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## MINING LAW & REGULATORY: PRACTICE IN INDONESIA

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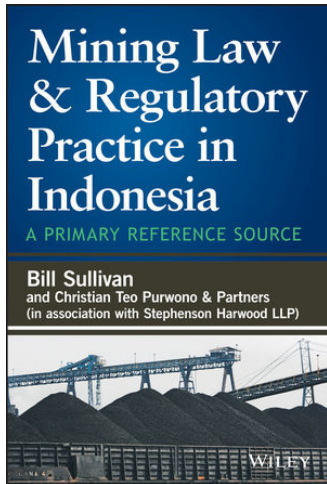
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## BOOK REVIEW

### MINING LAW & REGULATORY: PRACTICE IN INDONESIA



Mining law, since before the Indonesian independence has already been a debatable topic between the business sector, Government, and other stakeholders until now. Several issues of mining law that have been debated among others, are: the form of concession and the authority for issuing mining licenses in relations with the right of state control stipulated under Article 33 paragraph (3) of the 1945 Indonesian Constitution, issues regarding taxes and royalties, environmental issues and other obligations. Since the enactment of *Indische Mijn Wet* 1899 until the enactment of Law No. 4 of 2009, these debates have yet to be settled; more, other serious issues are rising. These issues are steeply raised since the beginning of the reformation era of Local Governance which was marked by the enactment of Law No. 22 of 1999 that gives the power for the Municipal/City level Government to regulate the mining sector.

This book discusses mining regulations after the independence, which is started from Law No. 11 of 1967 concerning Basic Mining Law. In this law regime, foreign enterprises could participate on a large scale with Concession Contract (*Kontrak Karya*, KK) and Coal Mining Concession Contract (*Perjanjian Karya Pengusahaan Pertambangan Batubara*, PKP2B) mechanisms. In addition to this, mining activities also can be carried out on a small and medium scale through mining permit (*Kuasa Pertambangan*, KP). Both foreign investment enterprises (PMA) and Indonesian companies with foreign capital investments can obtain a KP. KK/PKP2B is a contract between the Indonesian Government and mining companies that are approved by the People's Representative Council (DPR) and signed by the President. In 1990, the Indonesian Government discontinued new entries for KK and PKP2B companies, and only granted KPs. But, the Government still acknowledges and regards all the existing contracts until the terms are ceased. Also, the Indonesian Government does not allow the extension of these contracts (there are an estimated 100 KKs and 80 PKP2Bs, which consists of 7 generations of contracts).

In 1999, the Government introduced a local autonomy concept or "*otonomi daerah*" with Law No. 22 of 1999. Under the said Law, the Central Government only holds 6 sectors of governmental affairs. Other affairs would be given to the Provincial Government and Municipal/City level government, including the mining governance that is given to the Municipal/City level. The authority is divided based on certain conditions:

- a. if the mining activities are entirely located on a Municipality, KP issuance authority would be under the Municipal/City Government;
- b. if the mining activities are conducted across Municipalities, KP issuance would be under the Provincial Government authority;
- c. if the mining activities are conducted across Provinces, KP issuance would be

under the Central Government authority;

To adjust the regulation, on December 2009, the Government of Indonesia enacted Law No. 4 of 2009 concerning Mineral and Coal Mining which replaced Law No. 11 of 1967. In this new law, there are several clauses that are inconsistent and contradictory, causing uncertainty for the business activity as well as raised confusion among investors due to the law having stated the necessity to obtain approvals from various levels of government—from the Central Government, Provincial Government, to the Municipal/City level government—according to each own authority.

Facing these multi-complex regulations, the author has conducted a comprehensive analysis of these laws. The author stated that with the enactment of Law No. 4 of 2009, there are some strategic issues that should be done by the contractors, among others:

- a. evaluation of KK/PPK2B to be converted into mining permit (*izin usaha pertambangan*, IUP); submission of mining area utilization plan;
- b. not to extend the KK/PPK2B until the contract expiration date;
- c. pay the local government taxes and royalties based on existing regulations;
- d. carry out mineral refinery process in Indonesia;
- e. in the case of which the contractors' shares are owned by foreign entities/ persons, the contractor should carry out mandatory divestment up to 51% in the fifth year after the extracting has started. 20% divestment in the sixth year and 51% divestment in the tenth year;
- f. prioritize and utilize local and national mining service providers. Also not using subsidiary companies and/or its affiliates without permission from the Minister of Energy and Mineral Resources.

This book consists of 35 chapters, which can be divided into several topics: mining law (chapters 1 – 9); benchmark price (chapters 10 – 11); reclamation and post mining (chapter 12); KK and value addition (chapters 13-15); regulation amending mineral and coal mining enterprises (chapters 16-18); regulation amending mining services (chapters 19-20); draft procedures and guidelines for metal mineral and coal, non-metal mineral and rock licenses (chapters 21-23), draft for mining business, community development, value addition (chapters 24-26); and forestry regime (chapters 27-35).

