

## **Through the Justice and the Sovereignty Over Natural Resources: An Analysis of 100 % Foreign Direct Investor Ownership over Geothermal Sector Project**

Dinda Silviana Putri<sup>1</sup>, Haikal Arsalan<sup>2</sup>, Cecillia Christy Dwi Yudo<sup>3</sup>, Stefani Siauwanda<sup>4</sup>

<sup>1</sup>Universitas Surabaya, Indonesia

<sup>2</sup>Universitas 17 Agustus 1945 Surabaya, Indonesia

<sup>3</sup>Universitas Surabaya, Indonesia

<sup>4</sup>Universitas Surabaya, Indonesia

\*Corresponding Author: [silvianadinda@staff.ubaya.ac.id](mailto:silvianadinda@staff.ubaya.ac.id)

### **Abstract**

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*The enactment of the Job Creation Law and the Presidential Decree Number 10 of 2021 concerning the Investment Business Sector has made it possible for foreign investors to gain 100% ownership over geothermal sector projects. This policy then raises an important question, which is whether such policy violates the Sovereignty over Natural Resources doctrine, and if so, what kind of policy should be made. This study aims to analyze Indonesia's geothermal foreign direct investment policy through the Sovereignty over Natural Resources doctrine and implementation of the fair efficiency principle, which also includes aspects of efficiency and justice. This study is normative legal research using statute approach and conceptual approach. The result of this study indicates that, although 100% foreign investor ownership over geothermal exploitation projects could be seen as an efficient policy to attract investors. However, it is still lacking the proper regulation to ensure said policy will not cause harm to the people.*

### **1. Introduction**

In 1918, at the initiative of J.B. van Dijk, Geothermal in Indonesia was first developed by utilizing geothermal energy in Kamojang Crater, West Java.<sup>1</sup> The initial policies on geothermal utilization in Indonesia were outlined in several Presidential Decrees, until finally in 2003 the Government issued the National Energy Policy (KEN) and Law of the Republic of Indonesia Number 27 of 2003 concerning Geothermal (hereinafter referred to as Law 27/2003) which was later repealed in 2014 through Law of the Republic of Indonesia Number 21 of 2014 concerning Geothermal (hereinafter referred to as Law 21/2014). Through Law 21/2014 geothermal development can be divided in two categories, namely direct use of geothermal and indirect use of geothermal. Based on the Article 1 Section 10 of Law 21/2014, direct use of geothermal resources can be defined as business activities that directly utilize geothermal energy without the process of transforming thermal energy and/or fluid of other types of energy for non-electrical purposes, while according to Article 1 Section 11, indirect use of geothermal resources can be defined as business activities that utilize geothermal energy through the process of transforming thermal energy and/or fluid into electrical energy.

Although geothermal development in Indonesia are divided in two categories, but, law 21/2014, through the preamble, clearly implied that focus on geothermal development aims to reduce the dependency on fossil based energy and to maintain sustainability and security of national energy. Therefore, it is simple to conclude that the focus in developing geothermal energy in Indonesia is through indirect use of geothermal energy. Even so, direct use is still regulated in Law 21/2014. Article 20 Section 1 of Law 21/2014 states that Geothermal Business activities for indirect use involve exploration, exploitation, and utilization. On the other hand,

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<sup>1</sup> Lembaga Ilmu Pengetahuan Indonesia (LIPI), *Pengembangan Industri Energi Alternatif: Studi Kasus Energi Panas Bumi Indonesia* (Jakarta, 2014).

such activities demand a sophisticated technological arsenal to be successfully implemented. This to the fact that lacking the technology to explore and exploit geothermal energy would result in devastating environmental impact—in Indonesia, it was happened in the development of the geothermal project in Gunung Salak.<sup>2</sup>

After the enactment of the Law of the Republic Indonesia Number 11 of 2020 concerning Job Creation (which than change to Law of the Republic of Indonesia Number 6 of 2023 concerning Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation to Become Law –hereinafter referred as Job Creation Law) several changes was made in Law Number 25 of 2007 concerning Investment (hereinafter referred to as the Investment Law). One of the significant change is Article 12 paragraph (1) of the Investment Law which has been changed to, "All business fields are open for investment activities, except for business fields that have been declared closed for investment or activities that can only be carried out by investment carried out by the Central Government" In this regard, the Presidential Decree is derived from the Job Creation Law related to the business sector, namely Presidential Regulation Number 10 of 2021 concerning the Investment Business Sector (hereinafter referred to as Presidential Decree 10/2021) and Presidential Regulation 49 of 2021 that concerns Amendments to Presidential Regulation Number 10 of 2021 that concerns The Investment Business Sector (hereinafter referred to as Presidential Decree 49/2021) does not mention anything related to geothermal energy, thus it can be concluded that survey activities and geothermal management open 100% opportunities for foreign investment.

The Negative Investment List as regulated in Presidential Decree of the Republic of Indonesia Number 44 of 2016 concerning Negative Investment List is amended through Presidential Decree Number 10 of 2021 concerning the Investment Business Sector (Presidential Decree 10/2021) and Presidential Decree 49 of 2021 concerning Amendments to Presidential Decree Number 10 of 2021 concerning the Investment Business Sector (Presidential Decree 49/2021).

