014) <www.cia.gov/Library/publications/the-world-factbook/fields/2012.html>, accessed 23 May 2015.

6 For the full text of the *Pancasila*, see <http://web.archive.org/web/20060428021930/http://www.ri.go.id/Pancasila.htm>, accessed 23 May 2015.

7 Indonesian Constitution 1945, Article 33(3).

has been put forward whether it is justifiable that foreign investors have an additic litigation option at their disposal as compared with Indonesian companies. That pursuant to CoWs and BITs, FDIs have an additional legal mechanism thro international (investment) arbitration in which they can contest the rejection of a lice or the enforcement upon them of (new) environmental legislation.[8] The recent confli which will be discussed in section 15.4, concerning FDIs in the mining industry have to a declining support for this special legal regime. This will be analysed in section 1 The agitation culminated in a change of the perspective with which the Indones Government regards its rights and obligations under BITs. The first visibly step is recent termination by the Indonesian Government of the BIT between Indonesia and Netherlands.[9]

In this chapter, the authors will provide insights into several major recent conflicts cau by FDIs in the mining sector in Indonesia and will examine these conflicts in the cont of the Indonesian government's constitutional task to promote sustainable developm and social justice. The chapter will end with an update on recent policy decisions by government concerning FDIs prompted by the developments presented in this chapt

Reading Guideline

In section 15.2, to set the scene, the authors will discuss some economic data concern the mining sector in Indonesia: what share of the gross domestic product (GDP accounted for by the mining sector and to what extent does this sector rely on fore investors?

In section 15.3, the reader will be informed about the legal environment in wh international investors in the mining sector have to operate in Indonesia. The auth outline which BIT's and other international trade agreements – relevant for FDIs mining – have been concluded by the Indonesian government and examine whether t contain clauses concerning the environmental and social responsibility of foreign inv tors. Furthermore, an account will be given of pertinent Indonesian environmental a mining laws and of CSR norms applicable to investors in the mining sector.

Section 15.4 contains the particulars of several conflicts with mining companies owned multinational companies (MNCs). Where relevant, references are made to

8 This will be illustrated in this chapter and is also the subject of some of the other chapters of this book e.g., Chapter 13, 'The "Vattenfall Disputes" and their implications for sustainable development' Francesca Romanin Jacur; Chapter 16, '*Chevron-Texaco v. Ecuador*: The Environmental Case with Claim of Denial of Justice' by Blanca Gomez de la Torre; Chapter 12, 'Balancing Foreign Investm Protection and Environmental Protection under South African Bilateral Investment Treaties' by Jim Pfumorodze and M.M. Da Gama.

9 'Termination Bilateral Investment Treaty' (*Netherlands Embassy in Jakarta, Indonesia*), <http://indon nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.htm accessed 10 May 2015.

environmental and mining legislation set out in section 15.3. In one situation, the mining licences were revoked, which led to the submission of a multi-billion dollar claim against the Indonesian government in international investment arbitration proceedings by the foreign parent company of the mining company in question (see the *Churchill* case).[10] Other disputes were solved through settlement procedures between the company and the government (e.g., *Newmont* case).[11] The authors wish to find out to what extent local communities benefit from such settlements.

In section 15.5, the authors analyse the *Pancasila* and the constitutional task of the Indonesian government to realize sustainable development and to make every effort for an equitable distribution of wealth obtained from exploiting natural resources.

In section 15.6, the insights gained by discussing the mining conflicts (section 15.4) will be held against the overarching task of the Indonesian Government as set out in section 15.5, with the purpose to examine if FDIs in mining contribute to social justice and sustainable development. The findings are also put in the perspective of the economic data provided in section 15.2.

In section 15.7, some recent political developments in Indonesia in the field of international investment treaties will be addressed. The section also contains the concluding comments.

15.2 FDIs in Mining Operations in Indonesia

In the first quarter of 2015, FDIs accounted for 65.9% of total investments in Indonesia (in all sectors), while domestic direct investments (DDI) constituted 34.1%.[12] This is a small decline compared to the first quarter of 2014 where the numbers were 67.5% and 32.5%, respectively. Nevertheless, total FDIs have increased steadily from the first quarter of 2010 (USD 2,832 billion) to the first quarter of 2015 (USD 6.568 billion).[13] Mining, as we shall see later on in this section, drew in most investments (12% of both FDIs and

10 *PT. Ridlatama Tambang Mineral v. The Regent of East Kutai*, Decisions of the Administrative Court of Samarinda No. 31/G/2010/PTUN-SMD, 3 March 2011, p. 87; No. 32/G/2010/PTUN-SMD; No. 33/G/2010/PTUN-SMD; and No. 34/G/2010/PTUN-SMD, 3 March 2011.

11 *State Ministry of Environment v. PT Newmont Minahasa Raya*, Decision of the District Court of South Jakarta No. 94/Pdt.G/2005/PN.JKT.Sel, 15 November 2005. *Republic of Indonesia v. PT Newmont Minahasa Raya and Richard B. Ness*, Decision of the District Court of Manado Case No. 284/Pid.B/2005/PN.Mdo, 24 April 2007. Decision of the Constitutional Court No. 36/PUU-X/2012 on the review of Law No. 22 of 2001 on Oil and Gas, 5 November 2012, para. 3.12.

12 Indonesia Investment Coordinating Board, 'Domestic and Foreign Direct Investment Realization in Quarter I (January-March) 2015', 28 April 2015, <www.bkpm.go.id/file_uploaded/public/Bahan%20Paparan%20TW%20I%202015-ENG%20final.pdf>, accessed 11 May 2015. The figures of this source are used throughout this paragraph.

13 Total FDIs in quarter 1 of 2015 were IDR 82.1 trillion and IDR 35.4 trillion in quarter 1 of 2010. The exchange rate used is that of the Revised State Budget 2015 (USD 1=IDR 12,500).

DDIs). Other sectors which attracted a sizeable portion of FDIs are (i) metal, machine and the electronics industry (11.7% or USD 0.8 billion); (ii) food crops and plantati (9.1% or 0.6 USD billion); (iii) transport equipment and other transport industry (8.9% USD 0.6 billion); and (iv) the food industry (8.1% or USD 0.5 billion).

In the first quarter of 2015, there were eight locations which attracted over USD 3 million worth of total FDIs: West Java, East Kalimantan, Banten, the Special Territory Jakarta, West Kalimantan, Central Sulawesi, East Java, and North Sumatra.[14] In the rece FDI inflows in Indonesia, eight countries participated substantially: Singapore (US 1,235 million), Japan (USD 1,208 million), South Korea (USD 634 million), the Unit Kingdom (USD 580 million),[15] the United States (USD 292 million), Malaysia (USD 2 million), the Netherlands (USD 239 million), and China (including Hong Kong) (US 222 million).

Indonesia has become an attractive destination for FDIs because of its rich natu resources, steady economic growth, safe settings for living, and cheap labour.[16] T country's mining production mainly consists of coal, copper, gold, tin, and nickel, whi resources are found throughout the Indonesian archipelago (see the *Indonesian Mini Areas Map* of 2011 in Figure 15.1). Indonesia is a significant player in the global mini industry; in fact, it is one of the world's largest producers of coal.[17] As mining operatio require substantial amounts of capital as well as specific technical know-how, Indonesi extractive industries have been mostly dominated by MNCs; almost 75% of all mini concessions have been granted to foreign investors.[18]

Figure 15.2 from the Indonesia Investment Coordinating Board shows that of all inve realized in the first quarter of 2015 (i.e., both FDIs and DDIs), 12.0% was invest ments in the mining sector. Of FDIs alone, 17.3% of the investments were made in the mini sector, making it the sector which attracted most FDIs (a grand total of USD 1.1 billio The percentage of FDIs invested in the mining sector has fluctuated somewhat over t last five years: 2010 (13.6%; USD 2.2 billion), 2011 (18.6%; USD 3.6 billion), 2012 (17.3 USD 4.2 billion), 2013 (16.8%; USD 4.8 billion), and 2014 (16.4%; USD 4.7 billio although it continually hovers around 15% of total FDIs.[19]

14 Indonesia Investment Coordinating Board (n. 12). The figures of this source are used throughout t paragraph.

15 This includes the FDIs of the British Virgin Islands (USD 223 million).

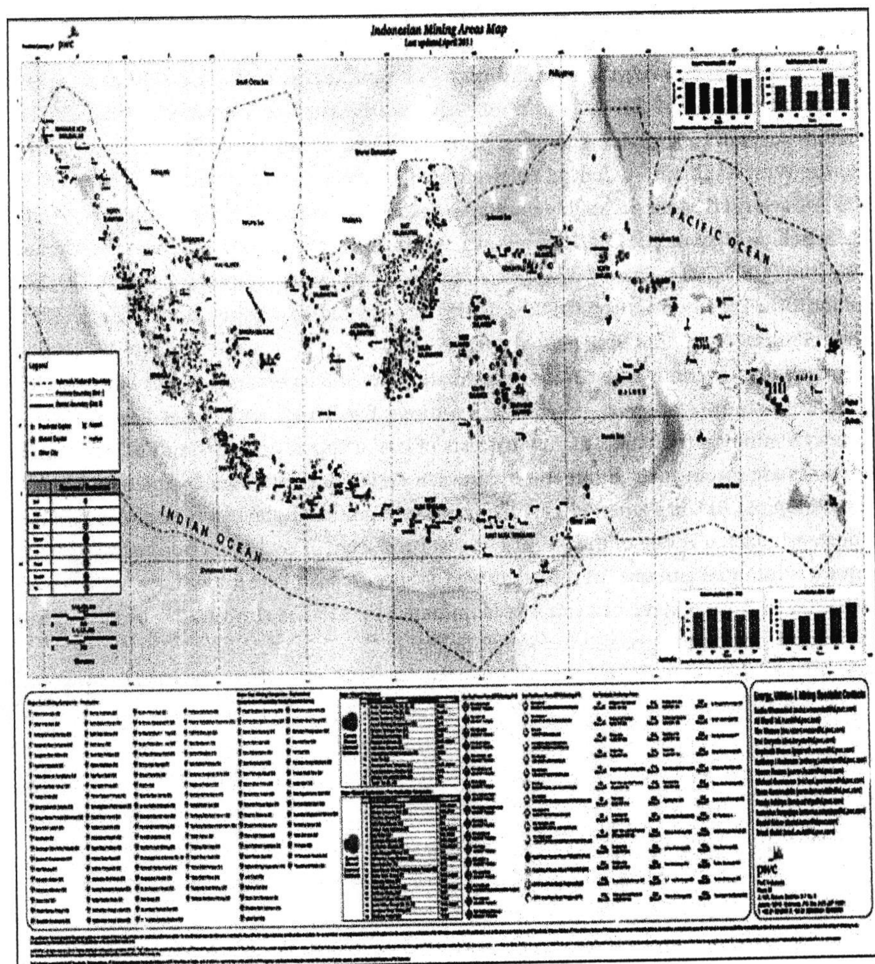
16 Compare the key decision criteria for FDIs presented in Table 3 in Jennifer McKay and Balbir Bhas 'Mining Law and Policy in Indonesia: Issues in Current Practice That Need Reform', 19(4), *Journal Energy & Natural Resources*, 2001, 329.

17 *Ibid.*

18 Siswono Yudho Husodo, 'Pelembagaan Nilai-nilai *Pancasila* Dalam Perspektif Ekonomi dan Kesejahtera dalam Dinamika Dunia Aktual' (Kongres *Pancasila* IV: Strategi Pelembagaan Nilai-nilai *Pancasila* Dal Menegakkan Konstitutionalitas Indonesia, Jogyakarta, 2012), 110.

19 Indonesia Investment Coordinating Board (n. 12). The numbers for 2010, 2011, 2012, 2013, and 2014 for the entire year, whereas numbers for 2015 are only for the first quarter.

Figure 15.1[20] **Indonesia Mining Areas Map**



20 PricewaterhouseCoopers, 'Mining in Indonesia Investment and Taxation Guide', May 2014, <www.pwc.com/id/en/publications/assets/mining-investment-taxation-guide-2014.pdf>, accessed 11 May 2015.

The relative share of mining's contribution to the Indonesian national income (gr domestic product (GDP)) decreased from 11.81% in 2012 to 11.29% in 2013 and 10.49% in 2014. For a comparison, the two main contributors to the Indonesian G from 2012 to 2014 are the manufacturing sector followed by agricultural sector. Mai facturing contributed 23.96% in 2012, 23.69% in 2013, and 23.71% in 2014. Agricult contributed 14.50% in 2012, 14.42% in 2013, and 14.33% in 2014.[21] These figures sh that the contribution of mining to the GDP remains significant. However, its contributi to Indonesia's economy has been decreasing gradually in the last three years.

Several studies conclude that the FDI inflows have brought benefits to the Indones economy. FDI inflows have contributed to Indonesia's accelerating export of good: created more jobs,[23] increased productivity, and facilitated technology spill-ove However, it has also been held that although the mining activities of MNCs in Indone positively contribute to figures on FDI inflows and GDP, they negatively affect the natu capital of Indonesia, i.e., the environment, and cause harm to the social, cultural, a economic lives of local communities.[25] The increasing level of FDI inflows in the mini sector during the last two decades[26] has led to a number of disputes between MN communities, and (local) governments, sometimes resulting in violent conflicts. section 15.4, this will be illustrated by depicting a number of major and recent disput

21 Central Bureau of Statistic Indonesia, 'Percentage Distribution of Gross Domestic Product at Curr Market Prices By Industrial Origin, 2000-2014', <www.bps.go.id/linkTabelStatis/view/id/1207>, accessed May 2015.

22 Organisation for Economic Co-operation and Development (OECD), *OECD Investment Policy Revi Indonesia 2010* (OECD Publishing 2010), 59.

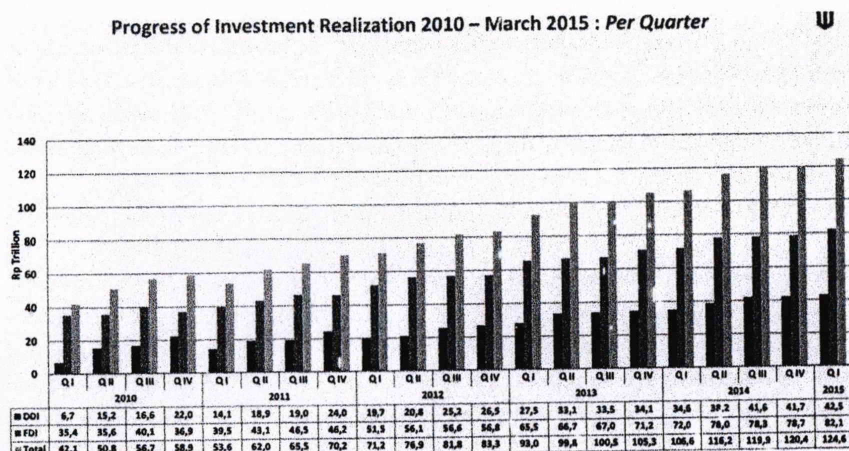
23 Robert E. Lipsey, Fredrik Sjöholm, and Jing Sun, 'Foreign Ownership and Employment Growth Indonesian Manufacturing', 2010, National Bureau of Economic Research Working Paper 15936, <http://core.ac.uk/download/pdf/6482703.pdf> accessed 28 April 2015.

24 Magnus Blomström and Fredrik Sjöholm, 'Technology Transfer and Spillovers: Does Local Participat With Multinationals Matter?' 43 *European Economic Review*, 1999, 915, 922. See also Sadayuki Takii a Eric D. Ramstetter, 'Multinational Presence and Labor Productivity Differentials in Indonesian Manuf turing 1975-2001', 2005, The International Centre for the Study of East Asian Development Working Pa Series Vol. 2004-15, 22, <http://en.agi.or.jp/user04/756_212_20110622173800.pdf>, accessed on 28 Aj 2015.

25 'Indonesia Breaks New Record in FDI Realization', *The Jakarta Post* (Jakarta, 22 January 2013), <ww thejakartapost.com/news/2013/01/23/indonesia-breaks-new-records-fdi-realization.html>, accessed April 2015; Linda Yulisman, 'FDI Rises to $19b Amid Global Woes', *The Jakarta Post* (Jakarta, 20 Janu 2012), <www.thejakartapost.com/news/2012/01/20/fdi-rises-19b-amid-global-woes.html>, accessed April 2015.

26 OECD, 'FDI in figures' (*OECD* April 2013), <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.W countries/ID?display=graph>, accessed 11 May 2015); World Bank, 'Foreign direct investment, net inflo (BoP, current US$)' (*World Bank*), <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.W countries/ID?display=graph>, accessed 11May 2015.

