



Legal Aspects of the Export Prohibition of Raw Nickel Related to Increasing Hilirization in Indonesia

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Abstract. In the last few decades, the results of mining natural resources sent abroad (exports) are mostly still in the form of semi-finished or raw materials and without any processing. This export action describes the fact that mineral materials in Indonesia lack added value which has a direct multiplier effect on the people. The impact was initially related to the formation process of this mineral material which is non-renewable. In order to improve the mineral and coal mining sector and improve people's welfare, the government issued Law Number 4 of 2009 concerning Mineral and Coal Mining (UU Minerva), which was amended by Law number 3 of 2020. This new law is expected to encourage development through Increased Value Added (PTL) of minerals and coal. In addition, it is also necessary to pay attention to the importance of reviewing several relevant regulations. Of course, it cannot be separated from Gustav Radbruch's statement, based on the priority principle of the three basic values of legal goals, namely legal justice, legal benefit, and legal certainty. The research methodology used in this paper is normative juridical, through scientific studies on legal issues that are conceptualized as written in regulations or legislation (law in books). The results of the study indicate that the ban on raw nickel exports is related to increasing downstream, by examining related regulations that require business actors (entrepreneurs) to build smelters, so that they can provide added value and in turn will improve welfare for all levels of society in general.

Keywords: Raw Nickel Export Prohibition · Smelter · Downstream

1 Introduction

In the last few decades, the results of mining natural resources sent abroad (exports) are mostly still in the form of semi-finished or raw materials and without any processing. This export action describes the fact that mineral materials in Indonesia lack added value and this has a direct multiplier effect on the people. The impact was initially related to the formation process of this mineral material which is non-renewable. Non-renewable natural resources have the meaning that they will run out if they are continuously used and take thousands of years to form.

Seeing this situation, the House of Representatives of the Republic of Indonesia (DPR RI) and the Government has put a fence in their efforts to further increase vigilance

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to improve the management of non-renewable minerals in the country. This will be a benchmark for increasing the mineral resources' selling value for the Indonesian people. The concrete actions taken by the government and the DPR RI can be seen from the creation of Law Number 4 of 2009 concerning Mineral and Coal Mining (UU Minerva). In particular, the information in articles 102, 103, and 170 of the Minerva Law states that the government also provides an effective step related to processing and refining it for the benefit of the Indonesian state. So that the creation of this policy is considered rational and in accordance with the Indonesian people, most of whom still need the results of these mineral resources. The Minerva Law in its management aims to provide legal certainty for mineral and coal mining business activities [1]. This will run smoothly if it is supported by all parties and all regulations and controls go hand in hand and firmly. The definition of legislation is a form of a regulation made in writing which contains a rule or legal norm binding on an agency with the authorized official [2].

The next government effort is the issuance of Government Regulation (PP) no. 1 of 2017 concerning the 4th amendment to PP No. 23 of 2010 concerning the implementation of the coal and mineral business industry. This is then stated in the Ministerial Regulation (PERMEN) of Energy and Mineral Resources (ESDM) No. 5 of 2017, which is about increasing the management of added value and refining domestic minerals. This regulation is furthermore related to the Regulation of the Minister of Energy and Mineral Resources No. 6 of 2017 which explains how to sell, process, and purify minerals abroad. Business actors and holders of work contracts in this field have a great impact,

So that the changes to the legislation carried out by the government are various steps starting from the results of controlling government regulations and regulations from the Minister of Energy and Mineral Resources regarding openness in terms of licensing for overseas shipments of raw minerals which have recently created debate and conflict. Although when examined from a legal perspective, this change will certainly have a significant impact from a formal and practitioner point of view.

Based on the background explanation of the changes to the PP and the Regulation of the Minister of Energy and Mineral Resources, two main things are very controversial and hereinafter referred to as the formulation of the problem. The formulation of the problem is as follows:

What are the government's actions in supervising and imposing sanctions for those who violate nickel exports, including what are the steps taken by the government in realizing the downstream of nickel raw materials in Indonesia?

