IMPLEMENTATION IMPACT OF LAW NO. 4 YEAR 2009 ON MINERAL AND COAL MINING TOWARDS MINERAL AND COAL BUSINESS DEVELOPMENT

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ABSTRACT

The issuance of Law No. 4 Year 2009 on Mineral and Coal Mining has certainly an impact on the management of mineral and coal mining operations throughout Indonesia as the law brings lots of new issues related to the regional autonomy that is contradictive to the previous issued regulation, i.e. Law No. 11 Year 1967 regarding centralized Main Guidelines on Mining.

Surveys to several regions and business operation show that various problems have occurred. It needs early action to avoid bigger problems that will create a negative impact to the investment climate in mineral and coal mining sector, and will eventually hinder the improvement of people welfare.

Keywords: Law No. 4 Year 2009, Law No. 11 of 1967, mineral and coal mining, regional autonomy

INTRODUCTION

The change of government from the New Order to the Reform Order in 1997 has changed the whole system of social and political life. Various policies that were used to be centralized, by placing the central government as the 'ultimate authority', must be changed into decentralization that makes local governments (district and city) autonomous. It is regulated in Law No. 22 Year 1999 on Local Government that was further revised to be Law No. 32 Year 2004. In this law, known as law on regional autonomy, government has only authority to regulate issues of foreign affairs, defense, security, judiciary, national monetary and fiscal, as well as religion (www.kpu.go.id/dmdocuments). Outside those issues, authority is transferred to regions under the leadership of regency/city government. The provincial government, that previously has authority to supervise regency/city government, is now positioned as the arm-length of the central government. For issues under the transferred authority to regency/city and provincial government, the central government is only obliged to formulate the standard, criteria, guidelines, and procedure for regency/city references.

The implementation of regional autonomy law automatically gives impact to the mineral and coal mining development. Law No. 11 Year 1967, which is centralized, has to be replaced by a decentralized law. After a long process, a law was eventually issues, namely Law No. 4 Year 2009. This law contains 26 chapters or 175 articles. This law acknowledges the importance of mineral and coal in fulfilling the people's need, so that the utilization must contribute to the national economic development to achieve the just welfare and prosperity of the people as well as sustainable regional development.

In line with the issuance of Law No. 4 Year 2009, surveys have been conducted to several regions aimed at identifying constraints and problems raised in regions due to the law. Then, possible solution could be perceived.

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METHODOLOGY

The methodology consists of collecting, processing, and analysing of both primary and secondary data. Primary data were obtained from direct survey on the field through interviewing resource persons from the Office of Mining and Energy and other competent informants. Secondary data were obtained from relevant and reliable official publications, such as from the Central Board of Statistics and its regional offices; the Directorate General of Mineral, Coal and Geothermal; and various related seminars.

RESULTS

Surveys were conducted in 3 provinces, namely Bangka-Belitung/Babel (Pangkalpinang), South Kalimantan (Banjarbaru), and West Java (Bandung Regency) by interviewing authorized officials of the Regional Office of Mining and Energy. The selection of the 3 regions is based on assessment that Babel Province represents metallic mineral mining (tin), South Kalimantan Province represents coal mining and West Java Province represents non-metallic mineral mining (mineral).

From the 3 regions, the obtained result is as follows:

