

# Reconstruction of Investment Regulations for Upstream Oil and Gas Business Activities Based on Legal Certainty and Justice in Papua

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## **Abstract**

*The Basic Agrarian Law recognizes customary law as the basis of national agrarian law, but its implementation in Papua still faces various obstacles, especially in upstream oil and gas investment. Conflicts between state land and customary land, weak legal certainty, and minimal participation of indigenous peoples have caused social tensions and suboptimal investment benefits for local communities. This study aims to analyze upstream oil and gas investment regulations in Papua from the perspective of legal certainty and justice and to formulate a more equitable policy reconstruction. This research uses a normative juridical method with a legislative, historical, and conceptual approach. Data was obtained from primary, secondary, and tertiary legal materials that were analyzed qualitatively and descriptively. Upstream oil and gas investment regulations are not yet fully based on justice and legal certainty. The UUPA has not been optimally implemented, oil and gas regulations have not been revised in accordance with the mandate of the constitution, and the licensing system is still complex and overlapping. This weakens the protection of customary rights and creates uncertainty for investors. Harmonization of customary law, national law, and sectoral oil and gas regulations is needed to create legal certainty and social justice. This study provides conceptual contributions and policy recommendations for strengthening upstream oil and gas investment governance in Papua.*

**Keywords:** Reconstruction, Investment, and Papua

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## **INTRODUCTION**

State control of natural resources is mandated in accordance with Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Article 33 paragraph (2) of the 1945 Constitution stipulates that branches of production, especially those that manage natural resources, must be controlled and managed by the state, because the management of natural resources can affect the interests of many people. While the meaning of Article 33 paragraph (3) is that the state controls the land and water and the natural resources contained therein, and these must be used for the greatest prosperity of the people. Oil and gas management must comply with applicable laws in order to provide the greatest possible welfare for the people, with the ultimate goal of being used as much as possible for the prosperity and welfare of the people [1].

Oil and natural gas have an important status as one of the main contributors to state revenue, serving as an important driver for advancing development and improving the welfare of the Indonesian people. This fact is indisputable, given that oil and gas are strategic resources with significant implications. Oil and natural gas are sources of foreign exchange for the country.

The existence of oil and gas has become a vital commodity that controls the livelihoods of many people and plays an important role in the national economy, so its management must be able to maximize prosperity and welfare for the people. Therefore, the implementation of oil and gas business activities must be based on a people's economy, integration, benefits, justice, balance, equity, shared prosperity and welfare for the people, security, safety, legal certainty, and environmental awareness. justice, balance, equity, shared prosperity and the welfare of the people, security, safety, legal certainty, and environmental awareness. To provide real added value to national economic growth and be carried out sustainably, businesses in the oil and gas sector require a large amount of funding from planning to production, as well as skilled human resources. Due to the large amount of funding required, many oil and gas businesses are run by the private sector, which has the financial capabilities and resources [2].

This inflation of *recovery costs* undoubtedly becomes a source of state losses. A concrete example is the finding by the Supreme Audit Agency (BPK) regarding the misappropriation of *recovery costs* by a domestic contractor of Pertamina EP, a subsidiary of PT Pertamina, which charged *depreciation costs* for *fixed assets* such as land, old wells, buildings, and others belonging to PT Pertamina during the period 2004-2008 to *the recovery costs* that would be charged to the government. This action is wrong because, apart from the fact that asset depreciation is not an operational expense for oil production, the depreciated assets are actually state property.

Based on this revelation, the state stands to lose Rp 20 trillion. This amount does not include *the recovery costs* of other contractors. To understand the root of this problem, it is necessary to examine the oil and gas regulations and legislation in force in Indonesia, which guarantee legal certainty not only in the determination of *recovery costs* but also in the criteria for appointing contractors for oil and gas blocks. An in-depth analysis is also needed to determine whether these schemes not only fulfill legal certainty but also fulfill a sense of justice and benefit for all elements of Indonesian society. In addition, it is also necessary to examine the legal relationships in the concept of international economic law between contractors, who are in fact almost all foreign multinational companies, and the Indonesian government, which has the position of regulator and also as a party in *the production sharing contract scheme*.

In 2013, in accordance with Presidential Decree No. 9 of 2013, the Minister of Energy and Mineral Resources (ESDM) issued a decree known as ESDM Decree No. 9 of 2013, aimed at establishing a Special Task Force for Upstream Oil and Gas Business Activities, commonly known as SKK Migas. SKK Migas was established with the aim of taking over the responsibilities previously held by the Executive Agency for Upstream Oil and Gas Business Activities (BP Migas) in supervising and controlling upstream oil and gas business activities.

Discussions regarding eastern Indonesia as a strategic area for the future of the upstream oil and gas industry have become increasingly prominent over the past decade. The phrase "from west to east" represents the shift in the orientation of national oil and gas exploration and production from western Indonesia, which has been the center of activity, to the eastern region, which is considered to have great potential but has not been fully exploited.

However, the success of production facility development is not solely determined by technical feasibility, but also by the ability to wisely manage potential social unrest and operational obstacles. This includes resolving issues related to the rights of indigenous peoples and recognition of customary land rights without neglecting their existence and interests. Responsive handling of these social and legal aspects is a determining factor for investors in assessing the level of social stability, legal certainty, and governance effectiveness in the region. Therefore, success in creating harmony between development and the protection of local community rights will be a key indicator of the feasibility of long-term investment in eastern Indonesia [3].

Discussions on the protection of indigenous peoples' rights and recognition of customary land in the context of investment activities cannot be separated from the historical framework of the land law system in Indonesia. Prior to the enactment of the 1960 Basic Agrarian Law (UUPA), the legal system in Indonesia was dualistic, consisting of Western agrarian law and customary law. The customary legal system recognized various forms of land rights, such as customary rights, ownership rights, and usage rights.

From the perspective of indigenous peoples, land has a much broader meaning than just an economic commodity. It functions as a living space, a symbol of collective identity, a unifying tool in customary associations, and a primary source of livelihood. Customary rights are the highest form of land rights in the customary legal system, whereby indigenous communities have collective authority to control, manage, and utilize the land and natural resources within their customary territories.

Land management practices in indigenous communities can be carried out communally under the supervision of traditional leaders or individually by community members, while still referring to applicable collective norms. Therefore, in the planning and implementation of investments, particularly in the natural resources sector, the recognition and protection of customary rights are crucial elements in ensuring social stability, legal legitimacy, and the sustainability of investment projects in areas under the jurisdiction of indigenous communities [4].

Issues related to policy reconstruction and legal certainty in the mining investment sector in Indonesia remain

quite complex. So far, the main reference in the development of the upstream oil and gas sector has been an approach that emphasizes the importance of legal certainty and justice. Therefore, the state needs to reorganize itself in order to be able to promote national development and improve the welfare of the people. The various challenges faced by the government in creating a conducive investment climate—especially in open mining industries such as nickel mining are triggered by unstable economic and political policy dynamics, rapid regulatory changes, and conflicts of interest between individuals or groups. In addition, overlapping regulations are a serious obstacle to realizing fair and legally certain investment regulations in the upstream oil and gas sector. Thus, it is necessary to reconstruct the governance of upstream oil and gas business investment based on the principles of fairness and legal certainty. To achieve this, the national legal framework must be developed democratically, through a participatory approach that encourages public participation and incorporates community aspirations in the law-making process. This process must be carried out through fair, transparent, and accountable procedures.

Given the strategic role of SKK Migas in the management of the upstream oil and gas sector, investment regulations that prioritize legal certainty and the principle of justice are needed, especially in the context of Papua. This effort is important in order to create a stable and equitable investment climate in the region. In this case, the legal basis can be referred to Article 3 of the Basic Agrarian Law (UUPA) No. 5 of 1960, which states that the implementation of customary rights and similar rights of customary law communities must be carried out with consideration of national interests and must not conflict with applicable laws and regulations. Furthermore, Article 5 of the UUPA emphasizes that the applicable agrarian law is customary law, as long as it does not conflict with the principles of nationalism, Indonesian socialism, and other regulatory norms.

Although the UUPA explicitly recognizes customary law as the foundation of national agrarian law, its application still contains a number of requirements and restrictions that can lead to the marginalization of indigenous peoples. Existing laws and regulations do aim to protect the rights of indigenous peoples, particularly those related to communal land ownership and customary land. However, in practice, conflicts often arise, such as unequal land distribution, weak legal certainty, minimal protection of customary rights, and lack of local community participation in decision-making processes.

