

## INDIGENOUS FORESTS AND CARBON TRADING: ASSESSING THE POTENTIAL FOR HUMAN RIGHTS VIOLATIONS

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### ABSTRACT

To promote national economic growth, the Indonesian government has introduced several laws, including investment policies related to carbon trading in indigenous forests. This article explores the legal concerns surrounding how investment strategies involving carbon trading in these forests could potentially lead to human rights violations, especially affecting Indigenous Peoples (IP). This study utilizes normative research methods and a case approach, with data collected through library research. This study shows that indigenous peoples gain both economically and environmentally from investment strategies involving carbon trading in indigenous forests. However, it may result human rights violations against IP. The state's failure to fully recognize Indigenous Peoples's rights has delayed the official acknowledgment of Indigenous Territories and Indigenous Forests. In contrast, business licenses for companies in the forestry sector trading carbon in Indonesia are processed quickly. This discrepancy can lead to potential human rights violations against IP, including threats to their indigenous forests and unfair access to social forestry management licenses.

**Keywords** : Human rights, Indigenous forests, Carbon trading.

### A. Introduction

Carbon trading is an issue that cannot be separated from the problem of climate change experienced globally. As the adage man in nature means that all human actions towards nature or the environment around them will have an impact on humans themselves. Climate change is one of the impacts felt by humans as a result of the instability of CO<sub>2</sub>, CH<sub>4</sub>, CFC, N<sub>2</sub>O, and O<sub>3</sub> gas concentrations or commonly referred to as greenhouse gas (GHG) elements. In order to stabilise the concentration of these greenhouse gases, the international community seeks to provide solutions in the form of mechanisms in international agreements to prevent, reduce and restore the negative impacts of climate change. Two of them are the Kyoto Protocol in 1997 which has been amended in the Doha Amendment in 2012 and the Paris Agreement in 2015, which regulates the mechanism of preventing and controlling climate change through a market mechanism approach. Through these two

international agreements, the concept of carbon trading was born.<sup>1</sup>

Indonesia also ratified the Kyoto Protocol through Law No. 17 of 2004 on the Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Law No. 17/2004). Indonesia also participated in the 2015 Paris Agreement, which resulted in Nationally Determined Contributions (NDCs) and ratified through Law No. 16/2016 on the Ratification of the Paris Agreement to the United Nations Framework Convention on Climate Change.<sup>2</sup> In its 2021 NDC, Indonesia has committed to reducing its greenhouse gas (GHG) emissions by 29% by 2030 through its own efforts, and potentially achieving a 41% reduction with international support.<sup>3</sup> The commitment places particular emphasis on the forestry and land use sector, which accounts for 24.1% of the reduction target, equivalent to 692 metric tonnes of carbon dioxide equivalent (Mton CO<sub>2</sub>e), and the energy sector accounts for 15.5% or 446 Mton CO<sub>2</sub>e.<sup>4</sup>

The legal mechanism for carbon trading contained in both international agreements gives participating countries the right to buy and sell carbon. In Indonesia, the carbon trading mechanism is regulated in Presidential Regulation (Perpres) Number 98 of 2021 concerning the Implementation of Carbon Economic Value for Achieving Nationally Determined Contribution Targets and Controlling Greenhouse Gas Emissions in National Development. The regulation defines carbon trading as a mechanism for buying and selling market-based carbon units aimed at reducing greenhouse gases.<sup>5</sup>

Technically, carbon trading uses the concept of offsets by allowing compensation from one place that has contributed an amount of carbon that exceeds the carbon emission limit and paid to another place that has an adequate amount of carbon storage as a carbon offset. With this offset method, forests in the southern hemisphere such as in Indonesia have become a commodity for carbon trading for large industrialised countries such as Germany and America.<sup>6</sup> Currently, the carbon trading mechanism in Indonesia has been incorporated into the Carbon Exchange so that any entity both state and private entities

- 1 Sukanda Husin, *Hukum Lingkungan Internasional* (Jakarta: Rajawali Pers, 2016), 86-89.
- 2 Nationally Determined Contributions (NDCs) are national commitments to address global Climate Change in order to achieve the objectives of the Paris Agreement to the United Nations Framework Convention on Climate Change (Article 1 point 4 of the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 7 of 2023 on Forestry Sector Carbon Trading Procedures).
- 3 Pasal 2 ayat 3 huruf a Presiden Nomor 98 Tahun 2021 Tentang Penyelenggaraan Nilai Ekonomi Karbon untuk Pencapaian Target Kontribusi yang Ditetapkan Secara Nasional dan Pengendalian Emisi Gas Rumah Kaca dalam Pembangunan Nasional.
- 4 Mahmul Siregar, Mohammad Ekaputra, Vita Cita Emia Tarigan, Agus Purwoko. ., "Empowering coastal communities: enhancing income via carbon trading initiatives (collaboration between JGUFH and USU)", *International Journal of Research and Review* 10 (9) (2023) 368-382, <https://doi.org/10.52403/ijrr.20230938>
- 5 Katadata Insight Center, "Indonesia Carbon Trading Handbook", [https://cdn1.katadata.co.id/media/files/pdf/2022/Indonesia\\_Carbon\\_Trading\\_Handbook.pdf](https://cdn1.katadata.co.id/media/files/pdf/2022/Indonesia_Carbon_Trading_Handbook.pdf) (diakses 27 Mei 2024)
- 6 Muhammad Arman dan Uli Arta Siagian, "Perspektif Ekonomi Politik Perdagangan Karbon dan Dampaknya bagi Masyarakat Adat", Policy Brief: Aliansi Masyarakat Adat Nusantara, [https://www.aman.or.id/files/publication-documentation/46147Kertas\\_Posisi\\_Perdagangan\\_Karbon\\_2023%20-%20fin.pdf](https://www.aman.or.id/files/publication-documentation/46147Kertas_Posisi_Perdagangan_Karbon_2023%20-%20fin.pdf) (diakses 20 Mei 2024).