a. Pangkalpinang-Babel Province
   According to the Office of Mining and Energy, Law No. 4 Year 2009 has brought new problem as there is still disparity between the law and its implementation in the field; further explanation is needed. The problems are:
   1) Article 22 on the criteria of Community Mining Area (CMA) which states that resource constitutes secondary mineral located in rivers and/or at between river sides (letter a) and resource constitutes community's mining area that has been operating at least 15 years (letter f). This regulation causes damages to the rivers and river bank areas. It also erases the chance for CMA to operate at coastal area or sea. Furthermore, the statement that community's mining area has to be at least 15 years has eliminated those less than 15 years to be eligible as CMA. This case happens a lot in this province;
   2) Article 46 point (2) on Production Operation Permit (POP) which states that the POP of Production Operation is awarded to business organization, cooperatives, or individual upon bidding on Mining Operation Permit Area (MOPA) for metallic mineral or coal backed up by data from feasibility study result;
   3) Article 51 and Article 60 whichstates that the Mining Operation Permit Area for metallic mineral and coal is awarded to business organization, cooperatives, and individual through tender. The problem is whose the authority to conduct the tender process;
   4) Article 52 Point (1) states that the holder of Mining Operation Permit Area for metallic mineral is awarded the permit with at least 5,000 ha and 100,000 ha maximum. The problem of 5,000 to 100,000 ha is too big for small investors and too small for big investors. It causes unconducive condition, on one side small investors cannot afford it, but on the other side big investors are not attracted.

b. Banjarbaru-South Kalimantan
   Provincial Office of Mining and Energy of South Kalimantan has no longer held authority to manage the mineral and coal mining activity, as the authority has been transferred to regency/city government. Provincial government has only authority to issue permit for cross-district mining activity (as regulated in Article 7 Law No. 4 Year 2009), which is mostly cross-cut by regency/city government by granting gradual permit. Regency/city government avoids the process of permit granting from the provincial government by making individual permits for mining activity although the location covers 2 regencies. There is no violation to the regulation; however, this action degrades the function of provincial government. It has happened for long, since the implementation of the autonomy law, in almost all over Indonesia. It is predicted to still go on even after the implementation of Law No. 4 Year 2009. In the future, it will create disharmony between provincial and regency/city Office of Mining and Energy.

c. Bandung regency-West Java Province
   The Office of Mining and Energy of Bandung Regency highlighted the regulation to conduct tender in the granting process of Mining Operation Permit Area for metallic mineral and

coal mining as stated in Article 51 and Article 60 Law No. 4 Year 2009. The logical consequences of the regulation is series of obligations for any Office of Mining and Energy to provide data and information of areas being tendered, covering data and information on procurement of exploration and laboratory equipment, implementation of preliminary exploration, as well as data/information processing and reporting to attract potential investors. All these activities are costly and the fund has to be allocated in the Regional Development Budget. The problem is whether district and city governments are willing to bear the cost. If they are, they will most probably be very selective in selecting locations that are only potential to be explored at this time. This condition will violate the principle of providing access to data and information, and the effort of strengthening promotion. At the end, the 'future' resources or metallic mineral potentials will not be revealed, and regency/city government (i.e. Office of Mining and Energy) will only be reactive, not anticipative.

The existing problems faced by the Office of Mining and Energy in 3 regions are basically indicating 2 things: first, the issuance of Law No. 4 Year 2009 has brought new problem; second, the problem is regionally specific, it will be different from 1 region to the other based on local situation and condition. Based on that assumption and the fact that technical factors (such as mining activity, mineral condition, etc) and non-technical factors (such as condition of Office of Mining and Energy, community's socio-cultural aspects, etc) varies within regions, it is believed that the more regions being surveyed will lengthen the problem list. Existing in 33 provinces, 399 regencies, and 98 cities all over Indonesia (www.depdagri.go.id/basisdata), there will be hundreds of problem faced by the Office of Mining and Energy due to the implementation of Law No. 4 Year 2009.

DISCUSSION

A. Analysis of Survey Result

The result of survey in 3 regions indicates 5 main problems that need extra attention in relation to the implementation of Law No. 4 Year 2009. The 5 problems relate to tender process, community mining area, scope of Mining Operation Permit Area, environment, and authority of provincial and regency/city Office of Mining and Energy.

a. Tender
   The tender procedure of Mining Operation Permit Area for metallic mineral and coal has been explained following the issuance of Government Decree No. 23 Year 2010 on the Implementation of Mineral and Coal Mining Operation (Anonym, 2010a). From Article 10 to Article 1, this Government Decree explains about recommendation, formulation of tender committee, task and authority of tender committee, conditions for tender participants, tender procedure, field visit to the area being tendered, tender duration, etc. Thus, the problem faced by the Office of Mining and Energy of Babel Province has been solved. However, problem faced by the Office of Bandung Regency remains, as the problem is on the issue of responsibility (or burden) of regency/city in providing data and information about the area will be tendered.

