

Weak Investment Law Enforcement in Land and Forest Fire Cases in Indonesia

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ABSTRACT

This article aims to analyze the formulation of sanctions in Indonesian investment law against foreign investors who commit environmental damage and pollution in the case of forest and land fires. This paper uses a legislative approach by analyzing the quality of legal norms on regulating sanctions for foreign investors involved in forest and land fires. The results show that the current development of global investment law requires companies, including transnational companies, to carry out environmental responsibilities in addition to social responsibility and good governance. The need to build pro-environmental investment law is important to strengthen environmental law enforcement with a multi-door approach. This is not followed by the investment law in Indonesia. The country's Investment Law does not strictly regulate sanctions against investors who violate their obligations and responsibilities to maintain the environment. The aspect of government supervision of the implementation of investor obligations is also weak. These weaknesses in legal substance show that investment law is not in line with today's investment objectives that require support for environmental preservation or better known as green investment. This paper concludes that investment law will not be effective in supporting law enforcement in forest and land fire cases due to the lack of sanction formulation and weak supervision. Because of this, the existing investment law is still far from the goal of realizing green investment in Indonesia.

Keywords: Investment Law; Forest and Land Fires; Environmental Responsibility;

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INTRODUCTION

Forest and land fires (hereinafter abbreviated as karhutla) trigger environmental damage and pollution, especially air pollution. The smoke from forest and land fires is not only felt domestically but also causes transboundary pollution. This condition has triggered tense diplomatic relations between countries, demanding the birth of the ASEAN Regional Agreement to tackle transboundary pollution. (Sheldon & Sankaran, 2017) (Varkkey, 2014) (Heilmann, 2015) (Bilqis, 2020)



In the last five years there has been a downward trend in forest and land fires in Indonesia. However, this does not mean that the threat of forest and land fires can be eliminated. After the massive 2015 forest and land fires that engulfed 2.6 million hectares of forest and land in the country, 2016 to 2021 saw a significant decline. Based on data from Indonesia's Ministry of Environment and Forestry (KLHK) from 2016 to 2021, the average area of forest and land burned was approximately 573 thousand hectares. The highest fire occurred again in 2019 which consumed 1.6 million hectares. But after that, the level of forest and land fires can be maintained not exceeding 400 thousand hectares. (Al-Jalahma et al., 2020)

Forest and land fires in 2015 mostly occurred in forestry and plantation concession areas. The 2015-2016 forest and land fires involved 30 corporations, and from 2019 to 2021 there were 19 corporations. These include corporations with foreign capital. (Juniar, 2021) Forest and land fires threaten biodiversity, trigger damage to forest ecosystem functions and increase global temperatures. Loss of life, property, health, and furthermore national and regional economies are also affected by forest and land fires. The World Bank, for example, stated that economic losses due to forest and land fires in Indonesia in 2015 reached USD 1.6 billion or 2% of Indonesia's Gross Domestic Product (GDP) at that time. (Glauber et al., 2016)

Indonesia's Investment Law actually adheres to the principle of being environmentally sound. This law states that investors have an obligation to maintain the environment. It also requires investors who cultivate non-renewable natural resources to allocate funds for environmental restoration. However, law enforcement in this investment sector is still weak. For this reason, it is important to know how the Investment Law regulates sanctions against investors who do not carry out environmental maintenance obligations and government supervision of the implementation of environmental obligations of investors.

A review of the literature shows that the legal aspects of investor liability are mostly studied from criminal, civil, administrative, and international law perspectives. No studies have been found that investigate the ability of investment law to strengthen investors' legal responsibility for the environment. Studies on the legal responsibility of corporations and investors for the prevention of forest and land fires explain the importance of making clear criteria in the formulation of the responsibility of corporations, shareholders and officers of the corporation. (Wibisana, 2016) (Gintoe et al., 2019) (Ikhsana & Rahmah, 2021) (Juniar, 2021) (Wikasitakusuma & Hartiwingsih, 2022) However, studies that explore the relationship between investment law in Indonesia and environmental law enforcement, especially in the case of forest and land fires, have yet to be found. Apart from the sanction aspect, supervision of investment is also important. One study recommends that oversight of investors is not only carried out by the government but also parliament. The House of Representatives in this case needs to increase supervision of the government that provides investment licenses. Parliament is also expected to encourage the government to tighten supervision on companies. (Yusyanti, 2019) However, how the

government, in this case the Ministry of Investment, conducts supervision has not been discussed.