(people and business entities) can invest in carbon units which are further categorised as securities based on the Financial Services Authority Regulation (POJK) Number 14 of 2023 concerning Carbon Trading Through Carbon Exchange.<sup>7</sup>

One of the forest categories used as carbon units is indigenous forests as stipulated in Article 6 letter g of the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 7 of 2023 concerning Procedures for Carbon Trading in the Forestry Sector. The implementation of carbon trading in indigenous forests uses the greenhouse gas emission (GHG Emission) offset method through customary law communities that manage businesses and/or GHG emission offset activities in the indigenous forest.<sup>8</sup> However, problems arose during the process of recognising indigenous forests that became the territory of indigenous peoples by the government.<sup>9</sup> When compared to the processing of Cultivation Rights Title (HGU) by corporations, it only takes about 14 days, while the recognition of people's rights or indigenous territories takes several years. Based on data from the Indigenous Territory Registration Agency (BRWA), there are at least 19.5 million hectares of indigenous forest land that are actually managed by indigenous peoples in Indonesia that have not yet received formal recognition from the state.<sup>10</sup>

This situation can occur in cases where indigenous peoples are evicted from their customary forests due to the lack of formal recognition of their customary forests by the state. Conversely, if one were to imagine a corporation registering its Business Use Rights over a particular forest land that may intersect with the indigenous forest, then the rights of indigenous peoples to their indigenous forests that have been part of their lives would be in danger of being lost. Furthermore, if the corporation uses the forest land for palm oil business, there is the potential for deforestation of these forests, especially indigenous forests.

The fact that GHG carbon emissions produced by forestry and land use sector businesses have increased between 2000 and 2020 with a total of 4.7 million tonnes of GHG. This is due to forest fires on peatlands that occurred between 2015 and 2019. Wahana Lingkungan Hidup Indonesia (WALHI) stated that there are 969 companies operating in

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7 Pasal 3 ayat (1) Peraturan Otoritas Jasa Keuangan Nomor 14 Tahun 2023 Tentang Perdagangan Karbon Melalui Bursa Karbon.

8 Pasal 7 Angka 7 Peraturan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia Nomor 7 Tahun 2023 tentang Tata Cara Perdagangan Karbon Sektor Kehutanan.

9 Customary Territory is customary land in the form of land, water, and/or waters along with the natural resources on it with certain boundaries, owned, utilized and preserved from generation to generation and sustainably to meet the needs of the Community's life obtained through inheritance from their ancestors or ownership claims in the form of customary land or Customary Forests (Article 1 point 23 of the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 9 of 2021 concerning Social Forestry Management).

10 WALHI, dkk, "Boikot! Perdagangan Karbon, Hentikan Pelepasan dan Pembongkaran Emisi, dan Percepat Pengakuan Wilayah Adat serta Wilayah Kelola Rakyat", Surat Bersama Masyarakat Sipil Atas Perdagangan Karbon, <https://www.walhi.or.id/boikot-perdagangan-karbon-hentikan-pelepasan-dan-pembongkaran-emisi-dan-percepat-pengakuan-wilayah-adat-serta-wilayah-kelola-rakyat> (diakses 27 Mei 2024).

forest and peatland ecosystem areas. On the other hand, companies responsible for forest fires and increased GHG emissions from their forestry and land-use businesses can get away with paying a certain amount of carbon units for their excess emissions. In relation to forests and peatlands, there is a possibility that some of the peatlands burnt due to palm oil land use could impact on adjacent indigenous forest areas.

The potential loss of indigenous forest areas and deforestation as a result of forestry and land use businesses that are quicker to process their Business Use Rights than the recognition of indigenous forest areas by the state, raises the issue of potential human rights violations against indigenous peoples. As Article 6(1) of Law No. 39/1999 on Human Rights states, in order to uphold human rights, the differences and needs of indigenous peoples must be considered and protected by law, society and government. Furthermore, in the explanation of the article, it is stated that indigenous rights that are actually still valid and upheld in the environment of indigenous peoples must be respected and protected in the context of protecting and upholding human rights in the community concerned by taking into account the laws and regulations. The potential for human rights violations proves the intersection between business activities and the protection of human rights in Indonesian society, especially for indigenous peoples.

In this regard, since 2023 there is a Presidential Regulation (Perpres) Number 60 of 2023 concerning the National Strategy for Business and Human Rights (Stranas BHAM) which basically aims to protect, respect and restore human rights from any business. The parties highlighted as having obligations for the protection of human rights in the Perpres are ministries / institutions and local governments. Meanwhile, the parties highlighted in the effort to respect human rights are business actors. The reality of the issue of potential human rights violations of indigenous peoples over their indigenous forests against carbon trading investments is interesting to investigate based on the existing legal situation to see whether or not human rights violations occur.

Previous research in 2022 showed that carbon trading poses a threat to the recognition of customary forests by the government. The threat is due to the fact that carbon trading is based on a market mechanism that tends to be business-like and pays little attention to the rights of indigenous peoples. The government's lack of attention to the rights of indigenous peoples is characterized by the government's weak recognition of customary forests.<sup>11</sup> Another study in 2024, showed that government policies on carbon trading have led to land disputes with indigenous peoples and tend to favor entrepreneurs. The government's carbon trading policy should accommodate both business and indigenous peoples and be oriented towards reducing greenhouse gases.<sup>12</sup>

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11 Aidal Rasyif Nurulhadi and Neni Ruhaeni., "Konservasi Kawasan Hutan Adat dalam Perdagangan Karbon berdasarkan Paris Agreement dan Implementasinya di Indonesia", *Bandung Conference Series: Law Studies*, Vol. 2, No. 2 (2022), <https://doi.org/10.29313/bcsls.v2i2.4557>

12 *Muhamad Afifullah, Imam Haryanto, dan Muthia Sakti*, Trading Bursa Carbon Indonesia Peluang atau Ancaman

Based on the legal issues previously outlined, the aim of this research will be to analyze the potential for carbon trading policies in Indonesia to violate the human rights of indigenous peoples.