   Besides the problem faced by the Office of Mining and Energy of Bandung District, other problem is that the tender procedure, from preparation to evaluation, is complicated and takes time. This condition creates opportunity for violation of authority for personal interest as there is absolute dependency on the tender committee. In relation to that, a clear legal structure is needed to oversight and ensure that the tender process conforms to existing regulation.

b. Community Mining Area
   Tight procedure for community mining area becomes a crucial problem because it is difficult to implement. Unfortunately, this condition can be perceived as unfair to the community of low level economy that constitutes the majority population which is poor, low-educated, has no access to economic resource, and mostly marginalized. There is also a dilemma; tight procedure will encourage illegal mining activity (mining activity without permit-PETI), but easy procedure will enforce negative impact to the environment. Thus, the procedure has to be revised for making it accessible for community to conduct mining activity through Community Mining Area scheme.

c. Scope of Mining Operation Permit Area
Comparing to Law No. 11 Year 1967, the scope of Mining Operation Permit Area of regulated in Law No. 4 Year 2009 is perceived as being too big for small investors and too small for big investors. The generalization of the scope of Mining Operation Permit Area reflects 2 issues: first, mining companies are being generalized to possess the same capacity across the board, from individuals, cooperatives, or legal entities (national or foreign); second, Indonesian resources or mineral and coal reserves are seen as still interesting for potential investors, so that the area is divided into lots of permits.

The above two issues are critical as there is not supported by adequate data and information about the capacity of mining companies, condition of resources, and existing mineral and coal resources. There is always different capacity of mining companies in terms of capital, technical capacity, human resources, market coverage, etc. Generalizing those companies will only result in a gap among them and jealousy of being treated unfairly. This condition will further disturb nationalism and trigger social chaos that causes unconducive investment climate and pushes away potential investors.

The opinion saying that Indonesia has still abundant resources/mineral and coal reserves can be questioned. There is strong perception that the 'bonanza' era (where huge and high-quality reserve is massive) has passed, and it is difficult now to find out abundant resources like copper/gold in Papua (PT. Freeport) and West Nusa Tenggara (PT. Newmont Nusa Tenggara), nickel in Pomalaa (PT. Inco), etc. Geologically, Indonesia is perceived as having various mineral resources, but it needs huge investment and lengthy time to explore the resources. It needs a breakthrough from the government to solve the problem, such as by providing incentive for companies to conduct general survey or exploration, a more attractive land relinquish system by the mining company, cooperation between government institutions or foreign fund, etc.

d. Environment
Environmental disaster caused by mining activity is a violation to the regulation that must be brought to court. Previous law (Law No. 11 Year 1967) has regulated this issue, but frequently ignored due to various reasons, because of light penalty, weak oversight, and corruption-collusion-nepotism between officials and entrepreneurs. Applying the environmental law with heavy penalty is difficult due to complicated and long procedure.

Law No. 4 Year 2009 has established strict signs for environment preservation. There are 7 articles regulate the environmental issue covering the tolerant limit of environment support capacity (Article 95 Letter e), reclamation and post-mining activity (Article 96 Letter c, and Article 99 – 101), applied standard and environment quality standard according to characteristic of a region (Article 97), preservation of sustainable function and support capacity of water resource (Article 98), as well as heavy legal penalty for violator (Article 151 and Article 165).

e. Authority of Province and Regency/City
In current government system, the philosophy of mineral and coal mining operation is regulated into the pattern of ownership and mineral right, implementation of mining right, and economic right (Gatot, 2009) as can be seen in Figure 1.