Figure 15.2[27] Indonesia Investment Coordinating Board, 'Domestic and Foreign Direct Investment Realization in Quarter I (January-March) 2015



	2010 QI	2010 QII	2010 QIII	2010 QIV	2011 QI	2011 QII	2011 QIII	2011 QIV	2012 QI	2012 QII	2012 QIII	2012 QIV	2013 QI	2013 QII	2013 QIII	2013 QIV	2014 QI	2014 QII	2014 QIII	2014 QIV	2015 QI
DDI	6,7	15,2	16,6	22,0	14,1	18,9	19,0	24,0	19,7	20,8	25,2	26,5	27,5	33,1	33,5	34,1	34,6	38,2	41,6	41,7	42,5
FDI	35,4	35,6	40,1	36,9	39,5	43,1	46,5	46,2	51,5	56,1	56,6	56,8	65,5	66,7	67,0	71,2	72,0	78,0	78,3	78,7	82,1
Total	42,1	50,8	56,7	58,9	53,6	62,0	65,5	70,2	71,2	76,9	81,8	83,3	93,0	99,8	100,5	105,3	106,6	116,2	119,9	120,4	124,6

15.3 Laws and Policies in Indonesia Regarding Relationships with Foreign Investors Involved in Mining

15.3.1 *Current Status of Indonesian BITs and FTAs*

Over the years, Indonesia has signed over 71 BITs.[28] Of the eight countries mentioned in section 15.2 that invest substantially in Indonesia, Indonesia has entered into BITs with six of them: Singapore (2005),[29] The Netherlands (1995),[30] China (1995),[31] South Korea (1991),[32]

27 Indonesia Investment Coordinating Board (n. 12).
28 UNCTAD, 'Investment Policy Hub, International Investment Agreements Navigator', <http://investment-policyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu>, accessed 11 May 2015.
29 Agreement on the Promotion and Protection of Investments, Singapore-Indonesia, signed 16 February 2005, <www.unctad.org/sections/dite/iia/docs/bits/singapore_indonesia2.pdf>.
30 Agreement on Promotion and Protection of Investment Netherlands-Indonesia, signed 6 April 1994, entered into force 1 July 1995, <www.unctad.org/sections/dite/iia/docs/bits/netherlands_indonesia.pdf>.
31 Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China on the Promotion and Protection of Investments, signed 18 November 1994, entered into force 1 April 1995, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/743>.
32 Agreement between the Government of the Republic of Korea and the Government of the Republic of Indonesia concerning the Protection and Promotion of Investments, signed 16 February 1991, entered into force 10 March 1994, <http://unctad.org/sections/dite/iia/docs/bits/korea_indonesia.pdf>.

United Kingdom (1977),[33] and Malaysia (1999).[34]

In order to explain the type of protection that a BIT offers to foreign investors, t Indonesian-Netherlands BIT is taken as an example. This BIT contains many provisions protect investors. The BIT states, for example, that its aim is to provide foreign investors wi 'fair and equitable treatment' prohibiting 'unreasonable or discriminatory' measures, accor ing 'full protection and security', treating investors the same as other domestic and forei investors, as well as prohibiting 'unlawful expropriation'.[35] Another important provision the BIT is the so-called umbrella clause, which obliges Indonesia to observe any obligation may have entered into with regard to investments of nationals of the Netherlands.[36] The B also includes a guarantee of the ability to transfer any freely convertible currency paymer relating to an investment without restriction or delay. In addition, the Indonesia-Netherlan BIT allows investors to directly submit a dispute against the State parties before International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal.[37]

As mining activities usually have a substantial impact on the local environment and lo communities, it is crucial to analyse the text of the six BITs which were entered into Indonesia and the countries that invest substantially in Indonesia in order to find out which way the treaty text aligns investor protection with protection of the environme and communities. The authors' examination revealed that none of them contains speci provisions obliging investors to comply with human rights norms and to ensure env onmental protection.[38] Hence, it can be concluded that these BITs fall in the category the so-called first-generation BITs – treaties that fail to integrate investor protection wi environmental and human rights protection (see the categorisation in Chapter 1, 'Inn vative legal solutions for investment law and sustainable development challenges', Marie-Claire Cordonier Segger in this volume).

The US is also one of the main contributors of FDIs in Indonesia. The protection of l investments in Indonesia takes place mainly through the 1967 US-Indonesia Agreeme

33 Agreement for the Promotion and Protection of Investments, United Kingdom and Northern Irelar Indonesia, signed 27 April 1976, entered into force 24 March 1977, <www.unctad.org/sections/dite/i docs/bits/uk_indonesia.pdf>.
34 Agreement between the government of Malaysia and the government of the Republic of Indonesia for promotion and protection of investments, signed 22 January 1994, entered into force 27 October 19 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1625>.
35 Articles 2, 3, and 5 of the Agreement on Promotion and Protection of Investment Netherlands-Indone (n. 30). See also Chadbourne & Parke LLP, 'Indonesia Gives Notice: Foreign Investors to Lose Tre Protection', 24 April 2014, <www.chadbourne.com/files/Publication/087f8881-2fba-4e4b-81a1-9f89920f43 Presentation/PublicationAttachment/41e5914f-a2c1-4079-8096-bbaef86eef6b/140424_PIL_IndonesiaGi NoticeForeignInvestorstoLoseTreatyProtection.pdf>, accessed 20 May 2015, 2.
36 Article 3(4) of the Agreement on Promotion and Protection of Investment Netherlands-Indonesia (n. 3
37 Article 9(4) of the Agreement on Promotion and Protection of Investment Netherlands-Indonesia (n. 3
38 Nor do these BITs contain so-called exceptions or carve-outs that limit the investment protection offered them in favour of policy space for the government. See the examples of such provisions discussed Chapter 1, 'Innovative Legal Solutions for Investment Law and Sustainable Development Challenges', Marie-Claire Cordonier Segger in this volume.

Relating to Investment Guaranties.[39] This Agreement contains general provisions on investment protection, but most investors' rights and obligations are specified through special agreements concluded between the Indonesian government and the individual US-based company. In the mining sector, for example, the Indonesian government has signed a number of CoWs, including mining concession agreements.[40] Given the private character of such CoWs, it is difficult to inspect whether they include provisions on human rights and environmental protection.

With Japan, another major investor in Indonesia, an economic partnership agreement has been entered into in 2008, i.e., the Japan-Indonesia Economic Partnership Agreement (JIEPA). The JIEPA covers investment issues.[41] This Agreement provides, very generally, an obligation concerning the protection of human rights and the environment in relation to foreign investments. In Article 74 of the JIEPA, it is stated "that each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area."[42]

Apart from bilateral investment and trade agreements, Indonesia is also a party to a number of regional and multilateral investment and/or free trade agreements (FTA). These include the ASEAN Comprehensive Investment Agreement (ACIA),[43] the ASEAN-China FTA[44] the ASEAN-Australia-New Zealand FTA,[45] and the ASEAN-Korea FTA.[46] The authors point out that none of these International Investment Agreements (IIAs) and FTAs contain specific obligations concerning human rights or environmental protection in relation to investment activities. However, it is noteworthy that the ACIA includes an exemption clause which states that nothing in the ACIA agreement prevents a

39 Agreement Relating to Investment Guaranties, US-Indonesia, signed 7 January 1967, entered into force 22 August 1967.

40 Hadin Muhjad, 'Renegosiasi Susah Dilakukan' ('It is Difficult to Renegotiate') (2011) 11(5) Desain Hukum 12.

41 Agreement for an Economic Partnership, Japan-Indonesia, signed 20 August 2007, entered into force 1 July 2008, <www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf>.

42 Japan-Indonesia Economic Partnership Agreement (JIEPA), Article 74 on Environmental Measures.

43 ASEAN Comprehensive Investment Agreement (ACIA), signed 26 February 2009, <www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf>.

44 Framework on Economic Co-operation and to establish an ASEAN-China Free Trade Area (entered into force 6 November 2001). See also Agreement on Investment of the Framework Agreement of the Comprehensive Economic Cooperation between ASEAN and PRC, signed 15 August 2009, <www.asean.org/images/archive/22974.pdf>.

45 Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), <www.dfat.gov.au/fta/aanzfta/chapters/aanzfta_chapter11.PDF>.

46 Agreement of Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, signed 2 June 2009, <http://akfta.asean.org/uploads/docs/agreements/Investment-Full.pdf>.

contracting party from applying any measures necessary to protect human, animal, plant life or health.[47]

In general, environmental and human rights protection has not (yet) become an integ part of Indonesia's BITs, IIAs, and FTAs. These agreements lag behind the latest dev opments in treaty-drafting practice. For example, major capital-exporting countries a regions such as the US, Canada, and the EU incorporate in their new Model BITs, II FTAs, and EU investment agreements, provisions on human rights and environmen protection.[48] South Africa changed its model BIT in order to incorporate sustaina development goals and to retain the right to regulate.[49] Another example of an innovat approach is the BIT between the Netherlands and the United Arab Emirates, signed November 2013, in which reference is made to the OECD Guidelines for Multinatio Enterprises.[50] It is an interesting regulatory move to refer to these Guidelines in a BIT, they specify CSR norms for investors from OECD countries for their outward inve ments. The effectiveness of these new developments has however not yet been tested depth.

15.3.2 *The Legal Framework of CSR in Indonesia*

The Indonesian Constitution, the highest source of law in Indonesia, dictates that "t organisation of the national economy shall be based on economic democracy tl upholds the principles of solidarity, efficiency along with fairness, sustainability, keepi the environment in perspective, [and] self-sufficiency, [...]."[51] To (re)shape the natio economy in the wake of the Suharto era (in Indonesia indicated as the '*reformasi*' perio

47 See ACIA, Article 17(b) General Exceptions (n. 43). However, it has been argued that this clause may insufficient to cover the broad spectrum of environment and human rights damages that may be caused trade and investment activities. See Hing Vutha and Hossein Jalilian, 'Environmental Impacts of ASEAN-China Free Trade Agreement on the Greater Mekong Sub-Region', 2008, <www.iisd.org/tkn/p tkn_enviro_impacts_china.pdf>. See also Marc Proksch, 'International Investment Agreements (II Issues and Considerations for ASEAN' (First ASEAN-OECD Investment Policy Conference Jakarta 18 November 2010), <www.oecd.org/investment/investmentfordevelopment/46485529.pdf>.

48 See Chapter 1, 'Innovative legal solutions for investment law and sustainable development challenges', Marie-Claire Cordonier (n. 38). See also Chapter 3, 'Fair and Equitable Treatment and the Protection of Environment: Recent Trends in Investment Treaties and Investment Cases', by Yulia Levashova in t volume.

49 See Chapter 12, 'Balancing foreign investment protection and environmental protection under So African Bilateral Investment Treaties', by Jimcall Pfumorodze and M.M. Da Gama in this volume (n. See also Jorge E. Vinuales, 'Foreword' to his volume.

50 Article 2(3) of the Agreement on Encouragement and Reciprocal Protection of Investments between Kingdom of the Netherlands and the United Arab Emirates states that "each Contracting Party sh promote as far as possible and in accordance with their domestic laws the application of the OE Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws."

51 Indonesian Constitution 1945, Article 33(4).

the Indonesian House of Representatives introduced social and environmental responsibilities for companies and investors ('CSR') in three laws: the Investment Law,[52] the Limited Liability Company Law,[53] and the State-Owned Enterprises Law.[54] The goals of these three laws are identical: to institutionalize CSR in the laws of Indonesia. Nevertheless, the way in which CSR is regulated in the Investment Law (section 15.3.2.1) and the Limited Liability Company Law (section 15.3.2.2) is distinct and will be discussed in detail below. Basically, these Acts oblige companies to embed CSR in their core business activities. The State-Owned Enterprises Law will not be discussed, because it deals with CSR in a different manner, i.e., it stipulates that state-owned enterprises initiate community development projects (which is different from the obligation to integrate CSR in the core activities). Moreover, the research discussed in this chapter focuses on FDIs (i.e., investment through *foreign* companies), thus excluding activities conducted by state-owned enterprises.

15.3.2.1 *Investment Law No. 25/2007* (the 'Investment Law')

The Elucidation Commentary (i.e., the legislative history) to the Investment Law stipulates that "investment must become part of the national economic organisation and [must be used] to increase sustainable national economic growth."[55] Investment is defined as any kind of investing activity by both domestic and foreign investors within the territory of Indonesia.[56] The law applies to *any* investment in any sector,[57] whether or not the investor is a foreign/domestic natural person or foreign/domestic legal person.

Sukmono distinguishes between four CSR obligations that are laid down in the Investment Law, next to the investor's general obligations.[58] The first of these is a "community-centric corporate social responsibility"[59] as laid down in Article 15(b) of the Investment Law, according to which investors are obliged to create a harmonious and balanced relationship in accordance with the environment, values, norms, and the culture of the

52 Investment Law No. 25/2007 (Investment Law).
53 Limited Liability Company Law No. 40/2007 (Company Law).
54 State-Owned Enterprises Law No. 19/2003.
55 Elucidation Commentary concerning Investment Law, 2.
56 Investment Law, Article 1. Prior to the 2007 Investment Law, there were two investment laws: one which applied to foreign investors and one which applied to domestic investors. To comply with the national treatment principles laid down in the various World Trade Organization agreements, one Investment Law was adopted, applying to both foreign and domestic investors. *See* A.F. Sukmono, 'The Legal Framework of CSR in Indonesia', *in* Tineke Lambooy, Afifah Kusumadara, Aikaterini Argyrou & Milda Istiqomah (Eds.), *CSR in Indonesia: Legislative Developments and Case Studies*, Konstitusi Press, 2013, 49-50.
57 Investment Law, Article 12.
58 Investment Law, Article 15 states that every investor is required to (i) apply the principles of good corporate management; (ii) draft reports on the investment activity and submit them to the Coordinating Investment Board; (iii) respect the cultural traditions of the communities around the location of the investment business activity; and (iv) comply with all of the rules of law.
59 Sukmono (n. 56), 54.

local community.[60] The second CSR obligation is an "environmental-centric respons ity,"[61] which obliges investors to preserve the environment.[62] The third is a "rem centric responsibility"[63]obliging investors who invest in non-renewable resource allocate funds for the recovery of the operating areas which fulfil the standar environmental worthiness.[64] The last CSR obligation which can be found in the Inv ment Law is the obligation "for investors to develop partnerships with SMEs cooperatives."[65]

15.3.2.2 *Limited Liability Company Law No. 40/2007* (the 'Company Law')

The preambular provisions of the Company Law stipulate that the national econ needs to be supported by strong economic institutions in order to create prosperity the community, thereby implementing the principles of community, fair, efficie sustainability, environmental awareness, independence, and safeguards for a balan progress and national economic unity.[66] This legislative goal is further elaborate Article 74 of the Company Law, which requires limited liability companies[67] that operating directly or indirectly in the field of natural resources[68] to undertake CS Companies operating directly in the field of natural resources are those companies wh business concerns the managing and exploiting of natural resources, such as min companies. Companies operating indirectly in the field of natural resources are those t do not manage or exploit natural resources themselves but whose business activities h an impact on the functional capacity of natural resources.[70]

The Company Law explains that CSR entails a company's commitment to participat sustainable economic development, to increase the quality of life and the quality of environment. Such participation is of value to the company itself, the local commun

60 Elucidation Commentary concerning Investment Law, 16.
61 Sukmono (n. 56), 54.
62 Investment Law, Article 16.
63 Sukmono (n. 56), 54-55.
64 Investment Law, Article 17.
65 Sukmono (n. 56), 55.
66 Company Law, preambular consideration (a).
67 The definition of limited liability company is given in Article 1(1) of the Company Law: "a legal en constitutes a capital alliance, established based on an agreement, in order to conduct business activities v the Company's Authorized Capital divided into shares and which satisfies the requirements as stipulate this Law, and it implementation regulations."
68 Foreign or domestic limited liability companies which engage in investment activities within Indonesia also subject to the obligations set out in the Investment Law, particularly the obligation to creat harmonious and balanced relationship in accordance with the environment, values, norms, and the cult of the local community, as set out in Article 15(b) of the Investment Law.
69 Limited Liability Company Law, Article 74(1).
70 Elucidation Commentary of the Company Law, Article 74.

and the society in general.[71] Companies directly or indirectly engaged in the business of natural resources must allocate funds ('budget') for embedding CSR and fulfilling their obligations in that respect.[72] The costs associated with CSR are to be accounted for as corporate costs.[73] Companies which fail to perform their CSR obligations are subject to (administrative) sanctions provided for under the related prevailing laws and regulations.[74] The Company Law indicates that the sanctions stated in the Investment Law apply.[75] In addition, according to Article 66(2)(c) of the Company Law, the board of directors of limited liability companies is obliged "to provide a report describing the implementation of CSR together with the annual report of the company."[76] The concretization of the corporate CSR obligations stated in the Company Law are elaborated on in Government Regulation No. 47/2012.[77] It exceeds the scope of this chapter to go into the details thereof.[78]

15.3.3 *Environmental and Mining Licences in Indonesia*

In Indonesia, various environmental laws and specific mining laws apply to mining activities. This is regardless of whether the activities are conducted by Indonesian companies or foreign companies. These laws cover the subsequent stages of mining activities: exploration, exploitation, and post-exploitation. In order to have a better grasp of the disputes that will be discussed in section 15.4, an overview of the pertinent legislation is provided in this sub-section.

71 Limited Liability Company Law No. 40/2007, Article 1(3).
72 Company Law, Article 74(2).
73 Sukmono (n. 56), 57.
74 *Ibid.*, 58.
75 Investment Law, Article 34 specifies the following (administrative) sanctions: (i) a written warning, (ii) a business restriction, (iii) a suspension of business and/or investment facility, or (iv) a revocation of the business license and/or investment facility.
76 Sukmono (n. 56), 58.
77 Governmental Regulation No. 47/2012 concerning Social and Environmental Responsibility of Limited Liability Companies. This Regulation was introduced pursuant to Article 74(4) of the Company Law which states that the obligations set out in Article 74 shall be further regulated in a Government Regulation.
78 Reference is made to Tineke Lambooy, Afifah Kusumadara, Aikaterini Argyrou & Milda Istiqomah, *CSR in Indonesia: Legislative Developments and Case Studies*, Konstitusi Press, 2013, in particular to Chapter 3, 'Investment Law: The implementation of CSR in Indonesian laws and the Indonesian Bilateral Investment Treaties: A Lack of Coherency?', by Kurratu Aini and Yulia Levashova in this volume; Chapter 6, 'The Legal Principles of (C)ESR of Mining Companies as a New Paradigm in Indonesia', by Indah Dwi Qurbani and Milda Istiqomah, in this volume; and Chapter 7, 'CSR Due Diligence in the Context of Merger and Acquisition Transactions of Mining Companies in Indonesia', by Listi Witanni, in this volume.

