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ICOn-LBG 2016

**The Third International
Conference on Law,
Business and Governance**

PROCEEDINGS

Hosted by
Faculty of Law, Faculty of Economics and Faculty of Social Science
Bandar Lampung University (UBL)

Icon-LBG 2016

THE THIRD INTERNATIONAL CONFERENCE
ON LAW, BUSINESS AND GOVERNANCE 2016

20, 21 May 2016
Bandar Lampung University (UBL)
Lampung, Indonesia

PROCEEDINGS

Organized by:



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PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the Third International Conference on Law, Business and Governance (3th Icon-LBG 2016) organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 46 technical papers were received for this conference.

The participants of the conference come from many well known universities, among others : International Islamic University Malaysia, Unika ATMA JAYA, Shinawatra University, Universitas Sebelas Maret, Universitas Timbul Nusantara, Universitas Pelita Harapan, Universitas Bandar Lampung, Universitas Lampung.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also grateful to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

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JURIDICAL STUDIES MASTERY MINE CONCEPT IN THE APPROACH TO HISTORY AND PRINCIPLES OF IMS (INTERNASIONAL MINIMUM STANDARD OF CIVILIZATION)

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Abstract

Article 33 (3) of the 1945 constitution state that “the land, the water and the nature riches contained there in shall be controlled by the state and exploited to the greatest benefit of the people”. As Stuart G Gross that article 33 (3) goes beyond traditional affirmation articulating, rather, a fundamental, inviolable precept of Indonesian constitutional law. Thus, contracts of the work (CoWs) resemble traditional concession contract only some ways, such as the manner in which revenue is transferred back to the state in the form of taxation and royalties and the level of control holders of CoWs have over operation. However, in the important ways foreign mining companies act not as concessionaires but as contractors for republic of Indonesia, which retains title to unextracted minerals and for whom the mining companies work¹.

Keywords: Mastery mine, historical approach, regulary approach.

1. INTRODUCTION

Laws should provide the most useful result or lead to the greatest happiness of the greatest number². Legislation or contracts should reflect the ethical quality. Contract or legislation as an instrument to be good, therefore it is a good law is a law that can lead to happiness. This is the fundamental theory elaborated by the founders of the Indonesian nation in Article 33 (3) UUD 1945, that the earth, water and natural resources contained in it are controlled by the State for the greatest prosperity of the people. The principle contained in Article 33 (3) UUD 1945 is the basis of philosophical and sociological formulation of Law No. 4 of 2009 on mineral and coal (hereinafter referred to Law No. 4 of 2009) which replaced Law No. 11 of 1967 concerning basic provisions mining. In practice it has not been able to accommodate the development of mining activities both nationally and internationally continues to grow.

Based on the historical development of the control of natural resources, sovereignty of the country as the host of natural resources began to emerge in the 1950s. This principle arose when colonized countries are trying to reorient to the existence of their sovereignty in acting as a State³. Over the development time, the sovereignty of the control of natural resources began to shift from the sovereignty of the colonized become sovereignty of natural resources is done through foreign investment had already entered massively into developing countries. Developing countries began to adjust its policies to fight for the rights of the maximum economic potential of natural resources, so that natural resources are exploited as much as possible by giving investors great benefits for the host country.

¹ Stuart G Gross, Inordinate Chill: *Bits, Non-Nafta Mits, and Host State regulary freedom –An Indonesian case study*, *Michigan Journal of International Law School*, Spring 2003, hlm 6-7

² <http://www.utilitarianism.com/Jeremy-bentham/greatest-happines.pdf>

³ Ahmad Redi, *Hukum Pertambangan*, Gramata Publising, Jakarta, 2014, hlm 25

Market globalization marked by the convening of foreign investment schemes in various countries can be a threat to the sovereignty of the host country. Factors State sovereignty is important if as a result of the investment of sovereignty at stake, particularly developing countries like Indonesia, which often have a weak bargaining position, so that the necessary prudence for developing countries to receive foreign capital that will enter the country.

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The history of foreign investment in Indonesia has been started in the evaluation arrangement mining colonial heritage Indische Mijnewet Staatsblad Year 1899 No. 244, the regulations regarding the classification of mineral. Enactment of Law No. 4 of 2009 to reform momentum Indonesian mining law changes. It is what lies behind the author's legal review to approach the history of law. Arrangements control of the mines from the colonial era in 1899, the beginning of the independence of Law No. 10 of 1959; Law No. 37 Prp of 1960; Law No. 11 of 1967 and the last Act No. 4 of 2009. The regulation has its own characteristics.