This study emphasizes the need for synergy between regulations, business practices, and the protection of the rights of indigenous peoples. Various challenges in regulating upstream oil and gas investment in Papua, such as conflicts of interest, legal uncertainty, and social and environmental impacts on indigenous peoples, are major obstacles to creating a sustainable investment climate. One crucial issue is the overlapping ownership of land between state land, customary land, and communal land.

In response to these issues, the approach used in this study includes a comparative study of best practices from other countries and an analysis of relevant policies. The author recommends the implementation of fair policies, including the use of legal instruments such as the Special Autonomy Law, which allows for the establishment of customary management institutions. These institutions play a role in protecting the rights of indigenous peoples and ensuring the transparent distribution of oil and gas revenues to support education, health, and other social needs. This is expected to be a tangible manifestation of the protection of rights and social justice for the people of Papua.

Based on these considerations, the author was motivated to conduct a more in-depth study on investment regulations in upstream oil and gas business activities, particularly in the Papua region. On that basis, the author conducted a study entitled: "*Reconstruction of Investment Regulations for Upstream Oil and Gas Business Activities Based on Legal Certainty and Justice in Papua.*"

## RESEARCH METHOD

This research uses a normative juridical method with a statute approach, historical approach, and conceptual approach. This normative research places law as a norm (law in books) which is analyzed through legislation, legal doctrine, and relevant literature.

The type of data used is secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, the Basic Agrarian Law, laws and regulations in the oil and gas sector, and regulations related to SKK Migas.

Secondary legal materials include books, scientific journals, and expert opinions. Tertiary legal materials include legal dictionaries, encyclopedias, and other relevant reference sources.

Data collection was carried out through literature studies and supported by limited interviews with relevant agencies, namely the Ministry of Energy and Mineral Resources and SKK Migas, to strengthen the normative analysis. The data obtained was analyzed qualitatively with an emphasis on the consistency of norms, synchronization of regulations, and their relevance to the principles of legal certainty and justice.

The research locations were focused on the Ministry of Energy and Mineral Resources (ESDM), the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas), and locations in the Salawati and South Sorong areas of West Papua Province.

## RESULTS AND DISCUSSION

### A. Efforts to Reconstruct Justice and Legal Certainty for Investors

#### 1. Justice for Investors in Conducting Upstream Oil and Gas Business Activities in Papua

The upstream oil and gas investment climate in Papua has not experienced significant improvement despite Papua's considerable investment potential. This is mainly due to various challenges faced by investors when trying to realize their investments in Papua. These challenges include regulatory issues, bureaucratic obstacles, credibility issues with land dispute resolution mechanisms, the influence of regional regulations and ministerial decisions on upstream oil and gas investment activities, uncertainty surrounding investment, and concerns about legal certainty. Collectively, these factors contribute to the stagnation of the investment climate in Indonesia, especially in Papua.

Upstream oil and gas businesses in Papua require fairness and investor protection, which is why the government has issued various regulations in the field of oil and gas law that support the upstream oil and gas industry. Investors in the upstream oil and gas business have realized that upstream oil and gas businesses can provide good returns and at the same time make a significant contribution to the development of Indonesia's economy.

One important aspect of legal protection for investors is the existence of customary land in Papua. Upstream oil and gas investors need access to and information about land in order to make sound investment decisions. Therefore, local governments are required to disclose important information, such as the status and position of customary land. Failure to provide adequate information can be considered a violation of the law and has the potential to harm investors. In addition, the social conditions of indigenous peoples are an important component of investor protection. Many upstream oil and gas investors may not have sufficient knowledge about the conditions of customary land in Papua and the characteristics of the investment products they purchase. Therefore, the role of the central and local governments is to help improve investors' understanding of upstream oil and gas in Papua to reduce the risk of unwanted losses. Although various efforts have been made to protect investors, there are still a number of challenges that need to be overcome. One of the main challenges is effective law enforcement. Many legal cases take a long time to resolve, and often the perpetrators do not receive appropriate sanctions. This can reduce the deterrent effect and encourage similar violations in the future.

One of the obstacles to upstream oil and gas investment is the legal framework, which is a major problem in the upstream oil and gas business climate that has slowed investment in Indonesia's upstream oil and gas sector. To date, the Oil and Gas Law has not been revised as mandated 16 years ago. However, this legal guarantee is important to encourage upstream oil and gas investment, which has been hampered by the need to obtain hundreds of permits from the central and regional governments.

There are significant differences between the Job Creation Law and the Oil and Gas Law regarding the governance of upstream oil and gas activities in Indonesia. The Job Creation Law introduces a shift towards business licenses issued by the central government, while the Oil and Gas Law emphasizes the use of cooperation contracts, particularly production sharing agreements, to maximize profits for the state and the welfare of the people. These regulatory differences have raised concerns about their potential impact on the investment climate in Indonesia's oil and gas sector, highlighting the need for regulatory clarity and stability to attract and retain investment in this vital industry.

A stable and sustainable oil and gas supply is not only important for national energy security, but also for Indonesia's economic competitiveness on the global stage. However, to ensure long-term success, the government and industry players need to collaborate in overcoming existing challenges.

## 2. Legal Certainty for Investors in Conducting Upstream Oil and Gas Business Activities in Papua

Investors need legal certainty in conducting upstream oil and gas business activities. Rules that are subject to change will confuse investment decision-making. Consistency in decision-making at the central and regional levels is also necessary. The upstream oil and gas industry is a business shrouded in uncertainty. The uncertainty he refers to is oil and gas well drilling, which may not necessarily yield profitable results. In addition, the upstream oil and gas industry is capital-intensive and long-term in nature. Therefore, legal certainty is very important in the upstream oil and gas industry. This is because, in addition to being capital-intensive and long-term in nature, the upstream oil and gas industry is also fraught with uncertainty regarding the success of well drilling.

Investors are faced with the lack of uniformity in the implementation of regulations at the central and regional government levels. Even though the central government has simplified regulations, this is not necessarily the case at the regional level. He cited the example of land acquisition, which is still complicated. The lack of legal certainty in the oil and gas sector is one of the reasons investors are leaving Papua. The current Oil and Gas Law provides legal certainty for investment in upstream oil and gas. In addition to the Oil and Gas Law, the Omnibus Law or Law No. 11 of 2020 concerning Job Creation, which was also recently declared conditionally unconstitutional by the Constitutional Court (MK), has also added to investors' concerns. The Job Creation Law is unconstitutional or conditionally unconstitutional and must be revised within two years. Indonesia's position in the Upstream Competitiveness Index (UCI) is still relatively low compared to other Asia-Pacific countries. In terms of *fiscal attractiveness*, Indonesia is ranked 16th out of 21 countries, below several countries such as Malaysia, Brunei, and Australia. The same report also highlights that the main challenges facing Indonesia's upstream oil and gas sector are not only related to fiscal competitiveness, but also concern regulatory aspects, including the complexity of licensing, inconsistencies in inter-ministerial policies, and uncertainty in the implementation of regulations. All of these factors contribute to increased uncertainty and non-technical risks for upstream oil and gas industry players, thereby reducing investment competitiveness.

Dependence on energy imports is adding to the pressure, eroding the state budget through ever-increasing energy subsidies. In this context, increasing domestic production is more than just an option; it is an urgent necessity to ensure energy security. However, the biggest challenge is not only in production. Complex regulations and convoluted licensing processes remain major obstacles to investment. Indonesia has recorded a significant increase in its overall upstream oil and gas attractiveness rating, from below 4.75 in 2021 to 5.35 in 2025. However, the report also highlights the stagnation of the upstream oil and gas rating over the past five years in aspects related to legal certainty regulations.

Improvements to upstream oil and gas regulations in Indonesia are essentially aimed at re-establishing three fundamental elements that have been "lost" since the enactment of Oil and Gas Law No. 22/2001, namely:

- (1) The separation of the administrative and financial affairs of Cooperation Contracts from government and state financial affairs;
- (2) The application of *the single door bureaucracy/single institution model* to handle the administration/bureaucracy/licensing of Cooperation Contracts (Production Sharing Contracts, PSC);
- (2) Application of the assume and discharge principle in PSC taxation (*indirect taxes*).

The necessary regulatory improvements cover both practical and fundamental levels more comprehensively and fundamentally. Regulatory improvements at the practical level are needed to support upstream oil and gas business activities in general and at the same time as an enabler at the operational level.

**At this practical level, a number of priority regulatory improvements need to be made, mainly related to:**

- (1) Licensing of upstream oil and gas business activities;
- (2) Legal protection against the criminalization of business policies/actions;
- (3) Tax facilities for indirect taxes;
- (4) Tax loss carry forward related to the change from Gross Split to Cost Recovery;

- (5) Domestic Component Level (TKDN);
- (6) National Strategic Project Regulations.