15.3.3.1 *Act No. 32/2009 on Environmental Protection and Management (t 'Environmental Act')*[79]

The Environmental Act requires a business and/or an activity which has a substa impact on the environment[80] to conduct an environmental impact analysis (EIA) (*A lisis Mengenai Dampak Lingkungan* or *'Amdal'*)[81] and to produce an EIA report.[82] must be done prior to the start of a project. The EIA report is to be formulated by initiators of the business plan (i.e., the company/the investor), thereby involving c munities by providing complete and transparent information, by notifying communi prior to execution of the business plan, and by letting communities raise objections.[83] EIA report is to be examined by an EIA appraisal commission.[84] Based on the resul the EIA appraisal commission, the relevant authority decides on the environme feasibility of the project.[85] For businesses that fall outside the scope of applicatior the EIA requirement,[86] the competent authorities decide whether they need to implem an Environmental Management-Monitoring Effort (EMME) (*Upaya Pengelolaan Li kungan Hidup dan Upaya Pemantauan Lingkungan Hidup* or 'UKL-UPL').[87] This ef is not appraised by a commission. Typically, businesses at the exploration stage require EMME, while this does not suffice for businesses at the exploitation stage, because stri norms apply to the latter.

79 Law No. 32 of 2009 regarding Environmental Protection and Management dated 3rd October 2009, ent into force on 3rd October 2009, State Gazette of the Republic of Indonesia of 2009 No. 140, Supplemen State Gazette of the Republic Indonesia Number 5059 (Environmental Act).
80 Whether or not a business and/or an activity has a substantial impact on the environment can determined in accordance with the criteria set out in Article 22(2) of the Environmental Act.
81 Environmental Act, Article 23, stipulates that the requirements to do an Amdal and to formulate an Am document apply to mining activities with regard to the exploitation of natural resources (either renew or non-renewable); processes and activities that potentially cause environmental pollution and/or dam as well as the squandering and degradation of natural resources; processes and activities that cc potentially result in influencing the natural, artificial, and socio-cultural environment; processes activities that could influence the conservation of conserved areas containing natural resources anc cultural reserves; the introduction of plants, animals, and micro-organisms; the production and utilizat of biological and non-biological substances; activities which are of high-risk and/or influence state defe the application of technology predicted to have great potential to influence the environment.
82 The Amdal document contains, according to Article 25 of the Environmental Act, (i) a study on the imp of the business plan; (ii) an evaluation of the activities around the location of the business plan; (iii) a pul recommendation, input, and response to the business plan; (iv) an estimate of the coverage and import characteristics if the business plan is in fact executed; (v) a holistic evaluation of the occurring impac order to determine the environmental (un)feasibility; and (vi) an environmental management and m itoring plan.
83 Environmental Act, Article 26: Communities consist of (i) affected communities, (ii) environme activists, and (iii) parties affected by decisions in the Amdal process.
84 *Ibid.*, Article 29.
85 *Ibid.*, Article 31.
86 *Ibid.*, Article 23.
87 *Ibid.*, Article 36.

Businesses which are obliged to conduct either an EIA or an EMME require an environmental permit issued by the competent authority.[88] This permit is a prerequisite to obtain other business permits such as an operating licence or a construction licence.[89]
Another important provision of the Environmental Act is the one regarding environmental audits. These audits are to be carried out by the government if the project concerns (i) an environmentally high-risk business and/or activity[90] or (ii) a business and/or activity which is in breach of or disobeys the law.[91]

15.3.3.2 *Act No. 4/2009 Regarding Mineral and Coal Mining (the 'Mining Act')*[92]

The Mining Act came into force in 2009 and provides a new legal framework for mining companies, which is called the 'licence-based system'. This new system replaces the CoW system (referred to in section 15.3.1). However, existing CoWs will remain valid up to the lapse of their contractual term. They may be converted into licence-based activities provided that they follow the prescribed licence application process.[93]
The central government can designate certain areas as mining zones where mining operations may be carried out. In determining the mining zones, the government is to take into account the suggestions of the regional government and must consult with the National Parliament.[94]
In general, there are two types of mining licences which a foreign investor must obtain from the Minister of Energy and Mineral Resources[95] in order to be allowed to commence mining operations. These are (i) a licence to conduct mining operation in a particular mining zone and (ii) a business permit for exploration and/or production of mining activities. The mining zone licence, in addition to the abovementioned environmental licences (see section 15.3.3.1), must first be obtained before a mining company can apply for an exploration and/or production permit.
According to the Mining Act, holders of a (special) mining business licence are obligated to implement, prior to the mining of mineral and/or coal, (i) a management and monitoring plan for the mining environment covering reclamation and post-mining

88 *Ibid.*, Article 37.
89 *Ibid.*, Article 40(1) Elucidation Commentary concerning the Environmental Act, 3a.
90 *Ibid.*, Article 49(1)(a).
91 *Ibid.*, Article 49(1)(b).
92 Law No. 4 of 2009 regarding Mineral and Coal Mining, State Gazette of the Republic of Indonesia of 2009 Number 4, Supplementary State Gazette of the Republic of Indonesia Number 4959 (the Mining Act).
93 Mining Act, Article 169.
94 *Ibid.*, Article 14.
95 Government Regulation No. 23 of 2010 on Mining and Coal Operation (as amended by Government Regulation No. 24 of 2012), Article 6, para. 3b.

activities or plans,[96] (ii) efforts illustrating that the holder is careful and not wastefu mineral and coal resources,[97] (iii) a management strategy concerning the treatment of waste of the mining activities until it meets the environmental quality standards disposal into the environment,[98] and (iv) post-mining deposit funds.[99]

15.3.3.3 *The Deforestation Moratorium*

In 2011, a Presidential Decree entered into force[100] which introduced a two-year mo torium on the issuance of new forestry permits in peat lands (traditionally sources of c and certain natural forest areas in order to reduce carbon emissions and deforestati This moratorium was renewed in 2013 by a new decree.[101] The moratoria do not appl permits that have been approved by the Ministry of Forestry or to projects which fu vital functions (e.g., oil, gas, and electricity).

15.3.3.4 *Government Regulation No. 78/2010 regarding Reclamation and Pc Mining ('Reclamation and Post-Mining Regulation')*[102]

The objective of the Reclamation and Post-Mining Regulation is to achieve a bet mining environment, management, and protection through the performance of reclan tion and/or post-mining on terrains disturbed by mining activities by holders of (speci mining business licences for production or exploration purposes.[103] The four ma elements which this regulation intends to regulate are (i) the formulation of reclamati and/or post-mining plans,[104] (ii) the approval of these plans by the competent autho ity,[105](iii) the funding and carrying out of the plans by holders of (special) mini business licenses,[106] and (iv) the provision of alternative means to carry out the plan case of non-performance by the licence holders.

96 Mining Act, Article 96(c).
97 *Ibid.*, Article 96(d).
98 *Ibid.*, Article 96(e).
99 According to the Mining Act, Article 100(1), the holders of mining licences have to make availal guaranteed funds. These funds are used for reclamation and post-mining (i.e., restore the land to approximate original or usable condition).
100 Presidential Decree No. 10/2011.
101 Presidential Decree No. 6/2013.
102 Government Regulation No. 78 of 2010 regarding Reclamation and Post-Mining, dated 20 December 201 entered into force on 20 December 2010, State Gazette of the Republic of Indonesia of 2010 Number 13 Supplementary State Gazette of the Republic of Indonesia Number 5172 (the Reclamation and Post-Minir Regulation). Article 5 states in particular that "before carrying out exploration activities, holders of a Exploration licence and Exploitation licence are obligated to compile reclamation plans based on doc mentation of the living environment in accordance with provisions of statutory regulations in the aspect protection and management of the living environment" (Reclamation and Post-Mining Regulation).
103 The Reclamation and Post-Mining Regulation, Articles 2, 3, and 4.
104 *Ibid.*, Articles 5 through 12.
105 *Ibid.*, Articles 13 through 18.
106 *Ibid.*, Articles 19 through 43.

The Reclamation and Post-Mining Regulation obliges holders of (special) mining business licences to return reclaimed land to the rightful party.[107] This obligation can be postponed if the land is still used for mining.

15.3.4 *Ownership of Mining Companies*

Not only are the rich mineral resources in Indonesia attractive to MNCs, certain recent legislative amendments concerning the ownership of mining companies have also made investments in mining activities more appealing to foreign investors.

Traditionally, foreign investors could only invest in the mining industry in Indonesia through a joint venture with an Indonesian partner or the government.[108] Pursuant to the amendments, foreign investors are now allowed to buy and own the shares in an Indonesian company which holds or has acquired an exploration and production mining permit ('mining company'), provided that the foreign investor strictly follows certain divestment rules.[109] Pursuant to Government Regulation No. 23 of 2010, as amended by Government Regulation No. 24 of 2012, a minimum of 51% of the foreign company's share in the Indonesian mining company must be gradually divested to 'Indonesian Participants'. The divestment process has to follow the following steps: (a) 20% must be transferred in the sixth year after starting the production; (b) 30%, in the seventh year; (c) 37%, in the eighth year; (d) 44%, in the ninth year; and (e) 51%, in the 10th year.[110]

According to Regulation of the Ministry of Energy and Mineral Resources No. 27 of 2013 on the Procedures of Pricing for Divestment, the central government has the first priority right to acquire a share in the mining company in the divestment process, followed by the regional governments, and then the State-Owned Company (*Badan Usaha Milik Negara* or BUMN) and the Local Government-Owned Company (*Badan Usaha Milik Daerah* or BUMD), and the last option to buy the divested shares is given to domestic companies.[111]

107 *Ibid.*, Article 47.
108 Law No. 11 of 1967 on General Rules in Mining, Article 12 (as amended by Law No. 4 of 2009 on Mineral and Coal Mining).
109 Government Regulation No. 23 of 2010 on Mining and Coal Operation (as amended by Government Regulation No. 24 of 2012), Article 97(1).
110 Government Regulation No. 23 of 2010 on Mining and Coal Operation (as amended by Government Regulation No. 24 of 2012), Article 97.
111 Regulation of the Ministry of Energy and Mineral Resources No. 27 of 2013 on the Procedures of Pricing for Divestment and the Change of Investment Structure in Mining and Coal, Article 5.

15.3.5 *Regulatory Changes Concerning the Export of Raw Ores*

In contrast to the legislative amendment mentioned in section 15.3.4, which was p tively received by foreign investors, certain other regulatory changes have not b appreciated by foreign investors. Since 2014, mining companies have to comply w the obligation to process and refine mineral ores before exporting them (someti referred to as the 'mineral ore export ban').

Pursuant to the Mining Act and Government Regulation No. 23 of 2010, compar which hold a mining permit for production operations and companies which cond mining operations based on a CoW must process their mineral ore in local refin facilities.[112] This law implemented the Indonesian government's policy to increase value of Indonesian mineral products for export, to create new jobs, and to increase national income.[113] The local processing obligation became effective as of 12 Janu 2014.

In order to create a disincentive for mining companies to export raw minerals, Indonesian Ministry of Finance issued Regulation No. 6/PMK.011 of 2014, whi imposes export taxes on the export of copper, iron, ilmenite, titanium, manganese, le and zinc concentrates.[114] Mining companies are (only) allowed to export their sen processed mineral concentrates if they pay a progressive tax over the export value. T tax ranges from 20% to 25% for the 2014 fiscal year and gradually increases to 50% 2015 and will increase again up to 60% by 2016.

The legislation outlined in this section 15.3.5 has led to various conflicts with forei mining companies (see further section 15.4).

Another legislative change that impacts foreign investors is the following: in 2013, t Minister of Energy and Mineral Resources passed Regulation No. 28 of 2013, whi restricts foreign participation in tenders for mining licences to areas which are great than 5,000 hectares in size. The Regulation prescribes that only district-owned, stat owned, and national companies are allowed to obtain an IUP mining licence for mini areas smaller than 5,000 hectares.[115]

112 Mining Act, Article 170.
113 Eludication Commentary to Article 103 of the Mining Act.
114 Annex of the Ministry of Finance Regulation No. 6/PMK.011 of 2014, <www.sjdih.kemenkeu.go.id/fu Text/2014/6~PMK.011~2014PerLamp.pdf>, accessed 19 May 2015.
115 Dakka Sirait, Fandy Adhitya, and Ali Mardi, 'New Rules for Mining Tenders' (PwC Indonesia Energ Utilities & Mining Newsflash, November 2013), <www.pwc.com/id/en/energy-utilities-mining-newsflas assets/eumnewsflash_49.pdf>, accessed 20 May 2015, 5.

15.4 Disputes Relating to FDIs in Mining Operations

15.4.1 *Introduction to the Cases*

In this section, a synopsis is presented of several recent FDI cases in the mining sector that concern human rights abuses and environmental pollution and/or degradation. The selection of these cases is based on the magnitude of the problems and the abundant media coverage which they received. The purpose of presenting them is to offer an insight in the variety of conflicts caused by or related to FDI in mining.

First, it needs to be explained on which type of information the case synopses are based. In Indonesia, it is difficult to obtain the text of lower court decisions, as these decisions are usually not made available online. The Supreme Court has recently started to publish decisions online, however, many decisions are not yet available in this way. Information concerning lower court decisions becomes known through journalists who attend court sessions and write about the cases in local newspapers. Those newspaper articles can be traced online. A similar accessibility problem exists concerning environmental and mining licences; even though the withdrawal or issuance of a mining or environmental licence by the authorities is usually published in a national newspaper, the content of such a decision, i.e., the conditions and the environmental requirements linked to the issuance or withdrawal, is not. Likewise, it is difficult to obtain the text of CoWs agreed upon between the Indonesian government and a foreign investor, because these are generally not published. Sometimes, (part of) the content can be examined because the CoW has been subjected to litigation and has become public through court or arbitral tribunal documents. Consequently, where no direct legal sources could be accessed to examine the background and facts of any conflict presented in this section, the authors had to rely on secondary sources such as reports from NGOs and governmental organizations, academic case studies, the websites of mining companies, and newspaper articles. Generally, the information contained in such reports and articles is based on site visits conducted by the authors thereof.

Second, to offer an indication of the mining activities in Indonesia and the companies/investors involved, Figure 15.3 provides an overview of all local operating companies that were active in this sector in 2011.[116]

116 McKay and Bhasin (n. 16).

Figure 15.3 Mineral Prospects and Mining Activities in Indonesia[117]

117 B.N. Wahju, Chairman of Indonesian Mining Association, 'Indonesian mining industry in the period transition, between 1997-2001', p. 6 (paper presented at the International Convention, Trade Sh Investors Exchange, Prospectors & Developers Association of Canada (PDAC), Toronto, Canada, Mar 10-13, 2002), <http://www.pdac.ca/docs/default-source/publications—papers-presentations—conventio t-21.pdf?sfvrsn=8>, accessed 9 July 2015.

In section 15.4.2, it will be demonstrated that conflicts between communities and foreign mining operations have occurred and still occur everywhere in the Indonesian archipelago: West Papua, Kalimantan, Maluku, Sulawesi, and Nusa Tenggara. The authors do not aim to provide a full overview of all mining conflicts in Indonesia. They selected those cases which have been often discussed in the academic literature and the press as this contributed to the collection of objective information.

Then, in section 15.4.3, the legal disputes in which the US investor, Newmont Corporation, is or was involved related to its mining business in Indonesia will be analysed.

This is followed in section 15.4.4 by an exposé about a recent conflict which resulted in villagers and students setting fire, in 2013, to the local authority building in Bima, the capital of the island of East Sumbawa in the province of West Nusa Tenggara.

In section 15.4.5, a discussion is presented concerning the disputes in which the UK firm, Churchill Mining PLC, is involved, including international investment arbitration proceedings. As the case is still pending at the moment of writing this chapter, not all relevant case materials are yet available.

15.4.2 *Conflicts in West Papua, Kalimantan, Maluku, and Sulawesi*

15.4.2.1 PT Freeport Indonesia – West Papua

PT Freeport Indonesia (PTFI) has been accused of violating human rights in West Papua (previously named Irian Jaya) since it began to operate its mines there in 1973. PTFI is a subsidiary of Freeport-McMoRan Copper & Gold Inc., a US-based copper and gold mining giant.[118]

In 1995, the Indonesian government granted a mining concession to PTFI for a new area. This area covered more than 1.3 million hectares[119] and was located in forest and protected forest areas. According to various sources, as will be explained in this section, the mining operations of PTFI have affected the human rights of the local inhabitants in several ways.

Because of the opening of the mining sites, the indigenous Amungme tribes were forced to relocate from their original residence in the highland to a lowland area. They were kept away from Tembagapura, a mining town established by PTFI.[120]

118 Freeport-McMoRan Copper & Gold Inc. (Freeport-McMoRan) holds the majority of shares in PTFI (90.64%). The other shareholder is the Government of Indonesia (9.36%).

119 In 1995, Rio Tinto PLC (a British/Australian mining company) provided funding to allow Freeport-McMoRan to increase its mining production. In return, Rio Tinto holds 16.5% of shares in Freeport-McMoRan.

120 Chris Ballard, 'Human Rights and the Mining Sector in Indonesia: A Baseline Study', *International Institute for Environment and Development*, 2001, <http://pubs.iied.org/pdfs/G00929.pdf> accessed 22 May 2015, 24-25.