**Table 1.** Comparison of Presidential Decree 44/2016, Presidential Decree 49/2021 Jo. Presidential Decree 10/2021 on Geothermal

<b>Indicator</b>	<b>Presidential Decree 44/2016</b>	<b>Presidential Decree 49/2021 Jo. Presidential Decree 10/2021</b>
<b>Attachment of Business Fields</b>	Appendix I: List of Business Fields Closed to Investment	Appendix I: List of Priority Business Fields
	Appendix II: List of Business Fields Open with Requirements: reserved or in partnership with Micro, Small and Medium Enterprises and Cooperatives	Appendix II: List of Business Fields Allocated or Partnership with Cooperatives and Micro, Small and Medium Enterprises
	Appendix III: Business Fields Open with certain Requirements (one of which is the energy and mineral resources sector)	Appendix III: List of Business Fields with Certain Requirements
<b>Foreign investment</b>	Article 2 and Article 6	100% Open (Article 2)

<sup>2</sup> Usman Slamet and Dewi Moelyono, "Maximizing Community Benefits and Minimizing Environmental Impacts in the Gunung Salak Geothermal Project, Indonesia," *Proceedings World Geothermal Congress, Japan, 2000*, 689–93.

<b>Foreign Investment in Presidential Decree</b>	1. Geothermal survey services: 95%	Not regulated in the Attachment of Investment
	2. Geothermal drilling services: 95%	Business Sector
	3. Geothermal operation and maintenance services: 90%	
	4. Geothermal power plant with capacity $\leq$ 10 MW: 67%	

The **Table 1.** above shows that the management of geothermal in Indonesia has changed after the enactment of the Job Creation Law. Where is in the geothermal business sector before the enactment of the Job Creation Act, it provided restrictions on foreign investment on the amount of capital ownership. Then, based on Article 2 of Presidential Decree 49/2021 Jo. Presidential Decree 10/2021 affirms that a business field is declared open if, except for a business field that is declared closed and a field that can only be operated by the Central Government, this is a form of implementing regulation of Article 12 paragraph (1) of the Investment Law with a similar substance. Based on this, previously limiting the amount of geothermal investment capital, is now changed to be fully open to foreign investors without any restrictions on the amount of capital, as well as the classification of business activities in the geothermal sector. The change was imposed by the government, as an effort to attract investors, considering that investment in geothermal has a high risk. This risk is influenced by high investment costs, longer payback costs compared to power plants sourced from other renewable energies, as well as quality uncertainty before the drilling stage is completed.<sup>3</sup> Thus, based on the investors perspective, a policy that can maintain the rhythm of instruments, that can affect risk must be able to provide a guarantee, so they can project their investment plans. It should be one of the concern by the government to pay attention in renewable energy investment, as it is is very important and influential in increasing economic growth.<sup>4</sup> Even though this investment is important for economic growth and job creation, its implementation must still be controlled and emphasize capabilities and capital originating from within the country.<sup>5</sup>

The said changes than raises important questions when it is associated with the principle of Sovereignty over Natural Resources (hereinafter referred to as SoNR). SoNR is a principle that emphasizes the role of state in the management of natural resources in its country – in Indonesia this provision is emphasized in the constitution, specifically through the Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as UUD NRI 1945), which stated that:

*(Paragraph 2) Production branches which are important to the state and which affect the livelihood of the people are controlled by the state.*

*(Paragraph 3) Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.*

<sup>3</sup> Mirmahdi Seyedrahimi-niarraq and Tohid Nouri, "Investigating the Economic Effects and the Roadmap of Developing Geothermal Systems to Generate Electricity" 9, no. 3 (2022): 52–64, <https://doi.org/https://doi.org/10.30501/jree.2022.317375.1290>.

<sup>4</sup> Fatma Ulfatun Najicha et al., "The Shaping of Future Sustainable Energy Policy in Management Areas of Indonesia's Energy Transition," *Journal of Human Rights, Culture and Legal System* 3, no. 2 (2023): 361–82, <https://doi.org/10.53955/jhcls.v3i2.110>.

<sup>5</sup> Rian Saputra and Silaas Oghenemaro Emovwodo, "Indonesia as Legal Welfare State: The Policy of Indonesian National Economic Law," *Journal of Human Rights, Culture and Legal System* 2, no. 1 (2022), <https://doi.org/10.53955/jhcls.v2i1.21>.

The granting of rights for foreign investors to carry out investment activities in the geothermal sector raises the question of whether this condition is the best solution that can bridge the interests of the host state and investors on the other hand. The host state is as the owner of resource, it is a party that needs to be prioritized, to pay attention about the provisions of UUD NRI 1945 above. As mandated by the UUD NRI 1945, policy formulation must be aimed at realizing social welfare.<sup>6</sup> Thus, in this study, researchers try to find the position of State over the owner of renewable energy resources (geothermal).

Regarding Sovereignty over Natural Resources, previously there was a study from Cut Asmaul Husna. In her study entitled "Adoption of the Principle of Permanent Sovereignty over Natural Resources (PSNR) for Oil and Gas", she discussed the PSNR principle as a prerogative of state sovereignty to determine the main objectives of economic development, the study focused on oil and gas resources.<sup>7</sup> Next, Tri Sulistianing Astuti and Luthfi Widagdo Eddyono conducted a study related to geothermal energy entitled "The Dynamics of Regulations and Legal Assurance of Authority of the Central Government over the Management of Indirect Use of Geothermal". The study focused on the dynamics of the relationship between central and regional government authority, relating to natural resource management.<sup>8</sup> Another study was conducted by Herawan Sauni, Zico Junius Fernando, and Septa Candra which was later published with the title "Geothermal Energy in Rules, Environmental Problems and Community Conflict Solutions". This study focuses on the development of geothermal energy development in Indonesia, which includes the advantages, disadvantages and obstacles. This study also examines the functionalization of Alternative Dispute Resolution (ADR).<sup>9</sup> Looking at these studies, it can be shown that there has not been an in-depth study regarding the principles of justice and analysis of 100% Foreign Direct Investor Ownership over Geothermal Sector Projects based on Sovereignty Over Natural Resources, thus providing a distinction between this study and previous studies.