2 Research Method

This type of research is legal research with a normative juridical methodology. The purpose of applying the normative approach in this research is to discuss and compare regulations regarding the export of minerals and raw materials. The regulations that are used as comparisons in the study are PP No. 1 of 2017 concerning the 4th Amendment to PP No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, PERMEN ESDM No. 5 of 2017 concerning Increasing Value Added Minerals Through Domestic Processing and Refining Activities and PERMEN ESDM No. 6 of 2017 concerning Procedures and Requirements for Providing Recommendations for the Implementation of Overseas Sales of Minerals resulting from Processing and Refining.

3 Findings and Discussion

In this study, discussions are carried out on various government regulations or policies as stated above. Furthermore, it is reviewed and analyzed in a juridical manner, which consists of Formal Aspects, Material, Chronology of the Prohibition of Nickel Ore Exports which Lead to Lawsuits by European Union Countries, Indonesia as the Second Largest Nickel Producer in the World, Firm Steps by the Government in the Export Process of Nickel Ore, and Downstream.

Formal and material aspects are the basis of legal instruments that are used as a tool for law enforcement officers (judges, prosecutors, police) to commemorate, investigate and enforce the law against perpetrators who are proven to have committed unrighteous acts/violated regulations.

A. Formal Aspect

Formal aspects are the legal basis, legal basis, and legal umbrella law [3] enforcement officers to regulate the obligation to investigate, prosecute and apply regulations. The formal aspect is the basis of the binding power of the previous regulations.

Formal sources of law consist of laws made with the approval of the President and regulations or policies made based on the authority of each maker. In addition, including customs, treaties, doctrines, and decisions of judges (jurisprudence).

Can be described as follows:

1. Delegation of further arrangements to provide added value in the form of Ministerial Regulations no. 5 and 6 of 2017 to carry out domestic maintenance and purification are the Law on the Establishment of Legislation (PUU) and the Minerva Law.

ESDM Ministerial Regulation No. 5 and 6 of 2017 is a clear violation in terms of the implementation of mineral processing and refining and this Regulation also clearly violates the appropriate institutional or formal institutional principles [4].

According to the Minerva Law, Article 103 (3) stipulates that in the country, all forms of processing and finishing are based on government regulations that are patented or cannot delegate or degrade other laws or regulations, such as becoming a candy and this regulation cannot be regulated by law. The Minister of Energy and Mineral Resources also has no authority in it. As the authority conveyed by Hadjon, [5] government policies and attitudes have been based on legal authority and this privilege comes from three things, namely attribution, delegation, and mandate. The division of state power is constitutionally divided by the state based on the mission, while the power results in the delegation of a delegation. Furthermore, Asshiddiqie also added that the law regulates the actions of the executive in granting authority [6].

Permit no 5 and 6 of 2017 are also following the arguments of Akkermans stated in the writings of I Made Arya Utama [7], there is explained about the things that follow after the establishment of the Legislation (PUU) and if this is not fulfilled it will cause the PUU to be invalid. These things include the factors of authority, substantial, and procedural. The authority factor is a right granted to an institution constitutionally and the substantial factor is the result or product that is adjusted to the arrangement in the

area of ability while the definition of procedural factor is a legal procedure carried out in forming a legal product and in this phase state officials are in the same class as the Minister. ESDM is not authorized to make laws and only the president has the authority and right to make these regulations.

Furthermore, Bagir Manan explained that, [8] As far as the juridical validity of the rules is concerned, it is determined by four conditions. First, the legislature must have the authority to do so, secondly, it must be adapted to the form and nature of regulating or regulatory requirements, thirdly the obligation to follow certain procedures and fourthly the obligation to be consistent with a higher level of law.

2. the processes and stages of Ministerial Regulation No. 5 and 6 of 2017 are considered not in line with the PUU.

The process of formation and promulgation of Ministerial Regulations No. 5 and 6 of 2017 has the same time and this regulation which is a derivative product of the delegation of PP No. 1 of 2017 was also promulgated in the same way as the Ministerial Regulation and these implementing regulations in detail did not go through the process of planning, drafting, discussion, and ratification or stipulation and in accordance with article 1 of the Law on the Establishment of Legislation that the process of stages must be carried out openly, and involve the community and this has violated Law No. 5 letter G of the formation of the Act. Concerning the principle of openness, which is defined in this case, it is a stage where the formation of regulations should start from planning, drafting, discussing, and ratifying, they must be transparent and open to the whole community.