Upstream oil and gas licensing currently involves up to 140 types of permits and must be coordinated with 17 cross-sector ministries/agencies, such as those responsible for the environment, forestry, marine affairs, and land. The lengthy time and process, as well as suboptimal coordination between agencies, often hinder project scheduling and increase risks in non-technical aspects. A change in the licensing system is needed by enacting *lex specialis* (through a Presidential Regulation) that internalizes the licensing of upstream oil and gas business activities (KUHM). KUHM licensing should not be processed as "permits" that are applied for separately to various ministries/agencies, but rather as "approvals" or "decisions" that are decided in an integrated manner in a single hearing led by the leading sector (Ministry of Energy and Mineral Resources). The application of Key Performance Indicators (KPIs) or service time standards and the consolidation of inter-agency processes are very important. The potential criminalization of corporate-business actions remains a source of concern for industry players. Clear boundaries are needed between administrative, civil, and criminal aspects in various regulations, such as the Corruption Eradication Law, the State Treasury Law, and the Financial Audit Law.

In addition, other obstacles faced in the reconstruction of regulations on upstream oil and gas business activities include:

#### **1. Substantive Legal Obstacles**

The legal position in the governance of oil and gas natural resources must be able to realize the objectives contained in the explanation of Article 33 of the 1945 Constitution of the Republic of Indonesia. The law that forms the basis of SKK Migas' authority in managing oil and gas, namely Law Number 22 of 2001 concerning Oil and Gas, states that oil and gas are strategic and non-renewable natural resources that constitute national wealth controlled by the state.

Law Number 22 of 2001 concerning Oil and Gas is no longer in accordance with the provisions of Article 33 of the 1945 Constitution, because important branches of production that can affect the livelihoods of many people are not managed by state-owned companies. Another reason states that Article 28 paragraph (2) of Law Number 22 of 2001 concerning Oil and Gas (hereinafter referred to as the Oil and Gas Law) prioritizes the mechanism of business competition and does not guarantee the meaning of the principle of economic democracy as stipulated in Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia. therefore, the Constitutional Court declared this article to be in conflict with the 1945 Constitution of the Republic of Indonesia.

Oil and gas are non-renewable natural resources, often referred to as natural resources with fixed stocks. Fixed stocks are resources with limited reserves, meaning that exploitation of these resources will deplete the reserves, and the stocks are said to be non-renewable. Oil and gas can be managed by either the government or the private sector without causing adverse effects on the welfare and comfort of the community.

The President holds the highest authority in the management of the oil and gas sector. It can be explained that the President grants a type of authority, namely bound authority. Bound authority is derived from applicable laws or regulations, which are obtained through attribution, delegation, or mandate. Specifically, in this discussion, the President's bound authority includes the type of bound authority obtained through mandate.

The mandate given by the President to the Minister of Energy and Mineral Resources (ESDM) allows the Minister of ESDM to issue a Ministerial Decree to follow up on the President's mandate in the management of oil and gas, as the Ministerial Decree must be based on the applicable legislation, namely Presidential Regulation Number 9 of 2013 concerning the Implementation of Upstream Oil and Gas Business Activities. The Minister of Energy and Mineral Resources has discretionary authority in the management of upstream oil and gas businesses. Discretionary authority is authority that is based on *freies ermesen* or inherent in the government as the state administration.

The method of granting/obtaining authority is through attribution, which is the granting of authority to agencies and/or government officials by the 1945 Constitution of the Republic of Indonesia or by law. With this authority, the Minister of Energy and Mineral Resources issued Minister of Energy and Mineral

Resources Regulation No. 15 of 2018, which regulates the procedures for and the obligation to deposit ASR funds. The issuance of this regulation reflects the government's interference in micro-level operational aspects. This certainly has the potential to create new problems. Problems that may arise include transparency and accountability in the allocation of these funds.

The ASR obligation for those not yet included in the contract is indeed stated in Article 21. However, this obligation is imposed because it concerns public safety, especially for offshore work areas. This recovery is intended to prevent disruption to shipping, thereby avoiding disputes with contractors. Regulations requiring ASR are not new. There is Government Regulation No. 35 of 2004 concerning upstream oil and gas activities. Since the regulation was issued, contractors whose contracts did not regulate ASR were also willing to comply. In fact, when Minister of Energy and Mineral Resources Regulation No. 15 of 2018 was issued.

In the legal world, contracts are equivalent to laws and even above government regulations. However, in Indonesia, many people do not understand this. The government is being unfair in applying ASR funds even though the contract does not require it. The reason is that before signing a contract, investors will first calculate the economics of the project.<sup>117</sup> Therefore, the new obligation regarding ASR will affect the economics of the field. This is actually unfair on the part of the government, because these costs were not taken into account before the contract was signed. On that basis, Minister of Energy and Mineral Resources Regulation No. 15 of 2018 has the potential to cause disputes if contractors object. It would be better if the ASR obligation were applied to new contracts. That way, contractors could include this variable at the outset when calculating the project's economic viability. The government must also honor existing contracts until their expiration before mandating ASR.

## **2. Legal Structure Constraints**

Based on the substantive weaknesses above, there are structural weaknesses. Many Cooperation Contract Contractors (KKKS) have not yet set aside funds for mine restoration (Abandonment Site and Restoration/ASR). This was revealed by the results of an audit of the central government's financial statements for the 2016 fiscal year at the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas).

The mechanism for collecting ASR funds carried out by SKK Migas from KKKS is conducted every semester. If KKKS has not paid its ASR bill, the bill is accumulated to the next semester. BPK considers contractors who have not paid ASR funds to have violated a number of government regulations and work guidelines (PTK) issued by SKK Migas. The regulation in question is Government Regulation (PP) No. 35 of 2004 concerning Upstream Oil and Gas Business Activities. In this regulation, Article 36 paragraph 1 states that contractors are required to allocate funds for post-operational activities in upstream oil and gas businesses, with payments beginning during the exploration period and implemented through work plans and budgets. Furthermore, the actions of the 16 KKKS are not in accordance with PP No. 79 of 2010 concerning Recoverable Operating Costs and Income Tax Treatment in the Upstream Oil and Gas Business. In this regulation, Article 17 paragraph 4 states, "Provisions regarding the procedures for the use of reserve funds for mine closure and restoration are regulated by a Ministerial Regulation". However, until the audit conducted by the BPK ended, the Ministry of Energy and Mineral Resources had not issued a Ministerial Regulation regarding ASR.

In addition, the actions of 16 KKKS contractors were deemed to be in violation of PTK No. 040-PTK-XI-2010 concerning ASR, specifically point 3.3.1, which states that KKKS contractors are required to deposit ASR funds with the Managing Bank in accordance with the ASR Fund reserve report, as well as point 3.3.3., which states that Contractors must deposit ASR Funds into the joint ASR Fund account no later than 30 days after the billing date. This has resulted in the unavailability of funds for the implementation of Post-Operational Activities in 16 oil and gas production working areas. This occurred because the management of the KKKS did not comply with the applicable provisions regarding ASR Fund reserves. On the other hand, the Head of SKK Migas did not impose strict sanctions on the KKKS that had not fulfilled their obligations.

## **3. Legal Culture Challenges**

In addition to weaknesses in the substance and structure of the law, another issue is Indonesia's legal culture. In this case, legal culture refers to the culture of corruption in the management of oil and gas resources.

Indonesia has more than 100 basins, but only 20 are in production. Without corruption, investment costs in Indonesia would be more competitive and have greater certainty in terms of timing.

Building a strong legal culture means striving to ensure that the desired legal culture becomes more fundamental, robust, widely embraced, and can be strongly passed down from generation to generation. Building a legal culture in society is part of nation character-building efforts, namely building attitudes and changing the mentality of the nation.

It is important to recognize that the upstream oil and gas industry is one of the sectors prone to corruption. The upstream oil and gas industry has a business turnover of hundreds of trillions of rupiah each year, originating from investments, procurement projects, and other sources. Therefore, it is important to ensure that the investment decision-making process is not disrupted by non-investment factors such as bribery.

One way to encourage increased upstream oil and gas investment is to implement good corporate governance (GCG) at a high level, including preventing and eradicating corruption. Upstream oil and gas investment involves high risks and technology, as well as competition between countries. Corruption clearly incurs high costs and increases business uncertainty, something that investors detest. Therefore, preventing corruption is one of the keys to improving the credibility of upstream oil and gas, promoting healthy business competition, improving the investment climate, and reducing cost recovery costs. Ultimately, this will optimize state revenue.