## 2. Methods

This research is legal research. As stated by Peter Mahmud Marzuki, legal research is a process of finding answers to a legal problem through the rule of law, principles, and existing doctrines.<sup>10</sup> The authors in this study use the statute approach and conceptual approach. The statutory approach is carried out by the author by for reviewing the laws and regulations related to state control and geothermal. Conceptual approach is carried out by examining concepts related to Sovereignty Over Natural Resources (SoNR), the principle of state control, and fair and efficiency principle.

## 3. Results and Discussion

### 3.1. The Sovereignty over Natural Resources v Foreign Direct Investment

After the exploring era begin in the 14th century, the age of modern colonialism initiated by the Portuguese Henry the Navigator started. Historian explains that the modern colonialism classified into four forms, one of them is exploitation colonialism which deal with

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<sup>6</sup> Istriani and Sultoni Fikri, "Kewenangan Pemerintah Daerah Dalam Penyelenggaraan Pengadaan Tanah Untuk Jalan Tol," *Mimbar Keadilan* 16, no. 2 (2023).

<sup>7</sup> Cut Asmaul Husna, "Adopsi Prinsip Permanent Sovereignty over Natural Resources Migas," *Jurnal Hukum & Pembangunan* 46, no. 4 (December 29, 2016), <https://doi.org/10.21143/jhp.vol46.no4.69>.

<sup>8</sup> Tri Sulistianing Astuti and Luthfi Widagdo Eddyono, "Dinamika Pengaturan Dan Kepastian Hukum Kewenangan Pemerintah Pusat Atas Pengelolaan Pemanfaatan Tidak Langsung Panas Bumi," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 3 (22AD).

<sup>9</sup> Herawan Sauni, Zico Junius Fernando, and Septa Candra, "Energi Geothermal Dalam Aturan, Masalah Lingkungan Hidup Dan Solusi Penyelesaian Konflik Di Masyarakat," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 3 (2022).

<sup>10</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Cetakan ke-6 (Jakarta: Rencana Prenada Media Group, 2010).

exploitation of resources by the colonial in its colonized territory.<sup>11</sup> Over centuries, myriad of African and Asian countries have suffered exploitation under western colonialism during and after the age of exploration. Of course, when the said era started, many modern African and Asian countries that exist right now had not even been established. However, following the conclusion of the war era, formerly powerful European countries struggled to regain control over colonized areas,<sup>12</sup> subsequently, colonized peoples from Africa and Asia started a movement that ignited the separation of colonized peoples from its colonial and started to establish an independent country of its own.

Following the establishment of newly independent countries in Africa and Asia, there are many countries in Asia and Africa started to fully regain control in political power within their own States, subsequently, those newly established countries started to contest concessions and/or agreements that former colonized governments had agreed upon with investors or were established during the colonial era.<sup>13</sup> The most notable purpose of it is to regain control over exploration and exploitation of their own natural resources due to the fact that concessions and/or agreements made by colonized government tend to be one-sided and strongly advanced the interests of the foreign investors and the colonial.<sup>14</sup>

Based on the description above, it can be assumed that the doctrine of SoNR rooted in the post-war era. During this period, newly-independent countries advocated the doctrine with an urge to secure natural resources from colonization and exploitation of natural resources within their territories by western countries or foreign companies with stronger both political and economic power. Following this particular event, the United Nation (hereinafter referred as UN) adopted the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources (hereinafter referred as RPSNR) on December 1962 with one primary reason to give legitimation for newly independent countries and all of the countries around the globe, sovereign over their natural resources. Such reason can be seen in Article 1 RPSNR, which Stated that:

*“The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”*

With regard to the mentioned provision above, however, one question might arise, that is, are there any limitation to exercise such sovereign for national interest? To answer that question, *first*, we need to understand sovereignty as a concept. In line with that, according to Black’s Law Dictionary, sovereignty can be defined as the supreme political authority of an independent State.<sup>15</sup> With regard to this definition, SoNR can be defined as supreme authority by Independent State over their natural resources. Such definition however, does not give adequate answer for previous question. Thus, after we understand sovereignty, we might as well put our attention to understand the authority of the State over natural resources.

The government as representation of the State, exercise its authority based on the law. Thus, to understand the authority of the State over natural resources we must understand the law which used by the government to exercise their authority over natural resources. In Indonesia, the prime virtue for the government to exercise its authority over natural resources regulated in Article 33 paragraph 3 of UUD NRI 1945, which Stated that, *“the land and waters*

<sup>11</sup> Tony Ballantyne, *Orientalism and Race: Aryanism in the British Empire* (Palgrave Macmillan, 2002), <https://doi.org/10.1057/9781137450753>.

<sup>12</sup> Cheyenne Pettit, “Decolonization in Africa and Asia: A Resource Guide” (ProQuest, n.d.).

<sup>13</sup> Ricardo Pereira and Orla Gough, “Permanent Sovereignty Over Natural Resources in The 21st Century: Natural Resource Governance And The Right To Self-Determination Of Indigenous Peoples Under International Law,” *Melbourne Journal of International Law* 14 (2014).

<sup>14</sup> Ricardo Pereira and Orla Gough.

<sup>15</sup> Bryan A. Gardner, *Black’s Law Dictionary*, ed. Bryan A. Garner, Ninth Edit (United States: West, 2009).

*and natural wealth contained in it shall be controlled by the State and utilized for the optimal welfare of the people*". According to the provision mentioned, it can be assumed that, in line with article 1 RPSNR, the limitation for the State to exercise its authority over natural resources is whether or not such authority exercised for the interest of the people, or in Indonesian context, for the optimal utilization of people welfare. Nevertheless, even the limit of State authority to over natural resources has been made clear in the previous paragraph, another question might arise, that is, in what extent does it should be exercised? is it allowed to damage the environment? Unfortunately, RPSNR does not regulated such provision to answer mentioned questions. However, we might find the answer when we pay attention to the changing paradigm of development.