However, in the discussion, there are incorrect uses of the legal basis; the author featured the Directorate General of Mineral and Coal Regulation (*Peraturan Dirjen Minerba*), which is not a part of the regulation hierarchy in Indonesia according to Law No. 10 of 2004 and Law No. 12 of 2011 concerning Drafting of Regulation. The author based his discussion to *Peraturan Dirjen Minerba* no. 367 of 2010, and *Peraturan Dirjen Minerba* No. 999 of 2011. In addition to this, the author also includes the Ministerial Decision (*Keputusan Menteri*), Presidential Decision (*Keputusan Presiden*), and Presidential Instruction (*Instruksi Presiden*), which are not categorized as regulations, but decisions (*penetapan, beschikking*).

There are also mistakes regarding the enactment date of the Law No. 4 of 2009. These mistakes can be found on pages 1, 3, and 25. On these pages, the author stated that the Law No. 4 of 2009 was enacted on 12 January 2009 while, in fact, the law was just approved by the DPR on December 2009 and effective by January 2010. This mistake caused another mistake in the discussion of transitional period under Art. 169 of Law No. 4 of 2009 for KK and PPK2Bin which the author stated on page 23 that

the transitional period expires on January 12th, 2010 (due to false calculation of the enactment date) while, in fact, Law No. 4 of 2009 was effective on January 12th, 2010.

In the discussion, from the all of the aspects of the Indonesian mining law, it seems the author had not feature their discussion from the philosophical basis which is mandated by Art. 33 paragraph (3) of the 1945 Indonesian Constitution. There are two main aspects embodied in said Article, which are the right of state control (*"hak menguasai negara"*) and the goal of "largest benefit for the people's prosperity". With the amendment of Law No. 11 of 1967 by Law No. 4 of 2009, the two most important aspects that should be analyzed are the realization of the "right of state control" concept towards natural resources and the goal for "prosperity of the people" which are considered to have yet been achieved by the previous law. This is the reason of the amendment of the Law 11 of 1967. Enactment of Law No. 4 of 2009 aimed to share the welfare and benefit for all the people. This is materialized by giving the Regent/Mayor authority to regulate the mining activities. This philosophical base is important to be featured in the discussion so that the goal of natural resource utilization can be perceived equally by the society. One of the changes of Law No. 4 of 2009 to materialize the goal is by giving the business sector obligation to conduct value addition activities, such as mineral processing and refinement before conducting overseas sales. In addition to this, the business sector is also required to utilize local and national mining service providers.

Another important issue that has not been covered further in the book is the issue related to the change of enterprising form; originally the Government adopted the contract regime before it changed to the licensing regime. This change is the main problem raised by stakeholders. The issue of renegotiation is a direct result of the change, which has not been settled by the parties until now. The author should have also featured a deeper discussion regarding the meaning of "license" and "contract". Furthermore, the discussion should have also featured the relation to Law No. 30 of 2014 concerning Government Administration. This law mandated that any governmental activities related to natural resources should be undertaken in the form of "concession". This meaning of concession needs to be discussed further, whether it is in line with the concept of the right of state control as stipulated in Art. 33 paragraph (3) of the 1945 Indonesian Constitution.

Since this book was published in 2013 and with the recent legal development, it would have been better if the book was updated with the additional discussion that refers to Law No. 23 of 2014 concerning Local Government. This Local Government Law regime, again, gives impact to Coal and Mineral Law in which the authority to issue the mining license previously incorporated in Municipal/City level Government is withdrawn to the Provincial and Central Government; hence, Law No. 4 of 2009 should be amended soon because it does not fit with the principle of regional autonomy. The amendment, again, attributed to the philosophical basis of Art. 33 paragraph (3) of the 1945 Indonesian Constitution, which is to materialize the concept of right of state control and to materialize the largest benefit for the people's welfare.

Indeed, this book has comprehensively discussed the changes of mining regulations from Law No. 11 of 1967 until the recent Law No. 4 of 2009. This book features the general description of the changes of law from the various aspects related to the mining area, KK, PKP2B, domestic interest priority, price settlement, reclamation and post-mining activities, value addition, overseas sales and its taxes, mineral processing and refinement, utilization of labor, goods, and services. Other than mining regulation,

this book also features the discussion on the forestry regulations, among others: categorization of forests in Indonesia, license for the activities utilizing forest areas, forest area functions, license moratorium, utilization of forest areas for underground mining, amendment of the regulation for rent use of forest area. Because of these reasons, this book is a good book which gives the directions and knowledge for all the stakeholders related to mining law in Indonesia. This book is also useful for the development of mining law in Indonesia to solve various issues encountered in mining activities, so that, in the end, it could give the largest benefit for all people.

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