Another impact of PTFI mining activities concerns the massive environmental degr tion. PTFI used the Aghawagon-Otomona-Ajkwa River system to transport tail allegedly without a waste disposal permit.[121] The use of this highland river system only contaminated the water with hazardous substances but also destroyed ecosy functions of the river. An environmental audit conducted by the US-based environm consultancy firm Parametrix revealed that the disposed tailings consist of a material is capable of generating acid harmful to aquatic life.[122] In the lowland, the dispos tailings into the Ajkwa Estuary caused the death of vegetation and sensitive aq species.[123] Consequently, the livelihood of the members of the indigenous Komoro who use this estuary as their vital hunting and fishing ground is affected.[124]

In the mean time, PTFI claims on its website that it is committed to engage in environmental management, holds an ISO 14001 certification, and has a comprehen program to monitor the acid mine drainage and other environmental risks.[125]

PTFI's mining activities had and have an effect on the traditional cultural and spiri rights of local communities. The Ertsberg and Grasberg – now mine sites – are cultu and ritually important for the Amungme tribe.[126] Furthermore, PTFI continuo dumped its overburdens (rock waste) into Wanagon Lake, which is a sacred lake the Amungme tribe.[127]

This practice led to the *Walhi vs. Freeport* case.[128] A claim was filed by the NGO *Wah Lingkungan Hidup Indonesia* (WALHI, Friends of the Earth Indonesia or the Indone Forum on the Environment) following the landslide accident which caused the deat four people on 14 May 2000. The accident occurred in Wanagon Lake where P discharged waste materials. WALHI claimed that the landslide was caused by the p environmental management of PTFI and because PTFI had failed to set up a pre-warr system. On 27 July 2000, WALHI alleged that PTFI had violated Law No. 23 of 1997 the Environmental Management by providing incorrect and misleading informat

121 *Ibid.*

122 'Kerusakan Lingkungan yang Ditimbulkan Freeport Parah', *Antara News*, 26 January 2006, <www.a anews.com/berita/26764/kerusakan-lingkungan-yang-ditimbulkan-freeport-parah>, accessed 15 2015.

123 *Ibid.*

124 NGO Wahana Lingkungan Hidup Indonesia, 'The Environmental Impacts of Freeport-Rio Tinto's Co and Gold Mining Operation in Papua', Jakarta, 2006, <http://pems.unsw.adfa.edu.au/staff/profiles/p WALHI_Freeport_Report_Part_1_Part_2.pdf>, accessed 23 May 2015, 63.

125 Kozik B. Soetjipto, 'Environmental Policy', http://ptfi.co.id/en/csr/freeport-in-environment/environme policy, accessed 22 May 2015.

126 Ballard (n. 120), 30.

127 *Ibid.*

128 'Freeport Indonesia Digugat oleh Walhi' *Hukumonline*, 22 August 2000, <www.hukumonline.com/be baca/hol417/freeport-indonesia-digugat-oleh-walhi>, accessed 22 May 2015. See WALHI, home <www.walhi.or.id/en/>, accessed 17 June 2015.

about its environmental management. WALHI claimed that PTFI had violated the law and requested that the court issue an order to the defendant to make public apologies in several national and international newspapers and TV and radio stations for 10 days.[129] The District Court of South Jakarta found that PTFI had violated Article 6(2) of Law No. 23 of 1997 on the Environmental Management by providing the public with incorrect information. PTFI had violated the law by announcing that no evidence existed that the landslide accident may have caused harm to human health and that there was no possible long-term impact to the environment.[130] Although the court decision garnered appreciation from many NGOs, the judgment remained far from what was expected. The court only focused on the obligation of PTFI to provide correct and precise information regarding environmental conditions following the accident. According to the NGOs, the court had failed to consider PTFI's more general obligation to provide correct and precise information about its environmental management in Wanagon Lake (i.e., also concerning the period before the accident had taken place). In fact, this was the main claim of the plaintiff – that the defendant had been giving incorrect information about the dumping of rock wastes, which in turn had caused the accident. Unfortunately, the court provided no explanation in the judgment why it decided to disregard this particular issue. One possible reason is that if the court had considered the issue, it might have been forced to opine on the question whether PTFI could continue to deposit its toxic and rock wastes into Wanagon Lake. No appeal has been instated in this case.

Besides the abovementioned issues, it has been argued by NGOs that the pollution could be considered a violation of Article 4(5) of Law No. 7 of 2004 on Water Resources valid at the time[131] and that PTFI has failed to communicate important documents such as EIA studies and independent external audit reports.[132]

15.4.2.2 PT Kelian Equatorial Mining – East Kalimantan

Local communities have submitted many complaints about the environmental and social impacts of the gold mining activities by PT Kelian Equatorial Mining (PTKEM) in Kalimantan. PTKEM operated a gold mine between 1995 and 2004. At that time, PTKEM was a subsidiary of the Australia-based mining giant Rio Tinto (holding 90% of PTKEM shares).[133]

129 *Ibid, i.e.* 'Freeport Indonesia Digugat oleh Walhi' *Hukumonline.*

130 *Yayasan Wahana Lingkungan Hidup Indonesia v. PT. Freeport Indonesia Company*, Decision of the District Court of South Jakarta No. 459/Pdt.G/2000/PN.Jak.Sel (28 August 2001), 51-52.

131 Law No. 7/2004 on Water Resources, <www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=1C673291504C2EBABACD60EDF569351E?id=LEX-FAOC048775&index=documents>, accessed 22 May 2015.

132 See section 15.3.3.1.

133 PTKEM indicates that it is "A member of Rio Tinto." See PT. Kelian Equatorial Mining, 'Social & Environmental Report 2002' (*Sustainable Solutions Global* 2002), <www.sustainablesolutionsglobal.com/~sustaina/files/6013/3818/0785/kem-se-report-2002.pdf>, accessed 22 May 2015.

The mine was located in an area of 286,233 hectares of rain forest in Kelian, Kalimantan. The communities asserted that PTKEM's mining operations caused fc destruction and polluted the Kelian River due to acid rock drainage.[134] Furthermore, communities could no longer conduct agro-forestry activities and farm their traditi lands because they were now in the PTKEM's mining area. Besides the loss of liveliho there were also allegations of human rights abuses.

In the period from April to June 2000, local people and mine workers protested aga these injustices. Hundreds of indigenous Dayak villagers set up blockades, preven supplies of lime (used to treat acid waste) and diesel fuel oil getting through to the n site. The company had to suspend operations.[135] Community leaders were imprisoned several weeks for 'initiating a blockade'.[136]

These protests reflected the anger of the local communities built up over the years. T years earlier, in 1998, an agreement had been concluded between PTKEM and a l community organization known as LKMTL. The organization LKMTL was establis through a community meeting of 2,000 people. The agreement was the result of community demands which were presented at annual shareholders' meetings PTKEM in London and Melbourne. PTKEM's parent company, Rio Tinto, and WAI were also parties to the agreement. In this agreement, PTKEM had committed itsel negotiate solutions for the identified injustices, *inter alia*, to provide compensation land, human rights abuses by mining staff and security personnel, and pollution and discuss the mine closure plans. The negotiations ended in a deadlock in April 20 According to the communities, "PTKEM has not been genuinely committed to se the issues and demands raised by the people. The company has only paid lip service various activities, such as community development projects, recruitment of local wo ers, environmental management and mine closure plans as a form of propaganda." Subsequently, PTKEM settled the issues with a government-backed team of a local he of the district. However, he had no mandate from most of the local residents a grassroots organizations. WALHI announced its withdrawal from the negotiations October 2000 on the grounds that "Rio Tinto had sought to split the community for

134 Pius Erick Nyompe, 'Indonesia Case Study: The Closure of the Kelian Gold Mine and the Role of Business Partnership for Development/World Bank' (Meeting on Indigenous Peoples, Extractive Industi and the World Bank, Oxford, 15 April 2003), <www.forestpeoples.org/topics/extractive-industries/pul cation/2010/closure-kelian-gold-mine-and-role-business-partnership>, 2.The perspective of the compa can be found in Rio Tinto, 'Why Human Rights Matter', January 2013, <www.riotinto.com/documer ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf>, accessed 22 May 2015, 8

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

own advantage, had misled and insulted LKMTL and were not genuinely committed to the terms and spirit of the original agreement."[138]

Another NGO, the international NGO CorpWatch, also examined the activities of Rio Tinto and, in particular, the activities of its subsidiary PTKEM in Keliam, between July 2000 – when Rio Tinto signed up to the UN Global Compact Initiative[139] – and July 2001. CorpWatch reported human rights abuses and environmental destruction by PTKEM and concluded that the company violated Principle 1 ("support and respect the protection of international human rights with in their sphere of influence") and Principle 8 ("undertake initiatives to promote greater environmental responsibility") of the Global Compact.[140] CorpWatch also referred to an investigation by the Indonesian Government's National Human Rights Commission of allegations of abuses at the Keliam mine.[141] The Commission's report revealed that "the Indonesian military and company security forcibly evicted traditional miners, burned down villages, and arrested and detained protestors since the mine opened. Local people have systematically lost homes, lands, gardens, fruit trees, forest resources, family graves and the right to mine for gold in the river."[142] Moreover, incidents of sexual harassment, rape, and violence against local Dayak women committed by senior company staff were reported.[143]

As regards compliance with environmental norms, CorpWatch referred to a WALHI report which stated that the company's operations affected the health of the surrounding community. It declared that the "company produces over 14 tons of gold per year using the cyanide heap-leaching process which produces contaminated tailings. The tailings are

138 In a letter to Rio Tinto and PTKEM, dated 19th March 2003, LKMTL states that "neither company has responded to repeated requests to supply a copy of the company's mining contract at Kelian; neither have they responded to the suggestion that there should be an independent expert to monitor pollution levels both now and after mine closure. The companies have not agreed to requests to rehabilitate the minesite by filling in pits and lakes left by excavation. Moreover, they have not explained, as requested by LKMTL, what RT's responsibilities are for various problems that might arise after the mine closes." A copy of this letter was given to Rio Tinto's chairman, Sir Robert Wilson, after the London Annual General Meeting of shareholders. See Down to Earth 'Rio Tinto Blasted Three Continents', May 2003, <www.downtoearth-indonesia.org/story/rio-tinto-blasted-three-continents>, accessed 5 May 2015. See for more information about environmental and social impact by the mining industry in Indonesia and concerning the attempts to solve conflicts: *Asia-Pacific Civil Society Statement of Withdrawal from the Extractive Industries Review Process*, 27 April 2003; the Oxford Declaration by indigenous representatives, <forestpeoples.gn.apc.org/briefings.htm>, accessed 25 May 2015.

139 Danny Kennedy, 'Rio Tinto; Global Compact Violator; PT Kelian, A Case Study of Global Operations', *CorpWatch*, 13 July 2001, <www.corpwatch.org/article.php?id=622>, accessed 14 April 2015.

140 *Ibid.*

141 Phil Mattera, 'Rio Tinto: Global Compact Violator', *CorpWatch*, 13 July 2001, <www.corpwatch.org/article.php?id=622>, accessed 22 May 2015.

142 Emily E. Harwell and Owen J. Lynch, 'Whose Resources, Whose Common Good, Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia' (*The Center for International Environmental* Law, January 2002), <www.ciel.org/Publications/Whose_Resources_3-27-02.pdf>, accessed 14 April 2015, 67

143 *Ibid.*

held in a dam and treated in a polishing pond near the Kelian River. Water from polishing pond pours into the river through an outlet. The company claims that the w is clean while the community says that people cannot drink or bathe in the water bec it causes skin lesions and stomach aches."[144]

In respect of the post-mining obligations, WALHI alleged that PTKEM ignored obligation to restore 450 acres of the mine pit and dump sites into their original fore condition. In response, the company claimed technical difficulties.[145] WALHI, howe pointed to the unjust mine closure procedure, which did not take community conce adequately into account and failed to provide basic information to the communities. The CorpWatch report also referred to the environmental policy of PTKEM's par company, Rio Tinto, which declared that it is committed to mining operations t minimally affect the environment: "We will maintain high standards in environme protection while complying with Indonesian and International environmental legi tion."[147] In its 2013 annual report, Rio Tinto claimed that it had made compensati payments as a settlement for the human rights abuses committed during the operation PTKEM. However, the authors could not find any information on the amount of compensation and to whom the compensation was provided.[148]

Another Indonesian NGO, *Jarigan Advokasi Tambang* (JATAM, the Indonesian Mini Advocacy Network) claimed that PTKEM consistently manipulated environmen reports,[149] whereas an Australian NGO, the Mineral Policy Institute, asserted that I Tinto violated environmental standards in its overseas operations.[150]

In sum, there are various reports which contain information suggesting that PTKEM c not properly comply with the Indonesian mining, environmental, and other applical laws such as waste management laws, coastal areas laws, and sea laws during the proc of applying for the mining licence, when conducting the mining operations, a

144 *Ibid.*

145 Down to Earth (n. 138).

146 WALHI's critique of the company's mining interests in Kalimantan, Sulawesi, and West Papua, included the report by WALHI and Friends of the Earth (2003), *'Undermining Indonesia: Adverse Social a Environmental Impacts of Rio Tinto's Mining Operations in Indonesia'*, <www.eldis.org/go/hom id=14113&type=Document#.VUk0EPntlBd>, accessed 5 May 2015, covers four Rio Tinto interests Indonesia: Kelian, Kaltim Prima, Freeport, and Poboya. WALHI says that the PTKEM would have dump 100 million tons of waste rock into the environment by the end of its operations. It accuses the company circumventing and violating Indonesian environmental regulations and highlights concerns over the use cyanide and acid rock drainage. The report also outlines the history of human rights abuses at the Keli mine, which includes forced eviction of local people by the military and the police. At least 444 famili were displaced from their settlements without any prior informed consent. See also <www.downtoeart indonesia.org/story/rio-tinto-blasted-three-continents>, accessed 5 May 2015.

147 Danny Kennedy (n. 139).

148 Rio Tinto (n. 134), 83.

149 See JATAM, homepage <www.jatam.org>, accessed 17 June 2015.

150 Danny Kennedy (n. 139).

thereafter (see section 15.3.3).[151] Usually, the requirements for granting the licence are included in the licence documents. It seems, however, that in practice, during the period of operations, government authorities do not adequately ensure and monitor whether the company fulfils the licence requirements. In this case, various sources also contend that there was a lack of transparency in the legal procedure and outcome of granting the mining licence.

15.4.2.3 PT Nusa Halmahera Minerals - North Maluku

The third case concerns the operation of an open pit gold mining project in North Halmahera, North Maluku by PT Nusa Halmahera Minerals (PTNHM).[152] PTNHM is a subsidiary of Newcrest Mining Ltd., an Australia-based company, which holds 75% of the shares in PTNHM. The other shareholder in PTNHM is PT Aneka Tambang, an Indonesian state-owned company, which holds 25% of the shares.[153]

It has been stressed that PTNHM's activities took place in indigenous forest land and in protected forest areas and that they affected the livelihood of the indigenous communities, caused environmental damages and polluted Kao Bay.[154] For instance, a report of the Association of Adat Community (*Aliansi Masyarakat Adat Nusantara* or *AMAN*) stated that in 2010, 2011, and 2012, the tailing pipe of the company collapsed, causing sewage to flow into the Kao Bay.[155] As a result, the river and sea water became polluted and the ecosystems were damaged. The Research Institute of Agriculture in Indonesia discovered mercury and cyanide contamination of local fish species.[156] The Hoana

151 Such as Act. No 41 of 1999 on Forestry Principals, as amended by Act No. 19 of 2004; Act No. 5 of 1990 on Conservation of Biological Resources and its Ecosystem; Act No. 7 of 2004 on Water Resources; Act No. 32 of 2009 on Protection and Management of Environment; Government Regulation No. 27 of 2012 on Environmental Permits; Act No. 39 of 1999 on Human Rights; Act No. 41 of 2009 on Protection of Agricultural Land for Food Sustainability; Act No. 12 of 2005 on the Ratification of International Covenant on Civil and political Rights and Act No. 11 of 2005 on the Ratification of Covenant on Economic and Cultural Rights; Act No. 11 of 1967 on Provisions of General Mining Principles, Act No. 41 of 2009 on Mineral and Coal Mining.

152 For the company website, see <www.nhm.co.id/index.php?lang=en>.

153 According to the Newcrest website <www.newcrest.com.au/our-business/operations/gosowong/>, in December 2012, Newcrest completed the sale of a 7.5% interest in PTNHM to PT Aneka Tambang (Antam), an ASX and Jakarta Stock Exchange-listed company, for market value, reducing Newcrest's interest in PTNHM to 75% (down from 82.5%) and increasing Antam's interest to 25% (up from 17.5%).

154 'Kao Bay's Fishermen Lost Their Sources of Incomes' ('Nelayan Teluk Kao Kehilangan Mata Pencaharian'), *Kompas*, Jakarta, 11 April 2011, <http://nasional.kompas.com/read/2011/04/11/03442562/>, accessed 23 May 2015.

155 Sapariah Saturi, 'PT Nusa Halmahera Mineral diLaporkan ke KLH, ESDM dan KOMNAS HAM' ('PT Nusa Halmahera Mineral Reported to KLH, ESDM and KOMNAS HAM'), *Mongabay*, 3 January 2014, <www.mongabay.co.id/2014/01/03/pt-nusa-halmahera-mineral-dilaporkan-ke-klh-esdm-dan-komnas-ham/>, accessed 14 April 2015.