In 1987, through the Burndtland Report, sustainable development as a new development paradigm has emerge. According to the report, this newly emerging paradigm emphasized its purpose on coexistence between economic growth and the sustainability of environment.<sup>16</sup> With the said paradigm replacing the economic development paradigm, it seems fair to assume that, exploitation of natural resources, even when the SoNR doctrine took place, should not cause harm or damage to the environment. In this perspective, sovereign authority of the State to exploit natural resources is not absolute – to some degree, it is bound to other variables, one of which is environmental sustainability.

Based on the explanations above, the SoNR doctrine not only contain the right of the State to freely exploit its natural resources. In a broader sense, the doctrine also gave duties to the State to manage their natural resources – in what purpose, and in what extent. Summarily, based on this perspective, the SoNR doctrine consist of two main idea – the rights of the State over its natural resources, and the duties of the State over its natural resources. Based on the RPSNR, the rights of the State over natural resources can be summarize to three:

1. The Rights to Exploit Natural resources, including exploration, dispose, and develop, which strictly Stated in article 1 and 2 of RPSNR.
2. The Rights to manage natural resources freely based on its own policies. This rights explicitly regulated in article 2 of RPSNR which Stated that:  
*"The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities."*
3. The Rights to Expropriate based on article 4 RPSNR which Stated that:  
*"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the natural interest which are recognized as overriding purely individual or private interests, both domestic and foreign...."*

As discussed earlier, the SoNR doctrine, not only provides sovereign rights for the State over its natural resources. Previously, explained rights granted by RPSNR also gave duties for the State to exercise its authority based on the its national interest without jeopardizing the well-being of the people live within the state. Another example can be seen in Article 4 of RPSNR, which stated that even the State has the authority to nationalize or expropriate, it should be done for the sake of public utility, national security or the national interest. Furthermore, article 4 also obligated the State to pay investors (both foreign and domestic) appropriate amount of compensation when the nationalization or expropriation happens.

Furthermore, other duties for the State over their natural resources come from the sustainable development agenda that has been discussed earlier. Without a doubt, the state's exploitation of natural resources should coexist with environmental sustainability, especially

<sup>16</sup> Haikal Arsalan, "Prinsip Administrative Justice Procedure Dalam Penataan Mekanisme Perizinan Usaha Wajib AMDAL Di Indonesia" (Airlangga University, 2020).

in light of the Burndland Report's significant concern over environmental sustainability. The sustainable development model also required the State to focus on current generation demands without compromising those of future generations. Thus, the exploitation of natural resources must be carried out based on sustainable development policies. Based on the description above, the task of State on its natural resources can be summarized as follows:

1. The duty of State to be concerned with people's well-being in natural resources exploitation.
2. The duty of State to pay an appropriate amount of compensation when expropriation and/or nationalization happen.
3. The duty does not harm the environment.
4. The duty pays attention to the needs of the future generation (sustainable use).
5. The duty imposes Natural Resources exploitation Policies based on the sustainable development paradigm.

In line with the topic that already discussed in the first part of this research, one of the most emphasized requirements to promote sustainable development, it is changing usage of fossil-based energy to renewable energy. Undeniably, countless newly-independent countries have been the subject of colonialism in the past due to the rich natural resources they possess. Even after these countries gain their independence over their political power and natural resources, it is not wrong to argue that these newly-established countries remain dependent on western countries or foreign investment due to their lacking financial stability and the quality of technologies they possess. In this case, developing renewable energy to promote sustainable development agenda need to be done through careful policies that benefits the investors without jeopardizing the rights and duties of the State over their natural resources. This is due to the fact that, States are indeed the legitimate holders of its sovereignty, which include SoNR.<sup>17</sup>

Without further ado, based on the previous explanation, it is fair to assume that the hardest problem that occurs when the SoNR and Foreign Direct Investment should coexist, it is how to determine the appropriate investment policies for the State. To answer this problem, we should try to understand the rights of State over its national resources in a broader sense. Of course, it is not wrong to say that this topic has already been discussed in the previous part of this research. Nonetheless, the RPSNR only determined the general rights of the State over their natural resources and did not regulate it further. In line with that, according to Armstrong, the rights of the State (or agent) over natural resources can be summarized as follow<sup>18</sup>:

1. Access. According to Armstrong, the right to access means the right for the State to interact with resources. It includes exploration and manages without damage it.
2. Withdrawal. The right to withdrawal according to Armstrong is the right of State over resources, which involves gaining the resources substantive benefits—it includes exploitation of the resources or consumes the resources entirely.
3. Alienation. The right to Alienation is the right of State to sell resources and transferred such right to another party.
4. The Rights to Derive Income. According to Armstrong, this rights involves gaining benefits from transferring right of the State over resources or to obtain benefits from allowing others to benefit from it.