## **B. Research Method**

This article uses normative juridical research by analyzing legal aspects based on legislation and finding legal rules, as well as legal doctrines to solve existing legal issues.<sup>13</sup> This article also uses a case approach and library research method as data collection technique. The case approach is used to map legal problems that arise in the process of implementing a policy or regulation related to carbon trading that involves and impacts indigenous peoples and indigenous forests. The author analyzes the substance of the rules contained in: 1) Law Number 39 of 1999 on Human Rights; 2) Presidential Regulation No. 60 of 2023 on the National Strategy for Business and Human Rights; 3) Presidential Regulation No. 98 of 2021 on the Implementation of Carbon Economic Value for Achieving Nationally Determined Contribution Targets and Controlling Greenhouse Gas Emissions in National Development; 4) Minister of Environment and Forestry Regulation No. 7 of 2023 on Forestry Sector Carbon Trading Procedures; 5) Minister of Environment and Forestry Regulation No. 9 of 2021 on Social Forestry Management; violation of Human Rights for Indigenous Peoples; 6) Regulation of the Financial Services Authority Number 14 of 2023 on Carbon Trading through Carbon Exchanges. The analysis is concerned with the utilization of indigenous forests in investment policies through carbon trading with reference to the above-mentioned laws and regulations. In order to solve the research question, the author will examine the relationship between the implementation of carbon trading investment in Indonesia that uses indigenous forests and the possibility of human rights violations for indigenous peoples.

## **C. Discussion**

### **1. Regulations Related to Investment Policy Through Carbon Trading in the Forestry Sector in Indonesia**

The mandate of Law No. 32/2009 on Environmental Protection and Management related to carbon emission reduction also became the forerunner of carbon trading. Carbon trading is one of the media used by the national and international community as a joint effort to control and balance greenhouse gases (GHG). The basic mechanism used is the provision of economic incentives to individuals or corporate entities in their efforts to

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bagi Lingkungan?, *National Conference on Law Studies (NCOLS) Fakultas Hukum Universitas Pembangunan Nasional Veteran Jakarta*, Vol. 6, No. 1 (2024)

13 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005), 35.

reduce their carbon emissions.<sup>14</sup> The parameters used in measuring the amount of carbon emissions are set by the government or international organizations for a country in the form of emission targets or permitted emission limits. This determination is then tied to the imposition of a fine that must be paid by the entity concerned if the emission limit exceeds the emission limit set by the government or certain international institutions. The setting of emission targets or limits provides individuals or companies with a predictable way of allocating the amount of carbon emissions they produce, as well as the consequences of exceeding these limits.<sup>15</sup>

Indonesia demonstrates its commitment to the Paris Agreement To The United Nation Framework Convention On Climate Change in realizing an open carbon market mechanism through the issuance of Financial Services Authority Regulation Number 14 of 2023 (hereinafter POJK Number 14 of 2023) on Carbon Trading Through Carbon Exchanges. Legally, this POJK implements the technical provisions of article 26 paragraph (1) of Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector.<sup>16</sup> Specifically in the forestry sector, through the Ministry of Environment and Forestry, Indonesia issued Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 7 of 2023 concerning Procedures for Carbon Trading in the Forestry Sector.

POJK Number 14 of 2023 aims to facilitate parties in Carbon Trading in the Capital Market Sector through the Carbon Exchange related to licensing, governance, requirements and supervision of its implementation. As stipulated in Article 1 point 8 of POJK Number 14 of 2023, Carbon Trading is a market-based mechanism to reduce GHG (Greenhouse Gas) emissions through the sale and purchase of Carbon Units.<sup>17</sup> The buying and selling of carbon units is done in a system called carbon exchange. Based on Article 1 point 9 of POJK Number 14 of 2023 Carbon Exchange is a system that regulates Carbon Trading and/or Carbon Unit ownership records.<sup>18</sup>

The launch of the Indonesia Carbon Exchange (IDXCarbon) was conducted by the Indonesia Stock Exchange (IDX) on September 26, 2023. The business license of the Carbon Exchange Operator has been granted to IDX by the Financial Services Authority (OJK) through Decree Number KEP-77/D.04/2023 on September 18, 2023 in accordance with POJK Number 14 of 2023 concerning Carbon Trading Through Carbon Exchange. Currently, there are 4 (four) IDXCarbon trading mechanisms, namely Auction,

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14 Suyanto., *Mengenal Bursa Karbon di Indonesia* (Serang: CV. AA. Rizky, 2023), 28.

15 *Ibid*, hlm. 29

16 Valiant Alfarizy, "Mekanisme Hukum : Perdagangan Karbon Melalui Bursa Karbon di Indonesia", *UNES Law Review Vol. 6, No.2* (2023), <https://doi.org/10.31933/unesrev.v6i2.1618>

17 Pasal 1 angka 8 Peraturan Otoritas Jasa Keuangan Nomor 14 Tahun 2023 Tentang Perdagangan Karbon Melalui Bursa Karbon

18 Pasal 1 angka 8 Peraturan Otoritas Jasa Keuangan Nomor 14 Tahun 2023 Tentang Perdagangan Karbon Melalui Bursa Karbon

Regular Trading, Negotiated Trading, and Marketplace. IDXCarbon is connected to the National Registry System for Climate Change Control (SRN-PPI)<sup>19</sup> owned by the Ministry of Environment and Forestry (KLHK), thus simplifying the administration of carbon unit transfer and avoiding double counting. Business actors in the form of companies that have obligations and/or have a commitment to voluntarily reduce Greenhouse Gas emissions, can become IDXCarbon Service Users and purchase available Carbon Units. In addition, project owners who already have Carbon Units registered in SRN-PPI, can sell their Carbon Units through IDXCarbon.<sup>20</sup>

Entities wishing to enter into carbon trading through carbon exchanges must first apply for registration and emission permits. The registration can be done by the company or project to the relevant agencies such as the National Carbon Exchange Agency or similar international organizations. The registration process includes the preparation of explanatory documents of the project aimed at greenhouse gas emission reduction efforts, following the standards set by the authorized agency, such as requirements in emission measurement methods and monitoring methods. A company or project that has passed the registration process will be issued an emission permit, which authorizes the company or project to emit a certain amount of greenhouse gases and a certain limit that the company or project is not allowed to exceed.<sup>21</sup>

Companies or projects that are able to reduce their emissions in excess of a predetermined requirement can sell permits for the excess emissions to other entities that need emission permits to achieve their targets. This concept is called an economic incentive for companies to continuously pursue any form of reduction in their carbon emissions releases. These emission permits are also traded on the secondary market with speculative investors able to participate. This economic incentive concept allows for a complex market mechanism that has a direct effect on the price of emissions permits, encouraging companies to compete and innovate in order to reduce their emissions requirements.<sup>22</sup>

The registration and emissions permit process is the foundation of a carbon exchange trading system, ensuring that entities can operate within the regulatory framework and

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19 The National Registry System for Climate Change Control, hereinafter abbreviated as SRN PPI, is a web-based system for managing, providing data and information on actions and resources for climate change mitigation, climate change adaptation, and carbon economic value in Indonesia (Article 1 point 14 of Presidential Regulation Number 98 of 2021 concerning the Implementation of Carbon Economic Value for Achieving Nationally Determined Contribution Targets and Controlling Greenhouse Gas Emissions in National Development).