In Indonesia, SKK Migas is one of the institutions that pioneered and initiated the implementation of ISO 37000:2016 on Anti-Bribery Management Systems (ABMS). To strengthen the integrity of the upstream oil and gas industry, SKK Migas then encouraged the implementation of ABMS in KKKS and upstream oil and gas goods/service providers. In its efforts to build integrity, SKK Migas has now equipped itself with various tools to ensure that it continues to apply transparency and accountability.

SKK Migas, which was formed as a replacement for BP Migas several years ago, only refers to a Presidential Regulation (Perpres). This provision is contained in Presidential Regulation Number 9 of 2013 concerning the Management of Upstream Oil and Gas Business Activities. There are at least three options or models for the institutional format of upstream oil and gas management that could be implemented to replace SKK Migas' current position. First, is the ministry-dominated model, which is an institution that will be under the Ministry. Second, Pertamina as a National Oil Company (NOC) Dominated model, which means that the institution is under Pertamina. Third, an independent body, which has a mandate to conduct upstream oil and gas industry operations.

The government and the Indonesian House of Representatives have not yet finalized the revision of Law No. 22 of 2001 concerning Oil and Gas (RUU Migas). The completion of the RUU Migas has been delayed for more than a decade. In fact, efforts to change the rules of the game in Indonesia's oil and gas sector have been touted for 14 years, but the back-and-forth over these changes has prevented the RUU Migas from being finalized. The new Migas Bill is considered essential to boost domestic investment, including strengthening the legal framework for institutions such as the Upstream Oil and Gas Regulatory Agency (SKK Migas).

The revision of Oil and Gas Law No. 22 of 2001 must be accelerated. This is because investors are waiting for legal certainty in order to invest. The revision of the Oil and Gas Law specifically concerns the status and legitimacy of the legal framework of the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas). This is because many foreign companies that want to invest in Indonesia are still questioning this issue.

The revision of Law No. 22 of 2001 concerning Upstream Oil and Gas (Migas) is necessary to accelerate and optimize the increase in national oil and gas production. The urgency of passing the revision of the Oil and Gas Law is also to strengthen upstream oil and gas governance in Indonesia, among others by clarifying the institutional structure of SKK Migas. Therefore, the Migas Bill in Indonesia must be immediately finalized by the Government to clarify the existing regulations in Indonesia regarding Migas.

### **3. Reconstruction of Special Autonomy in Papua**

Investment is a component of regional development and is the hope for achieving national development goals amid declining special autonomy funds. Investment is one of the drivers of a region's economy and provides added value and employment opportunities, leading to increased income, reduced unemployment, and

sustainable poverty alleviation.

Law Number 21 of 2001, which was later amended to Law Number 2 of 2021 concerning the Second Amendment to Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua, still has dynamics in various aspects of life for the Papuan people, especially for the Indigenous Papuans (OAP) [5]. The right to special autonomy, which is supposed to provide flexibility and independence for the Province of Papua to express and channel their interests, has not been fully accommodated by the state. This is in line with how the Papuan People's Assembly (MRP) filed a lawsuit against the revision of Law Number 2 of 2021, particularly the provisions of Article 6 paragraph (2), Article 6A, Article 28, Article 38, Article 59 paragraph (3), Article 68A, Article 76, and Article 77, which are considered to violate their constitutional rights as OAP [6]. In fact, the state's recognition of indigenous peoples as a form of obligation is in line with the phrase in Article 18 of the 1945 Constitution of the Republic of Indonesia. This is then manifested through the granting of special autonomy rights as a form of asymmetric decentralization in supporting the role and involvement of OAPs in the government structure.

The enactment of Law No. 21 of 2001 on Special Autonomy for the Province of Papua in conjunction with Perdasus No. 23 of 2008 on the customary rights of indigenous peoples and the individual rights of members of indigenous communities over land has made the process of land transfer among the Papuan people relatively easy. The process/method of transfer is through grants, sales and purchases, or even barter. The mechanism for land transfer is carried out through compensation for the land in question, which is then documented in a letter signed by the parties related to the customary land and approved by the customary authorities.

The granting of special autonomy is the highest form of recognition for other Customary Law Communities (MHA), especially the provision of special political space for OAP within the provincial government of Papua through the role of the MRP. This differs from how the state recognizes MHA, which is further defined in Law No. 6 of 2014 on Villages as a community unit that has the completeness to stand autonomously, which currently takes the form of a customary village [7].

In line with this, the specificity of Papua, in addition to being formally institutionalized, is also given the authority and responsibility to connect the entities of customary rights, ulayat rights, and governmental duties and functions, which need to be woven together in a synergistic construction. The Papua Provincial Government provides space for customary entities to have a place in society, including creating customary law mechanisms that apply in society while still being supported and providing positive law as a means of security. Under these conditions, providing space and synergy between customary law and rights in the life of the nation and state is the role of the Papua Provincial Government. The provision of customary law within the government structure is also inseparable from the political will of the government to respect and uphold customs and traditions, which are expected to become the foundation for a specific development pattern as an integral part of the customary system and the national development system. The essence of specificity does not mean giving exclusivity to the Province of Papua, but rather providing an understanding that specificity is a form of government accommodation towards the implementation of the motto of *Bhinneka Tunggal Ika* (Unity in Diversity) of the Indonesian nation.

Special autonomy for Papua Province has brought about many changes to the nation and state, especially in terms of how customary elements have become a priority in development, whether in the economic, social, legal, political, cultural, or defense and security aspects, which rely on customary elements in the dynamics of the nation and state. On the economic side, for example, customary land has a sacred value that cannot be fully codified, unlike in other autonomous regions. Then on the socio-community side, there is community compliance with customary values that are upheld, such as OAP identity.

Land issues in Papua are very complicated to resolve [8]. This is because *the mindset of indigenous peoples* is that the land in Papua is customary land, not state land. However, according to the Agreements dated July 28, 1956, and September 27, 1962; the New York Agreement dated September 7, 1962; which have been ratified into Indonesian Law No. 7 of 1996 dated November 8, 1966, these lands are state lands.

This difference in understanding between indigenous peoples and the government ultimately leads to legal pluralism in the field of land. However, as is well known, with the enactment of a law regulating land issues

issued by the government, namely Law No. 5 of 1960 concerning Basic Agrarian Principles, known as the Basic Agrarian Law (UUPA), legal unification in the field of land has been achieved.

The UUPA guarantees that land can be used for the welfare of the people and prevents the concentration of land ownership among certain groups in society. The UUPA also recognizes customary rights, as long as they do not conflict with other higher laws and regulations [9].

Based on Article 3 of the UUPA, it can be understood that customary rights are legally recognized and therefore legally valid. Therefore, customary rights can still be exercised by each customary law community that possesses them. The recognition of customary rights in Article 3 of the UUPA provides a strong basis for customary law communities to control, regulate, and utilize their customary lands. The same is stated in Article 2 paragraph (4) of the UUPA (State Gazette No. 104 of 1960), which states that the control of state land may be delegated to autonomous regions and customary law communities, as long as it is necessary and does not conflict with national interests. This means that the government continues to respect the customary land laws of a community. In Papua, the implementation of the UUPA has not been optimal in practice. This can be seen in the use of customary law as a reference, which means that land in Papua is generally recognized as customary land (ulayat rights). This customary land (ulayat rights) is owned by each clan or keret and is inherited from their ancestors.

In Papua, the issue of customary land is very complicated, especially when conflicts and claims over customary land arise. Demands by customary law communities have triggered widespread conflicts, because in the end, one of the tribes from the customary law community wins. As a result, other indigenous peoples also want to receive the same compensation. Therefore, other tribes also make claims. The customary law community argues that by recognizing the existence of customary land, other parties can obtain the right to use the customary land, provided that payment has been made through the customary authorities. The customary authorities are willing to relinquish their customary rights on the condition that compensation is provided to the customary law community.

The land that has been relinquished by the customary authorities is handed over to the party that has made the payment. For example, if an investor wants to use the land for investment activities, they must make a payment to the customary authorities before carrying out their investment activities. Investors who do not follow this tradition will eventually encounter problems with the indigenous communities. Based on this, there is a need for legal certainty regarding land rights in Papua for investors.

