

CHAPTER TWO

LITERATURE REVIEW

A. Illegal Mining

In the essence, there are two fundamental things related to mining business that is held by existing mining companies, namely legal mining, and illegal mining. In the case of a business is allowed to continue to run its business activities is categorized as a legal business. Meanwhile, in the mining business which is run out of the law, that is referred to as illegal mining business.

In determining whether or not a mining activity is categorized as legal mining business, it can be seen from the existing business license. Every mining company that has obtained a business license is categorized as a legal mining company and can run its business activities. If a company does not have a business license in question, it means it is an illegal mining company.

Illegal mining is a series of activities in the context of the search, excavation, processing, utilization, and sale of mining materials without licenses issued by the central or local government authorized.¹¹

The illegal mining is not only carried out by local people, but also by other people who come from any part of the country. Ironically, some of the illegal mining operations are fully supported and funded by entrepreneurs.

¹¹ Sabrina Helawati, "Kendala Penegakan Hukum Terhadap Tindak Pidana Pertambangan Batuan Tanpa Izin Oleh Penyidik Pejabat Polisi Negara Republik Indonesia", *Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya*, VI (February, 2014), p.6.

Environmental degradation takes place in the former mining activity because the illegal miners never rehabilitate the land properly. It is expected that prevention and tackling of the illegal mining could be carried out by: a). Good mining practices, b). Law in order, assurance of law and conducive investment atmosphere, and c). Reduction of negative effects of environmental impacts based on the Law Number 32 of 2009 concerning Environmental Protection and Management. In addition, to cope with the illegal mining is also expected to be beneficial for the state. For the mining industry, community empowerment through programs of corporate social responsibility is the main objective of protecting the mining operation.¹²

B. Mining Law

Mining Law is derived from the concentration of Environmental Law, which specifically regulates only on the mining issue.

The terms mining law in Dutch is called *mijnrecht*, and in Germany, it is called *bergrecht*. Then, Joan Kuyek raised the sense of the mining law:

“have been set up to protect the interests of the mining industry and to minimize the conflicts between mining companies by giving clarity to who owns what rights to mine. They were never intended to control mining or its impact on land or people. We have to look to other laws protect these interests.”¹³

Based on the Encyclopedia of Indonesia as cited by Salim HS, "mining law is a law that regulates the excavation or mining of ores and minerals in

¹² Ukar Soelistijo, “Control of Illegal Mining (PETI) in Indonesia: Policy and Program”, *Indonesian Mining Journal*, XIV (February, 2011), p.2.

¹³ Joan Kuyek, 2005, “Canadian Mining Law and the Impacts on Indigenous People Lands and Resources” (Paper for Presentation to the North American Indigenous Mining Summit, July 28th, 2005), p.1-2.

the soil¹⁴. The focal point on the definition is only in the activities of excavation or mining of ores and minerals in the soil or contained in the bowels of the earth.

In refining the definition of mining law, Salim HS said that it is “the whole legal rules governing the authority of the State in the management of minerals and regulating the legal relationship between the state and the person and/or legal entity in the management and utilization of minerals (mining).”¹⁵

Another definition related to mining law is found in Black's Law Dictionary,¹⁶ which defines that it is “the act of appropriating a mining claim (parcel of land containing precious metal in its soil or rock) according to certain established rules”

Based on the Article 1 point 1 of Law No. 4 of 2009 on Mineral and Coal Mining, mining is defined as part or all of the activities in the order of research, management and exploitation of minerals or coal including general investigation, exploration, feasibility study, construction, mining, management and purification, transportation and selling, as well as post-mining activities. In the Article 2, there are 8 (eight) principles of mining which are imposed, they are:

- 1) Principle of Benefit

¹⁴ Salim HS, *Hukum Pertambangan di Indonesia*, Jakarta, PT. Rajagrafindo Persada, 2006, p.7.

¹⁵ *Ibid.*, p.8.

¹⁶ West Group, “Mining Law”, *Black's Law Dictionary*, accessed from <https://thelawdictionary.org/location/> on December 11th, 2017 time 17.40.

