

Overlapping Synchronization of Mining Business Arrangements in Forest Areas in Indonesia

1st Indri Fogar Susilowati

*Law Department, Faculty of Social
Sciences and Law
Universitas Negeri Surabaya
Surabaya, Indonesia
indrifogar@unesa.ac.id*

2nd Tamsil

*Law Department, Faculty of Social
Sciences and Law
Universitas Negeri Surabaya
Surabaya, Indonesia
tamsil@unesa.ac.id*

3rd Mahendra Wardhana

*Law Department, Faculty of Social
Sciences and Law
Universitas Negeri Surabaya
Surabaya, Indonesia
mahendwardhana@unesa.ac.id*

Abstract— The provisions of the Forestry Law (Law No. 19 of 2004) which prohibits mining business activities in forest areas (both production forests and protected forests) create complicated problems, because the mining depositors already have permits and / or government approval as a remote mining authority before the Forestry Law was enacted. Meanwhile, there is a criminal threat for mining business actors who do not hold forest utilization permits. Overlap between these two sectors has the potential to cause conflicts of interest. On the one hand, the mining sector is a strategic business sector that is the mainstay of the country's revenue; on the other hand, the forestry sector also plays an important role in the national economy and environmental preservation. On that basis, efforts should be made to synchronize land use arrangements so that existing businesses in the mining sector can continue; and optimization of forest area functions and management is still achieved. Some efforts can be considered, including: Clarifying procedures that must be fulfilled by mining business actors to obtain a Forest Utilization Loan Permit (IPPKH); reviewing the allocation of forest areas to non-forest; and or using a zoning approach by utilizing remote sensing technology in the preparation of Spatial and Regional Plans (RTRW) as an effort to avoid overlapping land use.

Keywords - *Synchronization, mining business settings, forest areas*

I. INTRODUCTION

Indonesia is a country that has a high diversity of natural resources, this is influenced by the second highest biodiversity after Brazil. Abundant natural resources will support economic growth in Indonesia. Indonesia's high diversity of natural resources is influenced by several factors, the location of the Indonesian State in tectonic plates is one of the factors. This condition makes Indonesia has many mountains which factually contribute to the high natural wealth in this country. In addition, the sea area is wider than the land area, making it home to thousands of species of fish, animals, marine plants and other marine wealth. Indonesia's tropical climate and very high levels of rainfall make many plants thrive and breed well. This condition has an effect on the best soil fertility in Indonesia in the world, so various types of plants can grow and develop which play a major role in Indonesia's natural wealth. Sources of natural wealth in Indonesia are divided into biological and non-biological

natural resources, biological natural resources are the source of living things. Because it comes from living things, the living natural resources can be continuously renewed or renewable resources. Non-living natural resources are natural resources derived from inanimate matter, one example is mining material.

The mining sector in Indonesia is one of the wheels of the economy, which is a contributor to 40.6 trillion non-tax state revenue (PNBP) in 2017, according to the Ministry of Energy and Mineral Resources. . The great role of the state in the management of mining in Indonesia is based on the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) Article 33, where the state controls the earth's water and natural wealth in it and uses it as much as possible for the benefit of the people. This means that mining is one of the country's natural assets that regulates its management so that its benefits can be optimal, efficient, transparent, sustainable and environmentally sound. In an effort to carry out the mandate of the 1945 Constitution of the Republic of Indonesia, a legal basis was established in the management of mining, namely the enactment of Law Number 4 of 2009 concerning Mineral and Coal Mining (Minerba Law) in the Republic of Indonesia 2009 Number 4. This Act is an Act Law Number 11 of 1967 concerning Basic Mining Conditions which are no longer in line with the development of the mining industry. Important issues of the Minerba Law, namely increasing the added value of metal minerals through the processing and refining of metal minerals; provide optimal benefits for the country and provide legal certainty and business certainty for holders of Production Operation IUP, Production Operation IUPK, Work Contracts, Work Agreements. Coal Mining Business. This means that the Minerba Law seeks to regulate mining management which can provide better benefits compared to previous arrangements.