156 Domu Simbolon, Silvanus Maxwel Simange, and Sri Yulina Wulandari, 'Kandungan Merkuri dan Sianida pada Ikan yang Tertangkap dari Teluk Kao, Halmahera Utara' ('the Content of Mercuryand Cyanide in Fish Caught in Kaoy Bay, North Halmahera'), 15(3) *Indonesian Journal of Marine Sciences*, 2010, 126; see

Capping indigenous and local communities now fear to use shrimp, scallops, and o fish,[157] and their traditional form of life is at risk.[158]

In its examination of the above occurrences, AMAN found that PTNHM had ign various environmental requirements such as completing an EIA (see section 15.3.3) setting up a proper 'waste processing unit' (Indonesian term: *UPL*). The company also failed to comply with the requirements of Environmental Act and Governm Regulation No. 74 of 2001 on Hazardous and Toxic Management. The *UPL* was operated properly, and liquid waste containing hazardous and toxic materials w dumped or leaked into the environment.[159] Moreover, PTNHM had not discl material information in relation to its operations: when the tailings pipeline leak PTNHM should have informed the public in accordance with section 35 of Governm Regulation No. 74 of 2001 on Hazardous and Toxic Management.[160]

In sum, it was claimed that PTNHM had failed to fulfil various obligations imposed several Indonesian environmental and mining laws.[161] As a result, there has been a str demand from the local communities for the revocation of PTNHM's mining permit the government.[162] On 17 December 2013, a mass demonstration was organized by Kao Teluk Salvation Front, demanding that the government revoke PTNHM's per audit PTNHM transparently, and enforce legal sanctions.[163]

also Edward, 'Pengamatan Kadar Merkuri di Perairan Teluk Kao (Halmahera) dan Perairan Anggai (p Obi), Maluku Utara', ('Observation of Mercury Level in Kao Bay Water and Anggai Water'), 12(2) *Mak Sains*, 2008, 97.

157 *Ibid.*

158 'Teluk Kao Tercembar Limbah Tambang, Belasan Warga Idap Penyakit Aneh' ('Kao Bay Contaminated Mine Waste, Dozens of Residents Suffer Strange Disease'), *National Geographic*, 11 December 2013, htt nationalgeographic.co.id/berita/2013/12/teluk-kao-tercemar-limbah-tambang-belasan-warga-idap-penya aneh, accessed 14 April 2015.

159 *Ibid.*

160 Article 35 of Government Regulation No. 74 of 2001 on Hazardous and Toxic Management states following: "(1) the community preserves the rights to obtain information on the efforts of controlling living environmental impacts resulting from B3 management activities; (2) the information as conte plated in paragraph (1) shall be provided by the person responsible for B3 management activities; (3) provision of information as contemplated in paragraph (2) can be delivered through print media, electro media and or announcement board."

161 Such as the obligations pursuant to Act No. 27 of 2007 on Management of Coastal Areas and Small Islan Act No. 7 of 2004 on Water Resources, Act No. 32 of 2009 on Protection and Management of Environme Government Regulation No. 27 of 2012 on Environmental Permits, Act No. 11 of 2005 on the Ratificati of the Covenant on Economic and Cultural Rights, Act No. 31 on Fishery, and Act No. 41 on Forestry

162 Abdulran Jafar, 'Teluk Kao Polluted, Indigenous Community Urges Government to Revoke Perr from PT. NHM Gold' *AMAN*, 2013, <www.aman.or.id/en/2013/12/18/teluk-kao-polluted-indigeno community-urges-government-to-revoke-permit-from-pt-nhm-gold/#.U3GOZ4GSySo>, accessed on May 2015.

163 *Ibid.*

15.4.2.4 PT Vale Indonesia Tbk – Sulawesi

The fourth case regards the operation by PT Vale Indonesia Tbk (PTVI) of an open-pit nickel mine in Sorowako on the island of Sulawesi. PTVI is formerly known as PT International Nickel Indonesia Tbk. (PTINCO), a foreign investment joint venture company.[164] PTVI is presently a publicly listed company and a subsidiary of Vale Canada Limited, a Canadian company based in Toronto, which holds 60% of the shares in PTVI.[165] Vale Canada Limited itself is a subsidiary of Vale S.A., a public company based in Brazil. Besides the 60% of the PTVI shares held by Vale Canada Limited, 20% of the PTVI shares are owned by Sumitomo Corporation, a Japanese company. The remainder of the PTVI shares is publicly owned.

The Sorowako nickel mine has been in operation for more than 40 years (since 1968). A CoW was signed between PTINCO and the Indonesian government for a 30-year period (1978 to 2008), which allowed PTINCO to explore and develop minerals in an area of 66,000 km2.[166] The CoW was modified and extended in 1996 for another 30-year period (until 2025).[167]

PTVI has been accused of destroying indigenous forest and protected forest areas, thereby affecting the livelihood of local communities.[168] Serious concerns regarding environmental contamination of soil and water bodies and other human rights violations have also been communicated. A particular example concerns the Vale's golf course. The indigenous Karonsi'e Dongi "now live along a fence that borders Vale's golf course. This golf course and mining related buildings have replaced what used to be agricultural land of the Karonsi'e Dongi. It also has covered their graveyard."[169]

Because of mining activities in protected forest area, four PTVI executives were brought before the criminal court. However, in October 2011, the District Court of Malili

164 S.W. Marcuson, J. Hooper, R.C. Osborne, K. Chow, and J. Burchell, 'Our history in Indonesia', *E&MJ Engineering and Mining Journal*, 2009, <www.e-mj.com/features/117-sustainability-in-nickel-projects-50-years-of-experience-at-vale-inco.html#.VUjsd_ntlBc>, accessed 5 May 2015.

165 'About Vale, PT Vale Indonesia TbK', <www.vale.com/indonesia/en/aboutvale/Pages/default.aspx>, accessed 5 May 2015.

166 Marcuson et al. (n. 164). *Ibid.* 'Our History in Indonesia', *E&MJ Engineering and Mining Journal*, 1968, <www.e-mj.com/features/117-sustainability-in-nickel-projects-50-years-of-experience-at-vale-inco.html#.VUjsd_ntlBc>, accessed 5 May 2015.

167 *Ibid.*

168 Ridwan Max Sijabat, 'Inco Denies Contract and Environmental Violations', *The Jakarta Post*, Jakarta, 22 August 2011, <www.thejakartapost.com/news/2011/08/22/inco-denies-contract-and-environmental-violations.html>, accessed 24 May 2015. The impact on the local and regional population has been significant. In 1971, the village of Sorowako had a population of several hundred people which rapidly expanded as construction commenced. In 2008, the 11 local communities had grown to 219,000 people, and the company and contractor employees numbered some 7,000; see Marcuson et al. (n. 164).

169 Mining Watch Canada, 'Focus on Mining Giant Vale at World Social Forum', 5 January 2010, <www.miningwatch.ca/focus-mining-giant-vale-world-social-forum>, accessed 5 May 2015.

acquitted the PTVI executives.[170] Nevertheless, in 2013, the Indonesia Mining and Ene Studies urged the police to investigate PTVI's managing director for allegedly ille mining activities in protected forest areas.[171] The NGO FORBES, that is the Uni People's Forum of the Morowali Regency (*Forum Rakyat Bersatu*), reported this case the Central Sulawesi police.[172] In addition, an investigation has been initiated regard illegal logging by PTVI. It is postulated that other criminal behaviour such as failure pay taxes and royalties has occurred.[173]

15.4.3 Newmont Cases in Indonesia

15.4.3.1 PT Newmont Minahasa Raya – Sulawesi

PT Newmont Minahasa Raya (PTNMR) operated an open-pit gold mine in Minah District, Sulawesi. PTNMR is a subsidiary of Newmont Mining Corporation, a US-ba mining company, which holds 80% of the PTNMR shares. PT Tanjung Serapung ho the remaining 20%.[174]

The mining activity started in 1996 and ceased in 2001. In managing its mining wa PTNMR used the so-called sub-sea tailing disposal (STD) method. With this meth tailings are transported through a pipeline for their final disposal in the sea at a depth 82 meters. It is estimated that PTNMR disposed 2,000 tons of waste per day, and a total 4 million tons of waste since 1996, into the Buyat Bay.[175]

170 'Inco Sambut Baik Putusan Pengadilan Malili' ('Inco Welcomes the Verdict of Malili District Cou *ANTARANews*, 5 October 2011, <http://makassar.antaranews.com/berita/32524/inco-sambut-baik-putus pengadilan-malili>, accessed 5 May 2015.

171 'Polisi didesak untuk Memeriksa Presiden PT Vale Indonesia' ('Policy Urged to Examine the Presiden PT Vale Indonesia'), *Kabar Rakyat, Berdikari Online*, 18 September 2013, <www.berdikarionline.cc kabar-rakyat/20130918/polisi-didesak-untuk-memeriksa-presdir-pt-vale-indonesia.html>, accessed April 2015. See also Etal Douw and Fhay Hadi, 'Jika Modal Berkuasa, Rakyatpun terabaikan; Ka Pertambangan di Morowali', *Jatam* Sulteng, 28 October 2013, <http://jatamsulteng.com/index.p artikel/146-jika-modal-berkuasa-rakyat-pun-terabaikan-kasus-pertambangan-di-morowali.html>, acces 14 April 2015.

172 Wardi Bania and Christoperl Paino, 'Setahun Lebih dilaporkan Lakukan Perambakan Hutan Lindu Hingga Kini PT Vale Belum ditindak', *Mongabay*, 20 March 2015, <www.mongabay.co.id/2015/03/ setahun-lebih-dilaporkan-lakukan-perambahan-hutan-lindung-hingga-kini-pt-vale-belum-ditindak/>, accessed 14 April 2015.

173 *Ibid.*

174 See the Newmont Mining website for more information, <www.newmont.com/home/default.aspx>.

175 Robert Moran, Amanda Reichelt-Brushett, and Roy Young, 'Out of Sight, Out of Mine: Ocean Dumping Mine Wastes', 22(2) *World Watch Magazine*, 2009, 30; UNHCR, 'Environmental Rights Report, Hum Rights and the Environment Materials for the 61st Session for the United Nations Commission on Hum Rights' (Geneva, 14 March-22 April 2005) (2005), UN Doc E/CN.4/2005/135, 57; see also 'Hasil Peneliti TIM terpadu dan Sikap Pemerintah Terhadap Pencemaran Teluk Buyat Minahasa Selatan', *Kemeneri Lingkungan Hidup*, 15 December 2004, <www.menlh.go.id/hasil-penelitian-tim-terpadu-dan-sikap-pem intah-terhadap-pencemaran-teluk-buyat-minahasa-selatan-sulawesi-utara/>, accessed 24 May 2014.

The use of the STD method has eventually led to allegations against PTNMR for polluting the Buyat Bay and destroying the marine ecosystem, resulting in a significant decrease of marine catch – the vital source of food and income for the local communities. Furthermore, there were health problems reported by the local communities, including strange skin rashes, tumours, and other diseases. An investigation by the government revealed that the level of arsenic and mercury in fish in Buyat Bay posed a health risk if consumed, particularly by children.[176] Likewise, another investigation jointly conducted by the government, university scientists, and NGO representatives divulged high levels of arsenic and mercury in the seabed sediment.[177]

PTNMR denied all of these allegations and findings and conducted its own investigation. Their studies concluded that no pollution was found in Buyat Bay.[178]

Several counter-studies conducted by the *LIPI* and *BAPEDAL* study teams of the University of Sam Ratulangi and the Centre for Environmental Impact Control (*Pusarpedal*) of the Ministry of Environment did not find the thermocline layer of tailings disposal sites undertaken by PTNMR in the Buyat Bay.[179] They concluded that PTNMR had not met the legal requirements regarding the placement of tailings in the Buyat Bay.[180]

In relation to the Buyat Bay pollution, various claims have been filed against PTNMR. In 2005 and 2007, two cases were instigated by the Indonesian Government and an NGO, claiming violations of environmental laws.[181] These cases will be discussed in more detail below. An earlier case was instated by the local government and concerned the payment of taxes by PTNMR for the extraction of stone, gravel, and sand (1999).[182] Furthermore,

176 WALHI, 'Buyat Bay Is Polluted and a Risk to the Community: Highlights of the Official Joint Investigation of Buyat Bay', 9 November 2004, <www.earthworksaction.org/files/publications/20041110_SummaryTech-TeamFindings.pdf>, accessed 24 May 2015.

177 Down to Earth, 'New Pollution Study Corners Newmont', November 2004, <www.downtoearth-indonesia.org/story/new-pollution-study-corners-newmont>, accessed 24 May 2015; see also 'Dirty Gold, Buyat Bay, Indonesia' (*No dirty gold*, 2014), <www.nodirtygold.org/buyat_bay_indonesia.cfm>, accessed 9 June 2014.

178 PT Newmont Nusa Tenggara, 'Independent Team Concludes Buyat Bay Is Not Polluted', 13 May 2012, <www.ptnnt.co.id/independent-team-concludes-buyat-bay-is-not-polluted.aspx>, accessed 10 May 2015.

179 Eko Sasmito, 'Tindak Pidana dan Tanggung Korporasi di Bidang Lingkungan Hidup' ('Criminal Conduct and the Corporate Responsibility in Environmental Issue'), <http://www.undana.ac.id/jsmallfib_top/JURNAL/HUKUM/HUKUM%202012/TINDAK%20PIDANA%20DAN%20TANGGUNG%20JAWAB%20KORPORASI%20DI%20IDANG%20LINGKUNGAN%20HIDUP.pdf>.

180 Down to Earth (n. 177), accessed 6 June 2015.

181 *State Ministry of Environment v. PT Newmont Minahasa Raya*, Decision of the District Court of South Jakarta No. 94/Pdt.G/2005/PN.JKT.Sel, 15 November 2005. *Republic of Indonesia v. PT Newmont Minahasa Raya and Richard B. Ness*, Decision of the District Court of Manado Case No. 284/Pid.B/2005/PN.Mdo, 24 April 2007. Decision of the Constitutional Court No. 36/PUU-X/2012 on the review of Law No. 22 of 2001 on Oil and Gas, 5 November 2012, para. 3.12.

182 *Pemerintah Daerah Minahasa v. PT. Newmont Minahasa Raya*. In accordance with Regional Regulation No. 7 of 1998 on the Taxation of Mining Activities on Materials Category-C, the local government insisted that PTNMR pay USD 2.8 million in taxes for the extraction of stone, gravel, and sand, which the company (had) used for building roads for the mining operations. PTNMR argued that it had no obligation to pay the taxes, because all of its obligations were regulated in the 1986 CoW and that the CoW did not contain such

in 2005, Buyat residents claimed damages in a civil court case. It was withdrawn follov an out-of-court settlement between PTNMR and three Buyat residents.[183] WALHI also started a civil case against PTNMR but failed in holding PTNMR liable for pollu the Buyat Bay (2007). The court opined that the evidence was insufficient to prove pollution had taken place.[184]

State Ministry of Environment v. PT. Newmont Minahasa Raya (2005)

In the *State Ministry of Environment v. PT. Newmont Minahasa Raya* case, the S Ministry alleged that PTNMR's mining activities had polluted Buyat Bay and that defendant must be held liable based on the strict liability principle.[185] The case was dismissed by the court on the ground of lack of jurisdiction; the court decided pursuant to the CoW, all disputes between the government and PTNMR must submitted to an international arbitral tribunal (according to the UNCITRAL rules)

an obligation. Furthermore, PTNMR stated that the regional regulation was enacted in 1998 and could be applied retrospectively to PTNMR. The local government had also requested the Court to issu provisional decision ordering PTNMR to shut down its mining activities, pending the final decision of case. This was granted. Subsequently, PTNMR executives met with the Secretary General of the Supr Court and later also with some members of parliament. Next, as an extraordinary intervention, the Supr Court ordered the District Court by letter to delay the execution of its provisional decision. Vari politicians and businessmen praised the Chief Justice's intervention for effectively restoring the confide of foreign investors. Eventually, the parties went through an out-of-court settlement, in which PTN agreed to pay USD 500,000. See about this case: Donna K. Woodward, 'Newmont: Tax Peace at Any Pri *The Jakarta Post*, Jakarta, 24 April 2000, <www.thejakartapost.com/news/2000/04/24/newmont-tax-pe any-price.html>, accessed 24 May 2015; 'Presdir PT NMR: Tuntutan Retribusi Tak Legal', *Kompas*, Jaka 13 April 2000, <www.library.ohiou.edu/indopubs/2000/04/12/0042.html>, accessed 24 May 2(Provisional Decision No. 131/Pdt.G/1999/PN.Tdo, 22 January 2000; A. Priyanto, 'Tarik Ulur Pengelol Pertambangan di Era Otonomi Daerah', *Hukumonline*, 2001, <www.hukumonline.com/berita/b hol4351/tarik-ulur-pengelolaan-pertambangan-di-era-otonomi-daerah>, accessed 24 May 2015; 'Supre Court Orders Delay in Newmont Mine Closure', *The Jakarta Post*, Jakarta, 14 April 2000, <www.thejaka post.com/news/2000/04/14/supreme-court-orders-delay-newmont-mine-closure.html>, accessed 24 M 2015; 'Newmont Reaches Out-of-Court Settlement', *The Jakarta Post*, Jakarta, 20 April 2000, <w thejakartapost.com/news/2000/04/20/newmont-reaches-outofcourt-settlement.html>, accessed 24 M 2015.

183 *Rasit Rahmat et al. v. PT Newmont Minahasa Raya*, Decision of the District Court of South Jakarta 586/Pdt.G/2004/PN.Jak.Sel, 5 January 2005.

184 *Yayasan Wahana Lingkungan Hidup Indonesia v. PT. Newmont Minahasa Raya*, Decision of the Dist Court of South Jakarta No. 548/Pdt.G/2007/PN.Jak.Sel, 18 December 2007. See also 'LSM Lingkun Kecam Putusan Newmont' ('Environment NGO Slams Newmont Decision'), *Hukumonline*, 25 April 20 <www.hukumonline.com/berita/baca/hol16577/lsm-lingkungan-kecam-putusan-newmont>, accessed April 2015.

185 'KLH Menggunakan Dalil Strict Liability Dalam Gugatan terhadap Newmont', *Hukumonline*, 12 Ap 2005, <www.hukumonline.com/berita/baca/hol12637/klh-menggunakan-dalil-istrict-liabilityi-dalam-gu tan-terhadap-newmont>, accessed 24 May 2015.