Considering the above fact, the authority of provincial government cq. The provincial Office of Mining and Energy cannot be changed. However, after the implementation of Law No. 32 year 2004, their authority was improved by being involved in the formulation process of local regulations at district/city level. It gives the provincial government important role in setting the policy direction, including policy in mineral and coal mining sector.

B. Analysis Result based on Business Interest

The seminar of "Mining Business Climate after Implementation of Law on Mineral and Coal Mining", Arif (2009) predicted that the issuance of Law No. 4 Year 2009 would imply to:

a. Operating mining companies
Several articles in this law that regulate mineral and coal mining are shifting stipulations (transitional regulation) in Article 169 Point a, stating that government still acknowledges agreement/contract signed before the issuance of Law No. 4 Year 2009; however, Point b of

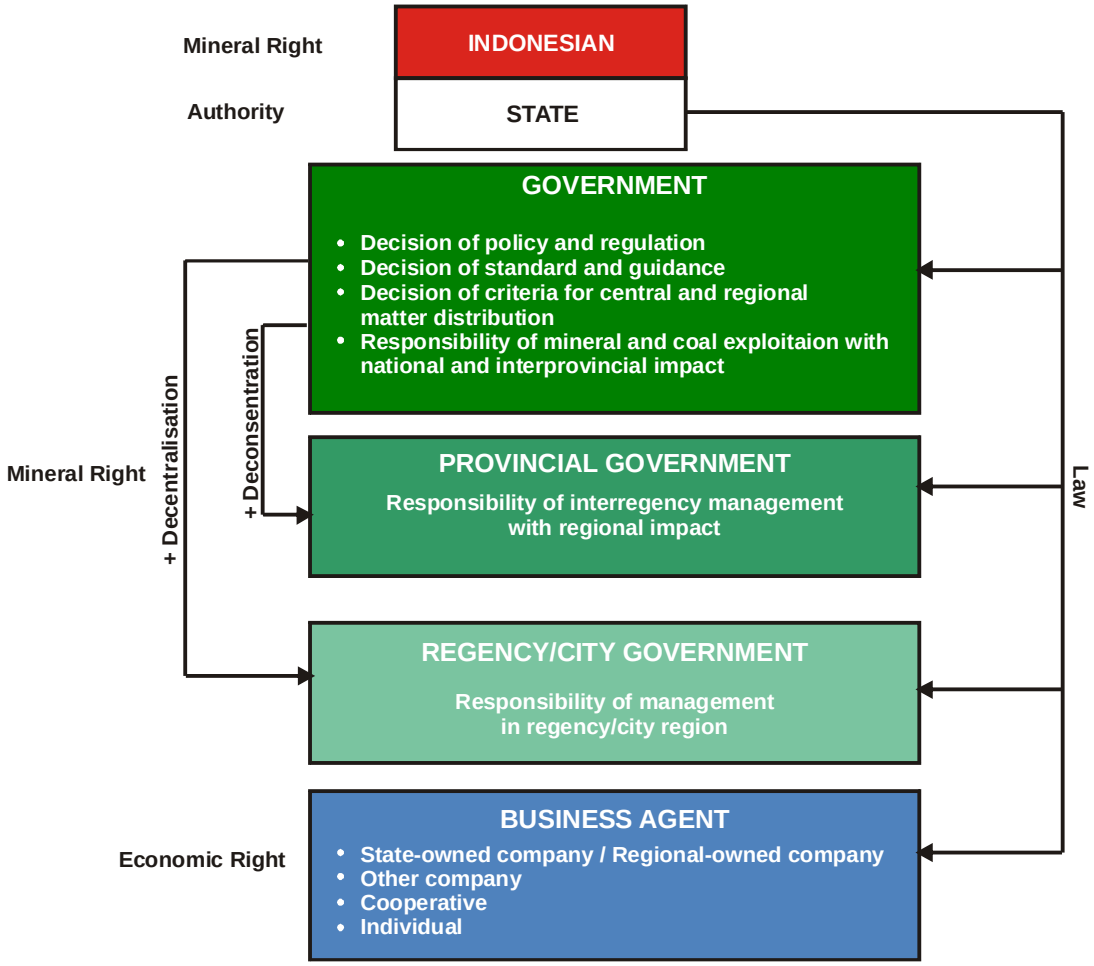

Figure 1. Philosophy of Mineral and Coal Mining Operation (Gatot, 2009)