II. RESEARCH METHODS

In achieving the desired goal, it was discussed about overlapping synchronization of the regulation of mining businesses in forest areas in Indonesia using prescriptive methods. This method provides an argument from the results of research conducted. The argumentation was

prepared by the researcher to assess a problem related to mining business in Indonesia's forest area with the regulations in the legislation governing mining and forestry. The method of assessing the problems of mining business in this forest area can be divided into four stages, namely:

- Case studies relating to mining operations in forest areas, to understand the problems faced by mining businesses in forest areas in Indonesia. Conflict of interests between mining businesses in an effort to increase state revenue oriented towards achieving people's welfare, on the other hand mining operations in forest areas are needed efforts to conserve forests using environmental balance.
- Policy and regulatory studies, to inventory policies and regulations related to mining and forestry businesses in Indonesia to identify legal aspects of the two sectors. Identification of policies and regulations that conflict with mining interests and interests related to forest.
- Review of literature, to internalize scientific references and newspaper articles / writings related to the discussion of the problem of overlapping the regulation of mining businesses in forest areas as input in the formulation of alternative solutions to problems.
- Formulation of alternative solutions to problems, to resolve overlapping problems in regulating mining businesses in forest areas based on technical / case studies, policies and related literature.

III. RESULTS AND DISCUSSION

A. Indonesian mining policy

Mining has great potential to be developed, because Indonesian mining makes business activities and export of mining materials as one of the biggest contributions to Indonesia's income and also supports the Indonesian economy. [1]. The State of the Republic of Indonesia through the 1945 Constitution of the Republic of Indonesia described in Article 4 of Act Number 4 of 2009 concerning Mineral and Coal (hereinafter abbreviated as Minerba Act) has the right to control the state. The right to control this country gives the state the authority to coordinate, regulate and supervise the use and use of mining materials.

The use of mining products for the benefit of the people can in fact not be carried out by the government alone. This can be seen in the policy of attracting mining investors to come to Indonesia and work together with the community to seek mining to have maximum results. Some things that are of our note about mining investors, there is a transfer of knowledge from foreigners to Indonesians, then the capital of mining exploitation in the forest area requires very large capital, so not everyone has the ability to invest in mining. Investment in the resource industry has three important characteristics. First, mining investment is partially or completely irreversible and the initial cost of investment is at least partially sunk. Second, investment in mining projects involves uncertainty over future rewards. Third, mining project investment has some leeway with regard to timing with the mining investor able to delay investment to obtain more information about future investment conditions[1].

Problems that then arise with the entry of mining investors not only think about the benefits they earn, but also must be able to preserve the environment. A sustainable mining venture takes cognisance of its impacts on the environment and adopts appropriate measures to address such impacts.[2] The environmental impacts that occur in mining operations are regulated in the Minerba Act Article 36 to Article 49 wherein these articles regulate mining business permits which require an environmental impact analysis (AMDAL). Between mining operations and environmental sustainability must be a priority for mining business license holders. Mining activities generate benefits but can also negatively impact human societies and the environment.[3]

The Minerba Law is a legal basis for efforts to renew and restructure mineral and coal mining management and exploitation activities previously regulated by Law Number 11 of 1967 concerning Basic Mining Conditions. Important issues regulated in the Minerba Act are as follows:

- Giving authority to the government and regional government to grant mining business licenses. With this pattern, the position of the state is above mining companies, so that the state has the authority to push for change of agreement if it is detrimental to the Indonesian nation. This authority is not found in the pattern of contract work agreements. In this pattern, mining companies are in the same position as the state. [5] Article 169 of the Minerba Law regulates the adjustment of the Contract of Work (KK) and the Coal Mining Exploitation Work Agreement (PKP2B) must be made no later than 1 year;
- Mining areas are the basis for determining mining businesses that are part of the national spatial plan. Determination of the mining area by the government after coordinating with the regional government and consulting with the people's representative council (article 9). This means that the regional government is involved in the determination of mining areas, thereby increasing the capacity of the government in the mining business in the region. In determining mining areas must be transparent, participatory, and responsible; in an integrated manner by paying attention to the opinions of relevant government agencies, the community, and by considering ecological, economic and socio-cultural aspects, as well as environmentally sound; and by paying attention to regional aspirations. (Article 10). The obligations of the government and regional governments in preparing the decree carry out mining investigations and research (article 11).
- recognizing people's mining activities in a mining area. This recognition is important considering that so far the people's mining activities have been categorized as illegal and illegal, so that they are prohibited by the threat of severe punishment. In fact, this activity has been going on for a long time and is carried out from generation to generation around the mining sites that have been cultivated, both by state-owned enterprises and private companies. Based on this fact, people's mining does not have to be prohibited and cannot be categorized as illegal activities, because the people also

have the right to use the mineral wealth for their prosperity.[4]