B. Material Aspect

The material aspect is a regulation that stipulates and formulates related actions that can be subject to criminal acts. Including setting the conditions for the imposition of a criminal and the basic provisions.

The material aspect can also be referred to as the basis and view of state life, which makes political power and gives influence when it is formulated in the rules of constitutional law [9].

1. Granting Export Permits for raw minerals.

The raw mineral sales permit is stated in Article 10 of the Minister of Energy and Mineral Resources No. 5 of 2017 in conjunction with Article 2 of the Minister of Energy and Mineral Resources No. 6 of 2017 in outline as follows:

- a. Article 10 paragraph 2 of Ministerial Regulation No. 5 of 2017 in conjunction with Article 2 paragraph 3 of Ministerial Regulation 6 of 2017 which both of these articles regulate nickel content and nickel utilization.
- b. Article 10 paragraph 3, Ministerial Regulation 5 of 2017 in conjunction with Article 2 paragraph 4 of Ministerial Regulation 6 of 2017 explains that in producing bauxite the sales are abroad at a level of 42%.

- c. The export regulations are required to have or are currently building refining facilities and pay additional export costs.

From the two regulations listed above, it is clear that in conducting sales abroad, there is a certain level of measurement and if this has met the requirements, a sales permit will be obtained. The message contained in the above regulations violates the rules written in article 103, article 107 of the Minerva Law, in these two articles in selling mining goods to foreign parties an exporter is required to contain all obligations that have been registered in existing laws and matters This is not multiple interpretations but has been clearly explained and understood [10].

A person who had IUP and IUPK permits are required to purify and process the mining products domestically. This is intended to increase its selling power and added value. So that it will have an impact on the country and society as seen from the foreign exchange earnings that will later be generated. Furthermore, products that cannot be processed domestically are not allowed to be sold abroad. Holders of permits or work contracts are implied in article 170, 103 paragraph 1 which states that permits and work contracts in processing and refining must be carried out domestically and have passed the constitutional test in the Constitutional Court. In the regulation of Article 10 of the Minister of Energy and Mineral Resources No. 5 yrs. 2017 in conjunction with Article 2 of the Minister of Energy and Mineral Resources No. 6 of 2017 concerning Limitations in Minerva exports which is strengthened by articles 102 and 103 of the Minerva Law.

The meaning of the word “mandatory” in terms of processing and refining by the Minerva Law is not appropriate and becomes blurred or even lost. This disappearance is due to the lack of socialization of the regulatory review and the absence of a review from the civilian side. In the Ministerial Regulations No. 5 and No. 6 of 2017, the underlying meaning is obscured or omitted from the meaning that already exists in the Minerva Law, and even the two Permits has acquired the meaning contained in the Minerva Law clearly and clearly. Processing and refining of mining minerals should be carried out in Indonesia, this is intended to increase domestic income before the goods are sent and will become foreign exchange from shipping costs.

2. Change from the original Work Contract (KK) to a Special Mining Business Permit (IUPK).

This change is contained in Article 17 point 2 of the Ministerial Regulation 5 of 2017 and this is contrary to the Minerva Law. The regulation that underlies this change is contained in Article 17 of Ministerial Regulation No. 5 of 2017. Furthermore, the change of Kfromto IUPK is an assumption that seems important to do. This change was made at least five years since the Minerva Law was created and this is enshrined in Article 170A of the Minerva Law no. 3 of 2020, KK holders are encouraged to make changes. In the article above, logically since 2014.

The change from KK to IUPK in detail is not in line with Article 1 of the Minerva Law and articles 27 to 32 which explain the State Reserve Area or WPN. IUPK, commonly known as Special Mining Business Permit, is a license to conduct mining business in a special area [11]. The definition of WUPK according to the latest amendments to the

Law [12] is part of the State Reserved Area (WPN) which in this case the WPN must have a determination for commodities and obtain permission from the DPR.