## **B. Efforts to Protect Customary Rights in Papua in Upstream Oil and Gas Business Activities in Papua**

### **1. Efforts to Harmonize Local and National Regulations in Protecting Investors and Special Autonomy in Papua**

The recognition of customary rights in Article 3 of the UUPA is used by indigenous peoples as a reference in defending the existence of customary rights. This can be seen in the indigenous leadership system in Papua. The kinship system in indigenous communities in Papua, including tribes in Jayapura, generally adheres to a patrilineal system (father's lineage) [10]. However, there are areas in Papua that adhere to a matrilineal system (mother's lineage). This kinship system influences the pattern of land ownership and use within indigenous communities.

In tribes that adhere to the patrilineal system, the heirs are on the male side, so the ones who have the right to inherit are the sons, while the grandsons can only inherit based on the will of the deceased traditional leader. The wife of the traditional leader and her daughters do not have the right to inherit, they can only use the land with the permission of the heir. Indigenous people residing in Papua. In addition to communal ownership, customary law communities in Papua recognize individual ownership by clans/marga. This is referred to by customary law communities as "Ver".

Ownership of customary land gives the party who has rights to the land the authority to issue a customary release letter when another party is interested in using or even acquiring the land in question [11]. Although in fact, in the customary law community in Papua, there is a belief that land and the customary law community cannot be separated, because the relationship between land and the customary law community is likened to that between a mother and her child. This understanding means that parties outside the customary law

community only have the right to use the land.

The understanding of customary law communities as guardians of the status quo (maintaining customary land) is no longer valid today because customary land in Papua can no longer be classified as pure customary rights. This is because the territory of Papua is now under the sovereignty of the Dutch East Indies government as stipulated in the Overenkomst. Based on the Overenkomst, ownership of the land in Papua is partly held by the state (the government based on delegation from the Dutch East Indies government) and partly remains under the control of the indigenous communities of Papua as long as it does not conflict with the general provisions applicable in the administration of Papua.

The control of land ownership mentioned in the Overenkomst makes its existence recognized. A partial understanding of the Agreement has led to differences in perception, to the extent that customary rights are considered absolute ownership. As a result, the behavior of customary law communities tends to be anarchic. Customary law communities tend to demand recognition of customary lands when they are used for development purposes, even though as a sovereign state, the state is the highest authority on land ownership. When viewed from Macpherson's theory, the behavior of indigenous communities in Papua, who always demand recognition, is a tendency of communities that do not have an authoritative allocation of work. As a result, they demand recognition, which is considered a fulfillment of rights. Land, which is a right obtained from generation to generation, is exploited as much as possible as a means of obtaining benefits (power).

After the enactment of the UUPA (unification in the field of land), ideally, the regulation of customary land is determined by the government as the highest authority in a country, even though the UUPA implies a dualistic legal system. Meanwhile, members of the legal community still have rights (ulayat rights) as long as they do not conflict with higher regulations. Land in Papua, according to the customary law community in Jayapura, is not only a place for economic activity but also a homeland that is likened to a "mother," therefore the relationship between the customary law community and the land cannot be separated. So even though the land has been released by the customary authorities, its use is only permitted when outside communities (investors) are present or using the land. When other investors (not those referred to in the customary release) are present, they must provide recognition again. Only after this has been done will the customary community allow investment activities.

The number of ethnic groups in a place will influence the norms and behavior of customary law communities. This also occurs in customary law communities in Papua. As a result, legal pluralism occurs. Customary law dominates land policy in Papua, especially with the issuance of Special Regional Regulation No. 23 of 2008 concerning the Customary Rights of Customary Law Communities and the Individual Rights of Members of Customary Law Communities over Land. In resolving land disputes in Papua, customary settlement is preferred over legal channels. This is because experience has shown that resolution through legal channels requires considerable time and expense. Furthermore, even if they win in court, the customary parties still demand that the matter be resolved again. If this is ignored, the customary parties will usually resort to anarchic actions in the form of blockades. These blockades are intended to demonstrate which tribe controls the land in order to demand recognition.

The transfer of customary land for investment purposes is carried out by both individuals and legal entities. The transfer of customary land is carried out through: sale and purchase, exchange, and inheritance. Transfers carried out through sale and purchase are usually conducted between customary law communities, in this case customary leaders, and parties who will own the land to be used for investment. Before the sale and purchase takes place, the party wishing to own the land will visit the location. The purpose is to see the condition of the land in the field and to see the boundaries of the land. If the land is considered suitable for investment, negotiations will then take place to reach an agreement on the price. A statement of customary release signed by the customary leader will then be provided. This statement of customary release is an acknowledgment by the customary community to the party using the land. The authority of customary law communities in Papua in customary release, as seen in Articles 3 and 6 of the UUPA, imposes restrictions on property rights.

Restrictions on property rights in indigenous communities in Papua (Jayapura) are not recognized, because indigenous communities consider land to be their absolute property. In this sense, customary land cannot be

transferred to anyone, including the government, because it will bring disaster and a curse from the ancestors. This mindset has an impact on the actions of customary law communities. Land used by migrant communities is often visited and challenged on the grounds that the period of use has expired. This is because the principle of customary law communities is that parties outside the customary law community can only use the land with usage rights, and when the time limit according to the customary law community has expired, it must be accompanied by a new agreement.

Transfers carried out through exchange are commonly practiced by customary law communities. Transfers carried out through inheritance in customary law communities can only be done when the customary leader dies and has descendants (children). Only sons (tant) can inherit, in accordance with the patrilineal customs of customary law communities in Papua. Meanwhile, the wife of the customary leader and his daughters (mon) cannot inherit. If the customary leader does not have a son, then his grandson can inherit through a will from the customary leader.

The basis for granting recognition is that there are no clear rules regarding the granting of recognition, so it is done at the discretion of the local government. The forms of recognition are as follows:

- 1) Providing facilities to the community in the form of public facilities such as churches, schools, and health centers;
- 2) Providing necessities/goods needed by the local community, such as transportation, livestock, outboard motors, and sensor;
- 3) Since 1984, involving and placing 20% of the local community together with migrant residents, with the same rights as the migrant residents.

Cash payments are avoided with the aim of raising community awareness in regional development. However, for areas where customary land has been cultivated/maintained, compensation in the form of cash may be provided.

Investors always prioritize certainty in investing, and a clear land status will further increase the value of the investment. This investment is urgently needed to support the acceleration of development in Papua as a follow-up to special autonomy. For the sake of investment, the Papua Provincial Government issued a regional regulation (perda) so that investment activities with customary land rights would be harmonious. The local regulation in question is the Special Regional Regulation Number 23 of 2008 concerning the Customary Rights of Indigenous Peoples and the Individual Rights of Indigenous Community Members over Land (.). This is because most of the land in the Papua region is still classified as customary land, so in order to attract investors to invest their capital, legal certainty is essential, especially regarding land ownership. The regional regulation accommodates the customary rights of the community, which are converted into shares in a company (for large-scale businesses such as plantations and agriculture that utilize a large amount of land), so that the community can enjoy dividends from generation to generation, just as they enjoy their customary land.

The recognition of customary rights uses national legal logic, which originates from the government. Recognition that leads to a government decision (by the regent, mayor, or governor) is preceded by a series of studies by a team appointed by government decree. The key position of whether or not customary law communities have customary rights in the location researched by the team lies in the hands of the government, although the government's authority to refuse to issue a decree on the existence of customary law communities is not explicitly stated. When customary law communities obtain recognition of both their identity and their customary territory, this opens up opportunities for customary law communities to engage in management. This customary land management is regulated in Chapter IV, which regulates the management of the customary land rights of indigenous peoples and/or the individual rights of members of indigenous peoples over land, Articles 8 to 12. The models developed in the context of this management are utilization patterns as contained in Article 8, which states that:

- (1) Based on the decision of the Regent/Mayor and/or Governor stipulating that the customary rights of indigenous peoples and/or the individual rights of members of indigenous peoples over land still exist, the indigenous peoples and/or individual members of indigenous peoples concerned are authorized to:
  - a) Manage the customary rights of indigenous peoples and/or the individual rights of members of indigenous

peoples over land in accordance with the customary laws applicable in the indigenous peoples concerned. The management of the customary rights of indigenous peoples and/or the individual rights of members of indigenous peoples over land shall not conflict with the provisions of laws and regulations.

b) Conduct deliberations with third parties outside the customary law community who require land for various purposes.

**The results of consultations with third parties may include:**

a) The release of part or all of the customary rights of the customary law community and/or the individual rights of members of the customary law community over the land, with mutually agreed compensation, or

b) Lending part or all of the customary rights of the customary law community and/or the individual rights of members of the customary law community over the land for a certain period of time to be managed by another party in the form of leasing or profit sharing or other forms agreed upon by mutual consent.