186 'RI-Newmont Damai, Aktivis Lingkungan Mengecam', *Hukumonline*, 26 February 2006, <www.hukumo line.com/berita/baca/hol14412/rinewmont-damai-aktivis-lingkungan-mengecam>, accessed 24 May 201

The State Ministry of Environment appealed to the High Court. The persistence of the government to pursue this case probably caused PTNMR to make a settlement offer to pay USD 30 million for community development projects and scientific observation in the Buyat Bay area.[187] Unfortunately, the authors could not find any sources confirming payment of the agreed amount nor information about the allocation of the funds. Hence, no conclusions can be drawn about the extent to which local communities have profited from the settlement agreement.

Republic of Indonesia v. PT. Newmont Minahasa Raya and Richard B. Ness (2007)
In the case of *Republic of Indonesia v. PT. Newmont Minahasa Raya and Richard B. Ness*, the Indonesian Government brought criminal charges against PTNMR, its director Ness, and other executives for polluting Buyat Bay. After an investigation by the Indonesian police, the prosecutor charged PTNMR and Ness with multiple criminal offences under Law No. 23 of 1997 on the Environment. PTNMR faced Indonesian rupiah (IDR) 1 billion in fines for restoring the environmental damages and Ness faced up to 10 years in jail and an IDR 500 million fine.[188] In the indictment, the prosecutor accused PTNMR and Ness of illegally dumping toxic waste and placing tailings above the minimum depth.[189] The court, however, concluded that the prosecutor did not sufficiently establish the guilt of PTNMR and Ness and it did not assess whether the legality of the dumping of tailings.[190]
There are indications that the US Government exerted pressure on PTNMR to prepare an exit strategy. Newmont, the parent company of PTNMR, is a US-based MNC. Following the arrest of several PTNMR executives by the police, the US Embassy in Jakarta released a press statement. It criticized the detention as inappropriate and warned that this incident could harm the investment climate in Indonesia.[191] A few days later, the US Ambassador to Indonesia held a meeting with the Indonesian President and the Chief of

187 *Ibid.*
188 'Kasus Pidana NMR Saksi Ahli Bicara tentang Asas Subsidiaritas', *Hukumonline*, 15 July 2006, <www.hukumonline.com/berita/baca/hol15151/saksi-ahli-bicara-tentang-asas-subsidiaritas>, accessed 24 May 2015.
189 'Newmont Menyangkal Telah Melakukan Polusi Teluk Buyat', *Hukumonline*, 5 September 2006, <www.hukumonline.com/berita/baca/hol15423/newmont-menyangkal-telah-melakukan-polusi-teluk-buyat>, accessed 24 May 2015.
190 *Republic of Indonesia v. PT. Newmont Minahasa Raya and Richard B. Ness*, Decision of the District Court of Manado No. 284/Pid.B/2005/PN.Mdo, 24 April 2007. See also 'Terapkan Asas Subsidiaritas PN Manado Bebaskan PT NMR dan Richard Ness', *Hukumonline*, 25 April 2007, <www.hukumonline.com/berita/baca/hol16576/terapkan-asas-subsidiaritas-pn-manado-bebaskan-pt-nmr-dan-richard-ness>, accessed 24 May 2015. As in this case the allegation relating to the pollution was a criminal allegation, the court could only examine whether the placements of the tailings had caused pollution. The court could not judge about the legality of the dumping of the tailings (PTNMR had a licence to place tailing in Buyat Bay).
191 Sari P. Setiogi and Fabiola Desy Unidjaja, 'U.S. Criticizes Arrest of Newmont Executives', *The Jakarta Post*, Jakarta, 25 September 2004, <www.thejakartapost.com/news/2004/09/25/us-criticizes-arrests-newmont-executives.html>, accessed 24 May 2015.

the Police, in which he expressed his concern about the arrest of US nationals and u that the detainees be released as soon as possible.[192] In addition, another US Ambass stated in an official press conference that the lack of legal certainty is a major problen Indonesia in attracting foreign business. He cautioned that the prosecution of PTNMR executives was setting a bad example.[193]
These events may have influenced the outcome of the case; following the US Emb intervention, the court decided that the prosecutor's evidence was invalid and un able.[194] The court also based the acquittal on the 'subsidiary principle' under Law Nc of 1997 on the Environment.[195] According to this principle, criminal measures can be applied if administrative and civil law measures have failed to prevent the viola from continuing and to restore the damages that have been incurred.[196] Environme regulations are essentially administrative in nature. However, various legal commenta questioned the court's application of the subsidiary principle in this case. They critici the prosecutor for the way he dealt with the case.[197] Although the prosecutor decla that he would appeal the judgment, this case was never taken to the Higher Court (next forum in Indonesia).

15.4.3.2 PT Newmont Nusa Tenggara - Sumbawa

PT Newmont Nusa Tenggara (PTNNT) operates copper and gold mining projects on islands of Lombok and Sumbawa (West Nusa Tenggara Province). PTNNT is a jc venture company that is owned by the US-based MNC Newmont Mining Corporati the Japanese MNC Sumitomo Corporation (Sumitomo), and some other shareholders Newmont and Sumitomo serve as operators of PTNNT's mines.

192 Abdul Khalik and Fabiola Desy Unidjaja, 'U.S. Asks for Release of Newmont Staff', *The Jakarta I* Jakarta, 28 September 2004, <www.thejakartapost.com/news/2004/09/28/us-asks-release-newmont-s html>, accessed 24 May 2015.
193 Abdul Khalik, 'No Investment without Big Changes: U.S. Envoy', *The Jakarta Post*, Jakarta, 23 Novem 2006, <www.thejakartapost.com/news/2006/11/23/no-investment-without-big-changes-us-envoy.htn accessed 24 May 2015.
194 'Terapkan Asas Subsidiaritas PN Manado Bebaskan PT NMR dan Richard Ness' (n. 190).
195 Law No. 23 of 1997 on Environmental Management, Articles 41-46.
196 Takdir Rahmadi, 'Perkembangan Hukum Lingkungan di Indonesia' ('The Development of Indones Environmental Law'), *Mahkamahagung*, 13 August 2014, <www.mahkamahagung.go.id/rbnews.a bid=4084>, accessed 24 May 2015. The author, Takdir Rahmadi (a Supreme Court judge), posits that t *subsidiary* principle or also called the *ultimum remedium* principle was ineffective to prevent environmer pollution. Therefore, the new Indonesian environmental law (Law No. 32 of 2009 on the Environm Protection and Management) does not contain this principle.
197 'Newmont Menyangkal Telah Melakukan Polusi Teluk Buyat' (n. 189).
198 PTNNT is a joint venture company that is owned for 56% by Nusa Tenggara Partnership B.V. (a vehi company established under the law of Netherlands), which in its turn is owned by Newmont Mini Corporation and Nusa Tenggara Mining Corporation of Japan. Seven percent of NTPBV's stake in PTNI was possibly divested to the Government of Indonesia through purchase by an agency of the Ministry Finance. In 2011, the Government of Indonesia, through its official body, indicated that it held a 7% sh

The mining concession of PTNNT covers more than 96,400 hectares of land. These include protected forest areas in the Dodo Rinti District on the island of Sumbawa. PTNNT uses the STD method for its tailings disposal (see also section 15.4.3.1). It is estimated that PTNNT disposes approximately 12,000 tons of tailings each day into the seabed of Senunu Bay at the North coast of Sumbawa.[199]

Since 2006, local communities have continuously expressed their resistance against the mining activities of PTNNT.[200] They argue that the mining operations produce environmental damages which affect their livelihoods. One problem is that the destruction of forests leads to a decreased water supply, which causes difficulties for the farmers to grow crops and cultivate rice. The PTNNT mining activities also prevent the local population from collecting foodstuffs, such as honey, candlenut, and palm sugar.[201] In addition, a decrease in fish catch has been blamed on the dumping of tailings in Senunu Bay.

In response, PTNNT argued that its STD system is safe for the environment and that it has obtained government permits to use this system.[202]

In 2011, the West Sumbawa Regency expressed its intention to discontinue the STD permit of PTNNT.[203] However, the licence was renewed. Several NGOs filed claims before the Administrative Court of Jakarta,[204] requesting the court to declare that the

in PTNNT. Other shareholders of PTNNT are PT Multi Daerah Bersaing (24%; PT MDB is owned by PT Multi Capital and PT Daerah Maju Bersaing, a joint company owned by the province of Nusa Tenggara Barat, and the kabupatens of Sumbawa Barat and Sumbawa), the Indonesian mining company PT Pukuafu Indah (17.8%) and the investment company PT Indonesia Masbaga Investama (2.2%). The company's shareholders list is available at <www.ptnnt.co.id/id/pemegang-saham.aspx>, accessed 5 May 2015.

199 The amount of tailings disposed by PTNNT is 60 times higher than that of PTNMR's tailings, see Down to Earth, 'FDI: Still Inflicting Damage on Communities', May 2006, <www.downtoearth-indonesia.org/id/node/681>, accessed 24 May 2015.

200 H. Salim H.S and Idrus Abdullah, 'Penyelesaian Sengketa Tambang; Study Kasus antara Masyarakat Samawa dengan Pt. Newmont Nusa Tenggara', 24(3) *Jurnal Mimbar Hukum*, 2012.

201 Tracy Glynn, 'STD Toolkit: Indonesia Case Studies' (*Project Underground and Mining Watch Canada*, 2002), <www.miningwatch.ca/sites/www.miningwatch.ca/files/03.STDtoolkit.Indo9_.pdf>. See also 'Free the Detained and Stop the Shootings and Repression of People Who Oppose Mining in an Indonesian Protected Forest', *Mines and Communities*, 17 April 2006, <www.minesandcommunities.org/article.php?a=1393>, accessed 21 October 2013.

202 'Fact Sheet on Tailing', *PT Newmont Nusa Tenggara*, 2014, <www.ptnnt.co.id/id/SharedFiles/Download.aspx?pageid=40&fileid=6&mid=126>, accessed 24 May 2015. See also in regard of Buyat Bay: 'Independent Team Concludes Buyat Bay Is Not Polluted', *PT Newmont Nusa Tenggara*, 13 May 2012, <www.ptnnt.co.id/independent-team-concludes-buyat-bay-is-not-polluted.aspx>, accessed 5 May 2015.

203 Rangga D. Fadillah and Panca Nugraha, 'Newmont Banned from Dumping Into Sea', *The Jakarta Post*, Jakarta, 5 May 2011, <www.thejakartapost.com/news/2011/05/05/newmont-banned-dumping-sea.html>. See also Direktori Putusan Mahkamah Agung Republik Indonesia, Putusan No. 145/G/2011/PTUN-JKT, <http://putusan.mahkamahagung.go.id/putusan/downloadpdf/78ff2a229e0d361dffbcd686f9059f9c/pdf>, accessed 14 April 2015; *see also* 'Keputusan Majelis Hakim PTTUN Jakarta Tentang Ijin Tailing PT. Newmont Nusa Tenggara', *Kementerian Linkungan Hidup*, 3 April 2011, <www.menlh.go.id/keputusan-majelis-hakim-ptun-jakarta-tentang-ijin-tailing-pt-newmont-nusa-tenggara/>, accessed 14 April 2015.

204 *Yayasan Wahana Lingkungan Hidup Indonesia et al.*, Case Register No.145/G/2011/PTUN-JKT.

permit of PTNNT to use STD[205] did not comply with the Indonesian Biodive Strategy and Action Plan 2003-2020 (an official national document which clearly s that STD will be prohibited as of 2004)[206] and that, therefore, the STD permit was t revoked. However, the court decided that the government had followed all legal pr dures in renewing the STD permit to continue the disposal of tailings into Senunu I

Yet another conflict came up because of the new legislation which limits the expo ores (see section 15.3.5). Since 2000, under a CoW, PTNNT also operated a gold copper mine in the Batu Hijau area, on the South-West coast of Sumbawa.[207] Pursuar the new legislation, PTNNT – like all mining companies in Indonesia – was oblige conduct the smelting process of the ores in Indonesia rather than to export the materials. PTNNT disagreed and initiated international investment arbitration proc ings against the Republic of Indonesia before an ICSID arbitral tribunal. Its princ claim entailed that the amended legislation and the subsequent obligations wer conflict with the terms of its CoW, as they implied a complete stop on copper and production on the Batu Hijau location. In August of 2014, PTNNT withdrew its arbi claim after the Indonesian Government and PTNTT concluded a memorandum understanding.[208] This memorandum modified the CoW and resulted in a new pe to export copper concentrate for PTNTT.

In 2013, JATAM asserted in a press release that the presence of PTNNT has faile contribute to the reduction of poverty in the mining area.[209] JATAM pointed out West Nusa Tenggara Province is one of the poorest provinces with as much as 21.55% the population still living in poverty.[210] According to the NGO, people have always b deceived by the "sweet promises" of PTNNT regarding community development proj

205 Decision of the State Minister of Environment No. 92 of 2011 on Sub-sea Tailing Disposal Permit for Newmont Nusa Tenggara, Batu Hijau Project.

206 The Indonesia National Development Planning Agency, *Indonesian Biodiversity Strategy and Action P. National Document*, 2003 (on file with the authors).

207 See PT Newmont Nusa Tenggara's website, <www.ptnnt.co.id/id/Default.aspx>, accessed 5 May 2015.

208 PTNNTannounced that it has concluded a "Memorandum of Understanding to participate in a proc with PT Freeport Indonesia designed to lead towards the development of a smelter." PTNNT also sig conditional concentrate supply agreements with two Indonesian companies that publicly announced pl to build their own copper smelters in the country, see 'PTNNT Discontinues and Withdraws Arbitrat Claim', *PT Newmont Nusa Tenggara*, 26 August 2014, <www.ptnnt.co.id/ptnnt-discontinues-and-wi draws-arbitration-claim.aspx>, accessed 5 May 2015.

209 'PT Newmont Nusa Tenggara, Pembawa Kerusakan Lingkungan dan Kemiskinan', *JATAM*, 26 Aug 2013, <http://indo.jatam.org/suara-jatam/siaran-pers/291-pt-newmont-nusa-tenggara-pembawa-keru kan-lingkungan-dan-kemiskinan.html>, accessed 14 April 2015.

210 Mario Kulas, 'Ternyata Pertambangan Tidak Mampu Mensejahterakan Rakyat NTB', *Kompasiana*, August 2011, <http://ekonomi.kompasiana.com/bisnis/2011/09/01/ternyata-pertambangan-tidak-mamp mensejahterakan-rakyat-ntb-392301.html>, accessed 14 April 2015.

and the integration of CSR in the mining activities.[211] JATAM stated that PTNNT's community projects and CSR efforts were not on target, as local education is behind other regions and the environment is still polluted. The tailings disposal has destroyed ecosystems not only in the gulf of Senunu but also in the river of Tongo Sejorong.[212] In sum, JATAM reinforces the claims of local communities that the presence of PTNNT adds only minimal prosperity to the local people. JATAM encourages the government to enforce laws and regulations.[213]

15.4.4 *PT Sumber Mineral Nusantara – The Bima Case – Sumbawa*

Learning from the negative impacts of mining activities, Indonesian citizens have become more open in showing their resistance. The most recent case concerns the mining activities of PT Sumber Mineral Nusantara (PTSMN) on Sumbawa.[214] PTSMN was/is an Indonesian subsidiary-joint venture company of Arc Exploration Limited, an Australian-listed MNC.[215]

In 2010, PTSMN obtained a mining permit from the local government to conduct gold mining operations in an area covering 24,980 hectares, located in three districts: Lambu, Sape, and Langgudu on Sumbawa.[216] It is argued that the granting of the mining licence failed to satisfy the requirement of a public consultation process.[217] Residents of Bima, the capital of East Sumbawa, have for nearly a year demanded that Bima's Regent (the local governmental authority) revoke the licence.[218]

211 'PT Newmont Nusa Tenggara, Pembawa Kerusakan Lingkungan dan Kemiskinan', *JATAM*, 26 August 2013, <http://indo.jatam.org/suara-jatam/siaran-pers/291-pt-newmont-nusa-tenggara-pembawa-kerusakan-lingkungan-dan-kemiskinan.html>, accessed 14 April 2015.

212 *Ibid.*

213 *Ibid.*

214 Mining Permit No. 188/45/357/004/2010.

215 Olivia Rondonuwu, Reza Thaher, and Heru Asprihanto, 'Indonesia Confirms Revocation of Sumber Mineral/Arc Exploration JV Exploration Permit', *Mineweb*, 26 January 2012, <www.mineweb.com/archive/indonesia-confirms-revocation-of-sumber-mineralarc-exploration-jv-exploration-permit/>, accessed 5 May 2015.

216 'Two Dead as Police Fire into Protesters in Bima', *The Jakarta Post*, Jakartam, 26 December 2011, <www.thejakartapost.com/news/2011/12/26/two-dead-police-fire-protesters-bima.html>.

217 Public consultation based on the principles of free, prior informed consent (PIC) is a fundamental element to fulfil the principles of responsible mining which has also been endorsed by the International Council on Mining and Methal (ICMM). See on this case Bill Sullivan, 'Bima Riot and Requested Revocation of PT Sumber Mineral Nusantara's Mining License – A Case Study in How Not to Handle Mining Dispute', *Mitraismining*, <http://news.mitraismining.com/Mining%20Regulations%20Documents/12WAS009%2002%20Coal%20Asia%20-%20Bima%20Mining%20Incident%20-%20Article.pdf>, accessed 16 April 2015.

218 Rondonuwu et al. (n. 215).

On 24 December 2011, after several years of voicing their resistance, hundreds of far and fishermen from the three districts gathered to protest against the opening of mining project by PTSMN.[219] They argued that the mining operations would negati affect their farming and fishing activities, since mining operations on other parts of island caused drought of farmland and pollution of the sea.[220] When the prote occupied the Sape Seaport, the police forces tried to disperse the crowd, which led clash. Two villagers died, and nine others were in critical condition.