- require mining companies to build mineral processing and refining plants in the country. The presence of factories in an effort to increase the added value of minerba mining materials, and open up new jobs for the people of Indonesia. Builders of mineral processing and refining plants will cause trickle down effects for communities around the plant site and can increase economic activity and people's welfare around the factory location.
- Alignment of the Minerba Law to Regional Development (articles 106, 107, 108 and 124). Its form of involving local entrepreneurs, local labor, developing community empowerment programs is an effort to synergize the benefits of mining business with development in the regions.
- Sustainability of post-mining area development and environmental recovery (Article 95 to Article 100). As for what must be done is to apply the mining principles that are good and right, guarantee environmental quality standards according to regional characteristics, preserve the function and carrying capacity of water resources, surrender reclamation plans and post-mining plans and must submit reclamation and post-mining guarantee funds.

The presentation of issues in the Minerba Law has not yet been stipulated to discuss mining exploitation in the forest area. Although there are provisions that mining must pay attention to the local environment where mining permits are granted. What if the mining product is located in a forest area, what kind of arrangement has not been accommodated in the Minerba Law.

B. Forestry policy in Indonesia

Forest resource is an integral part of the national natural resources and the important material basis of human survival and development. It plays an irreplaceable role of supporting the sustainable development of economic and social well-being. Because the forest resource is renewable, it is always in a dynamic change for a long time.[5]

Forests are a renewable resource, but this does not mean that they do not require careful treatment. Sustainable forest management implies not only quantitative but also qualitative reproduction of forests, which should contribute to the conservation of biodiversity.[6] he state according to the mandate of the constitution as the party given the authority to manage our forests in order to have benefits for many people. State intervention is needed in forest management more to provide legal certainty, so that it does not cause confusion, doubt not only in the corridor of forest management but also in solving problems that arise in the management. In order to grasp the present situation and changes of forest resources and predict trends well and provide a scientific basis for the development of forestry policy, management policies, production and operation plans, long-term planning and testing the operating results, we need to survey and monitor regularly the continuous change of forest resource.[7]

The legal basis for regulating forestry in Indonesia, namely Law Number 41 of 1999 concerning Forestry (hereinafter abbreviated as Forestry Law) which is then amended by Government Regulation in Lieu of Law Number 1 of 1994 stipulated in Law Number 19 of 2004 and Law related to Law Number 5 Year 1990 concerning Conservation of Natural Resources and Ecosystems. Based on the mandate of Law Number 41 of 1999 that one dimension of the four main pillars of organizing forest resource management is implemented through forestry planning, which is carried out in a transparent, accountable, participatory, integrated, and paying attention to regional peculiarities and aspirations, so as to provide guidance and direction in achieving the objectives of forestry implementation for the greatest prosperity of the people that is just and sustainable. Implementation of forest planning is carried out with four main activities, namely: 1) forest inventory; 2) Inauguration and stewardship of forest areas; 3) Establishment of forest management areas; and 4) Formulation of forestry plans, as well as controlling the use of forest areas.[8]

Article 4 paragraph (1) of the Forestry Law is the elaboration of article 33 of the 1945 Constitution of the Republic of Indonesia, wherein this article regulates all forests and assets contained within the territory of the Republic of Indonesia controlled by the State for the greatest prosperity of the people. The state has the right to control what is meant:

- regulate and manage everything related to forests, forest areas, and forest products;
- determine the status of certain areas as forest areas or forest areas as non-forest areas; and
- regulate and establish legal relations between people and forests, and regulate legal actions concerning forestry (Article 4 paragraph (2))

The meaning of mastering what is meant is not as a forest owner in Indonesia but has the meaning of the state in the concept of a welfare state (welfare state), state interference in this concept is needed to achieve people's welfare.