20 OJK, "Bursa Karbon Indonesia (IDXCarbon) Resmi Diluncurkan", <https://www.idx.co.id/id/berita/siaran-pers/2016> (diakses 28 Mei 2024)

21 Suyanto., *Mengenal Bursa Karbon di Indonesia* (Serang: CV. AA. Rizky, 2023), 27.

22 Posma Hutasoit, "Kajian mengenai Pemanfaatan Perhutanan Sosial dalam Perdagangan Karbon di Indonesia untuk Menghadapi Perubahan Iklim", *Fundamental Management Journal*, Vol. 9, No. 1 (2024), <https://doi.org/10.33541/fjm.v9i1.5809>

play a role in global greenhouse gas emissions reduction efforts.<sup>23</sup> The pricing of carbon credits is determined by the market's supply and demand system, giving companies the ability to predict the price of their carbon credits in their emission reduction efforts. The drive to reduce the need for carbon emissions has led to technological breakthroughs and knowledge transfer among carbon trading companies.<sup>24</sup>

The price of carbon credits is set at a value that reflects the potential cost of the environmental damage caused by these emissions. As explained earlier, companies are encouraged to innovate to reduce their carbon emission needs, essentially as a result of the carbon market mechanism or Carbon Exchange that sets prices based on supply and demand. In other words, a company will seek to sell its surplus carbon emissions to companies that are struggling to meet their carbon emissions targets. Conversely, if a company is still trying to meet its carbon emissions target, it is required to purchase carbon credits from other companies or entities that have surplus carbon emissions. Companies that are able to sell their surplus carbon emissions can make more profit, while companies that are required to buy carbon credits will be burdened by the high cost of carbon credits. In addition, companies that benefit from selling their surplus carbon emissions can use them to reallocate to other environmentally sustainable development projects.<sup>25</sup>

For developing countries like Indonesia, mitigation measures in reducing GHG emissions through renewable energy and technology require a long time. Economic development is also the main consideration for developing countries to continue running economic activities that have externalities on the environment, especially carbon-producing energy-intensive industries. Carbon trading is considered as one of the appropriate mechanisms in achieving GHG emission reduction goals under the Paris Agreement.

One solution to achieving GHG emission reduction targets is the provision of Nature Based-Solution (NBS) projects. Such projects can include nature conservation, restoration and sustainable ecosystems that allow carbon sequestration through natural means to compensate for global emissions from human activities.<sup>26</sup> These projects are located in the forestry, agriculture and marine sectors. Carbon trading is particularly beneficial for Indonesia, which has one of the largest tropical forests in the world. According to data from the Coordinating Ministry for Maritime Affairs and Investment, Indonesia has the third largest tropical rainforest in the world with an area of 125.9 million hectares that has the potential to absorb 25.18 billion tons of carbon emissions.<sup>27</sup> Meanwhile, the area of mangrove forests in

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23 Suryanto, *Loc.Cit.*

24 *Ibid.* hlm. 28-29.

25 *Ibid.* hlm 30.

26 Daniel Oehling, Marc Schmidt, (2021), "Seeding Environmental and Economic Success with Nature-Based Solutions", <https://jakartaglobe.id/opinion/seeding-environmental-and-economic-success-with-naturebased-solutions> (diakses 27 Mei 2024).

27 Cindy Mutia Annur, "Potensi Ekonomi Karbon Indonesia Capai Rp8.000 Triliun, Ini Rinciannya", Databox, <https://databoks.katadata.co.id/datapublish/2022/07/28/potensi-ekonomi-karbon-indonesia->

Indonesia reaches 3.31 million hectares and peatlands around 7.5 million hectares, which can absorb 33 billion tons and 55 billion tons of carbon emissions, respectively.<sup>28</sup>

The implementation of the NBS project contributes to carbon trading as a provider of carbon credits in mitigation measures to reduce GHG emissions. According to calculations by the Ministry of Environment and Forestry (KLHK) in 2020, the economic potential of carbon trading reached IDR 350 trillion in the next five years.<sup>29</sup> Even from the above data on forest area, with the scenario of the selling price of carbon credits at US\$ 5 per ton in the carbon market, the potential revenue obtained from such trading could reach around Rp 8,000 trillion.<sup>30</sup> Globally, Indonesia will play an important role in achieving the Paris Agreement goals through carbon trading. One aspect that opens up this opportunity is the involvement of domestic stakeholders. Industry can contribute significantly to the enhancement of the carbon trading ecosystem, both as carbon credit consumers and carbon credit providers. Given the scale and importance of NBS projects in sequestering carbon and as a counterweight to an efficient carbon market, the potential marketing, trading and sale of carbon credits will be key in Indonesia's evolving carbon market in the future.<sup>31</sup>

The concept of 'Nature-based Solutions' (NBS) has become a concern for parties and a hot topic of discussion at the global level. In particular, after the final decision of the UN Climate Summit at COP 27 in Egypt, at the end of 2022. Pros and cons revolve around the implementation of NBS. Especially, since this topic became the target of the Kunming-Montreal Global Biodiversity Framework (GBF) discussion at the UN Biodiversity Conference COP15/2022 in Canada. On the one hand, pro-policy makers see NBS as a potential means by which nature can be used to assist humans in addressing the global climate crisis through carbon trading mechanisms, halting biodiversity loss, and other environmental issues in the world.