The principle of benefit in mining is a principle which shows that in doing the slack one must be able to provide the maximum benefit for the improvement of people's prosperity.

2) Principle of Justice

The principle of justice means in conducting mining must be capable of providing opportunity and an equal chance for all proportionate citizens without exception.

3) Principle of Balance

The principle of balance means in conducting mining should be paying attention to other areas especially has to do directly with the impact that will occur.

4) Alignments to the State Interests

This principle says that mining activities are oriented to the interests of the State. Although in conducting mining activities using foreign capital, foreign workers, and also foreign planning, the activities and the results are only for national or state interests.

5) Participatory

Participatory principles in the rule of law mean that in conducting mining activities it is required roles and social participation in policy formulation, management, monitoring, and surveillance against its implementation.

6) Transparency

The principle of transparency in the mining business is openness in conducting mining activities and the public can obtain clear and honest information. The opposite also can provide input to the Government as the competent authority in organizing the State.

7) Accountability

Referred to as the principle of accountability is that mining activities carried out with the ways that right, so it can be accountable to the State and also to the community.

8) Sustainable and Environmentally

Whereas the principle of sustainable and environmentally means programmatically integrates basic dimensions of economic, environmental, and socio-cultural dimensions in the overall effort of mineral and coal mining to realize the welfare of the present and the future generation.

The implementation of mining business has already determined in the form of licensing from the authorities, which is specified in the Law No.4 of 2009 on Mineral and Coal Mining in that there are 3 (three) kinds of permits, namely:¹⁷

- 1) Mining Permits / *Izin Usaha Pertambangan (IUP)*
- 2) People's Mining Permits / *Izin Pertambangan Rakyat (IPR)*
- 3) Special Mining Permits / *Izin Usaha Pertambangan Khusus (IUPK)*

C. Mining Permits / *Izin Usaha Pertambangan (IUP)*

¹⁷*Ibid.*, Article 35.

Every mining business of strategic mining materials and class of minerals according to the Mineral and Coal Mining Law can only be implemented if the first has obtained a mining permit.¹⁸

Mining Permits / *Izin Usaha Pertambangan* (IUP) is a permit granted for mining activities, processing, and refining activities, as well as transporting and selling in the order of mining, as stipulated in Law No.4 of 2009. One IUP is given for one type of mineral or coal.¹⁹

A mining business can only carry out mining activities if it has been granted an IUP, this is because IUP is a legal instrument which has a strong power in the legalization of mining business activities.

In giving IUP, the government officials who are authorized in issuing the permit are:

1) Governor

The authority of the governor to give IUP is based on the law No. 23 of 2014 on Local Government, as stated that the authority of giving the Mining Permit is in the Provincial Government.²⁰

2) Minister

The Minister is authorized to grant an IUP is the Minister of Energy and Mineral Resources, who has the authority to give the IUP if the mining location, location of processing and refining, as well as ports are

¹⁸ Sri Rahayu, "Penegakan Hukum Ketentuan Pidana Pasal 158 Undang-Undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral dan Batubara Terhadap Kegiatan Pertambangan Tanpa Izin di Kabupaten Muaro Jambi", *INOVATIF / Jurnal Ilmu Hukum*, VI (April, 2013), p.6.

¹⁹ Gatot Supramono, 2012, *Hukum Pertambangan Mineral dan Batu Bara di Indonesia*, Jakarta, Rineka Cipta, p.23.

²⁰ Article 10 of Law No. 23 of 2014 on Local Government

located in the different provinces after getting the recommendation from the Governor in accordance with the provisions of its legislation.

IUP is classified into 2 (two) kinds i.e. IUP of Exploration and IUP of Production Operation. IUP of Exploration is granting permits in the first phase, and its activities include the activities of the public inquiry, exploration, and the feasibility study.²¹ IUP of Production Operation is granted after IUP of Exploration has been published and its activities include construction, mining, processing, and refining, as well as the transporting and selling.²²

Each IUP of Exploration is guaranteed by the law to obtain the IUP of Production Operation because as a continuous activity of the mining business. IUP of Production Operation may be given to companies in the form of limited liability company, cooperative, or individuals for the auction results of Area of Mining Permit / *Wilayah Izin Usaha Pertambangan (WIUP)* of metal or coal minerals that already have the data of feasibility study.