the same Article contains contradiction as it states that an adjustment is needed for all agreement/contract signed before the issuance of Law No. 4 Year 2009. Point b also states that adjustment should be done to the area width of mining operation permit, share divest owned by foreign companies must be conducted after 5 years of production; and, mining and processing/purification operations cannot be conducted by mining service providers.

The operating mining companies constitute Mining Authority (MA) holders, Contract of Work (CoW) holders, and Coal Contract of Work (CCoW) holders.

The interpretation of the shifting stipulation tends to cause confusion to business players and will affect those who use the regulations in the signed agreement/contract as reference for their business.

For CoW and CCoW holders, the obligation to adjust the agreement/contract has legal implication that if ignored it will disturb the business operation. The obligation will also bring negative impact; and it must be avoided to happen as the government (as the party of the agreement) has committed not to issue policy that might disadvantage business activity. Regulations in CoW and CCoW predicted to be adjusted due to the obligation to do so are among others:

1) There is no security of tenure for business operation due to changes in the new regulation, although the business players (CoW and CCoW holders) have signed the agreement/contract that must be applied until the agreement is due;
2) The area width is potentially decreased due

to the new regulation, and it will greatly influence the investment and activity plan that has been prepared and funded by bank loan;
3) There are additional responsibilities relating to the state's income;
4) There is constrain or limitation in conducting export due to the procedure of mining product added value.

b. Mining companies apply for application after implementation of Law No. 4 Year 2009 (future investors)
For companies applying for CoW or investing, stipulation in Law No. 4 Year 2009 that waives the concept of CoW and CCoW will oblige the companies to conduct review on their investment plan. Generally, some stipulations in Law No. 4 Year 2009 that need to be paid attention by the companies are, among others:
1) Form of mining operation permit is predicted to be potentially more risky for companies, especially in the implementation of regional autonomy;
2) Mechanism of dispute resolution through public court can be influential to the investment interest; it is because most business players prefer to the alternative resolution through arbitrate;
3) There is a raised concern on the unsolved overlapping allocation of mining area (including WIUP and WIUPK).

c. Mining Service Providers
For mining service provider companies, the main concern lies on Article 124 Point (3) letter b, stating that types of service provider for mining sector and processing/purification are consultation, planning, and testing, excluding its implementation. If it is the fact, then the implication to the mining service business will become deeply serious.

In other context, Arif (2009) explains that:
a. The proposed scheme of mining operation, in the form of permit and not cooperation agreement, is predicted to be difficult in attracting investment on big scale mining like PT. Freeport, PT. Inco, PT. Newmont Nusa Tenggara, etc. It is because big mining companies prefer to have cooperation that can guarantee long-term investment, requiring relatively big capital. For small and medium scale mining companies, the operation scheme in Law No. 4 Year 2009 is considered not to hinder interest of foreign investors to invest, such as those from China, India, South Korea or Malaysia. Besides, domestic investors, including state-owned companies, will also take the opportunity.

b. Development of downstream industry sector as stated in Article 95 Letter c, Article 102, and Article 103 will provide opportunity for business to invest in processing industry. Although the establishment of smelter inside the country can increase the added value, the government has to consider the following issues:
1) Economic feasibility, not only for the existing mining companies that have to bear the processing and purification responsibilities as stated in each agreement/contract, but also for new investors that need to increase their investment to build processing factory;
2) It needs to explain in more detail up to what level the upstream industry has to be built for each mineral. Is it limited to improving the content of raw material/nugget into concentrate, or to produce ingot. Time period to build downstream industry also needs to determine as it relates to technical and economic factors, such as, equipment, investment, production rate, etc.