The carbon trading concept run through the NbS project is one of the investment-based businesses managed by the state, which should be able to guarantee human rights. As stipulated in Article 2 of Presidential Regulation No. 60 of 2023 concerning the National Strategy for Business and Human Rights which states that the National Strategy for Business and Human Rights includes: a) the obligations of ministries/agencies and Regional Governments to protect human rights in business activities; b) the responsibility of Business Actors to respect human rights; and c) access to remedies for victims of alleged human

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capai-rp8000-triliun-ini-rinciannya (diakses 27 Mei 2024).

28 Kementerian Sekretariat Negara, "Arti Pesan Mangrove Indonesia di G20: Atasi Krisis Iklim Global", [https://www.setneg.go.id/baca/index/arti\\_pesan\\_mangrove\\_indonesia\\_di\\_g20\\_atasi\\_krisis\\_iklim\\_global](https://www.setneg.go.id/baca/index/arti_pesan_mangrove_indonesia_di_g20_atasi_krisis_iklim_global) (diakses 27 Mei 2024).

29 Rio Christiawan, "Maximizing our massive carbon trading potential", The Jakarta Post <http://www.thejakartapost.com/academia/2021/08/14/maximizing-our-massive-carbon-trading-potential.html> (diakses 27 Mei 2024).

30 Cindy Mutia Annur, *Loc.Cit.*

31 Kementerian Sekretariat Negara, *Loc.Cit*

rights violations in business activities. Its function is as a guideline for ministries/institutions and local governments to carry out planning, implementation, and monitoring of business and human rights; and guidelines for business actors and other stakeholders to participate in respecting human rights in the business sector.<sup>32</sup> Based on Article 2 paragraph (2) letter a of Presidential Regulation Number 60 of 2023 above, there is an obligation of ministries/agencies and Regional Governments to protect human rights in business activities.

But on the other hand, NBS can be a danger to the ecology and local communities of indigenous peoples. It is feared that the NBS instrument as a carbon credit provider will legitimize companies, financial institutions, and other organizations as a means of greenwashing, achieving profit alone, and can further trigger violations of the human rights of indigenous peoples over the use of indigenous forest products.<sup>33</sup>

Article 5 of the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia No. 7 of 2023 on Forestry Sector Carbon Trading Procedures states that carbon trading in the forestry sector is carried out through emission trading and GHG emission offset mechanisms. Emission trading is a transaction mechanism between Business Actors that have emissions exceeding the specified GHG emission ceiling. Meanwhile, GHG emission offsets are GHG emission reductions made by businesses and/or activities to compensate for emissions made elsewhere. Carbon trading in the forestry sector can be carried out on indigenous forests as stated in Article 6 letter g of the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 7 of 2023 concerning Procedures for Carbon Trading in the Forestry Sector. Forestry sector carbon trading for indigenous forests applies the GHG emission offset mechanism and is implemented by customary law communities that conduct GHG emission offset businesses and/or activities. Related regulations and implementation of forestry sector carbon trading towards indigenous forests are further discussed in the sub-chapters below.

## **2. Regulation and Implementation of Indigenous forests Use in Indonesia's Carbon Trading Policy**

Law No. 41/1999 on Forestry recognizes the existence of indigenous forests as part of state forests whose management is handed over to indigenous communities. The use of the word "indigenous forests" can also be found in the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number 9 of 2021 concerning Social Forestry Management. Social Forestry as defined in Article 1 point 1 of Minister of Environment and Forestry Regulation No. 9 of 2021 is a sustainable forest management system implemented in state forest areas or Indigenous forests /Rights Forest implemented

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32 Peraturan Presiden Nomor 60 Tahun 2023 tentang Strategi Nasional Bisnis dan Hak Asasi Manusia

33 MONGABAY, "Kritik dan Kekhawatiran 'Solusi Berbasis Alam': Dari Hilangnya Kehati hingga HAM", <https://www.mongabay.co.id/2023/02/03/kritik-dan-kekhawatiran-atas-konsep-solusi-berbasis-alam-dari-hilangnya-keanekaragaman-hayati-hingga-ham/> (diakses 28 Mei 2024).

by Local Communities or Customary Law Communities as the main actors to improve their welfare, environmental balance and socio-cultural dynamics in the form of Village Forests, Community Forests, Community Plantation Forests, Indigenous forests and forestry partnerships.

Indigenous forests are forests located within the territory of Indigenous Peoples.<sup>34</sup> As mentioned earlier, carbon trading can be carried out on indigenous forests using the GHG emission offset mechanism. For indigenous peoples, holders of Social Forestry Management Agreements and communities with forest rights who conduct GHG Emissions Offset businesses and/or activities must receive assistance or partners who have experience or expertise related to carbon measurement, project planning and implementation or accessing the carbon market. In the implementation of carbon trading in the Forestry sector, the Government facilitates communities including customary law communities to improve knowledge and skills. The facilities as referred to are carried out in 3 (three) stages, namely starting from activity planning, activity implementation and/or activity reporting.<sup>35</sup>

In the context of carbon trading involving indigenous forests, the most fundamental challenge is related to the recognition of the status of Masyarakat Hukum Adat. Article 1 point 22 of Minister of Environment and Forestry Regulation Number 9 of 2021 limits the definition of Indigenous people as a traditional community that is still related in the form of a community, has institutions in the form of customary institutions and legal instruments that are still obeyed, and still collects forest products in the surrounding forest area whose existence is confirmed by regional regulations. Specifically, if the Customary Law Community is located within the state forest area, it is determined by regional regulation, while if it is located outside the state forest area, it is determined by regional regulation or decree of the governor and/or regent/mayor in accordance with their authority. However, it is known that there are still many Indigenous Peoples whose status has not been confirmed by regional regulations or decrees of governors and/or regents/mayors. This is because the identification of indigenous peoples in Indonesia has not been optimized. Then sometimes the process of recognizing Indigenous people often faces bureaucratic obstacles and conflicts of interest with other parties such as forestry and plantation companies.