The Forestry Law is formulated to provide legal certainty in forest management related to the existence of forests with sufficient area and proportionate distribution, optimization of various functions of forests as our natural wealth which includes conservation functions, protection functions and production functions (article 6 of the Forestry Law) to achieve balanced, sustainable environmental, social, cultural and economic benefits. [9] The sustainable development of forest is becoming the critical issue of global ecological conservation, while the growing public interest in and global consciousness of environmental and social issues.[10]

The conservation function is a forest area with certain characteristics, which has the main function of preserving the diversity of plants and animals and their ecosystems, and in accordance with Law Number 5 of 1990 concerning Conservation of Biological Natural Resources and their Ecosystems, the conservation of living natural resources and their ecosystems aims to achieve the preservation of living natural resources and the balance of the ecosystem so that it

can better support efforts to improve the welfare of the community and the quality of human life.[11]

In an effort to realize conservation forest objectives, in this forest area production forests cannot be used. The protection function is a forest area which has the main function as protection of life support systems to regulate water management, prevent flooding, control erosion, prevent sea water intrusion, and maintain soil fertility. Protected forest areas should not be used, but if there is wealth which is used in private. The production function is a forest area that has the main function of producing forest products. The production forests of Permanent Production Forests (HP), Limited Production Forests (HPT), and Convertible Production Forests (HPK) are used and utilized by economic activities.

In its implementation, the utilization of production forest must have a forest area utilization permit and business license to utilize environmental services as regulated in article 28 of the Forestry Law. Determination of Indonesia's forest area is determined by the Minister of Environment and Forestry with a Decree of the Minister of Environment and Forestry concerning the Appointment of Provincial Forests and Waters. The extent of forest area in Indonesia in 2016 according to statistical data of the Ministry of Environment and Forestry is the conservation forest area of 22% of forest area, the protected forest area is 24% of the forest area, and the production forest area is 55% of the forest area.[8]

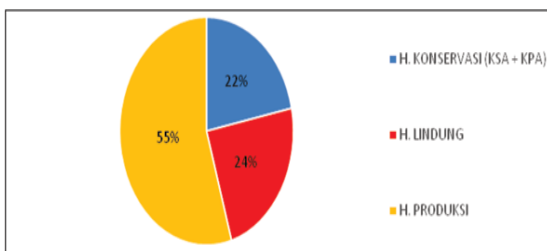


Fig. 1 Area of Indonesian Forest Area and Marine Conservation Area at 2016

The area of production forest is broader compared to conservation forests and protected forests, it aims to obtain optimal benefits for the welfare of all communities in a just manner while maintaining its sustainability (Article 23 of the Forestry Law).

The fact that there is the use of forest areas as stipulated in the Forestry Law, the use of forest areas cannot be avoided for interests outside the forestry sector, namely the use of forest areas outside their functions and allotments, including mining. Mining located in the forest area requires strict regulation so as not to reduce the forest area and the conversion of forest functions does not occur. According to data from the Ministry of Environment and Forestry's Ministry of Forestry's Planology and Environment Directorate (KLHK) in 2017 of 93.6 million hectares, the deforestation rate in the forest area for that year was 64.3% lower than in 2014, meaning that there are efforts to reduce the deforestation. Deforestation in Indonesia is caused by illegal logging, forest fires, mining. Mining business in the forest area has a big potential issue, on the one hand working

on mining in the forest area to increase state revenues with forests needs to be maintained for environmental balance. Large-scale mining projects inevitably have widespread impacts on local societies and ecologies.[12]

Article 38 of the Forestry Law regulates the use of forest areas, namely (1) The use of forest areas for development purposes outside forestry activities can only be carried out in production forest areas and protected forest areas; (2) The use of forest area as referred to in paragraph (1) can be done without changing the main function of the forest area; (3) The use of forest areas for mining purposes is carried out through the granting of borrowed use permits by the Minister by considering certain area and time limits and environmental sustainability; (4) In protected forest areas, mining is prohibited with open mining patterns; (5) The granting of a loan use permit as referred to in paragraph (3) which has an important impact and a broad scope and strategic value is carried out by the Minister with the approval of the House of Representatives.

In Article 38 this has explicitly regulated the prohibition on mining in protected forest areas with open mining patterns, this article which is deemed not to provide legal certainty in the use of forest areas for mining. The uncertainty is not regulated about the use of protected forest areas for mining that have been carried out before the Forestry Law was passed, this explains that mining carried out in the forest area is no longer valid. This condition will complicate the government's position in attracting investors into Indonesia, and will result in a reduction in the opinion of the mining sector.