Investment law that has a firm and robust formulation of norms on investors' environmental obligations and responsibilities can strengthen the implementation of a multi-door approach in environmental law enforcement that allows the use of various laws and regulations in handling a legal case. So far, the multi-doors approach has not used the investment law regime. It can be presumed that this is due to the weak legal sanctions provided by existing investment law. Therefore, to strengthen the multi-doors approach, strengthening sanctions in investment law is needed. (Trisna Agus, 2019) (Aminudin et al., 2020)

This article aims to describe the development of international and transnational investment law today and relate it to the quality of norms in the Investment Law relating to sanctions and supervision of investors who do not carry out their environmental obligations and responsibilities. It is important that norms related to sanctions and supervision are formulated clearly and firmly so that law enforcement can be strengthened.

METHOD

This paper is based on legal research using a statutory approach. Legal materials are mainly taken from laws relating to investment, environment and forestry. Several international legal instruments such as United Nations Resolutions and relevant International Treaties are also used. The focus of the research is the development of international investment law associated with the quality of legal norms in investment law that can support law enforcement. This research assesses the robustness of legal norms based on two elements, namely the existence and clarity of the formulation of sanctions and supervision rules that will determine the enforcement power of the investment law under study.

ANALYSIS AND DISCUSSION

This section explains three things related to the focus of the research, namely the concept of environmental responsibility in multinational investment; the regulation of sanctions against the obligations and responsibilities of foreign investors in Indonesian investment law and the scope of supervision of investment in Indonesian law. In the foreign investors concept of environmental responsibility, recent developments in transnational business show that investors are now held accountable for integrating environmental, social responsibility and good business governance. The Environment, Social and Governance (ESG) approach to investment has emerged in line with demands to implement green investments and respect human rights. (Henderson, 2012) (Al-Jalahma et al., 2020) (MacNeil & Esser, 2022)

Three driving factors behind the emergence of the concept of transnational corporate environmental responsibility. The first is the rise of demands by investment host countries on transnational corporations to protect the environment, either in domestic or international dispute

resolution forums. The second factor is the recent trend of investment treaties demanding the inclusion of clauses on respect for human rights, environmental protection and social responsibility of transnational corporations when operating in the host country. Finally, United Nations Resolution 26/9 elaborates the use of internationally legally binding instruments on transnational corporations and other business enterprises in relation to human rights. (Gathii & Puig, 2019)

UN Resolution 26/9 emphasizes three points. The first is that the primary obligation and responsibility of states is to promote and protect human rights from violations that occur within their national jurisdiction, including violations committed by transnational corporations. Second, it emphasizes that transnational corporations are responsible for respecting human rights and that civil society has an important role to play in promoting corporate social responsibility, and supporting efforts to prevent, mitigate and seek remedies for adverse human rights impacts resulting from the activities of transnational corporations.

Important to note is the UN Resolution on Guiding Principles on Business and Human Rights (Resolution 17/4). This resolution commands business entities, among other things, to avoid causing or contributing to adverse human rights impacts and to address such impacts when they occur. Business entities are also required to prevent or mitigate human rights impacts that are directly linked to their operations, products or services, even if they do not contribute to those impacts.

The Business and Human Rights Guidelines are an important instrument to enforce the environmental responsibility of transnational corporations because the environment is intrinsically linked to human rights. Everyone has the right to a good and healthy environment. This is stated in the Indonesian Constitution. Recent human rights theory also states that the right to the environment is an important part of human rights either procedurally or substantively. (Anton & Shelton, 2011) (Alan, 2017)

The UN Guidelines on Business and Human Rights have been adopted into the National Action Plan on Business and Human Rights published by the National Human Rights Commission. The document states that the adverse impacts that may be caused by a company's operations include impacts on communities, on the environment and on workers. Komnas HAM stated that there is an increase in human rights violations involving corporations. One of the most common violations is related to the environment. (Prinhandono et al., 2021) Given these developments, it is imperative that the environmental obligations and responsibilities of investors, including foreign investors, are taken seriously. The question then is how the investment legal framework in Indonesia supports this intention. The following section explains the substance of investment law relating to investors' environmental responsibilities.

Limitation of legal sanctions on investor's environmental liability and responsibility determined by Indonesian regulation, know as Job Creation intends to improve the investment

ecosystem through the implementation of risk-based business licensing. Investment activities according to the Job Creation Law need to mitigate hazards from health, safety and environmental aspects. In reality, investment in the utilization of natural resources is prone to causing environmental damage and pollution. Therefore, investment law needs to ensure that environmental disaster mitigation needs to be clearly regulated. the main legal basis for investment activities in Indonesia. One of the objectives of this Law is to promote sustainable economic development. According to the Investment Law, environmentally sound principle is one of the principles in investment. This principle requires investors to pay attention to and prioritize the protection and maintenance of the environment.