In addition to the obstacles in determining the status of Indigenous Peoples through local regulations, the determination of Indigenous Forest status is also needed to obtain legal access to social forestry management. Determination of Indigenous Forest status is granted by the Minister of Environment and Forestry of the Republic of Indonesia.<sup>36</sup> The

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34 Pasal 1 angka 8 Peraturan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia Nomor 9 Tahun 2021 tentang Pengelolaan Perhutanan Sosial.

35 Pasal 24 Peraturan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia Nomor 7 Tahun 2023 tentang Tata Cara Perdagangan Karbon Sektor Kehutanan.

36 Pasal 6 ayat (1) dan (3) Peraturan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia Nomor 9 Tahun 2021 tentang Pengelolaan Perhutanan Sosial.

indigenous forests referred to above can originate from state forests and/or non-state forests managed by Indigenous Peoples and have the main functions of conservation, protection, and/or production.<sup>37</sup> The social forestry project initiative provides forest management rights to local and indigenous communities through Community Forests (HKm), Village Forests, Community Plantation Forests (HTR) and Indigenous Forests schemes.

An interesting point is that although laws and regulations at the level of Laws to Ministerial Regulations have included the term Hutan Adat, this does not mean that indigenous peoples will have management rights over the indigenous forest. Indigenous peoples still have to prove that they have met the requirements stipulated by the law to be recognised by the state as indigenous peoples and only then have the right to apply for approval of Indigenous Forest management from the Government. Not only that, ironically, after receiving recognition and approval, indigenous peoples still have to apply for forest utilisation permits from state authorities in the forestry sector. This means that recognition of the rights that have been granted is not enough of a basis to enjoy everything on top of those rights.<sup>38</sup>

Within the context of carbon trading, Director General of Sustainable Forest Management of the Ministry of Environment and Forestry (MoEF) Agus Justianto stated that indigenous communities are also entitled to benefit from carbon trading activities, which are part of efforts to control greenhouse gas emissions.<sup>39</sup> Furthermore, the status of indigenous forests under the social forestry framework means that as long as indigenous communities undertake quantifiable mitigation actions, they are eligible to benefit from carbon trading.

The implementation of carbon trading that impacts Indigenous Peoples can be seen in Indigenous Peoples in East Kalimantan and Jambi Provinces who have received result-based payments. Another customary forest that has the potential to be included in carbon trading is the Imbo Putui Prohibition Forest located in Petapahan Village, Tapung District, Kampar Regency, Riau Province. Imbo Putui Forest is a forest managed by the customary law community around the forest, namely Ninik Mamak.<sup>40</sup> There is also the Rumbio Indigenous Forest located in Kampar District, Kampar Regency, Riau Province and the 987-hectare Yapase Indigenous Forest located in Yapase Village, Jayapura Regency, Papua Province, both of which have potential for carbon trading. In fact, the Rumbio

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37 Pasal 62 ayat (1), (2) dan (3) Peraturan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia Nomor 9 Tahun 2021 tentang Pengelolaan Perhutanan Sosial.

38 Apricia, N. (2022). "Hak Negara Dan Masyarakat Hukum Adat Atas Hutan Adat", *SIBATIK JOURNAL: Jurnal Ilmiah Bidang Sosial, Ekonomi, Budaya, Teknologi, Dan Pendidikan*, 1(7) (2022), <https://doi.org/10.54443/sibatik.v1i7.128>

39 KLHK, "Masyarakat adat berhak mendapat manfaat dari perdagangan karbon", <https://www.antaranews.com/berita/3815475/klhk-masyarakat-adat-berhak-mendapat-manfaat-dari-perdagangan-karbon> (diakses 28 Mei 2024).

40 Sadjati, E., Sulistyio, J., & Azwin, A. (2023). "Potensi Karbon Pada Tegakan Hutan Adat Imbo Putui Desa Petapahan Kabupaten Kampar", *Jurnal Karya Ilmiah Multidisiplin (JURKIM)*, 3(1) (2023): 90-94, <https://doi.org/10.31849/jurkim.v3i1.12658>

Indigenous Community also has a 10-year management plan masterplan that includes the utilisation of environmental services and carbon trading in its programme of activities.<sup>41</sup>

Through Presidential Regulation (Perpres) Number 60 of 2023 concerning the National Strategy for Business and Human Rights, the Government stipulates Strategy 2, namely the Development of Regulations, Policies and Guidelines that Support the Protection and Respect of Human Rights, which in Action Plan point 2 states that the availability of policies to encourage the protection and empowerment of indigenous peoples in business practices is a criterion for the successful implementation of human rights-based business. The relevant agencies given responsibility for ensuring the implementation of the national strategy are the Ministry of Environment and Forestry, Ministry of Agrarian Affairs and Spatial Planning/ National Land Agency, Ministry of Villages, Development of Disadvantaged Regions and Transmigration, Ministry of Education and Culture and Ministry of Social Affairs.<sup>42</sup>

The use of indigenous forests in Indonesia's carbon trading policy is a strategic step towards achieving greenhouse gas emission reduction targets and supporting the welfare of indigenous peoples. Existing regulations provide a legal basis, but effective implementation requires collaboration between the government, indigenous peoples and the private sector. Challenges such as customary rights recognition and management capacity need to be addressed through inclusive and sustainable policies. Moreover, the potential for human rights violations for Indigenous Peoples should be the focus of the government in considering the implementation of investment policies through carbon trading for Indigenous Forests.