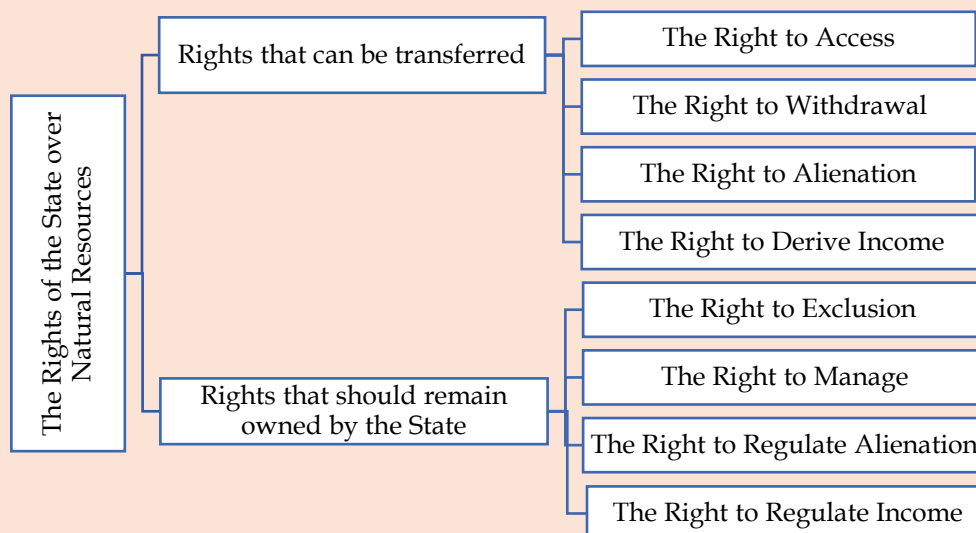
<sup>17</sup> Petra Gumplová, "Popular Sovereignty Over Natural Resources: A Critical Reappraisal Of Leif Wenar's Blood Oil From The Perspective Of International Law And Justice," *Global Constitutionalism* 7, no. 2 (July 1, 2018): 173–203, <https://doi.org/10.1017/S2045381718000114>.

<sup>18</sup> Chris Armstrong, *Justice & Natural Resources: An Egalitarian Theory*, First Edition (United Kingdom: Oxford University Press, 2017).

5. Exclusion. The Right to Exclusion is the right of State to determine who have the right to access and/or withdraw resources, and therefore, according to Armstrong, forbid others from doing so.
6. Management. The Right to Management is the right of State to regulate how the right to access or withdraw should be imposed.
7. The Right to regulate Alienation. The right formulates and imposes, the rules that concerns how alienation should be exercised.
8. The Right to Regulate Income. The right formulates and imposes, the rules on how and who can derive income from resources.

Armstrong further classified these rights into two categories: the first four rights, they are: the rights to access, withdraw, alienation, and the right to derive income are the rights that are typically prerogatives and owned by individual owners. Furthermore, the rest four rights, which are: exclusion, management, regulate alienation, and regulate income are the rights to govern which typically owned by governing authorities such as the State.<sup>19</sup> Based on the previous explanation regarding the right of State over its natural resources, with regard to Armstrong opinion, it is fair to assume that some of these rights owned by the State can be transferred to another parties, and the rest should remain owned by the State. To summarized that, it can be drawn as follow:

**Figure 2.** The Rights of State over Natural Resources



Source: illustrations by the authors

Regarding to the **Figure 2** above, we can assume that the rights of State over natural resources that represent its SoNR, they are reflected in the rights that should be owned only by the State – if we pay attention carefully, these rights also represent State rights regulated in the RPSNR. In this case, when the foreign direct investment policies applied to the first four rights (or the rights that can be transferred), it is fair to assume that such policies do not violate the principle of SoNR. Thus, it can be said that the State has so-called special claim over natural resources within its territories, and it has the right to govern such resources. In this sense, one question that might occur would be, how can this notion be justified?

To answer the question above, first, when the newly-independent countries started to promote the sovereign right over their natural resources, it based its arguments on the self-determination theory. In this theory, rights of State over its natural resources and self-determination are connected – one of the arguments to support this notion, it is having the rights to govern natural resources located within the territory of State is needed in order to

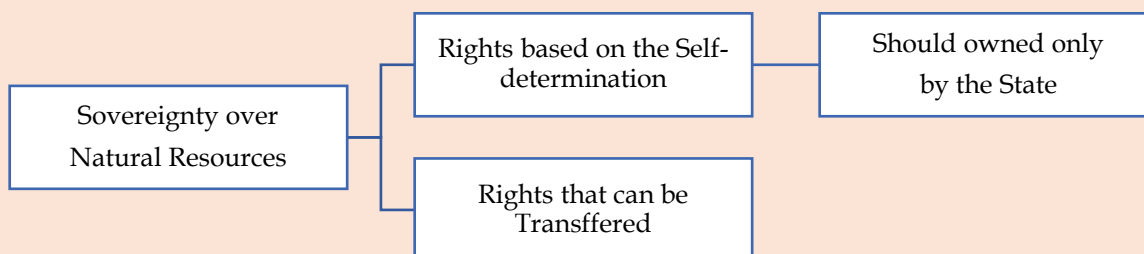
<sup>19</sup> Chris Armstrong.



enjoy meaningful self-determination.<sup>20</sup> In line with that, another argument that can support such notion could be based on the article 1 of RPSNR which stated that, the rights over natural resources should be exercised in the interest of their national development without jeopardizing the well-being of people live within it. Thus, it seems fairly plausible to assume that the rights to govern such resources should be owned only by the State, because to exercise such rights, national development and well-being of people should be concerned. Moreover, it can said that, such provision could help the state duty to fulfil demands implied in social, economic, and human rights.<sup>21</sup>

Undeniably, even though self-determination theory already has a such plausible explanation, there are still critiques left that try to negate the connection between self-determination and resources rights – one of which is why people (represented by the State or not) should have the right to govern natural resources within their territory? To answer such critique, Moore argues that the right to govern natural resources (or in her term ‘right to control’) is indeed needed because it bears the capacity of the right bearer to make decision related to the resources and such decision is important to what she calls as collective self-determination.<sup>22</sup> Moore further explain that, without such right, people who lived within the territory where the resources located can not exercise their right to know and determine what happened to the land they live in.<sup>23</sup> With regard to Moore’s thesis, we can assume that without such right, colonization would happen again. Thus, while self-determination theory fails to explain where the connection between self-determination and resource right comes from, it succeeded to explain why the connection should happen. In line with that, Cara Nine stated that, resources rights should be understood as rights that own by a collective within a territory which involves right to make rules (or it can be implied as making natural resources-related decision through rules) and the right to own.<sup>24</sup> Simply put, the explanations above can be drawn as follow:

**Figure 3.** The relationship between self-determination, SoNR, and Rights over Natural Resources



Source: illustrations by the authors

Based on the previous explanations, the appropriate foreign direct investment policies should be done giving foreign investors the rights that can be transferred (access, withdrawal, alienation, derive income) and keep the rest (exclusion, management, regulate alienation, and regulate income) for the State. In this sense, such foreign direct investment policies would not

<sup>20</sup> Ioannis Kouris, “Sovereignty over Natural Resources,” *Critical Review of International Social and Political Philosophy* 26, no. 2 (February 23, 2023): 204–27, <https://doi.org/10.1080/13698230.2020.1737474>.