After this deadly incident, protests against the PTSMN mining plan continue According to police and local media, on 26 January 2012, thousands of people riote demonstrate against the company's gold exploration plan, which they claim will dam their land and livelihoods.[222] They set fire to offices of the Bima Regency and sev buildings burned down.[223] After this incident, the Bima Regency revoked the mi concession licence.[224] The Indonesian Government announced on the same dat January 2012 that it would revoke PTSMN's exploration permit.[225]

15.4.5 *The Churchill Case – Kalimantan*

In 2008, Churchill Mining Plc. (Churchill), a UK-based MNC, acquired 75% of share Ridlatama Group (this group includes PT Ridlatama Tambang Minerals, PT Ridlata Trade Powerindo, PT Investmine Nusa Persada, and PT Investama Resources).[226] Ri tama Group secured a coal mining concession from the local government in Kaliman for an area of about 35,000 hectares, which is believed to contain the seventh-largest c reserves in the world.

219 'Bima Protesters Shot from Close Range', *The Jakarta Post*, Jakarta, 28 December 2011, <www.thejakapost.com/news/2011/12/28/bima-protesters-shot-close-range.html>, accessed 24 May 2015.

220 'Human Rights Body Says Three People Died in Bima Incident', *The Jakarta Post*, Jakarta, 26 Decem 2011, <www.thejakartapost.com/news/2011/12/26/human-rights-body-says-three-people-died-bima-incid html>, accessed 24 May 2015.

221 Andriani Salam Kusni and JJ. Kusni, 'Siaran Pers Tragedi Bima Berdarah', *Jurnal Toddoppuli*, 24 Decem 2011, <https://jurnaltoddoppuli.wordpress.com/2011/12/24/siaran-pers-tragedi-bima-berdarah/>, acces 14 April 2015; see also 'Stop Activity for Mining Slaughtering in Bima, Solidarity for Civilians', *Jatam*, December 2011, <http://english.jatam.org/content/view/142/17/>, accessed 15 April 2015.

222 Rondonuwu et al. (n. 215).

223 'Kapolri Siap Usut Pembakaran Kantor Bupati di Bima', *Kompas*, Jakarta, 26 January 2012, <http://regio kompas.com/read/2012/01/26/21094472/Kapolri.Siap.Usut.Pembakaran.Kantor.Bupati.di.Bima>, acces 15 April 2015.

224 Rangga D. Fadillah, 'Bima Regent Revokes Permit for Troubled Firm', *The Jakarta Post*, Jakarta, 27 Janu 2012, <www.thejakartapost.com/news/2012/01/27/bima-regent-revokes-permit-troubled-firm.html>, acces 24 May 2015.

225 Ronònuwu et al. (n. 215).

226 Churchill Mining Plc, Annual General Meeting 2011 (2011), <www.churchillmining.com/library/fi Churchill%20AGM%20Presentation%202011%20FINAL.pdf>, accessed 10 May 2015.

In 2010, the local government of the East Kutai Regency revoked four coal mining licences of Ridlatama Group, because various regulations were violated. According to the audit conducted by the Financial Audit Board of Indonesia in 2010, the four coal mining licences were illegal because the number codes listed on the licences were not registered.[227] However, the main reason for the revocation was the following: the concession was located in a protected forest area, in which case the approval from the Ministry of Forestry is required for carrying out mining operations.[228]

In response to the revocation, Ridlatama Group filed four law suits before the Administrative Court of Samarinda, requesting the annulment of the administrative decisions of the East Kutai Regency.[229] The court rejected the claims and ruled in favour of the government. In one of the cases, the court decided that the government has the full authority to evaluate and correct its administrative decisions. This is consistent with the principle of spontaneous annulment (*spontane vernietiging*). Ridlatama Group appealed the four decisions to the Administrative Appeal Court of Jakarta, but the result remained the same.[230] Likewise, the Supreme Court upheld these decisions.[231]

After having lost the cases in the Indonesian courts, Churchill – acting as the majority shareholder of Ridlatama Group – submitted a letter to the President of Indonesia, seeking for an amicable settlement.[232] Apparently, the government did not respond

227 East Kutai Regent Decision No. 540.1/K.443/HK/V/2010 on the Revocation of Mining Permit No. 188.4.45/118/HK/III/2009 to PT. Ridlatama Tambang Mineral. See also Hendarsyah Tarmizi, 'Churchill's Legal Suit Sends Negative Signal to Investors', *The Jakarta Post*, Jakarta, 4 July 2012, <www.thejakartapost.com/news/2012/07/04/commentary-churchill-s-legal-suit-sends-negative-signal-investors.html>, accessed 24 May 2015; Raras Cahyani, 'East Kutai May File Criminal Charges Againt Churchill, *Jakarta Post*, Jakarta, 5 March 2014, <www.thejakartapost.com/news/2014/03/05/east-kutai-may-file-criminal-charges-against-churchill.html>, accessed 15 April 2014; 'Britain's Churchill Mining vs Ridlatama; Ridlatama Grant Case Settled, Churchill Mining Operation Is Illegal', *ACN Newswire*, 15 January 2013, <www.acnnewswire.com/press-release/english/12011/britain%27s-churchill-mining-vs-ridlatama:-ridlatama-grant-case-settled,-churchill-mining-operation-is-illegal>, accessed 24 May 2015.

228 'Churchill Mired in Imbroglio', *The Jakarta Post*, Jakarta, 4 July 2012, <www.thejakartapost.com/news/2012/07/04/editorial-churchill-mired-imbroglio.html>, accessed 24 May 2015. See also 'Britain's Churchill Mining vs Ridlatama: Ridlatama Grant Case Settled, Churchill Mining Operation Is Illegal' (n. 227). See also Article 5 of the Ministry of Forestry Regulation No. P.16/Menhut-II/2014 on the Guideline to the Use of Forestry Area.

229 *PT. Ridlatama Tambang Mineral v. The Regent of East Kutai*, Decisions of the Administrative Court of Samarinda No. 31/G/2010/PTUN-SMD, 3 March 2011, p. 87; No. 32/G/2010/PTUN-SMD; No. 33/G/2010/PTUN-SMD; and No. 34/G/2010/PTUN-SMD, 3 March 2011.

230 *PT. Ridlatama Tambang Mineral v. The Regent of East Kutai*, Decisions of the Administrative Appeal Court of Jakarta No. 109/B/2011.PT.TUN.JKT, 8 August 2011; No. 110/B/2011.PT.TUN.JKT; No. 111/B/2011.PT.TUN.JKT; and No. 112/B/2011.PT.TUN.JKT, 8 August 2011.

231 Decisions of the Supreme Court No. 136 PK/TUN/2012; No. 137 PK/TUN/2012; No. 138 PK/TUN/2012; and No. 139 PK/TUN/2012. See also 'Britain's Churchill Mining vs Ridlatama: Ridlatama Grant Case Settled, Churchill Mining Operation Is Illegal' (n. 227).

232 Sara Schonhardt, 'British Mining Firm Sues Indonesia for Asset Seizure', *New York Times*, New York, 6 June 2012, <www.nytimes.com/2012/06/07/business/global/british-mining-company-sues-indonesia-over-1-8-billion-coal-project.html?_r=0>, accessed 16 April 2015.

favourably to this request.[233] Eventually, Churchill submitted a claim with the ICSID arbitration against the Government of Indonesia. Churchill argued that the Indone Government had breached its obligations under the BIT between the UK and Indo sia.[234] The MNC alleged that the revocation of several mining licences held by Church subsidiary constituted a failure of the Indonesian Government to provide protection Churchill as a foreign investor. Churchill seeks an amount of USD 1.8 billion compensation for its potential loss (of future income).[235] In February 2014, international investment arbitration tribunal issued an interlocutory judgment confi ing that it has jurisdiction to examine the dispute.[236]

15.5 THE GOVERNMENTAL TASK TO REALIZE SOCIAL JUSTICE AND SUSTAINABLE DEVELOPMI

In the presentation of the mining disputes in section 15.4, various types of conflicts w discussed: (i) collisions between communities and mining companies because of hun rights abuses and environmental pollution conducted by mining companies; (ii) lo unrest because the government was considered to not sufficiently enforce environme laws, mining laws, and nature protection laws and regulations upon the mining com nies; (iii) matters where the government did not succeed in creating transparent set ment processes with mining companies; and last but not least, (iv) internatio investment arbitration claims filed by mining companies against the government ba on provisions in CoWs or BITs with the purpose to contest the rejection of a min licence or to fight new mining regulations.

The examples of conflicts with communities raise the question whether mining in gene and FDIs in the mining sector in particular, contribute to the overarching goals of Indonesian Government – to realize social justice and sustainable development. In t section, the authors will discuss the standard(s) for the Indonesian Government

233 Churchill Mining PLC., *Request for Legal Protection No. 028/CHL-RI1/IV/2012*, 20 April 2012, <w italaw.com/sites/default/files/case-documents/ita1042.pdf>.

234 Agreement for the Promotion and Protection of Investments, United Kingdom and Northern Irela Indonesia, signed 27 April 1976, entered into force 24 March 1977, <www.unctad.org/sections/dite/ docs/bits/uk_indonesia.pdf>.

235 International Centre for Settlement of Investment Disputes, *Churchill Mining (the Claimant) v. Republi Indonesia (the Respondent)*, ICSID Case No. ARB/12/14/ and 12/40 at <www.churchillmining.com/libra file/ICSID-Churchill%20&%20Planet%20v%20Indonesia-Decision%20on%20Jurisdiction.pdf>, accessed 15 April 2015. Rabby Pramudatama, 'Govt Gets Ready for $1.8b Suit', *The Jakarta Post*, 5 July 2012, <ww thejakartapost.com/news/2012/07/05/govt-gets-ready-18b-suit.html>. Rabby Pramudatama, 'Govt Appo Senior Lawyers for Churchill Arbitration', *The Jakarta Post*, 9 August 2012, <www.thejakartapost.com/ne 2012/08/09/govt-appoints-senior-lawyers-churchill-arbitration.html>.

236 International Centre for Settlement of Investment Disputes, *Churchill Mining Plc v. Republic of Indone* 24 February 2014, <www.italaw.com/sites/default/files/case-documents/italaw3103.pdf>.

provided in the *Pancasila* and the Indonesian Constitution. As part of the analysis, relevant Constitutional Court's decisions are also addressed.[237]

The *Pancasila* contains five principles which represent the fundamental norms of the Indonesian legal system.[238] It constitutes the spirit of the 1945 Constitution of Indonesia (hereinafter 'the Constitution'). The *Pancasila* and the Constitution are inseparably linked and intertwined. Principle 5 of the *Pancasila* calls for the "the equitable spread of welfare to the entire population, not in a static but in a dynamic and progressive way. This means that all the country's natural resources and the national potentials should be utilized for the greatest possible good and happiness of the people. Social justice implies protection of the weak [...]. Protection should prevent wilful treatment by the strong and ensure the rule of justice."[239]

The element of social justice is also laid down in Article 33(3) of the Constitution. This article provides that "[t]he land, the water and the natural resources within shall be controlled by the State and shall be used for the maximum prosperity of the people."[240]

As these terms are open norms, the concepts have been regularly contested in the Indonesian Constitutional Court. In particular, issues which relate to the exploitation of natural resources by MNCs and the rights of the citizens to also reap benefits from this exploitation have been brought before the court.

The first issue regards the government's power to *control* the use of natural resources. In its constitutional review of Law No. 20 of 2002 on the Electricity Power (2004), the Constitutional Court defined the meaning of the words "controlled by the State" in Article 33(3) of the Constitution. According to the Court, the control of the State of natural resources means more than in the context of ownership as known in the legal concept of private law. The Constitutional Court was of the opinion that the power of the State to control the use of natural resources must be exercised in several ways: (a) to establish policy (*beleid*), (b) to take care (*bestuursdaad*), (c) to regulate (*regelendaad*), (d) to manage (*beheersdaad*), and (e) to supervise (*toezichthoudensdaad*).[241]

237 The Constitutional Court is the only body in Indonesia which has the authority to interpret the Constitution.

238 Jimly Asshiddiqie, 'Membudayakan Nilai-nilai *Pancasila* dan Kaedah-kaedah Undang-undang Dasar Negera RI Tahun 1945', Kongres *Pancasila* III, Surabaya, 1 June 2011. Asshiddiqie posits that the *Pancasila* can be regarded as the spirit that lives in the body of the Constitution.

239 See also Principle 2 of the *Pancasila* ('Just and Civilized Humanity') which states *inter alia* that the Indonesian people do not tolerate physical or spiritual oppression, and Principle 3 ('a Democracy Guided by the Inner Wisdom in the Unanimity Arising Out of Deliberations Amongst Representatives') which holds that democracy calls for decision-making through deliberations to reach a consensus. For the full text of the *Pancasila*, see <http://web.archive.org/web/20060428021930/http://www.ri.go.id/*Pancasila*.htm>.

240 Indonesian Constitution 1945, Article 33(3).

241 Decision of the Constitutional Court No. 001-021-022/PUU-I/2003 on the constitutional review of Law No. 20 of 2002 on the Electricity Power, 1 December 2004, 334.

In a subsequent decision, concerning the constitutional review of Law No. 22 of 2001 Oil and Gas (2004), the Constitutional Court further explained four of the abovem tioned five elements. First, in exercising its power to "take care", the government r issue and revoke licences, permits, and concessions. Second, the power to "regulate" r be performed through cooperation with the legislative branch in enacting legislation through government regulation. Third, the "management" power may be exercised by government through ownership of company shares or direct involvement in the boarc directors in state-owned and government-linked companies. Finally, the power to "sup vise" must be used to ensure that the natural resources are utilized in such a way as maximize the prosperity of the people of Indonesia.[242]

Furthermore, in 2008, in its constitutional review of the Investment Law (i.e., Law No. 2007 on Investment; see section 15.3.2), the Constitutional Court asserted that government's control of natural resources must be exercised in a manner that respe protects, and fulfils the economic and social rights of the people of Indonesia.[243]

The second issue regarding the Indonesian State's power to control natural resource how to rank the abovementioned five elements of authority. In 2012, the Constitutio Court determined in its constitutional review of Law No. 22 of 2001 on Oil and Gas tl the most important element in the government's power to control is to exercise "power to manage" through direct involvement in the exploration and exploitation natural resources, because these two processes are key to the prosperity of the peop This is followed by the "power to set policy" and to "taking care" of the use of natu resources. Finally, the "power to regulate" and "to supervise" are ranked lowest.[244]

In this way, the decisions of the Constitutional Court determine in large part how t government must exercise its power in controlling the use of natural resources in order act in accordance with the abovementioned principle 5 of the *Pancasila* and Article 33 of the Constitution.

However, another important question is yet to be answered: in which way can the exerc of these powers maximize the prosperity of the people of Indonesia? Although t Constitutional Court has explained what the constitutional duty of the governme entails in relation to the use of natural resources, the implementation of the 20 judgment remains challenging. Nevertheless, this decision provides a legal tool a creates an opportunity for all Indonesian citizens and NGOs to directly challenge a influence the government's conduct in managing the use of natural resources. Tl

242 Decision of the Constitutional Court No. 002/PUU-I/2003 on the review of Law No. 22 of 2001 on Oil a Gas, 15 December 2004, 209.

243 Decision of the Constitutional Court No. 21-22/PUU-V/2007 on the review of the Law No. 25 of 2007 Investment, 25 March 2008, para. 3.9.

244 Decision of the Constitutional Court No. 36/PUU-X/2012 on the review of Law No. 22 of 2001 on Oil a Gas, 5 November 2012, para. 3.12.

decision in particular may therefore be used as a legitimate cause of action in suing the government when it fails to conform to the Constitutional Court's decision, e.g., when environmental and mining legislation are insufficiently enforced upon mining companies.

The standard for testing the effectiveness is provided in another decision of 2012, i.e., the constitutional review of Law No. 27 of 2007 on Coastal and Small Islands Management. In this case, the Constitutional Court introduced a standard to determine whether or not the control of natural resources by the government has resulted in the maximum prosperity of the people of Indonesia. This standard consists of four elements:

1. the benefit of natural resources for the public,
2. the level of equal spread of the benefit of natural resources for the public,
3. the level of public participation in determining the use of natural resources, and
4. the respect of the traditional rights on the use of natural resources.[245]

In sum, according to the Constitutional Court's interpretation, the *Pancasila* and the Constitution mandate the Indonesian Government to exercise five powers in relation to the use of natural resources. However, in exercising these powers, the government has to take into account four standards to ensure that the use of natural resources will result in the maximum prosperity of the Indonesian people.

15.6 Analysis of the Conflicts in the Context of Social Justice and Sustainable Development

In section 15.4, the authors presented various examples of conflicts in relation to mining activities conducted by MNCs. Local communities claimed that the mining activities led to human rights abuses[246]; destruction of the environment[247]; environmental pollution[248]; loss of housing, traditional grounds, and rights[249]; loss of possibilities to generate an income from living in the forest or from fishing (due to destruction of the forest and to the contamination of the water sources and the sea)[250]; and social injustice (because the

245 Decision of the Constitutional Court No. 3/PUU-VIII/2010 on the review of the Law No. 27 of 2007 on Coastal and Small Islands Management, 9 June 2012, para. 3.15.8.

246 See section 15.4.2.1 on PT Freeport Indonesia and section 15.4.2.4 on PT Vale Indonesia.

247 See section 15.4.2.2 on PT Kelian Equatorial Mining, section 15.4.2.3 on PT Nusa Halmahera, section 15.4.2.1 on PT Freeport Indonesia, section 15.4.2.4 on PT Vale Indonesia, section 15.4.3.2 on PT Newmont Nusa Tenggara, and section 15.4.4 on PT Sumber Mineral Nusantara.