C. Synchronization of Mining and Forestry Business Settings

Overlapping use of forest areas for mining provides legal uncertainty for right-holders. In addition, it triggers conflicts of interest and impacts the uncertainty of resource use in forest areas, which impacts national interests. The problem of using protected forest areas for mining activities arises when Law Number 41 of 1999 concerning Forestry in Article 38 paragraph (4) prohibits protected forests from using mining with an open pattern. The purpose of article 38 paragraph (4) is intended to stop and prevent mining activities in protected areas, including by permit holders and / or who will apply for permits. Considering the emergency conditions, the government issued a Regulation in Lieu of Law Number 1 of 2004 concerning Amendments to Law Number 41 of 1999 concerning Forestry, which later became Law No.19 of 2004. Law Number 19 of 2009 in Article I adds new provisions in the closing which is made into Article 83A and Article 83B which reads: "All permits or agreements in the mining sector in forest areas that have existed before the enactment of Law Number 41 of 1999 concerning Forestry are declared to remain valid until the end of the license or agreement." as a savior for investors who use it protected forest for open mining. Article 38 paragraph (4) can be interpreted as an effort not to provide opportunities for anyone who uses the protected forest for mining and is a problem to obtain a dispensation permit for investors, of course, contrary to government programs to attract as many investors as possible to increase foreign exchange.

In the era of regional autonomy, regions are granted the authority to grant mining permits and forest management permits. This means that the ministry must share authority with the region in terms of providing licenses. The problem that then arises is the synergy of each government agency is needed to give permission for investors is not an easy thing. The Minerba Law and the Forestry Law should be prepared by considering the linkages between the two agencies, so as not to form regulations that are only sectoral. Synchronization of arrangements between mining and forestry businesses is needed to provide legal certainty for all. This is aimed at the use of forest areas and mining exploitation can be realized well. The synchronization that must be done is:

- The establishment of interrelated laws and regulations such as mining and forestry is carried out by coordinating with each agency so that the arrangements are not sectoral. In the formation of a regulation that begins with the preparation of the academic text must contain the background and urgency of the need for this regulation to be formed, so that there is synergy of content and agencies involved and not suspected of having sectoral interests. The proposal to revise and synchronize the contents of the Forestry Law and the Minerba Law is absolutely necessary. At the moment the Minerba Law is currently being revised, this opportunity is used by the government to immediately adjust to the forestry law so as not to overlap.
- Government policies to improve the investment climate, especially in the mining sector in the forest area, must pay attention to the interests of forest conservation. One of the problems in investment policy is the government's view that is still aimed at macroeconomic factors with various fiscal, monetary instruments and administrative policy instruments to overcome the crisis of investment in the use of natural resources. National and regional economic policies that generally agree to drain natural resources, but must be supported by efforts to protect natural resources and impose sanctions for those who violate.
- Licensing for mining operations in forest areas to be the entry point for the utilization of our natural resources. Therefore, licensing is the controlling of the utilization and is given to agencies that are indeed given the authority to issue permits. The key authority for granting permits is coordination between agencies in realizing good services for mining investors in forest areas. The ease of obtaining licensing is not interpreted as providing ease of licensing without regard to the interests of forest sustainability and national interests.
- Synchronization is carried out not only for the sake of the contents of each law and regulation, but must pay attention to the environmental aspects of mining operations in forest areas. The environmental aspects are as follows:
 - a) The use of forest areas does not cause disruption to the sustainability of forest functions and does not change the main function of forest areas.
 - b) Changes in landscape and environmental conditions do not result in erosion, landslides,

- flood hazards, and other conditions of environmental damage that cannot be recovered.
- c) Changes in biophysical conditions do not result in extreme changes in climatic conditions, water systems and soil fertility so as not to reduce the carrying capacity of the environment.
 - d) The use of forest areas on a large scale does not exceed the environmental carrying capacity that can lead to global climate change.
 - e) The use of forest areas does not destroy endemic species
 - f) In the implementation of the use of forest areas, the opening of forest areas is carried out in stages and to a minimum as needed.
 - g) To improve the quality of forests and the quantity of forest areas, forest area users must reclaim forest areas used and offset by compensation in the form of land or forest rehabilitation in the relevant watershed / province.
 - h) Consistently carrying out environmental management and monitoring in accordance with the Commitments in AMDAL[11].