After consulting with the holders of customary community land rights and/or the individual rights of members of the customary community over the land, the party requiring the land must obtain a location permit from the district/city government in accordance with the provisions of the legislation. All legal actions resulting from the deliberations of the customary law community ( ) must be carried out with an authentic deed. Transferring some or all of the customary rights to the community members to be controlled by each member as individual rights.

The enactment of Special Regional Regulation No. 23 of 2008 concerning Customary Rights of Indigenous Peoples and Individual Rights of Indigenous Community Members to Land has resolved investor issues related to land. As a result, many companies have invested in Papua. Companies investing in Papua are mostly in the plantation and other service sectors.

**Investments in the upstream oil and gas sector in Papua contribute to community welfare by creating numerous job opportunities. To invest, investors must follow certain procedures if they come directly to Papua [12], namely:**

a. Preparing a proposal that includes the company profile, the company's investment plan, and the community empowerment plans/programs that the company will implement.

b. The investor presents their project plan to the Governor along with the economic team/relevant agencies (the Papua Provincial Investment Coordinating Board as the coordinator). In response, the relevant SKPD will provide suggestions and assistance needed by the investor in obtaining the necessary permits and completing the processes that must be undertaken by the investor.

c. Investors must take care of the necessary regional permits, which can be processed in parallel with investment permits (PMA/PMDN) at BKPM.

Land disputes do not always have to be resolved through the courts. Resolutions reached through deliberation involving community leaders are sometimes effective in resolving land disputes. Such resolutions can be categorized as a form of traditional mediation. In addition, there is also resolution through the Land Office of the National Land Agency (BPN). In order to resolve disputes through this method, the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 01 of 1999 dated January 29, 1999 concerning Procedures for Handling Land Disputes has been established. Article 1 paragraph 2 of this Regulation states that a land dispute is a difference of opinion regarding: the validity of a right; the granting of land rights and the registration of land rights, including their transfer and the issuance of proof of rights between interested parties and agencies within the National Land Agency.

Article 2 states that to handle land disputes submitted to the Office of the Minister of Agrarian Affairs/National Land Agency, a Land Dispute Handling Secretariat and a Land Dispute Processing Working Team shall be formed, chaired by the Director of Government Agency Land Acquisition in the Deputy for Land Rights-Land Rights at the National Land Agency, with a number of members and duties of the Secretariat and Working Team in question. Then, on May 31, 2007, a Decree of the Head of the National Land Agency was also issued, signed by the Deputy for Assessment and Handling of Land Disputes and Conflicts, Technical Guideline No. 05/JUKNIS/D.V/2007 concerning the Mechanism for Implementing Mediation. This provision is a further elaboration of Regulation of the Head of the National Land Agency of

the Republic of Indonesia No. 3 of 2006, which stipulates in Article 345 that one of the functions of the Deputy for Assessment and Resolution of Land Disputes and Conflicts is to the implementation of alternative resolutions to land issues, disputes, and conflicts through mediation, facilitation, and other means. These technical guidelines were created because, in addition to dispute resolution through the courts/litigation, the national legal system recognizes dispute resolution through extrajudicial/non-litigation institutions as regulated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. It is also stated that one of the alternative dispute resolution methods is through mediation, which is a resolution process based on the principle of a win-win solution that is expected to provide a satisfactory resolution that is acceptable to all parties. These technical guidelines are intended as a guide for mediators appointed by the Land Office, the Regional Office of the National Land Agency, and the National Land Agency of the Republic of Indonesia in handling the mediation process. The purpose of these technical guidelines is to ensure uniformity, a common understanding, and standardization for mediators appointed in the mediation process. Mediation is defined as an alternative dispute resolution process with the assistance of a third party (mediator) and procedures agreed upon by the parties, whereby the mediator facilitates the achievement of a mutually beneficial solution (settlement) for the parties. In short, this mediation can be referred to as "Land Mediation," such as Banking Mediation, Insurance Mediation, Judicial Mediation, and so on. In these Technical Guidelines, a Mediator is defined as a person/official appointed by the

The final result of Land Mediation is a dispute resolution decision that constitutes an agreement between the parties concerned. This agreement essentially contains the accepted options, matters, and obligations of the parties. With this agreement, the mediation is substantively complete, while the implementation of follow-up actions falls under the authority of the State Administrative Officer. Every mediation activity should be documented in a report.

## **2. Protection of Transparency and Fairness in Oil and Gas Business Activity Contracts in Papua (Describing Fairness and Legal Certainty for All Parties, Including Local Government, Indigenous Communities, and Investors)**

Government policy on ASR Migas is regulated in Regulation of the Minister of Energy and Mineral Resources Number 15 of 2018 concerning Post-Operational Activities in Upstream Oil and Gas Activities (Permen ESDM 15/2018). Article 11 states: Article 11 (1) Contractors are required to reserve funds for post-operational activities in accordance with the estimated costs of post-operational activities, which are part of the post-operational activity plan as referred to in Article 3. (2) The provision of funds for Post-Operational Activities as referred to in paragraph (1) shall be carried out with the following provisions: a. gradually placing funds for Post-Operational Activities in accordance with the Work Plan and Budget; and b. must be deposited for the first time in the year of commencement of each commercial production. (3) The Post-Operational Activity Funds as referred to in paragraph (2) letter b shall be reserved and deposited in a joint account between SKK Migas and the Contractor at a public bank of the Government of Indonesia in Indonesia. (4) If there is interest income from the reservation of the Post-Operational Activity Fund, it shall be calculated as an accumulation of the amount of the Post-Operational Activity Fund that must be reserved by the Contractor.

The provisions of Article 11 paragraph 3 of the Minister of Energy and Mineral Resources Regulation Number 15 of 2018 above are related to the provisions of Article 20 and Article 21 of the Closing Provisions of the Minister of Energy and Mineral Resources Regulation Number 15 of 2018, which state that: Article 20 of Minister of Energy and Mineral Resources Regulation No. 15 of 2018: Upon the entry into force of this Ministerial Regulation, the Post-Operational Activity Fund that has been reserved and not yet used prior to the entry into force of this Ministerial Regulation must be adjusted and/or implemented in accordance with the provisions of this Ministerial Regulation. Then Article 21 of the Minister of Energy and Mineral Resources Regulation Number 15 of 2018 emphasizes that: Upon the enactment of this Ministerial Regulation: a. Contractors whose Cooperation Contracts do not yet regulate Post-Operational Activities must carry out Post-Operational Activities in accordance with the provisions of this Ministerial Regulation; b. To carry out Post-Operational Activities as referred to in letter a, Contractors must provide Post-Operational Activity Funds and use Post-Operational Activity Funds in accordance with the provisions of this Ministerial

Regulation; c. The amount and method of setting aside Post-Operational Activity Funds shall be determined by the Head of SKK Migas and reported to the Director General. The ASR provisions as stated above do indeed create legal uncertainty, namely:

1. For investors who have entered into a contract agreement with the Government and are currently conducting business through exploration, the provisions of Article 20 of Regulation of the Minister of Energy and Mineral Resources Number 15 of 2018 may give rise to disputes, because what the oil and gas contractor is currently working on is based on an agreed agreement (contract). However, the provisions of Article 20 of Regulation of the Minister of Energy and Mineral Resources No. 15 of 2018 are retroactive, as reinforced by the provisions of Article 21 of Regulation of the Minister of Energy and Mineral Resources No. 15 of 2018 to provide post-mining restoration funds. This means that contractors are faced with new regulations that force them to comply with these binding provisions, whereas at the time they entered into an agreement with the government, there were no such regulations and the agreement had been agreed upon through a contract.
2. The provisions of Article 21 letter c of the Minister of Energy and Mineral Resources Regulation No. 15 of 2018 regarding the amount and method of reserves are vague and could lead to extortion of business actors. This is highly irrelevant to business accounting because investors face uncertain situations and unclear finances.

For investors who have invested capital in Indonesia and are experiencing regulatory changes, this will also have an impact on the assessment of other investors that regulations in Indonesia are subject to change, which does not provide legal certainty. In addition, what has been agreed upon in a contract does not necessarily become the basis because the Indonesian government has set it aside.