<sup>21</sup> Markku Oksanen, Ashley Dodsworth, and Selina O’Doherty, *Environmental Human Rights: A Political Theory Perspective* (Routledge, 2018).

<sup>22</sup> Margaret Moore, “Natural Resources, Territorial Right, and Global Distributive Justice,” *Political Theory* 40, no. 1 (February 23, 2012): 84–107, <https://doi.org/10.1177/0090591711426999>.

<sup>23</sup> Ibid.

<sup>24</sup> Carla Nine, *Global Justice and Territory* (New York: Oxford University Press, 2012), <https://doi.org/https://doi.org/10.1093/acprof:oso/9780199580217.001.0001>.

violate the SoNR principle, whilst make sure that the investors could get an appropriate benefits from it. Furthermore, albeit the rights it possess, It should be noted that, emphasizing the duties of the State that comes with its rights over natural resources is important. It is due to the fact that, resources rights usually come with resource curse – a term that can be defined as the perverse effects of a country's natural resources wealth on its economic, social, or political well-being.<sup>25</sup> Uncontrolled SoNR bestows coercive agents with unaccountable power, fuelling authoritarianism and civil conflicts in resources rich countries.<sup>26</sup>

Based on the **Table 1.** the geothermal business sector before the enactment of the Job Creation Act, provided restrictions on foreign investment on the amount of capital ownership. Then, based on Article 2 of Presidential Decree 49/2021 Jo. Presidential Decree 10/2021 affirms that a business field is declared open if, except for a business field that is declared closed and a field that can only be operated by the Central Government, this is a form of implementing regulation of Article 12 paragraph (1) of the Investment Law with a similar substance. Thus, further question that arise whether such policies violate the SoNR Principle or not.

### **3.2. Analyzing the Policy: Efficient and Justice Perspective**

Based on the previous explanation above, it can be easily concluded that there are several rights that can not be transferred to foreign investor with regard to SoNR doctrine in relation with natural resources. Nonetheless, through the Presidential Decree 49/2021, Indonesian government has made it possible for foreign investor to own a hundred percentage of geothermal development project. Thus the main questions are, does such regulation violate the SoNR doctrine? And if so, how to fix the said scenario to attract foreign investors, while at the same time maintaining State sovereignty over its natural resources? In Indonesia, one of the fundamental principles that should be considered when formulating investment policy is the principle of fair efficiency – said principle is regulated through article 3 section 1 of Law 25/2007. However, Law 25/2007 does not define the principle adequately. According to the explanation section of Law 25/2007, the principle of fair efficiency can be define as the principle underlying the implementation of capital investment by prioritizing fair efficiency in an effort to create a fair, conducive and competitive business climate.

While Law 25/2007 does not give an adequate definition of what constitute fair efficiency principle, The Constitutional Court of the Republic of Indonesia, through decision number 149/PUUVII/2009 define fair efficiency as<sup>27</sup>:

“Joint exploitation of the Indonesian economy through economic democracy, where the state controls the branches of production which control the lives of many people through proper and effective regulation, supervision, administration and management, where losses in production activities are still considered efficient as long as these losses are subsidized and not waste social resources. Normatively, these things are implemented by the State to achieve the greatest prosperity for all the people.”

Based on the definition above, it can be concluded that the principle of fair efficiency does not forbid the State to let foreign investors have 100% ownership over any natural resources projects (including geothermal), the said principle only stipulates that it should be efficient in the one hand, and in another hand, the State should formulate relevant policies based on the

<sup>25</sup> Michael L. Ross, “What Have We Learned about the Resource Curse?,” *Annual Review of Political Science* 18, no. 1 (May 11, 2015): 239–59, <https://doi.org/10.1146/annurev-polisci-052213-040359>.

<sup>26</sup> Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules That Run the World* (New York: Oxford University Press, 2016).

<sup>27</sup> Adhi Anugroho, Ratih Lestarini, and Tri Hayati, “Analisis Yuridis Terhadap Asas Efisiensi Berkeadilan Berdasarkan Pasal 33 Ayat (4) UUD 1945 Dalam Peraturan Perundang-Undangan Di Bidang Ketenagalistrikan,” *Jurnal Hukum & Pembangunan* 47, no. 2 (July 2, 2017): 183, <https://doi.org/10.21143/jhp.vol47.no2.1451>.

economic democracy principle, where the State controls the branches of production which control the lives of many people through proper and effective regulation, supervision, administration and management, and these things are implemented by the State to achieve the greatest prosperity for all the people. Based on the said definition, it can be concluded that the fair efficiency has two sides which constitute it, these are efficiency and justice/fair side. Efficiency means the state still maintain its power to regulate, and justice means that such policy is implemented for sake of prosperity for all the people.

Based on the explanations above, the 100% ownership of geothermal projects by foreign investors does not abuse these rights because the State still maintains its rights that should not be transferred, which according to the previous part of this paper, these rights are: Exclusion or the right of State to determine who have the right to access and/or withdraw resources, and therefore, according to Armstrong, forbid others from doing so, the right to Manage or the right of State to regulate how the right to access or withdraw should be imposed, the Right to regulate Alienation or the right to formulates and imposes the rules that concerns how alienation should be exercised, and last, The Right to Regulate Income or the right formulates and imposes, the rules on how and who can derive income from resources. However, there is one thing left to be considered, that is, does the said policy implemented by the State to achieve the greatest prosperity for all the people?