In general, investors have obligations and responsibilities that every investor is obliged to apply the principles of good corporate governance, implement corporate social responsibility, make reports on investment activities and submit them to the Investment Coordinating Board (now the Ministry of Investment), respect the cultural traditions of the community around the location of investment business activities, and comply with all provisions of laws and regulations. That the responsibilities of investors are to ensure the availability of capital from sources that are not contrary to the law, not to abandon business activities, to create a healthy business climate, to prevent monopolistic practices and activities that harm the state, to preserve the environment, to ensure work safety, and to comply with all provisions of laws and regulations.

In practice, there are many violations of the obligations and responsibilities of investors. Abandonment of land that has obtained land rights, for example, is widely practiced by investors in the plantation sector. Some of the environmental damage and pollution caused by forest and land fires also occurred in the concession areas of foreign investment companies. One of the companies which operates in Riau Province, is a Malaysian palm oil company that was convicted by the Supreme Court through Decision Number 2042K/Pid.Sus/2015. In the verdict, the Supreme Court sentenced the company to a fine of Rp. 1.5 billion (USD 98 thousand) and an additional penalty of restoring 40 hectares of burned land. For this, the company provided IDR 15 billion (USD 980 thousand) to the government for environmental restoration costs.

In West Kalimantan, a similar case occurred involving a subsidiary of a Malaysian palm oil company. The District Court of Sintang, West Kalimantan sentenced the company to pay material damages of Rp. 270 billion and to pay environmental recovery costs of Rp. 642 billion. The total cost incurred by the company was Rp. 912 billion. Meanwhile, the Ministry of Environment and Forestry is asking for Rp. 1 trillion (USD 6.5 million) in compensation and restoration costs. This is for the 2,560 hectares of burned land.

Law enforcement in the two forest and land fire cases above did not use the Investment Law at all. Despite explicitly stating the responsibility of investors to preserve the environment, there are no sanctions stipulated in the Investment Law for violations of this responsibility. Law enforcement, as in the case of forest and land fires, can certainly be constrained by the absence

of these sanctions. Environmental law enforcement is the result of various factors such as regulatory content material, government apparatus, infrastructure, community participation and program innovation. (Akhmaddhian et al., 2021) Nevertheless, the content of the regulation remains the main determining factor. Therefore, the existence of clearly and firmly formulated sanctions will be significant in law enforcement.

Administrative sanctions associated with non-performance of the investor's obligations, not sanctions against non-performance of responsibilities. The investors who do not fulfill their obligations may be subject to administrative sanctions, such as written warnings, restrictions on business activities, suspension of investment activities or facilities, and revocation of licenses or facilities. There are no provisions related to sanctions in the case of breach of responsibility. Thus, it can be said that there are no sanctions at all provided by the Investment Law against non-performance of environmental conservation responsibilities by investors, including the responsibility to prevent and mitigate forest and land fires in their working areas.

Environmental responsibility is also regulated in the Law on Limited Liability Companies. This law states that companies conducting business in the field of or related to natural resources are obliged to implement social and environmental responsibility. Social and environmental responsibility is the company's commitment to participate in sustainable economic development. Non-implementation of this obligation may be subject to sanctions in accordance with the provisions of laws and regulations in the field of business. The problem is that there is no sectoral regulation on natural resources that formulates sanctions for non-implementation of social and environmental responsibility. Several studies have concluded that law enforcement using sectoral laws in the field of natural resources has not provided a deterrent effect for corporations that commit land burning. In the case of burning by transnational corporations, international and transnational legal instruments are also not sufficient to support the implementation of this environmental responsibility. Social and environmental responsibility also needs to be distinguished from the responsibility to protect and preserve the environment. (Toppinen et al., 2015) Social and environmental responsibility in the Limited Corporate Law is more of a required commitment. Meanwhile, the responsibility required here is more than just a commitment but a legal responsibility that implies the imposition of sanctions if ignored.

This fact shows that investment law in Indonesia still does not support sustainable development. Green investment, which is now a global development goal, (Ibragimov et al., 2019) (Rizzello, 2022) does not appear to be accommodated in the Investment Law. And at the practical level, the company's willingness to comply with environmental responsibility is still low. (Yani et al., 2019) (Nyoman et al., 2020) Local governments themselves are also still not optimally implementing green investment, as the framework for green development in the regions is still in line with national policies. (Sulistio et al., 2019) Aims to improve the investment ecosystem, also does not sufficiently strengthen law enforcement of environmentally sound investment. (Santosa,

2021) The amendment of the Investment Law in the Job Creation Law does not change Article 15, Article 16 and Article 34 Paragraph (1) of the Investment Law. Nonetheless, the Job Creation Law tries to provide environmental disaster mitigation through the amendment of Article 12 Paragraph (2) of the Investment Law that regulates business fields that are closed to investment. Initially, the closed business fields only included business fields related to weapons and war equipment. With the Job Creation Law, it is added to the business of catching protected fish species, utilization or collection of coral and coral, as well as the chemical industry and the ozone layer depleting material industry. However, this norm becomes weakly enforced when the Job Creation Law does not change the provisions of the Investment Law regarding sanctions. As stated earlier, the existing sanctions in the Investment Law are only administrative sanctions and they are also not related to violations of the investor's environmental responsibility.