From a legal perspective, the provisions of Article 11 of the Minister of Energy and Mineral Resources Regulation No. 15 of 2018 are confronted with the provisions of Article 11 of Law No. 22 of 2001 concerning Oil and Gas (Migas Law), which states:

- (1) Upstream Business Activities as referred to in Article 5 point 1 shall be carried out by Business Entities or Permanent Business Entities based on a Work Contract with the Implementing Agency.
- (2) Every Cooperation Contract that has been signed must be notified in writing to the House of Representatives of the Republic of Indonesia.
- (3) The Cooperation Contract as referred to in paragraph (1) shall contain at least the following basic provisions: a. state revenue; b. working area and its return ( ); c. expenditure obligations; d. transfer of ownership of oil and gas production; e. contract term and conditions for extension; f. dispute resolution; g. obligations to supply oil and/or natural gas for domestic needs; h. termination of the contract; i. post-mining operation obligations; j. occupational safety and health; k. environmental management; l. transfer of rights and obligations; m. required reporting; n. field development plans; o. prioritization of the use of domestic goods and services; p. development of surrounding communities and guarantees of the rights of indigenous peoples; and q.

With reference to the provisions of Article 11 of Law Number 22 of 2001 above, it can be interpreted that the contract must at least contain the matters mentioned in letters a to q, however, points c and I relating to ASR are subject to agreement between the two contracting parties, whereby the obligation to disburse funds and post-mining operation obligations are bound by contract clauses. whereas Article 11 of Regulation of the Minister of Energy and Mineral Resources Number 15 of 2018 directly provides absolute requirements and, moreover, existing contracts must comply with its provisions. This becomes a legal issue because there is a discrepancy between higher and lower regulations (subordination).

This legal uncertainty has implications that make Indonesia's oil and gas natural resources unattractive to investors. ASR, also known as Cost Recovery, is common in any mining activity, but it is possible that ASR for oil and gas mining cannot be equated with mineral and coal mining, which is paid in advance. In addition, the government's discourse is also unclear as to whether ASR will be replaced by taxes and royalties, adding to the legal uncertainty for investment.

According to Article 36 of Government Regulation No. 35 of 2004 concerning Upstream Oil and Gas Activities, it is stated that Contractors are required to allocate funds for post-operation activities of Upstream Business Activities, starting from the commencement of the exploration period and implemented through

work plans and budgets. The allocation of funds is agreed upon by the Contractor and the Implementing Agency and serves as a special reserve fund for post-operational activities of Upstream Business Activities in the relevant Working Area.

The contractor's obligation to allocate funds for post-operational activities of upstream business activities is further regulated in BP Migas Decree Number KEP-0139/BP00000/2010/S0 concerning Guidelines for Abandonment and Site Restoration (SK BP MIGAS 2010). Explicitly, the issuance of SK BP MIGAS 2010 is a measure to anticipate the ASR implementation obligations of old contractors who will eventually leave production facilities and other supporting facilities. The purpose of this decree is stated as follows: The purpose of implementing the Abandonment and Site Restoration Work Procedures is as follows: 1) to ensure that ASR activities are carried out in accordance with applicable laws and regulations; 2) to ensure the availability of sufficient funds to carry out ASR activities.

In addition, the Considerations section states: that after the completion of production activities in upstream oil and gas operations, the cooperation contract contractor will leave behind production facilities and other supporting facilities that have been used for production activities, which have the potential to become obstacles or pose a danger to other activities in the area related to transportation, agriculture, maritime navigation, exploration, and natural resource research; that to support the above post-operational activities, the Cooperation Contract Contractor ( ) the Cooperation Contract Contractor must carry out Abandonment of Production Facilities and other supporting facilities that have been used for upstream oil and gas business activities, and Site Restoration of the upstream oil and gas business activity area upon cessation of production that based on considerations a and b above, it is deemed necessary to establish Abandonment and Site Restoration Work Guidelines in a BPMIGAS Head Decree. Some of these regulations have actually imposed post-operation decommissioning obligations on oil and gas operators.

Technically, the current decommissioning regulations refer to the provisions of SKK Migas Decree PTK 040 of 2018 concerning ASR Revision 01 Guidelines for Abandonment Site Restoration (PTK ASR 2018), which revises SK BP MIGAS 2010. In 2011, research by Indonesian Corruption Watch (ICW) and the Indonesian Center of Environmental Law (ICEL) concluded that the international community believes that the principle of prudence needs to be applied at the decommissioning stage and in the implementation of decommissioning funding (ASR Funds). This has resulted in total attention being paid to the implementation of ASR, so that installations that have reached the end of their operational life are not neglected and cause problems in the future.

The management of oil and gas through Cooperation Contracts (KKS) carried out by BP Migas in the Constitutional Court's decision is considered unconstitutional because it constructs the state and contractors as being in an equal position. The state becomes bound by a civil contract that must be followed, thereby losing its sovereignty to make regulations that may differ from or contradict the contents of the civil contract. Meanwhile, BP's duties are very important, one of which is to supervise upstream business activities so that the extraction of state-owned oil and gas can provide maximum benefits and revenue for the state for the greatest prosperity of the people. However, in reality, this has not happened, while investors have enjoyed more profits.

The government issued regulations on post-operational activities for upstream oil and gas businesses through Minister of Energy and Mineral Resources Regulation No. 15 of 2018. With the introduction of this regulation, all oil and gas contracts are required to set aside funds for post-operational activities. The provision and use of post-mining funds or *abandonment and site restoration* (ASR) collected by cooperation contract contractors are regulated in the Minister of Energy and Mineral Resources Regulation so that the funds can be maximized according to priority needs. SKK Migas notes that the current unused ASR funds amount to US\$1 billion.

Some of the ASR funds in the joint account at SKK Migas have been used, but only a portion. When viewed, the value of the funds used is still much smaller than the total funds collected. "In the future, there will be regulations governing the use of joint account funds for ASR. So, in the future, these funds can be used for priority projects. The ASR funds in the joint account are collected from cooperation contract contractors (KKKS). In the future, these funds can be used by KKKS that do not have sufficient funds to carry out ASR.

The use of ASR funds in the joint account will be regulated in a ministerial regulation (Permen) of the Ministry of Energy and Mineral Resources (ESDM). The incentive to defer the deposit of Abandonment and Site Restoration (ASR) funds, which was given by the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas) to Cooperation Contract Contractors (KKKS) in July 2020, received a fairly good response.

Based on SKK Migas data, of the 43 KKKS offered the incentive, 30 KKKS have stated that they will participate in the relaxation program in 2020. The ASR fund reserve incentive is provided so that KKKS can maintain their financial stability and focus on achieving their production targets. KKKS that have participated in the relaxation program are immediately requested to refocus on production or exploration activities, with the most important thing being that upstream oil and gas investment continues. There are nine incentives proposed by SKK Migas to the government. Apart from ASR funds, other upstream oil and gas fiscal incentives, such as taxation, are currently still being discussed with the relevant ministries and institutions. Another incentive provided by the government is the exemption of value-added tax (VAT) on the sale of liquefied natural gas (LNG). This policy is stipulated in Government Regulation (PP) Number 48 of 2020 concerning Amendments to Government Regulation Number 81 of 2015 concerning the Import and/or Delivery of Certain Strategic Taxable Goods that are Exempt from Value Added Tax. Recognizing the importance of ASR, the Ministry of Energy and Mineral Resources (ESDM) issued a regulation on Abandonment Site Restoration (ASR). This regulation stipulates the obligation of cooperation contract contractors (KKKS) to carry out ASR and set aside funds in accordance with the details of ASR activity requirements. With the clarification of the ASR regulations, it is hoped that issues related to post-mining activities in the future can be minimized.

### **3. Legal Certainty in Contracts Guarantees Investment in Upstream Oil and Gas Activities**

Indonesia's upstream oil and gas investment climate in the Asia Pacific ranks 9th out of 14 countries (IHS Markit (S&P Global) Report, June 2025). One of the points in the report is that there has been a trend of improvement and increase in the overall attractiveness rating from below 4.75 in 2021 to 5.35 in 2025 [13]. Four key elements serve as benchmarks in measuring this rating, namely (1) activities & success, (2) fiscal system, (3) oil and gas risk, and (4) legal & contractual. In general, Indonesia's upstream oil and gas investment climate rating has continued to improve in the first three aspects, while the fourth aspect, legal & contractual, has tended to stagnate and requires a breakthrough, namely the need for a stronger legal framework.