International Minimum Standard Of Civilization is the result of the development of international investment law in the 21st century initiated to respond to the needs of industry investors and the form of concern for developing countries as the host country of investment.

IMS principle is minimum standards for how the State of multinational investors through his company and host country in relation to treating the investment as well as the interests of the country, human rights, environmental protection and management⁴.

The two approaches are the basis for the analysis of the legal study mastery foreign mining that has generated a lot of problems related to the position of Indonesia as the host State mining investment. The issues outlined in the discussion wanted that how does the concept of mining mastery in terms of Article 33 (3) UUD 1945 and a series of historical laws that govern them, how the application of the principles of this IMS determine the bargaining position of the host State in the control of mines.

2. DISCUSSION

Mining became an attraction in foreign investment in developing countries. Developing countries that have natural resource-rich mining will be hunted by transnational and multinational corporations to be cultivated any natural resources contained therein. Developing countries also makes mining commodities as the object of free trade with manual or give permission to multinationals. The liberalization of the mining management through foreign investment is considered economically because it provides the benefits received by state, ranging from state revenue in the form of tax and non-tax, employment, technology transfer and the development of a new development center. But on the other hand foreign investment in the field of mine actually cause problems, conflicts surrounding communities (culture), environmental damage, human rights and conflict of interests of the political elite.

Indonesia is one country in the world that has the potential of natural resources mining is very promising for the future, ranging from gold, nickel, iron ore, iron sand, coal, oil and gas, but why precisely the areas that have the resources mining is a regional power that is entwined with social poverty with the poverty rate is high enough, according to Khairil Anwar was quoted by H. Salim Indonesia yr in 2013, there are still 34.94 million (15:42%) of the population classified as very poor, the problem is not only in social poverty, environment rundown and become damaged. Potential natural resources mining Indonesia since the Year 1960 until now has been dominated by foreign investors and national private sector, until now, there are 111 households and PKP2B includes 37 families and 74 PKP2B, beyond the tens of thousands of IUP (Mining Business License) issued by regents and Mayors. Indonesia bowels of the earth, promising a prosperous future has been dominated by the private investors both foreign and

⁴Nicolaas Jan Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties in An Interdependent World*, 1995: Hlm.163

national, including contract work PT. Freeport in Papua, PT Karya contract. Newmont NTT, CoW PT. NHM In North Halmahera⁵.

As an illustration of the mastery the data mining by foreign investors is as follows⁶:

1. Nusa Tenggara Barat (NTB), PT. Newmont Nusa Tenggara control 50% of the value added to the contract area covering an area of 1.27 million hectares. On the island of Sumbawa one NTB area, Newmont control of 770 thousand hectares, equivalent to 50% more land area Sumbawa Island which covers 1.4 million hectares. While the regents / mayors in several districts of the city on Sumbawa Island also continue to permit the mine on the remaining lands. Currently more than 150 mining license operating in the province, both of which are conducting exploration and production.
2. In Papua, Kontrak Karya (KK) Freeport 2.6 million hectare, HPH 15 million hectares, 1.5 million hectares of plantations, plantation of 5.4 million hectares, equivalent to 57% of the land area of Papua. This does not include oil and gas contracts that the numbers are very large, it is estimated that Papua has been completely distributed to hundreds of foreign giants.
3. In East Kalimantan (Kaltim) is expected throughout the region of its land area of 19.8 million hectares have also been distributed to big capital from foreign countries. Mineral and Coal mine permit about 5 million hectares; 2.4 million hectares of plantations, forest clearance (HPH, HTI, HTR, etc.) have reached 9.7 million hectares (data MP3EI). It also does not include oil and gas contracts, known as East Kalimantan is one of the largest contributors to the state oil and gas revenues.
4. In Madura, the vast oil and gas contracts has exceeded even Madura Island itself, which the government handed over to the Petronas, Huskil Oil, Santos, and other foreign companies.

Mastery Mine In History Approach.

In the reign of President Soekarno elaboration of Article 33 of the 1945 Constitution all a matter of state control over land, water and natural resources contained therein interpreted by giving birth to the Law on Agrarian Conditions or BAL (Law No. 5/1960). The main purpose of UUPA is to redistribute land and equalize land ownership for the people. According to Mahfud MD, UUPA is a legal product that is highly responsive, insightful. At that time, UUPA is the main rule as the basis for administration of land, water, forests and plantations.

New Order were in power for 32 years is a regime that is servile to the interests of capital. Even the legislation was first made by the regime that is a Foreign Investment Act (Act No. 1/1976). Hoses four months later, enactment Law on Basic Provisions of Forestry (Law No. 5/1967), and the Law on Basic Provisions of Mining (No. 11/1967). Three legislation shows the political direction of the government law that the Indonesian economy under the New Order will be supported by foreign capital as much as possible in the forestry and mining sectors.