### **3. Interconnections between the Use of Indigenous Forests in Indonesia's Carbon Trading Policy and Potential Violations of Indigenous Peoples' Human Rights**

The interconnection between potential violations of indigenous peoples' human rights and the use of indigenous forests in carbon trading in Indonesia can be seen in the gap between the number of companies in the forestry and land-use sectors that obtain business licences to clear land and use forests as a place to set up their businesses compared to the number of customary forest designations by the government, which takes a long time. This assumption is supported by the existence of a forestry permit regime that tends to be multidimensional where companies can carry out several types of business or exploitation activities by only applying for one type of forestry permit. Based on WALHI data in 2023, there are around 624,012 hectares of ecosystem restoration concessions owned by companies.<sup>43</sup> This situation is inversely proportional to the total number of indigenous forest

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41 Alviya, I., Muttaqin, M. Z., Salminah, M., Hamdani, F. A. U., & Uhib, A. "Upaya penurunan emisi karbon berbasis masyarakat di hutan berfungsi lindung", *Jurnal Analisis Kebijakan Kehutanan*, 15(1) (2018): 19-37, <https://doi.org/10.20886/jakk.2018.15.1.19-37>

42 Peraturan Presiden Nomor 60 Tahun 2023 tentang Strategi Nasional Bisnis dan Hak Asasi Manusia

43 Muhammad Arman dan Uli Arta Siagian, *Op.Cit.*, hlm. 14

designations in 2023 in Indonesia recorded by the Indigenous Territory Registration Agency (BRWA), which totalled around 221,648 hectares.<sup>44</sup>

With this permit, companies can exploit timber from natural forests, plant timber plantations and trade carbon at the same time. The practice of carbon credits in the voluntary carbon market, created through projects that remove community lands and territories, is a common practice.<sup>45</sup> This can happen, for example, because carbon credit project developers say they have to 'protect' the area being used to generate carbon credits and use this as an excuse to evict communities living there, or restrict community access to, and use of, the area. This ignores indigenous knowledge and governance systems, which have protected forests for thousands of years, and continue to do so today. Where indigenous forests have not yet been designated by the government, their status still tends to merge with state forests because it is considered that there is insufficient proof of the existence of customary law communities that manage these indigenous forests. This proof is what makes the establishment of indigenous forests by the government take quite a long time and could potentially be lost due to the carbon credit. Carbon credit projects may also make it more difficult for indigenous peoples to gain legal rights to their customary lands and territories in some places. Some carbon credit projects have also violated indigenous peoples' right to consultation and the use of the principle of Free, Prior, Informed, Consent (FPIC), which affirms the right of indigenous peoples and/or local communities to determine what forms of activities they want in their territories, can be formulated in more detail as the right of indigenous peoples and/or local communities to be informed before a development programme or programmes are implemented in their customary territories, and based on this information, they are free without pressure to agree or refuse.<sup>46</sup> However, it is important to note that many of the risks posed by carbon markets to indigenous peoples and communities may depend on context-specific matters, such as what the law says about respecting the rights and customary lands of indigenous peoples and the legality rights of peoples and communities to those customary lands.

Law No. 39/1999 explicitly regulates the rights of indigenous peoples in Indonesia through Article 6 paragraphs (1) and (2) which are intended to uphold the human rights of indigenous peoples who have unique and diverse needs that must be considered by the law, society and government. Furthermore, paragraph (2) states that the cultural identity of indigenous peoples, including the right to customary land, is protected, in line with the times. The element that becomes the reference for proving the existence of customary law

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44 Ariya Dwi Cahya, "Status Pengakuan Wilayah Adat di Indonesia pada Hari Internasional Masyarakat Adat Sedunia Tahun 2023", Badan Registrasi Wilayah Adat, <https://brwa.or.id/news/read/609> (diakses 28 Mei 2024).

45 Drupal, "Pasar Karbon, Hutan dan Hak: Seri Pengantar (Serangkaian penjelasan singkat untuk masyarakat dan komunitas adat", Forest Peoples Programme, <https://www.forestpeoples.org/sites/default/files/documents/Latar%20belakang%20dan%20pendahuluan.pdf> (diakses 27 Mei 2024).

46 Drupal, Pasar Karbon, Hutan dan Hak: Seri Pengantar.. *Op.Cit* hlm 22

communities is attached in the explanation section of article by article of the law, namely, customary rights that are actually still valid and upheld in the environment of customary law communities must be respected and protected in the context of protecting and upholding human rights in the community concerned by paying attention to laws and regulations.<sup>47</sup> From the explanation of this article, it basically requires a process of proving the existence of customary law communities, but in reality it is not accompanied by a real commitment from the government to accelerate the process. On the contrary, the government tends to accelerate all forms of business licensing including forestry sector business licences and land use in Law Number 6 of 2023 on Work Creation (Cipta Kerja).

The potential for human rights violations here is seen from the threat of loss of residence of indigenous peoples who may have settled in Indigenous forests scattered in Indonesia. In the context of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), there is an affirmation of human rights from the communal, economic, traditional and cultural dimensions. The ICESCR also covers the fulfilment of the right to adequate shelter and housing.<sup>48</sup> The principles contained in the ICESCR are basically oriented towards the commitment of the state, in this case the government as a duty bearer, to protect, respect and fulfil human rights in economic, social and cultural aspects. Duty bearers in the context of ICESCR must be able to properly regulate and promote the economic, social and cultural human rights of their people. If the principles in the ICESCR are not regulated or have errors in the regulation and application of the law in society, then the government as a duty bearer has the potential to violate human rights.<sup>49</sup>

The actions of the Indonesian government as a duty bearer towards efforts to protect, respect and fulfil the human rights of indigenous peoples in Indonesia have errors in the regulation and application of the law, resulting in potential human rights violations. Regulatory errors that support the potential for human rights violations can be seen from the ease of business licences accommodated by Law Number 6 of 2023 concerning Work Creation which is not accompanied by accelerated recognition of indigenous forest areas. In general, the ease of business permits is in the form of deregulation and debureaucratisation of several permits such as environmental permits. This simplification of permits is intended to improve the good business climate in Indonesia and advance the country's economy, but the negative effects of the provisions of the Law have an impact on the state's fulfilment of

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47 Pasal 6 ayat (1) dan (2) dan Penjelasan Undang-undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia.

48 Cecillia Maria Margaretha, Mutiara Safa'atidz Dzikra, dan Sofia Azizah Salsabiila, "Penanganan Pelanggaran Hak Asasi Manusia dalam Hukum Internasional oleh Perserikatan Bangsa Bangsa", *Kultura: Jurnal Ilmu Hukum, Sosial, dan Humaniora*, Vol. 2, No.1 (2024): 176-195, <https://doi.org/10.572349/kultura.v2i1.826> .