248 See section 15.4.2.3 on PT Nusa Halmahera, section 15.4.2.1 on PT Freeport Indonesia, section 15.4.2.4 on PT Vale Indonesia, section 15.4.3.1 on PT Newmont Minahasa Raya, section 15.4.3.2 on PT Newmont Nusa Tenggara and section 15.4.4 on PT Sumber Mineral Nusantara.

249 See section 15.4.2.4 on PT Vale Indonesia.

250 See section 15.4.2.3 on PT Nusa Halmahera.

local people did not profit from the incomes generated by the mining activity and bec they were not adequately heard in the preliminary, in the exploitation, nor in the p exploitation phase).[251]

All of these complaints indicate that the local communities suffer from mining activ and do not profit from them, as was promised. Apparently, the government – in issu licences and permits for mining activities – does not (yet) comply with the four stand explicated by the Constitutional Court (see section 15.5).

Moreover, when a mining company submits complaints to the government concern for instance, a revocation or non-issuance of a licence, or regarding new environment mining legislation, the government usually enters into negotiations with suc company.[252] Several of the disputes discussed in section 15.4 were solved through out-of-court settlement between the company and the government. This meant, in aln every case thus far, that the mining company could continue their projects (except in *Bima* case). Sometimes, a promise was made that a development fund for the lo communities would be established by the mining company. The authors tried to f out how the funds have been allocated and used but did not succeed therein due to fact that these agreements and reports are not made public and the companies in quest do not provide information about them. All the cases indicate the lack of transparency, the one hand, regarding the companies' activities and, on the other hand, regarding governmental documents and deals concluded in the mining sector. Still, the quest remains to what extent the four standards underlined by the Constitutional Court complied with by the authorities who take the decision(s).

The events in the two *Newmont* cases discussed in section 15.4.3 illustrate that government and the courts were concerned about the risk of losing FDIs. Both fea that any perceived lack of providing protection to foreign investors may cause F outflows.[253] Commentators stated that the courts and government authorities have be influenced by foreign parent companies when deciding these cases. The *Newmont* ca show that environmental protection is sometimes compromised in Indonesia in favour allowing mining activities and concomitant FDIs. In addition, traditional ways of living local communities are not always deemed sufficiently important to stop mining activit in the area.

The authors also point at the situation in the Buyat Bay: the Government of Indone was not successful in its claims against PTNMR for polluting the Buyat Bay (see secti

251 See section 15.4.2.2 on PT Kelian Equatorial Mining.

252 *Ibid.*

253 'Government Regrets Court Order to Shut Newmont Mine', *The Jakarta Post*, 11 April 2000, <ww thejakartapost.com/news/2000/04/11/government-regrets-court-order-shut-newmont-mine.html>, accessed 15 May 2015.

15.4.3.1). Pursuant to the applicable concession agreement, disputes between the government and PTNMR had to be settled through an international investment arbitration mechanism. The government found itself between a rock and a hard place: either it was to be subjected to the caprice of this MNC or to take the risk of losing the case before an international investment arbitration tribunal. This may have been the reason why the government accepted PTNMR's settlement offer to pay USD 30 million for a community development fund rather than pursuing this case.

The government was also confronted by a dilemma when asked to revoke the renewal of the sub-marine tailing disposal permit for PTNNT (see section 15.4.3.2). The concession agreement limited the government's power to change applicable laws and regulations during the lifetime of the concession. If the government were to change the law and prohibit the use of STD, PTNNT could have filed an investor-state arbitration claim before an international investment arbitration tribunal.

In fact, Churchill[254] and PTNNT[255] have submitted claims for damages against the government before ICSID tribunals. These companies claimed that they have the right to have their claim judged by international arbiters pursuant to a BIT or specific provisions in their CoW(s). Their claims pertained to the rejection of a permit (Churchill; see section 15.4.5) and the new legislation on ores (PTNNT; see section 15.3.5). This implies that MNCs have an additional way of fighting Indonesian environmental and mining legislation – an extra way in comparison with domestic companies. The amounts claimed by MNCs in international investment arbitration proceedings are high: USD 1.8 billion in the case of Churchill.

When such an amount is contrasted with the contribution of FDIs in the mining sector to the Indonesian national income, the question emerges whether it is economically sensible for the Indonesian Government (and the local communities) to stimulate FDIs in mining through allowing additional legal protection based on BITs, FTAs, and CoWs to MNCs. Suppose that two or three claims by MNCs in the same range as the Churchill claim (USD 1.8 billion) would be submitted and awarded by an international investment arbitration tribunal. In that case, the total annual income that the Indonesian state receives from FDIs in mining sector has gone astray (e.g., total FDIs in the mining sector accounted for USD 2.2 billion in 2010, USD 3.6 billion in 2011, USD 4.2 billion in 2012, USD 4.8 billion in 2013, and USD 4.7 billion in 2014; see section 15.2).

254 Italaw, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, Decision on Jurisdiction (Churchill Mining Plc), <www.italaw.com/cases/documents/2438>, accessed 14 May 2015.

255 Italaw, *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia*, ICSID Case No. ARB/14/15, <www.italaw.com/cases/2723>, accessed 14 May 2015. This claim has been withdrawn as was explained in section 15.4.

MNCs that are active in the Indonesian mining sector can usually make use of the op of international dispute resolution. Some MNCs work on the basis of the old regime on the basis of a CoW, the contractual terms of which provide for the optio international (investment) arbitration. Other investors can file for international inv ment arbitration pursuant to BITs, IIAs or FTAs, which protect their investment Indonesia. The country has concluded many BITs, IIAs and FTAs (see section 15. The chances are that more claims will arise due to the increase in international inv ment arbitration worldwide.[256] Furthermore, it should be taken into account that current Indonesian Government is investing substantially in the enforcement of envi mental and mining legislation and in the fighting of all forms of corruption.[257] means that corporate non-compliance of environmental or mining regulations wil detected earlier. It can be supposed that MNCs will look for other ways to avoid (st compliance with environmental and mining laws, such as by starting, or threatenin commence, international investment arbitration proceedings against the Indone Government. Reference is made to the case studies concerning Vattenfall and Ecua in this volume, in which cases MNCs pressure host states to deviate from apply local laws.[258]

The most recent cases indicate a change in the Indonesian Government's attitude prioritizing the promotion of FDIs and the protection of foreign investors at the expe of ensuring environmental protection and realizing sustainable development. The *Bi* case (PTNNT; section 15.4.3.2) shows that the local government, after a long ti eventually listened to the demands of the local villagers, farmers, and fishermen a revoked all new mining permits. Another interesting feature of this case is that the lc communities were aware of the negative environmental and social impact of other mi in the region.[259] This was the reason that they urged the local government not to all any mining activities in the region. Similarly, the *Churchill* case proves that the (cent government is more confident in facing a legal dispute against an MNC and in takin firmer position in upholding environmental legislation. The government has prepa itself for defending its position against Churchill before the international investm arbitral tribunal.

256 UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', April 2014, <http://unct org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf>, accessed 6 June 2015. See also Levashova (n. 4

257 Henk Addink et al. (n. 3).

258 Jacur (n. 8) and Blanca Gomez de la Torre (n. 8).

259 These protests were the latest example of demonstrations by local citizens in Indonesia's fast growi economy against foreign-owned companies they fear will exploit the country's natural resources at th expense.

The *Churchill* case is an example of the trend that environment protection has now become an issue in international investment-related disputes.

One lesson learnt from analysing these conflicts against the backdrop of the governmental tasks to ensure social justice and sustainable development is that the government has to deal with conflicting interests and that this apparently is a great challenge as MNCs can be very persuasive when they insist on pursuing certain mining practices.[260] But as the Indonesian economy grows and the amount of FDI inflows increases,[261] the government may change its strategy in responding to the pressure exerted by MNCs. The *Churchill case* is a first sign that the Indonesian Government takes a more firm approach towards foreign investors.

Another lesson learnt is that the government seems to apply different standards. On the one hand, the government avoids conflicts with foreign investors which entered into CoWs before 1999 (when the '*reformasi*' took place). This attitude applies to disputes concerning the concession agreements with Freeport in West Papua, Newmont in Minahasa, and Newmont in Sumbawa. On the other hand, the government's attitude towards '*post-reformasi*' mining concession agreements (*Kontrak Karya*) holders and mining licences holders differs significantly. In the latter era, the authority to grant concessions and licences has been conferred to the local governments, as we observed in the *Bima* and *Churchill* cases. Apparently, the central government is yet more willing to share a (financial) risk of losing a case in an international investment arbitral tribunal with the local government.

The application of double standards and the hesitation of the government to be firm on compliance of environmental norms by mining companies do not give a clear signal to the Indonesian population that the government aims to ensure sustainable development. Human rights of local citizens and the environment are often neglected to keep FDIs and its investors in Indonesia.[262] MNCs take advantage of this situation. In fact, both the *Pancasila* and Article 33 of the Constitution provide guidance for the government when dealing with the use and allocation of Indonesian natural resources. The Constitution

260 Reference is made to Atilla Tanzi's argument in Chapter 7, 'Bridging the Gap between International Investment Law and the Right to Access to Water' in this volume. Tanzi discusses international investment arbitration cases regarding water disputes between the government and the investor. He argues that these cases affirm that adequate due diligence must be exercised by both parties to ensure compliance with human rights and environmental laws.

261 UNCTAD, 'World Investment Report 2011', 26 July 2011, <http://unctad.org/en/docs/wir2011_embargoed_en.pdf>, accessed 20 May 2015, 189. See also Indonesia Investment Coordinating Board, 'The Domestic and Foreign Direct Investment Realisation Quarter IV and January-December 2012 BKPM', 22 January 2014, <www4.bkpm.go.id/img/file/press_release_tw_iv_2012_eng.pdf>, accessed 20 May 2015, 5-6.

262 Reference is made to the various reports referenced in section 15.4 when discussing the collisions between mining companies and local communities.

mandates that natural resources must be used to maximize the prosperity of *all* citi The wording of the *Pancasila* and the Constitution, however, are of an open nature. Constitutional Court has explained what these open norms mean by giving its inter tation. The Constitutional Court decided in the *Electricity* case that Article 33 of Constitution mandates the State to exercise direct control over the country's nat resources (see section 15.5). This control is implemented in a number of ways: (1) to policy, (2) to taking care, (3) to regulate, (4) to manage, and (5) to supervise. In the *and Gas* case, the Constitutional Court determined that the direct management of the of natural resources is the most important aspect (see section 15.5). Direct managem implies that the government is to be actively involved in the mining operations cannot leave a large autonomy to (foreign) investors in deciding how to run a mine. analysis of the disputes in section 15.4 revealed, however, that generally, the governm is not actively involved in the mining operations. The local and central governments le the decisions on how to conduct the operations to the mining company and, in fact, foreign investor. Also, the conflicts exemplify that the (local) government hesitates strictly enforce applicable environmental and mining legislation and to firmly super compliance of environmental conditions under which the licences were issued, includ post-mining obligations. According to local communities and various (NGO) repo such enforcement and supervision is completely inadequate. This is in contrast to control that the government must exert pursuant to its constitutional tasks, wh includes setting appropriate policies and taking proper care of the natural resour supported by regulation and supervision (*Oil and Gas* case).

15.7 RECENT POLITICAL DEVELOPMENTS CONCERNING INDONESIAN BITS AND CONCLUDING COMMENTS

Indonesia is one of the G-20's fastest growing economies. FDIs in the Indonesian mini industry constitute part of this growth. The government facilitates these FDIs throu agreeing to special legal regimes in so-called CoWs or BITs. These regimes provide ext protection to foreign investors by allowing them to submit disputes to internatior investment arbitration tribunals. Recently, however, collisions between internatior mining companies and local communities regarding environmental pollution and hum rights abuses have come to light. Underlying these collisions is a conflict of governmen goals. On the one hand, the government aims to facilitate economic growth throu stimulating FDIs. On the other hand, it is the government's constitutional goal establish sustainable development and social justice (*Pancasila*), and foreign investmen also need to be in line with this goal.

This chapter attempted to find out what the challenges are to canalize FDIs in the mining sector in such a way that the environment and the local communities are not adversely affected. A first step was to set out the Indonesian institutional framework applicable to (foreign) investments in mining. This was followed by an analysis of the major recent collisions between mining companies and local communities and disputes with the government about the implementation of the environmental and mining laws. Next, the authors held the claims of local communities concerning social injustice and loss of livelihoods due to the mining companies' activities against the constitutional task of the government to ensure social justice and sustainable development. Section 15.6 discussed the lessons learnt.

One of the lessons learnt is that the rules provided by the Constitutional Court regarding the management of natural resources govern the conduct of both central and local governments when issuing an executive decision relating to mining operations (see sections 15.5 and 15.6). It is the task of the Indonesian Government to make sure that these norms are also included in CoWs and mining licences. It is also the task of the Indonesian Government to negotiate the international investment treaties and trade agreements to which it is a party, in such a way that they allow the government to fulfil its constitutional duties.

International investment and trade treaties can be drafted in such a way that it will be able for a host government, such as Indonesia, to protect local communities and the environment, and to guarantee social justice, even in situations where foreign investors are active. An alternative for the Indonesian Government is to decide not to offer any special legal protection to foreign investors and to treat them as regular domestic investors.[263] An example of this option is the decision of the Indonesian Government to terminate the BIT with the Netherlands. However, it appears not so easy to immediately realize the desired effect of discontinuing the international investment arbitration litigation option for foreign investors. The reason is the following.

In March 2014, the Netherlands Ministry of Foreign Affairs announced that the Indonesian Government had given notice of termination of the BIT with the Netherlands by July 2015.[264] The Dutch Government indicated that – according to the BIT – a 'sunset period' of 15 years applies before the BIT officially comes to an end.[265] This means that the existing protection of foreign investments in Indonesia will continue to apply to

263 E.g., South Africa seems to follow this course. See Pfumorodze and M.M. Da Gama (n. 8).

264 Clifford Chance, 'Alternative Investment Protection Strategies for Indonesia', 11 April 2014, <www.clifford-chance.com/briefings/2014/04/alternative_investmentprotectionstrategiesfo.html>, accessed 20 May 2015, 1. Chadbourne & Parke LLP (n. 35).

265 Clifford Chance (n. 264).

investments made prior to the 1st of July 2015 for a period of 15 years, i.e., until the 1 July 2030.[266]

One reason for the Indonesian authorities not to extend the Indonesian-Netherlands may have been the annoyance which they experienced about the BIT claims bro forward by foreign investors, the most important example of this being the previo described *Churchill* case.[267] For the future, they wish to prevent that BITs can lea these situations. Many MNCs have incorporated a subsidiary in the Netherlands (am other for tax reasons), and hence such MNCs can profit from the many BITs conclu by the Netherlands. An underlying, and perhaps more fundamental, reason is that Indonesian Government announced that it will evaluate its position in respect of all I In particular, the government intends to scrutinize the additional legal protection offe by BITs to foreign investors and their Indonesian joint ventures or subsidiary compar This is still to be officially confirmed by the Indonesian authorities.[268]

The government's new stance towards FDIs and BITs can be seen as an attempt balance its conflicting tasks in seeking to protect the public interest as well as the right (foreign) investors.[269] *Prima facie,* this new stance seems unfavourable for Indones ability to attract more FDIs. However, it also provides for a number of potential bene First of all, it gives Indonesia momentum to renegotiate better BITs – BITs that not o protect foreign investor's interest but also grant the government the policy space protect and to ensure public policy goals and interests, such as environmental, labc and human rights protection. Second, this stance may open the way for the inclusion such protective international standards (e.g., environmental and human rights standar with which every investor should comply. Perhaps, Indonesia can use as a source inspiration the example of the Netherlands-United Arab Emirates BIT, which was sigr in November 2013.[270] As indicated in section 15.3.1, this BIT contains a specific referei to the OECD Guidelines on Multinational Enterprises, an international stand

266 Clifford Chance (n. 264), 1; Chadbourne & Clarke LLP (n. 35), 4; Ashurst Singapore, 'Indonesia Termin Indonesia-Netherlands BIT', April 2014, <www.ashurst.com/doc.aspx?id_Content=10329>, accessed May 2015.

267 Ashurst Singapore (n. 266); Chadbourne & Parke LLP (n. 35), 3.

268 Clifford Chance (n. 264), 1. See also Berwin Leighton Paisner, 'International Arbitration: The End of Line for Indonesia's Bilateral Investment Treaties?', 14 April 2014, <www.blplaw.com/expert-legal-insig articles/the-end-of-the-line-for-indonesias-bilateral-investment-treaties/>, accessed 20 May 2015.

269 Ben Bland and Shawn Donnan, 'Indonesia to Terminate More than 60 Bilateral Investment Treati *Financial Times,* London, 26 March 2014, <www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af 00144feabdc0.html#axzz31rQZJEMV>, accessed 20 May 2015.

270 Loyens & Loeff, 'The United Arab Emirates and the Netherlands Sign a Bilateral Investment Agreement', November 2013, <www.loyensloeff.com/en-US/News/Publications/Newsletters/DubaiNewsflash/Duba flash_26nov.pdf>, accessed 20 May 2015. However, this BIT is not a perfect example as it still allows indirect investors to benefit from this BIT. In addition, this BIT has an Unqualified and Fair and Equital Treatment clause. Reference is also made to other interesting examples: new model Indian Model BIT (s a draft), the US Model Bit. Also, there are nowadays a number of investment treaties which directly refer

endorsed by the OECD member countries which imposes CSR responsibilities on companies, in particular concerning their investments abroad.
The authors also refer to the contributions of Marie-Claire Cordonier and Yulia Levashova in this volume. These authors provide examples of the various ways in which several investment treaties and trade agreements have embedded environment protection.

CSR or have a separate chapter on CSR, such as Canada-Senegal BIT 2014, Canada-Nigeria BIT 2014, Japan-Uruguay BIT 2015.

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