Considering the positive trend in Indonesia's upstream oil and gas investment climate and the need for a stronger legal framework, ReforMiner has a number of observations and views, as follows:

1. In the activity & success aspect, Indonesia recorded a high rating of 6.03 in 2025, up from around 5.00 in 2020, reflecting that the prospects for upstream oil and gas investment activities and success remain highly competitive. This rating achievement is also in line with the trend of exploration investment, which has also continued to increase from US\$ 0.5 billion in 2020 to US\$ 1.3 billion in 2024, with a projection of reaching US\$ 1.5 billion in 2025. On average, the annual increase in during this period was recorded at 25.01%.
2. Regarding point (1), the discovery of reserves in Geng North and Layaran in 2023, which are categorized as giant field discoveries, as well as exploration achievements in 2025 with a success ratio of 56% (10 discoveries from 18 wells), and a total post-drill recoverable resource of approximately ±82.32 MMBOE confirm the high rating of Indonesia's upstream oil and gas activities & success. Based on reports from Wood Mackenzie, Rystad Energy, and S&P Global, the exploration results in Geng North and Layaran are among the five largest deepwater discoveries in the world in 2023.
3. In terms of fiscal systems, Indonesia recorded a rating of 5.11 in 2025, an increase from around 5.00 in 2020. The implementation of a flexibility policy for KKKS to choose a contract system (PSC Cost Recovery, PSC Gross Split, and New-Simplified Gross Split), the ability to switch from the PSC Gross Split contract system to PSC Cost Recovery, the availability of better offers and additional splits in existing contracts, and the existence of negotiable signature bonuses are factors that have contributed to the improvement of Indonesia's upstream oil and gas rating in terms of fiscal systems over the past five years.
4. In terms of legal and contractual aspects, Indonesia's upstream oil and gas rating has stagnated. Indonesia's

upstream oil and gas rating in this aspect has remained relatively stagnant at a score of 5.34 over the past five years. In terms of legal and contractual aspects, Indonesia's upstream oil and gas investment climate ranks 13th out of 14 countries in the Asia-Pacific region. Specifically, in this legal & contractual aspect, it is mentioned that the existence of a new Oil and Gas Law (Migas Law) is urgently needed to create legal certainty, contract sanctity, and better fiscal stability.

5. The issuance of a new Oil and Gas Law is an urgent need and should be a priority for President Prabowo's administration. This urgency is not only to improve the overall attractiveness rating of Indonesia's upstream oil and gas investment climate, but also to support the government's strategic agenda of achieving energy self-sufficiency and improving national energy security. From a constitutional perspective, the issuance of the new Oil and Gas Law is also important as a form of implementation of the mandate of Constitutional Court Decisions No. 002/PUU-I/2003, No. 20/PUU-V/2007, and No. 36/PUU-X/2012, which in principle emphasize the importance of restructuring the national oil and gas management system to align with the provisions and spirit of the 1945 Constitution.

6. The new Oil and Gas Law needs to regulate and include at least three fundamental elements necessary to improve the effectiveness of the Production Sharing Contract (PSC) system. These three elements, which have been missing from the regulatory framework of Oil and Gas Law No. 22/2001, are:

a. The application of the assume and discharge principle in the taxation of Production Sharing Contracts: Assume and discharge (A/D) is a principle whereby contractors are only required to pay direct taxes, while indirect taxes are borne and exempted by the government. The calculation of the state and contractor's share from upstream oil and gas activities is net revenue because it includes the calculation of tax components (assume and discharge). In line with this principle, it is also necessary to apply the principle of *lex specialis* as the " " by emphasizing that upstream oil and gas taxation provisions follow the provisions of the Oil and Gas Law specifically. The application of these two principles in the upstream oil and gas taxation system will provide greater legal certainty in the fiscal aspects of the implementation of Production Sharing Contracts (PSCs).

b. Application of the principle of separation of administrative and financial matters of Cooperation Contracts from government and state finance matters: This principle stipulates that the financial management of PSC contracts is carried out within the framework of business administration and cooperation. With this separation, all issues relating to financial aspects, calculation differences, or disputes arising in the implementation of the PSC, including audit findings by state audit institutions, will be resolved through the business dispute resolution mechanism stipulated in the PSC contract, and will not be linked to the administration or legal mechanisms of state finance and criminal law. Conceptually, the application of this principle requires that business entities exercising mining authority be required to provide general reserves (funds/assets) to cover potential losses from the implementation of the contract.

c. Application of the single door bureaucracy/single institution model principle that handles administration/bureaucracy/licensing for Cooperation Contracts: This principle stipulates that the licenses required for the implementation of upstream oil and gas business activities will be issued by a single institution. This institution will also be the entity that handles all licensing across ministries, agencies, and local governments, which is required in the implementation of upstream oil and gas business activities. Conceptually, the same institution also has authority over the work area (WK) auction process, from preparation, compilation and evaluation, to bidding and determination of the winning business entity/contractor for the WK.

7. Beyond the three fundamental elements outlined above, ReforMiner believes that the new Oil and Gas Law should also include additional provisions that can enhance the investment appeal of upstream oil and gas business activities in a more progressive manner, including:

a. Regulations on the transfer of firm commitments: The new Oil and Gas Law needs to regulate the possibility of transferring unfulfilled firm commitments to other working areas or available open areas.

b. Provisions regarding cost consolidation mechanisms for tax reduction purposes The new Oil and Gas Law needs to regulate opportunities for companies that have more than one Production Sharing Contract (PSC) to consolidate operational costs between contracts for the purpose of calculating tax reductions. Thus, oil

and gas companies receive equal treatment with other industrial sectors, particularly in terms of fiscal and taxation policies.

c. Regulations regarding CO<sub>2</sub> emissions management: The new Oil and Gas Law needs to emphasize that greenhouse gas (GHG) emission reduction activities, including the implementation of Carbon Capture and Storage (CCS) and Carbon Capture, Utilization and Storage (CCUS) technologies, are recognized as part of upstream oil and gas activities. Thus, in the context of existing PSCs, all costs incurred in the context of emission reduction are categorized as operational costs ( ), which can be included in the cost recovery scheme or tax deductions in accordance with applicable fiscal provisions.

d. Establishment of a Petroleum Fund: The new Oil and Gas Law needs to regulate the establishment of a Petroleum Fund as a special source of funding to support upstream oil and gas exploration activities, including improving the quality of working area (WK) auction data and conducting initial exploration well drilling.

## CONCLUSION

The regulation of upstream oil and gas investment activities in Papua is currently not based on fairness and legal certainty because the UUPA has not been implemented properly, due to the fact that the UUPA has not been fully socialized in Papua. This can be seen from the influence of customary law, which is more dominant than the keondoafian system. Although the UUPA has been implemented in Papua, the transition has been accommodated more through customary transition. Customary land transition can provide legal certainty for investors if it is carried out in accordance with the traditions of customary law communities in Papua.

The challenge in regulating upstream oil and gas investment and its social and environmental impact in Papua is that the Upstream Oil and Gas Investment Law has not been revised as mandated 18 years ago. This legal guarantee is important to encourage upstream oil and gas investment, which has been hampered by the need to obtain hundreds of permits from the central government and local governments in Papua. Despite efforts to simplify the process, upstream oil and gas business activities still face complex licensing procedures, with Cooperation Contract Contractors (KKKS) still having to go through around 140 licensing processes involving 17 ministries/institutions, with each permit taking between 3 and 24 months to complete. So far, efforts to simplify licensing, particularly through the Job Creation Law and deregulation at the level of the Ministry of Energy and Mineral Resources, have been more focused on simplifying the requirements and procedures related to licensing, which are more oriented towards the legality of the business. The implementation of Risk-Based Business Licensing (PBBR) within the OSS framework focuses only on basic licensing and administrative requirements for business establishment. Meanwhile, the main issues in licensing and bureaucracy for the implementation of upstream oil and gas business activities are more at the operational stage. The social impact of upstream oil and gas investment in Papua has both positive and negative effects. The positive impact is that it encourages early development of new fields and increases formal and informal employment in Papua and the surrounding area as a result of upstream activities and gas utilization. However, this has not yet been optimally enjoyed by the local community. Meanwhile, the environmental impact in Papua is pollution and environmental damage.

Efforts to reconstruct justice and legal certainty for investors in conducting upstream oil and gas business activities in Papua are carried out to create a healthy business climate for investors in Indonesia and are an urgent necessity so that investors who invest their capital in Indonesia obtain legal certainty. If investors who invest do not obtain legal certainty, there will be doubts about investing, as it could risk causing losses. Therefore, legal certainty is a key requirement that must be guaranteed by the government. Efforts to reconstruct justice and legal certainty for investors are carried out by synchronizing positive regulations, regional regulations, customary laws, and other laws that are still related to oil and gas, so that their implementation in the field is effective and promotive, providing justice for investors. The government's efforts through policy reforms in providing treatment and facilitating investment licensing through simplified procedures are already very good, referring to a one-stop service system for licensing issues.

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