49 Setiyani dan Joko Setiyono, "Penerapan Prinsip Pertanggungjawaban Negara Terhadap Kasus Pelanggaran HAM Etnis Rohingya Di Myanmar", *Jurnal Pembangunan Hukum Indonesia*, Vol. 2 (2020): 261-274, <https://doi.org/10.14710/jphi.v2i2.261-274>. Lihat juga Muhammad Miftahul Huda, Suwani, dan Aunur Rofiq, "Implementasi Tanggung Jawab Negara Terhadap Pelanggaran HAM Berat Paniai Perspektif Teori Efektivitas Hukum Soerjono Soekanto", *In Right: Jurnal Agama dan Hak Azazi Manusia*, Vol. 11, No. 1 (2022): 115-134, <https://doi.org/10.14421/inright.v11i1.2591>.

adequate housing for citizens,<sup>50</sup> including customary law communities who inhabit certain indigenous forest areas because it is not followed by legal regulations that accelerate the recognition of these customary forest areas. The fast processing of business permits can be seen in the Work Creation Law and Government Regulation (PP) Number 5 of 2021 concerning the Implementation of Risk-Based Business Permits that have been integrated with the Online Single Submission (OSS).<sup>51</sup> This can then be compared with the recognition of indigenous forest areas regulated in the Minister of Environment and Forestry Regulation (Permen LHK) Number 9 of 2021 concerning Social Forestry Management, which tends to still require lengthy proof by involving several stakeholders.<sup>52</sup> Besides the slow recognition of indigenous forest areas by the government, the misapplication of the law can be seen in the technical provisions for the implementation of carbon trading investments regulated in the Financial Services Authority Regulation (POJK) Number 14 of 2023. The POJK sets the capital requirement for carbon exchange organisers at Rp. 100,000,000,000 (one billion rupiah) and is not a loan. This provision tends to make it difficult for indigenous peoples to become a carbon exchange organising entity, so that the 'players' in carbon trading appear to be favoured by corporations.<sup>53</sup>

The efforts that have been regulated in Presidential Regulation Number 60 of 2023 concerning the National Strategy for Business and Human Rights (Stranas Bham) in dealing with the negative effects of business activities consist of three pillars, namely, protection of human rights by the state, respect for human rights by business actors, and recovery of victims of human rights violations due to business. From these three pillars, it is clear that the potential for human rights violations in this issue is a violation of the second pillar, namely the vulnerability of violations of respect for human rights by business actors or corporations for the rights of indigenous peoples to their indigenous forests. Therefore, in resolving this potential human rights violation, the government needs to adjust all relevant laws and regulations and decrees from relevant agencies regarding carbon trading investment through carbon exchanges, with the Perpres Stranas Bham. This urgency is in line with the explanation in the appendix on the background point of the Presidential Regulation, which is in the form of mainstreaming the three pillars of human rights in national policy by making various efforts in the form of research to strengthening the state apparatus across

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50 Rony Sulistyanto Luhukay, "Penghapusan Izin Lingkungan Kegiatan Usaha dalam Undang-undang Omnibus Law Cipta Kerja", *Jurnal Meta-Yuridis*, Vol. 4, No. 1 (2021): 100-122, <https://doi.org/10.26877/m-y.v4i1.7827>.

51 Pasal 179 Peraturan Pemerintah Nomor 5 Tahun 2021 Tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko.

52 Pasal 68 Peraturan Menteri Lingkungan Hidup dan Kehutanan Nomor 9 Tahun 2021 Tentang Pengelolaan Perhutanan Sosial. Lihat juga dalam Kenny Cetera, "Keselarasan Implementasi Aturan Pengakuan Hak Masyarakat Adat untuk Mengelola Hutan terhadap Nilai-nilai Pancasila", *Pancasila: Jurnal Keindonesiaan* Vol. 1, No. 2 (2021): 152-162, <https://doi.org/10.52738/pjk.v1i2.39>

53 Muhammad Arman dan Uli Arta Siagian, *Op.Cit*, hlm. 14. Lihat juga Pasal 13 ayat (1) dan (2) Peraturan Otoritas Jasa Keuangan Nomor 14 Tahun 2023 Tentang Perdagangan Karbon Melalui Bursa Karbon.

ministries and other stakeholders.<sup>54</sup>

## D. Conclusion

Indonesia's commitment to implementing the contents of the Kyoto Protocol and the Paris Agreement is demonstrated by the issuance of various arrangements related to carbon trading. The concept of carbon trading through the Nature Based Solution (NBS) project is one of the investment-based businesses managed by the state. But on the other hand, NBS can be a threat to ecology and Indigenous Peoples. The utilisation of indigenous forests in carbon trading as regulated through the MoEF Regulation poses challenges for Indigenous Peoples. This is due to the sub-optimal recognition of the status of Indigenous Peoples (Masyarakat Hukum Adat, MHA) by the state, resulting in the slow recognition of Indigenous Territory, which is closely related to the recognition of Indigenous Forest status. The interconnection between the use of indigenous forests in carbon trading and potential violations of the human rights of Indigenous Peoples in Indonesia lies in errors in legal arrangements and the application of law by the government. Errors in legal arrangements can be seen in regulations that accelerate all business licences in carbon trading investments by the government to business actors, but are not accompanied by a commitment to accelerate the recognition of Indigenous Peoples in order to determine the status of Indigenous Forests. Another factor is the misapplication of the law in the provision of capital requirements for carbon exchange organisers, which tend to be high-cost and difficult to reach by indigenous peoples, and seem to be more specialised for business actors.

As a recommendation, it is necessary to adjust the implementation of carbon trading towards indigenous forests to encourage the protection and empowerment of indigenous peoples in business practices that are based on human rights as the government's strategic policy contained in Presidential Regulation (Perpres) Number 60 of 2023 concerning the National Strategy for Business and Human Rights. Collaboration between relevant agencies, namely the Ministry of Environment and Forestry, Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, Ministry of Villages, Financial Services Authority (OJK) Non-Governmental Organizations (NGOs) and Indigenous Peoples is needed to ensure the implementation of the national business and human rights strategy.

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54 Peraturan Presiden Nomor 60 Tahun 2023 Tentang Strategi Nasional Bisnis dan Hak Asasi Manusia.

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