According to the Minerva Law, the definition of IUPK is a special mining area that in its implementation must be approved by the DPR and can generate foreign exchange and has broad industrial power, and has the potential as a center for high economic development which involves large investment capital [13]. This Ministerial Regulation No. 5 of 2017 is contextually implied and explicitly contradicts the MINERVA Law where the change from KK to IUPK is a new thing that is not based on the lives of many people.

C. Chronology of the Prohibition of Nickel Ore Exports Which Leads to Lawsuits by European Union Countries

In 2020 as of January 1, some of the member countries of the European Union opposed the ban on exports of raw nickel ore, Indonesia responded by relaxing. This prohibition by some member states of the European Union is considered an injustice which results in limited access to nickel ore and other mineral ores such as chromium. This has been intervened by the WTO (World Trade Organization).

The WTO then plans to set up a discussion panel between Indonesia and the disputed European Union countries. Indonesia through its representative, namely the Minister of Trade, Muhammad Lutfi, stated that he would be ready to face the demands of the European Union and would be ready to be summoned by the WTO regarding this matter. [14].

D. Indonesia is the second largest nickel producer in the world.

Countries in the European Union view Indonesia as the second largest nickel exporter, especially in their steel industry and some of these countries depend on Indonesia for raw materials. Cecilia Malstrom, EU Trade Commissioner at the end of 2020 made a surprising statement. He stated that cessation of nickel exports to the EU would make their steel industry a very high negative impact. Indonesia is noted to have become a nickel exporter country by controlling the market share in Europe and 27 percent of nickel in the world, although crude exports of nickel have only been carried out for a few decades.

Besides Indonesia, other nickel-producing countries in the world are America, Australia, Bolivia, Brazil, China, and several countries from Africa.

Enrico Tanuwidjaya, an expert in banking economics, argues that in the future nickel minerals will become an asset where the development of electric vehicles in the world is rapidly developing. The statement was quoted from Kompas published on November 18, 2019. [15] Nickel in the manufacture of the electric car industry has an important role, especially in the manufacture of batteries used in electric cars. Electric cars use Lithium-ion batteries which contain anode, cathode, and electrolyte and nickel is the main metal material in these batteries, especially in the cathode of Lithium-ion batteries. Furthermore, Enrico believes that the low nickel price will automatically encourage entrepreneurs to increase the nickel content of the main material for electric vehicle batteries.

With the development of power sources, lithium-ion batteries in electric vehicles are expected to have more nickel content than before. The higher the nickel content in the lithium-ion battery, it will store more energy than before and can increase mileage and efficiency for car users. Processing and refining raw nickel ore will bring in a lot of foreign exchange profits, for example processing nickel ore into ferronickel will increase the price from the original \$55 per ton to \$232 and an increase of four hundred percent will increase foreign exchange for Indonesia.

In the second quarter of 2019, the increase in nickel exports to the European Union increased by 18% compared to 2017 and this is a good sign for the country's income in terms of minerals. China has been importing more nickel from Indonesia for decades and about 50% of the nickel has been absorbed by this country within decades. Quoting from Kompas, January 1, 2021, those other facts have also been created from this country of China, a country that has a high need for nickel supports Indonesia in the export ban, and opposes the member countries of the European Union. Countries that have long secured ferronickel supplies, and processed nickel ore products by investing a large amount of capital in the construction of smelters in Indonesia and in recent years have also been actively building an environmentally friendly electric vehicle industry. A smelter can be defined as a mining product processing facility that aims to increase the content of metals such as tin, nickel, copper, gold, and silver to a certain level by the standards that have been set as raw materials for the final product. Cleaning metal minerals from impurities and refining is a process that must be passed. And silver to a certain level by the standards that have been set as raw materials for the final product. Cleaning metal minerals from impurities and refining is a process that must be passed. And silver to a certain level by the standards that have been set as raw materials for the final product. Cleaning metal minerals from impurities and refining is a process that must be passed. [16].