In order to decide whether energy transtition policy, including investment to fund it, implemented by State to achieve the greatest prosperity for all people or not, there are two things that should be considered. First, does such policy still maintain the State control to regulate the results of the said transtition, and secondly, does it cause harm to people effected by the policy? The first question itself represent the efficiency side of the policy, and the second question represent the justice side of the policy. To answer the first question, based on the previous explanations, it can be concluded that the State still maintain his fundamental rights over natural resources, which are rights to exclusion, rights to managem right to regulate alienation, and the right to regulate income.

To answer the second question, the principle of energy democracy can be used to analyze whether or not such policy cause harm to people effected. Energy Democracy itself is an idea which spread globally for the first time in 2010.<sup>28</sup> This idea tries to combine ideas about democracy and energy which aims to become a mediating medium between society and the transformation towards sustainable energy. The transition to the use of new and renewable energy is interpreted as a political process and dynamic with two priority goals, namely aiming to achieve the use of renewable energy and strengthening democracy.<sup>29</sup> The main demand for energy democracy is the combination of two important components related to climate, namely democracy on the one hand and efforts to transition from non-renewable energy to renewable energy on the other hand. Energy democracy holds the main key to awareness of anthropogenic global climate change<sup>30</sup> which is closely related to the implementation of the energy transition.<sup>31</sup>

<sup>28</sup> Kacper Szulecki and Indra Overland, "Energy Democracy as a Process, an Outcome and a Goal: A Conceptual Review," *Energy Research & Social Science* 69 (November 2020): 101768, <https://doi.org/10.1016/j.erss.2020.101768>.

<sup>29</sup> Poppy S. Winanti et al., "Ekonomi Politik Transisi Energi Di Indonesia: Peran Gas Dalam Transisi Energi Baru Dan Terbarukan" (Yogyakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Gadjah Mada, 2021).

<sup>30</sup> M. Esmaeili Shayan et al., "The Strategy of Energy Democracy and Sustainable Development: Policymakers and Instruments," *Iranian Journal of Energy and Environment* 13, no. 2 (2022): 185–201, <https://doi.org/10.5829/IJEE.2022.13.02.10>.

<sup>31</sup> Perry Pada et al., "Presidensi G20 Indonesia: Prioritas, Potensi Capaian, Dan Langkah Ke Depan" (Jakarta: Badan Strategi Kebijakan Luar Negeri Kementerian Luar Negeri Republik Indonesia, 2021).

According to our previous paper entitled "Public Participation in Renewable Energy Investment Policy in Indonesia: A Democratic Energy Perspective", Indonesian government indeed put an effort to ensure that energy transition do not cause harm to people through Draft Law on New and Renewable Energy (EBT Bill). The government realize the devastating impact that geothermal development might cause to the environment and the people surrounding the areas.<sup>32</sup> However, the said draft still lacking the public participation aspects based on the procedural justice perspective. The concept of procedural justice itself is a concept that emphasizes the importance of *audi alteram partem* or equal rights to be heard in any decision making, especially difficult decisions involving two conflicting spectrums.<sup>33</sup> In other words, procedural justice emphasizes the importance of fair and equal involvement in decision-making procedures.<sup>34</sup>

Indeed, the EBT Bill has provided regulations regarding community rights in relation to renewable energy exploitation through article 56, which stated that:

- (1) The community has the right to participate in the implementation of new and renewable energy.
- (2) Community participation as intended in paragraph (1) in the implementation of new and renewable energy takes the form of:
  - a. Providing input in determining the direction of new and renewable energy policies;
  - b. Submitting objections to the implementation of new and renewable energy regulations or policies;
  - c. Individual initiatives or cooperation in the provision, research, exploitation and utilization of new and renewable energy; and/or
  - d. Supervision and evaluation of the implementation of new and renewable energy regulations or policies.
- (3) In implementing new and renewable energy, the community has the right to:
  - a. Obtain information relating to the exploitation of new and renewable energy through the central government and/or regional governments in accordance with their authority;
  - b. Obtaining benefits from new and renewable energy business activities; And
  - c. Obtain employment opportunities from new and renewable energy activities.
- (4) Further provisions regarding community participation as intended in paragraph (1), paragraph (2), and paragraph (3) are regulated in Government regulations.

However, as with regulations in Indonesia in general, this will be further regulated in Government Regulations. The problem is, the new and renewable energy sector is a type of business that is included in the risk-based business licensing regime - this is regulated in the Government Regulation of the Republic of Indonesia Number 5 of 2021 concerning the Implementation of Risk-Based Business Licensing (PP OSS RBA). Furthermore, even though it already exists at the Government Regulation level as implementing regulations of the Law, regulations regarding community involvement are again not regulated explicitly. This can be seen through the provisions of Article 19 paragraph (3) PP OSS RBA which regulates that community involvement can take the form of:

- a. Provide input on the risk level of business activities;

<sup>32</sup> Dinda Silviana Putri, Haikal Arsalan, and Mariah Ulfa, "Partisipasi Publik Dalam Kebijakan Investasi Energi Terbarukan Di Indonesia: Perspektif Demokrasi Energi," *Jurnal Recht Vinding: Media Pembinaan Hukum Nasional* 11, no. 3 (2022): 478-81.

<sup>33</sup> Arsalan, "Prinsip Administrative Justice Procedure Dalam Penataan Mekanisme Perizinan Usaha Wajib AMDAL Di Indonesia."