IV. CONCLUSION

Overlapping arrangements for mining concessions in forest areas are caused by the regulation of these two sectors which are still sectoral. The Forestry Law and the Minerba Law have not regulated the integration of the implementation of the two, so that it still creates uncertainty for investors which has an impact on government policies. Article 38 paragraph (4) of the Forestry Law is a trigger for problems that are legal uncertainty in regulating the prohibition of mining businesses in protected forests with open patterns. This article confirms that protected forests cannot be used for mining business, even for investors before this law is passed, permission is given to conduct mining business with an open pattern. Dispensation can be given to investors if they seek mining in protected forest areas with a closed pattern, which may be considered not to provide much benefit for investors and for the government. Promulgated Government Regulation In lieu of Law Number 1 of 1994 stipulated in Law Number 19 of 2004 is a solution for investors, but becomes an indecisiveness of the articles governing the Forestry Law relating to mining operations in forest areas. National interests seem to be the main consideration compared to the interests of forest sustainability with the enactment of Government Regulation in Lieu of Law Number 1 of 1994 stipulated by Law Number 19 of 2004. Therefore, synchronization of mining and forestry arrangements must be a concern of the government in sustainability forests and national interests.

ACKNOWLEDGMENT

Writing gives thanks to the Faculty of Social and Legal Sciences for facilitating this activity so that the authors get many benefits for scientific development

REFERENCES

- [1] N. Foo, H. Bloch, and R. Salim, "The optimisation rule for investment in mining projects," *Resour. Policy*, vol. 55, no. November 2017, pp. 123–132, 2018.
- [2] T. Zvarivadza, "Sustainability in the mining industry: An evaluation of the National Planning Commission's diagnostic overview," *Resour. Policy*, vol. 56, no. November 2017, pp. 70–77, 2018.
- [3] A. Zhang and K. Moffat, "A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia," *Resour. Policy*, vol. 44, pp. 25–34, 2015.
- [4] Iskandar Zulkarnain, "Dinamika dan Peran Pertambangan Rakyat di Indonesia," in *Dinamika dan Peran Pertambangan Rakyat di Indonesia*, Jakarta: LIPI, 2007, p. 13.
- [5] J. Cui and S. Li, "Forest-cover monitoring based on high resolution remote sensing image," no. Icitmi, pp. 569–575, 2015.
- [6] O. Ikonnikova and A. Gorkin, "Sustainable forest development: problems and prospects," vol. 38, no. Ttiess, pp. 241–245, 2017.
- [7] M.KOHL, "Forest inventory and monitoring," *Encyc-lopedia of Forest Science*, pp. 403–409, 2006.
- [8] Kementerian Lingkungan Hidup dan Kehutanan Republik Indonesia, "Statistik Lingkungan Hidup dan Kehutanan Tahun 2016," in *Statistik Lingkungan Hidup dan Kehutanan Tahun 2016*, Jakarta: Kementerian Lingkungan Hidup dan Kehutanan Republik Indonesia, 2017, p. 3.
- [9] Suparno, "Laporan Akhir Tim Pengkajian Hukum tentang Penambangan Terbuka dalam Kawasan Hutan Lindung," Jakarta, 2006.
- [10] J. Li, "Corporate Social Responsibility Reporting by Forest Companies: the Study of Forest-based Industry in China," vol. 121, no. Ichssr, pp. 79–84, 2017.
- [11] Kementerian Lingkungan Hidup dan Kehutanan Republik Indonesia, "Statistik Lingkungan Hidup dan Kehutanan Tahun 2016," in *Statistik Lingkungan Hidup dan Kehutanan Tahun 2016*, Jakarta: Kementerian Lingkungan Hidup dan Kehutanan Republik Indonesia, 2017, p. 115.
- [12] L. S. Horowitz, A. Keeling, F. Lévesque, T. Rodon, S. Schott, and S. Thériault, "Indigenous peoples' relationships to large-scale mining in post/colonial contexts: Toward multidisciplinary comparative perspectives," *Extr. Ind. Soc.*, vol. 5, no. 3, pp. 404–414, 2018.