Post-New Order, changes in leadership and change in various sectors with the spirit of reform progress. At the legal level culminating in the 1945 Constitution amendment package four times (1999-2002). The changes add to the constitutional provision is in line and followed by a change at the level of legislation and other policy. Legislation in the field of natural resources, regulatory fragmentation pattern and style of the New Order continued to grow massively. There are twelve (12) of the Act are made, namely: (a) the Forestry Law; (b) Plant Variety Protection Act; (c) Law on Oil and Gas; (d) of the Electricity Act; (e) the Geothermal Energy Law; (f) Law on Water Resources; (g) the Plantation Act; (h) Determination Law decree No. 1/2004 on Forestry Law Changes; (i) the Fisheries Act; (j) Investment Law; (k) of the Management of Coastal Areas and Small Islands; (l) the Energy Act. At the level under the Act also contained many rules that highlighted, among PP 36/2005 on Land Acquisition for Development Activities For the Public Interest, and PP 2/2008 regarding Type and Tariff Non Tax Revenue Originating use of forest areas for the Interest Development Overseas Forestry Event Applicable within the Department of Forestry. The development of the Indonesian legal system is inseparable from the history of the Indonesian nation from time to time. Each time the development of the Indonesian nation is strongly associated with the development among other aspects of social, cultural, political and economic community by the time the law was created and implemented by a competent authority.

⁵Hendra Karianga, <http://manadopostonline.com/read/2014/08/08/Menyoal-Kedaulatan-Pertambangan-Indonesia/4697>

⁶<https://myrepro.wordpress.com/2016/01/27/kajian-penguasaan-tanah-indonesia-oleh-pihak-asing/>

The Concept Of Mining Mastery In Terms Of Article 33 (3) UUD 1945.

Viewed mastery of data mining by foreign investors, reminding how should the concept of mastery mines that have been mandated by Article 33 (3) UUD 1945? Article 33 (3) UUD 1945 became the constitutional basis of the mastery the State over natural resources. The phrase "earth, water and natural resources contained therein controlled by the State and utilized for the welfare of the people" to phrase doctrinal as the foundation of philosophical, sociological and juridical in the management of Indonesia's natural resources⁷.

Meaning "rule of the State" in Article 33 (3) UUD 1945, has been interpreted by the Constitutional Court on the interpretation of the meaning of control by the state in the broad sense sourced and originates from the conception of the sovereignty of the people of Indonesia over all the earth, water, and natural riches contained therein, included in the definition of public ownership by the people collectivity over the resources in question. The people collectively constructed by the 1945 Constitution mandates the State to establish policies (beleid), acts of management (bestuurdaad), setting (regelendaad), management (beheersdaad) and supervision (toezichthoudensdaad) for the purpose of the prosperity of the people.

Based on the Body and explanation of Article 33 of the 1945 Constitution outlined the basic elements of control of natural resources as follows:

1. Natural resources are controlled by the State, especially the branches of production that dominate many people;
2. Branches of production is done by all, for all, under the leadership or members of the community owner
3. Used for the overall prosperity of the people, not the prosperity of individual persons.

State mastery over the natural resources referred to in Article 33 of the 1945 Constitution can be interpreted into 3 (three) forms of understanding control of natural resources, namely⁸:

1. Control is done by the State.
In this sense the state itself is controlling the natural resources that are in earth, water and natural resources contained therein through the State Company. State not only as regulators but also operator.
2. Mastery is not done by the State, but its control is done by the private sector.
In this case the State only a regulator but the operation control of natural resources handed over in full to the private sector.
3. The control by the State, but mastery can be done by the State and / or the private sector.
In this case the State's involvement in the control of natural resources is influenced by how big the benefits (economic) is obtained on the basis of such engagement to the overall prosperity of the people.

Of the three (3) that there is a selection of mastery and operation, Mohammad Hatta as leaders and as a proclamation of Indonesian economic thinkers, argues⁹ Controlled by the State under Article 33 UUD 1945 does not mean the State itself as a businessman, industrialist or ondernemer. More accurate to say that the State authorities are in the regulations to make way melancarkan economy, regulations prohibiting also exploiters of the weak by others who have capital. The ideals are embedded in Article 33 of the 1945 Constitution is the production as much as possible as far as possible be implemented by the government. Opportunity opened for foreigners to invest their capital in Indonesia is that they participate in developing the prosperity of our people, the nation of Indonesia.