<sup>34</sup> Hudali Mukti and Bobur Baxtishodovich Sobirov, "Environmental Justice at the Environmental Regulation in Indonesia and Uzbekistan," *Journal of Human Rights, Culture and Legal System* 3, no. 3 (2023): 476-512, <https://doi.org/10.53955/jhcls.v3i3.171>.

- b. Providing information data related to business activities in determining risk levels; And
- c. Increase understanding of business activities to carry out risk management.

Referring to the provisions of Article 19 paragraph (3), it is clear that the regulations at the implementation level do not differ in terms of details regarding community involvement with the EBT Bill. Apart from that, even though the PP OSS RBA is not an implementing regulation of the EBT Bill, it can be said that it is quite clear that Indonesia often does not provide detailed regulations regarding community involvement, either at the law or government regulation level.

Such arrangements are certainly different from those regulated in countries with environmental awareness and high levels of community participation, such as New Zealand. For example, this can be seen in the National Policy for Freshwater Management Act 2020. Regulated through Clause 3.4, the New Zealand Government clearly provides regulations regarding the duties of regional governments and the involvement of indigenous communities (tangata whenua) in clean water management based on the Te Mana o te Wai principle (a traditional principles and value belived by tangata whenua). Futhermore, clause 3.4 stipulates that:

- (1) Each local authority must actively involve tangata whenua (to the extent they wish to be involved) in freshwater management (including decision-making processes), including in all of the following:
  - a. Identify local approaches to impact Te Mana o te Wai
  - b. Make or amend regional policy statements and regional and district plans as far as freshwater management is concerned
  - c. Applying NOF (see sub-clause (2))
  - d. Develop and implement Matauranga Maori and other monitoring.
- (2) In particular, without limiting paragraph (1), in order to implement the NOF, each regional council must cooperate with, and enable, tangata whenua to:
  - a. Identify the Maori freshwater values (other than mahinga kai) applicable to each FMU or part of an FMU in the region; And
  - b. Actively engage (to the extent they wish to be involved) in the decision-making process, relating to the value of Maoiri freshwater at each subsequent step of the NOF process.
- (3) Each local council must work with tangata whenua to investigate the use of existing mechanisms under the law, to involve tangata whenua in freshwater management, such as:
  - a. Transfer or delegation of powers under section 33 of the Act
  - b. Join a management agreement under section 36b of the Act
  - c. Mana whakahono a rohe (iwi participation arrangements) under subsection 2 of section 5 of the act.
- (4) For the avoidance of doubt, nothing in this national policy statement authorizes or requires local authorities to act in a way that is, or make decisions that are, inconsistent with the relevant iwi participation legislation or any direction or vision under the legislation -invite.

Indeed, these two regulations (PP OSS RBA and National Policy for Freshwater Management 2020) are two different regulations. However, from the formulation of these regulations, it is clear that the regulations made by the New Zealand Government regulate matters in more detail than Indonesia, both in the EBT Bill and PP OSS RBA.

In relation to energy democracy, the energy transition process which contains the idea of energy democracy means a process that can bridge two conflicting spectrums (in this case environmental damage due to renewable energy exploitation and environmentally friendly energy produced by the process) through opening up the dimension of participation.

However, the EBT Bill is lacking on two aspects of public participation, namely, regarding people that should be involved in the decision-making process, and regarding announcements and opportunities to provide complain and suggestions.

These problems should be resolved legally by providing detailed regulations relating to public participation. The problem is that neither the EBT Bill nor the RBA PP OSS are detailed, even though public participation is an important thing to do. This is also confirmed in Principle 10 of the Rio Declaration which stipulates that:

“Environmental issues are best addressed with the participation of all concerned citizens, at the relevant level. At the national level, every individual should have appropriate access to environmental information held by public authorities, including information about hazardous substances and activities in his or her community, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative processes, including redress and redress, must be provided.”

In this provision, it is emphasized the importance of community involvement in the decision-making process and also the Government's openness to all information related to decision-making. Such a large environmental impact from renewable energy business requires appropriate public participation, and thus social stability can be achieved so that the investment climate can operate properly.

Other problems regarding public participation related to renewable energy policies in Indonesia currently can also be seen from the system side. As is known, currently the digitalization process has entered the realm of the licensing regime in Indonesia through the existence of risk-based assessment online single submission (OSS RBA), including permits related to the environment and new renewable energy. Referring to Article 19 of PP OSS RBA and the EBT Bill, one form of public participation is manifested in providing input and objections to existing permits or projects. Theoretically, this makes sense considering that the opportunity to object or appeal against a decision is part of the principle of procedural justice. The problem is, the procedure for providing input has not yet been regulated in detail.

Previous explanations above highlited several important thing, which are, even though the 100% ownership over geothermal sector project by foreign direct investors clearly does not violate the SoNR principle, however based on the fair efficiency and energy democracy principle, there are two problems that need to be fixed in order for the geothermal investment policies can be seen as a policy that embody the value of justice, namely, regarding people that should be involved in the decision-making process due to the fact that geothermal development project tends to cause harm to the environment and the people in the area, and regarding announcements and opportunities to provide complain and suggestions for the people impacted by the said project.

#### **4. Conclusions**

Based on the explanations above, it can be concluded that while the 100% ownership over geothermal sector projects by foreign investors policy do not violate the SoNR Doctrine, However, there are things that should be considered from the fair efficiency principle (that include efficiency and justice) to analyze the said policy. In which case, in one hand, in the efficiency matter, Indonesia can be said to achive such efficiency because it stilll maintains its rights over natural resources that can not be transferred while at the same time formulating policy that should attracting more investors. However, in justice perspective, Indonesian government still lacking the proper regulation to ensure that such policy will not cause harm to the people – in the energy democracy perspective, Draft on new and renewable energy still lacking the public participation aspects based on the procedural justice perspective.

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