E. Government's Strict Steps in the Export Process of Nickel Ore

Quoted on the official website of the Ministry of Industry, the opinion of the Minister of Trade Agus Suparmanto stated: [17] that nickel ore will continue to be exported if the process is by the established rules and the permit will also be revoked if a license violation is found in exporting the nickel. According to Agus Suparmanto, nickel export regulations will not be changed as long as exporters invest.

The Minister of Maritime Affairs, Luhut Panjaitan, also stated that the nickel export ban would temporarily lift the ban on nickel exports to companies that document regulatory violations of regulations and whose export quota exceeds the stipulated regulations. This statement was made because many companies have violated nickel export regulations. Furthermore, Luhut also added that the issue of nickel ore export violations is expected to further encourage the integrated industry and add more value to the country, "for example in the case of freeport the derivative can be 10–15 times its value.

On another occasion, High-Pressure Acid Leaching (HPAL) and pyrometallurgy in the nickel ore refining process. In a simple picture, HPAL is a kind of nickel refining process in this process applies low levels of nickel using certain chemicals while in

pyrometallurgy it will be more traditional, namely by using metallization which is converted into energy. The HPAL process in nickel processing and refining is considered more suitable and effective.

F. Downstream

Downstream is commonly referred to as a process, method, or deed to process raw materials into ready-to-use goods. Similar to reforestation, downstreaming or downstream is a verb. To be precise, downstreaming or downstream has already occurred in the field. It's gone, even beyond words. Walk the talk is a term that is often used in the field [18].

Downstream is a key strategy to increase the added value of commodities. Indonesia, which has long been known for decades to export raw materials, downstream is very necessary so that raw materials are processed domestically first. Downstream, in the future, the exported commodities will no longer be in the form of raw materials, but the form of semi-finished goods or finished goods.

Existing natural resources are non-renewable natural resources and their management must be controlled by the state, which is useful for providing real added value to the national economy. Legally, the downstream application of the mineral mining material industry has been regulated in the Minister of Energy and Mineral Resources Regulation (Permen) Number 25 of 2018, Law number 4, 2009 concerning Mineral and Coal Mining, and Law number 5, 1984 concerning Industry.

In line with the opinion of Gustav Radbruch which states that the purpose of the law is: justice, legal certainty, and benefit. Downstream with all its supporting regulations in Indonesia is the government's effort to prosper citizens by the constitution. Sonny Keraf in a public discussion at the Center for Energy and Mining Law on April 27, 2021, stated that realizing the downstream Minerva constitutional and ideological spirit needs to be applied and practiced. Sembiring added that Keraf's opinion was aimed at stopping the circulation of money in the form of export concentrates and this was contextually and ideationally unknown to Keraf.

A very real goal downstream is to realize the precepts in Pancasila and increase added value in the Minerva industry for the public interest and indirectly this aims to create a working environment for the Indonesian people. Minerals that a synergistic effect on work and the welfare of the community. Another objective is to strengthen Indonesia's negotiating position in the world economy, bearing in mind that Indonesia has minerals and all its by-products as a strategic industrial center.

The former drafter of Law No. 4 of 2009, Keraf explained that IUP holder exporters are proud of the development of low-grade nickel refining and this has clear a legacy in this country. In our country in particular, the management of nickel which is the basic material in the electric vehicle industry will have a calculated value in the industry. In addition, Keraf said he was very happy to be able to participate in the coercion in improving the nickel industry in tortoise the interests of Indonesia and for the advancement of economic sovereignty in Indonesia.

Furthermore, Keraf also felt deeply disappointed. This disappointment is shown by the creation of articles 102, 103, 170, and Law No. 4 of 2009 on mineral and coal mining industry regulations that have not been strictly enforced by law. Keraf explained

that there are still few mineral IUP holders. CoW and PKP2B owners are often negotiated and negotiated to prevent downstream and many are allowed to export raw materials that have not been processed or refined.

The many technical reasons underlying the delay downstream are believed to be just a trick for some companies because the construction of smelters can still be carried out for some IUP holders. This fact becomes an injustice because there is no equal distribution of permits for the export of concentrates, refining, and processing of nickel. Based on Article 170 of the Minerva Law, provides a five-year transition period that applies to KK holders rather than new IUD applicants and in its clause, Keraf states that the permit application must include a downstream plan.