Based on these opinions, the principle of mastery the State does not mean that the State is the business but can also be operated by a private company or a foreign capital. The foreign involvement should still in an investment scheme remained fixed for the greatest prosperity of the people. In other words, foreign investment only as a means to realize the prosperity of the people, besides other hand, capital investment may also benefit from the investment process.

This is also consistent with the provisions of the Company Law No. 5 of 1960 on the Basic Agrarian subjects, that the Indonesian nation or state does not need to act as the owner of the land, so it is more appropriate if the State as the organizational power of the population to act as Ruler Agency. From this

⁷Marwan Batubara (Direktur Indonesia Resources Studies (IRESS)), Sambutan pada buku Hukum Tambang, Ahmad Redi.

⁸Ahmad Redi, *Hukum Pertambangan*, Gramata Publising, Jakarta, 2014, hlm 4

⁹Mohammad Hatta, *Bung Hatta Menjawab*, Gunung agung, Jakarta, 1979, hlm 201

angle it can be seen that the earth, water and air space including the natural resources contained therein at its highest level controlled by the State. Within the meaning of giving the sense that 'controlled' is giving the authority to the state power organization of the Indonesian nation, to:

1. Set up and organize allocation, use, supplies and maintenance
2. Determine and regulate the rights to possess the land, water and the space.
3. Determine and regulate legal relations between the people and the legal acts which the earth, water and space.

Control of natural resources by the State, including the mining sector as stipulated in the 1945 Constitution can not be separated with the intention of such authorization is to realize the people's welfare. People as a connoisseur result of the utilization of natural resources through the management and control of natural resources is a main party in getting the general welfare as one of the destination country.

Application of the principles of IMS

In the development of international investment law in the 21st century to respond to the needs of investors, began to develop progress in the implementation of foreign investment in developing countries. In the decade known principles of International Minimum standards of Civilization (IMS) is the minimum standard of how the State investor and the host State in treating the investment as well as the concern of the country, human rights, environmental protection and management.

In broad outline IMS consists of principles¹⁰:

1. Respect for domestic law of the host state.
Foreign investment should accept and respect the laws and customs of the State investment destination.
2. No treatment below a minimum international standard.
The host country of foreign investment in the country that applies not below the applicable standards in the country are not under international standards means that foreign investment should be in conformity with international standards and treat the host country must be in accordance with international standards.
3. Expropriation standard
Although the State has the sovereign territory terhdap but certain countries can not do the takeover of foreign property rights arbitrarily, except pursuant to certain circumstances based international law have been met to the deprivation or expropriation of the property.
4. Pacta sunt servanda
The principle that contracts must be agreed to be respected by the parties, so no action on the part of certain contrary to the agreed contract.
5. Due process of law
That the actions of foreign investors in implementing their business interests should be subject to the rules of law applicable host country is taken from the legislation, including the constitution, besides it is also that the law applicable in the host State does not arbitrarily applied to foreign investors.
6. Local remedies rule
Foreign investors in resolving a dispute with the host State or other related parties, attempted to be solved by court procedures host State or other related parties, attempted to be solved by court procedure the host country, then if necessary measures are based other interests to ensure fairness, the international adjudication can be reached.

Based on the principles of the IMS, the bargaining position of developing countries is strong enough in implementing the country's sovereignty against foreign investment, especially in terms of control and management of natural resources. IMS as an ideal principle should certainly be implemented either by the investor. In fact the form of colonization The host country is actually done through efforts to incorporate the interests of big in the employment contract, or licensing agreements made by the parties or permit granted host State. Thus, the harmonization between the State's interest in the welfare of the people without having liberalized mining and also the achievement of benefit economically by foreign mining companies who undertake mining in Indonesia could be established in harmony.

¹⁰Nicolaas Jan Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties in An Interdependent World*, 1995: Hlm.163

4. CONCLUSION

The concept of mining mastery in terms of Article 33 (3) UUD 1945, that the control of natural resources by the State, including the mining sector as stipulated in the 1945 Constitution can not be separated with the intention of such authorization is to realize the people's welfare. People as a connoisseur result of the utilization of natural resources through the management and control of natural resources is a main party in getting the general welfare as one of the objectives of the State.

The development of the Indonesian legal system is inseparable from the history of the Indonesian nation from time to time. Each time the development of the Indonesian nation is strongly associated with the development among other aspects of social, cultural, political and economic community by the time the law was created and implemented by a competent authority. Based on the principles of the IMS, the bargaining position of developing countries is strong enough in implementing the country's sovereignty against foreign investment, especially in terms of control and management of natural resources. IMS as an ideal principle should certainly be implemented either by the investor.

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