C. Prediction of Mining Business Post-Law No. 4 Year 2009

From the geological point of view, Indonesia has quite abundant mineral resources, but the fact is that investment and exploration activities are stagnant and tend to decline in the last decade. In the same period of time, a contradictory condition happens to coal with significantly increasing investment rate. It is not because the Indonesian condition is conducive for coal business, but merely due to the factor that the global oil price is rocketing and oil reserves is decreasing. Thus, coal that is positioned as substitute for oil experiences an increasing demand. In 2008, Indonesia positioned the world's 3rd steam coal exporter after Australia and South Africa with 165 million tons or 75% of the total national product (Daulay, 2009). The above condition provides an expectation that mineral and coal mining still has good potential to be developed. It was stated by the R&D Centre for

Mineral and Coal Technology (Dani *et al*, 2008)) that conducted a study on mineral and coal mining operation before Law No. 4 Year 2009 was issued. By using SWOT analysis (Strength, Weakness, Opportunity, and Threat) and cross-parameter correlation of mining development investment climate, Dani *et al* (2008) states that mineral and coal mining operation can be developed as long as the government can handle the weakness and threat issues. They recorded that the weakness factor covers issues of poor data and information, limited infrastructure, overlapped regulation, and weak human resource in regions. The threat factor constitutes limited legal insurance, growing illegal mining activities, increasing environmental issue, existing ego-sector, unstable political and security condition, and high rate of corruption. If the weakness and threat factors cannot be handled by the government, there will be no new investors doing business in mineral and coal mining in Indonesia.

Besides that, analysis on the Office of Mining and Energy in 3 regions and investors indicates existing serious problem due to the issuance of Law No. 4 Year 2009. The considered alternative for solution highlights is the needs for correction to the substance of the law. If the government still enforces the Law No. 4 Year 2009, three things are expected to happen:

First, Offices of Mining and Energy at provincial and district/city level will not be able to implement Law No. 4 Year 2009 as it cannot respond to the condition in the field (region). It is a critical condition as misconducts potentially happen with the absence of control by the government due to limited structure and infrastructure;

Second, if the operating mining companies are objected to the law, there will be 12 CoWs (Anonym, 2010b) and 47 CCoWs (Anonym, 2010c), as well as thousand of MA all over Indonesia that will stop operating. This obviously will endanger the national economy due to the loss of the state and district income, job opportunity, and other negative impacts. In long term, this condition can be bad precedent that creates negative image to the legal assurance in Indonesia and push away foreign investors.

Third, legal procedure that is not applicative can hinder opportunity to utilize mineral and coal resource for the maximum benefit for the people.

CONCLUSION AND SUGGESTION

Conclusions

Basically, mineral and coal resource is adequately potential to be exploited in the future. A more intensive exploration is needed to preserve the resources.

There are still many problems occur due to the implementation of Law No. 4 Year 2009 on Mineral and Coal Mining. Problems are not only faced by the Office of Mining and Energy in province and district/city, but also by the business activity. The problem faced by the Office is regionally specific, while the problem faced by the business activity is due to the regulation of Law No. 4 Year 2009 that needs further explanation from the government to avoid multi-interpretation by the operating mining companies or by potential investors.

Correction to Law No. 4 Year 2009 is still needed to create a conducive investment climate for mineral and coal mining.

Suggestions

To improve investment in the future, the government must consider several things:

a. provide clarification to the business players about the assurance for MA, CoW, and CCoW holder companies to keep operating;

b. consider inputs from business players in formulating the implementation procedure of Law No. 4 Year 2009 to maintain conducive investment climate;

c. increase accountability, transparency, and good governance in the implementation of Law No. 4 year 2009;

d. improve socialization on the existence of mining operation with its positive and negative impacts, to gain supports from the society and related stakeholders on the activity;

e. issue the Government Regulation and Ministerial Regulation of Energy and Mineral Resource to make the mining activity normally operating;

f. revise the law due to existing problems caused by the implementation of Law No. 4 Year 2009;

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