Keraf considers that the changes that have been outlined previously have been violated by the government or the legislators themselves, namely by issuing PP or derivative regulations from these regulations and this has resulted in conflicts on the ideological side and the spirit of the constitution and this can be seen in the example of Article 170 A Law 3 of 2020 concerning KK and IUP holders as well as processing and refining Nickel and also how to market it. In this regulation, it is clear that there are violations, especially in the granting of permits to export raw or concentrated goods, because according to the regulation, the goods to be exported must first go through the processing industry or purification in Indonesia. This violation is tantamount to “straddling” or “deviating” on intellectual grounds,

Mohamad S. Hidayat stated that [19] the downstream process will continue to be a priority and be carried out and this is useful for increasing added value, which in turn will continue to be carried out optimally so that the nickel that will be shipped is not a nickel in a raw state but material that has been processed in Indonesia first. It was further explained that this downstream program will continue to be developed in all sectors currently there are approximately 153 investors interested in this field and most investors are from abroad, such as China, Hong Kong, Singapore, and South Korea. Regulations for the downstream of mining materials have been regulated in Law 4 of 2009 on mining, Land w No. 5 of 1984 on the industry. The Minister of Industry said that the effect of Law No. 4 of 2009 is that many mines have been exported abroad and this has also implemented 65 types of minerals that can be exported. The concentration of mineral-based industries will be focused on steel, aluminum, nickel, and copper. These types of metals have a very wide scope as industrial raw materials in the world and examples are docks, ships, airport runways, inter-island bridges, toll roads, electricity networks, and telecommunications facilities.

The Indonesian government’s plan is not to export mineral concentrates abroad by 2022. The purpose of this prohibition is to increase revenue from the state treasury in mineral and coal mining. This business has been running for about 10 years and at least about 2–3 billion USD has been spent on this business. It is recorded that 31 smelters have been built and the details of the 31 smelters are 4 iron ore smelters, 21 nickel smelters, 2 bauxite smelters, 2 manganese smelters, and 2 copper processing smelters.

Before the establishment of a smelter, is recorded in Law No. 4 of 2009 which contains mining in Indonesia which obliges to building smelter as a means of increasing added value in obtaining profits. This regulation was strengthened by the issuance of PP 23 of 2010 concerning the implementation of business activities, PP N0 1 of 2014,

regarding the second amendment above, and PP No. 1 of 2017 Amendment to PP No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities.

These regulations were created as an effort by the government to limit and fence off exporters from exporting raw or concentrated goods and to provide incentives for industry players to build smelters and the government's efforts to provide incentives in the form of fiscal. The obstacles faced in its implementation are:

1. There is still confusion and ambiguity in granting permits
2. The high cost of energy and equipment in the manufacture of smelters
3. There is still a lack of smelter products for the absorption of all products

In line with the problems, in this case, it triggers the problem of processing concentrate to be not optimal, so that it has an impact on efforts to increase added value and if the processing can be optimized, the benefits obtained are certainly much greater.

Various kinds of regulations have been created by the government to encourage the creation of this program and regulations other than for minerals that are created to advance this program are Government Regulation Number 9 of 2016, which was amended to Government Regulation Number 18 of 2015 concerning Reduction of Income Tax on Investment in the Region. Certain Businesses and/or Certain Regions, Government Regulation Number 24 of 2018 concerning Electronically Integrated Business Licensing Services [20].

This is reinforced by the opinion of the Minister of Investment / Head of the Investment Coordinating Board (BKPM) Bahlil Lahadalia who stated that in the future only nickel which has a nickel metal content of 70% can be exported abroad and nickel with a grade of 30–40% is already available not allowed [21].

4 Conclusion

From the presentation of the problem, two conclusions can be drawn and the conclusions are:

The Indonesian government will strictly supervise nickel export activities and revoke the licenses of companies found to be fraudulent.

In the end, the Government of Indonesia is still working hard to encourage the implementation of nickel downstream, where it is hoped that in the future only nickel with nickel metal content above 70% will be allowed to be exported. And of course, there will be an increase in usability.

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