The drafters of the Investment Law and the Job Creation Law may have taken the view that sanctions for environmental obligations and responsibilities could be embedded in other laws in the environment and natural resources sector. This has been the practice so far. On the one hand, there is progress in terms of law enforcement using environmental law instruments. However, on the other hand, when a multi-doors approach is also considered important to strengthen law enforcement, the existence of clear and firm sanctions in investment law instruments will be able to strengthen law enforcement, especially in the case of forest and land fires where many foreign investors operate. (Thomas et al., 2018)

Absence of investment supervision in addition to not containing sanctions against violations of investors' responsibility to preserve the environment, the Investment Law also does not contain rules regarding government supervision of the implementation of investment activities. This law provides more facilities and incentives to investors rather than supervisory aspects. Included in the incentives provided are those for investors who take good care of the environment (Article 18 Paragraph (3) letter g).

The Ministry of Investment as an authorized agency in the field of investment should supervise investors, including foreign investors, so that they do not destroy the environment, such as forest and land burning. However, such supervision is not included in the scope of duties and functions of the Ministry of Investment, which is regulated by Presidential Regulation Number 63 of 2021. This regulation states that the Ministry of Investment is tasked with organizing government affairs in the investment sector. The functions carried out include functions related to policy, coordination and synchronization, employee development, management of state property and internal supervision. There is no function that provides the basis for supervision of investors. This supervision may be carried out by sectoral Ministries in accordance with the investment business field. However, if this aspect of supervision is also regulated in the Investment Law regime, it will strengthen the multidoor approach in cases of environmental damage and pollution, as discussed in sub-chapter B.

The aspect of supervision by the Ministry of Investment is needed considering that local government supervision is still not optimal. (Sulistio et al., 2019) Parliament itself wants supervision to be tightened by asking the government to tighten supervision in licensing and investment implementation. (Utomo et al., 2022) In addition, several legal cases of forest and land fires are related to foreign investment. (Juniar, 2021) One media outlet, for example, reported that in 2019 four companies suspected of forest and land fires were owned by foreign investors from Malaysia and Singapore. The four companies were found guilty of violating the Environmental Protection and Management Act for committing the crime of land clearing by burning. Although they were deemed to have set aside funds to carry out rehabilitation efforts for environmental damage, the four companies were still charged with fines.

The obligation of foreign investors to prevent and mitigate forest fires is regulated in the Limited Liability Company Law No. 40/2007. The Limited Liability Company Law states that companies carrying out business activities in the field of and/or related to natural resources are obliged to carry out social and environmental responsibilities. This responsibility is a reflection of the company's commitment to sustainable development. (Renouard & Ezvan, 2018) The social and environmental responsibility must be budgeted by the company and calculated as the company's cost. Companies that do not carry out social and environmental responsibilities are subject to sanctions in accordance with the sanctions regulated by each regulation in the natural resources sector (Article 74 of the PT Law).

Social and environmental responsibility of course also applies to foreign investors because the requirement to do business in Indonesia is to have an Indonesian legal entity. Thus, multinational and transnational companies have an obligation to protect the environment in order to improve the quality of life and a beneficial environment, both for the company itself and the local community, as well as society in general. Unfortunately, the formulation of this obligation is not accompanied by a supervisory institution that checks whether the company has carried out its obligations in implementing social and environmental responsibility.

CONCLUSION

This paper concludes that Indonesian investment law is still unable to respond to the development of international investment law that promotes green investment, and has difficulties in strengthening the multi door approach in environmental law enforcement. This is because the Indonesian Investment Law only regulates administrative sanctions on investors who do not fulfill their obligations, and does not specifically regulate sanctions against investors who commit forest fires. The inconsistency of the investment law is also evident from the absence of supervision by the Ministry of Investment on the obligations and responsibilities of foreign investors to preserve the environment. The Job Creation Law, which aims to improve the investment ecosystem, does not strengthen legal sanctions on investors who do not carry out their environmental obligations and responsibilities.

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