D. People's Mining Permit / *Izin Pertambangan Rakyat (IPR)*

The definition of the People's Mining Permit / *Izin Usaha Pertambangan Rakyat (IPR)* is a permit to carry out the mining business in community mining areas with limited area and investment.²³ Implicitly the people's mining is regulated in Law No. 4 of 2009 on Mineral and Coal

²¹ Article 1 point 8 of Law No. 4 of 2009 on Mineral and Coal Mining

²² Article 1 point 9 of Law No. 4 of 2009 on Mineral and Coal Mining

²³ Article 1 point 10 of Law No. 4 of 2009 on Mineral and Coal Mining

Mining, which is followed up with 4 (four) Government Regulation as a guide.²⁴

The activities of people's mining are grouped into 4 (four) types, they are:

- 1) Mineral and metal mining
- 2) Non-metallic mineral mining
- 3) Rock mining
- 4) Coal mining

Regulated in Article 67 of Law No.4 of 2009, the authorized officials who grant a permit is Governor, in that the governor can only provide IPR especially to local residents, either to individuals or community groups and/or cooperatives.²⁵

E. Special Mining Permit / *Izin Usaha Pertambangan Khusus (IUPK)*

Special Mining Permit / *Izin Usaha Pertambangan Khusus (IUPK)* is a permit to carry out mining business in a special mining permit area. The authority in providing IUPK is on the Minister of Energy and Mineral Resources. IUPK is given by the Minister by observing the local interests. The granting of IUPK is done under the principle of one permit is for one mine. The Minister provides for 1 (one) type of metallic mineral or coal in 1 (one) Special Mining Permit Area.²⁶

²⁴ Bambang Yuniarto, "Persoalan Pertambangan Rakyat Pasca Pemberlakuan Undang-Undang No. 4 Tahun 2009", *Jurnal Teknologi Mineral dan Batubara*, VII (October, 2011), p.145.

²⁵ Gatot Supramono, *Op.Cit.*, p.30.

²⁶ *Ibid.*, p.33.

In conducting the exploration activities and feasibility study activities, IUPK Exploration holders may get metal or coal minerals excavated. Towards the discovery, the holder of IUPK Exploration is obliged to report to the Minister of Energy and Mineral Resources, since the status of a mine excavated is controlled by the state.

Therefore, IUPK Exploration holder who will sell the metal or coal minerals of its findings is required to apply for a temporary permission to the Minister of Energy and Mineral Resources because for the interest of carrying out the transport and sale of the goods concerned. The goods need to be transported from the mining site to be delivered to the purchasers.

In relation to the discovery and selling of mining products that have been excavated, the holder of IUPK Exploration is charged with the fee of production, in addition to any other obligation of payment i.e. sales tax payment.

As in the Article 28 of Law No.4 of 2009 on Mineral and Coal Mining that has explained on the basis of consideration in granting of IUPK, i.e.:

- 1) The fulfillment of domestic industrial and energy raw materials
- 2) Source of foreign countries
- 3) Conditions of regions based on the limitation of the facilities and infrastructure
- 4) Potential to be developed as a center of economic growth
- 5) Environmental support, and
- 6) The use of high technology and capital investment.

In the above considerations, in giving the IUPK its nature is alternative or cumulative. This is because the Minister of Energy and Mineral Resources in providing the IUPK not all elements should be considered to be fulfilled entirely, but if it is viewed from one of these elements it has been able to be considered for the grant of permits, then the element does not need to be considered again. This means that even with only one element, the Minister has been able to make a reason for consideration to issue or grant the permit.

Similar with the IUP, the procedure of providing the IUPK is also carried out with 2 (two) phased of procedures, namely IUPK Exploration as the first and IUPK Production Operation for the second.