

A BRIBERY CASE RELATED TO MINING LICENSES

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I. THE MINING SECTOR IS VULNERABLE TO CORRUPTION

Natural resources are the wealth of nature, that contain in the earth, must be used wisely by good and right purposes for the prosperity of mankind. Article 33 of the 1945 Constitution of the Republic of Indonesia stipulates that the earth, water, and natural resource wealth that are buried within the earth are under the control of the state and utilized for the greatest prosperity of the society. Consider minerals and coal as non-renewable natural resources, thus they should be consumed as optimally as possible, efficiently, transparently, sustainably and in the perspective of the environment, as well as fairness in order to obtain greatest benefit of the prosperity of society. However until now this desire has not been implemented maximally because there was bad management of natural resources due to several weaknesses, namely a weak financial and mining audit system, law enforcement, lack of transparency and public access to information regarding licensing and the inability in efforts to mitigate risk.¹

According to Article 1, point 1 Law Number 04 Year 2009 on Mineral and Coal Mining, mining is a part or all activity stages in the framework of mineral and coal research, management, and exploitation which includes general investigations, exploration, feasibility studies, construction, mining, processing and purification, transport, and sales, as well as post-mining activities.

Another challenge in maximizing the mining sector for economic progress to the holders of contracts of work that were issued under the pre-2009 mining regime, as well as to the holders of Mining Business Licenses that have been issued under the new regime. These challenges include but are not limited to:²

- Difficulties in dealing with the downstream in-country processing requirements under the Mining Law;
- Foreign shareholder divestment requirements;
- Lack of coordination between the central, provincial, and regional governments;
- Conflicts between mining operations and forestry regulations;
- Community relations and labour regulations; and
- Corruption, collusion, and nepotism.

For a long time, the mining sector has been very popular among those who want to get a lot of money due to the amount of profit to be received. The investors would be trying very hard to get a license and justify any means including by bribing officials in either the central government or in the regional government. As the results of *Transparency International Indonesia's* research reported that the provincial service office that has the highest probability of bribery is the Mining Service, with a probability of bribery of 35%.³

Recently, the Corruption Eradication Commission (CEC)⁴ has paid attention on the mining sector in a case involving a former governor who issued nickel-mining licenses corruptly which began to be investigated in 2016 then until tried before court, and completed in 2018. The application of environmental damage as a form of state financial losses in the Governor's case is the first time that the CEC has dealt with this issue.

Corruption in the mining sector not only has an impact on the state's financial losses but also an impact on environmental damage due to mining operations produce mining tailings, smelter gases, overburden

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¹ Corruption Perceptions Index 2017, A Survey Between Business Actors.

² PwC, Mining in Indonesia: Investment and Taxation Guide.

³ Ibid.

⁴ Formally in Indonesian state legislation referred to as Komisi Pemberantasan Korupsi (KPK).

flotation chemicals, and oxidization products including acids, water pollutants and sludge. Mining activities also lead to vast land degradation and soil erosion which can lead to flooding and can also divert drainage systems.

Investment in the mining sector which often involves foreign companies makes difficulties for law enforcement apparatus related to state jurisdiction. The complexity of procedures related to the investigation and tracking of financial flows received by parties and companies in other countries often races against time limits and the results are not satisfactory. Instead of receiving the bribe money directly into bank accounts or by hard cash, perpetrators disguise the bribe transaction into a legitimate business transaction which involves some unusual form of transaction in other countries which somehow seems unrelated to the perpetrators. Therefore, good cooperation among law enforcement in domestic and foreign jurisdictions is one of the keys to success in tracking the bribe money and revealing the case.

Regarding to the latest corruption trends in Indonesia, this paper will discuss bribery cases related to mining licenses.

II. MAIN DISCUSSION

A. Identifying Law Enforcement Against Corruption in Indonesia

In Indonesia there are essentially three law enforcement bodies in combating corruption in Indonesia, namely: (i) Police; (ii) the Corruption Eradication Commission (CEC) and (iii) the Attorney General's Office (AGO). Each body is authorized to investigate criminal acts of corruption.

Prevention and eradication of corruption in Indonesia is provided in Law Number 31 Year 1999 as amended by Law Number 20 Year 2001 on the Eradication of Corruption and Law Number 28 Year 1999 on Corruption-Free State Governance. Based on the law, corruption in Indonesia is classified as follows: corruption-related state loss; corruption related to bribery; corruption related to fraud in incumbency; corruption associated with the act of extortion; corruption related to skulduggery/manipulation; corruption related to conflicts of interest in procurement; corruption associated with gratification and other criminal acts related to corruption (for example, hindering investigations, giving false testimony, etc.).

All countries have similar perceptions of corruption, and it is classified as an extraordinary crime done by highly educated and intellectual people; therefore, in order to reveal the case, the law enforcement apparatus in Indonesia needs to optimize the implementation of their authority as mentioned in Law Number 31 Year 1999 on Corruption Eradication and Law Number 30 Year 2002 on the Corruption Eradication Commission which provides special authority for investigators, prosecutors and judges as follows:

- a. Tap into communication lines and record conversations;
- b. Order the relevant institution to ban an individual(s) from travelling abroad;
- c. Request information from banks or other financial institutions about the financial details of a suspect or defendant;
- d. Order banks or other financial institutions to block accounts suspected to harbour the gains of corrupt activities of a suspect, defendant, or other connected parties;
- e. Order the superior of a suspect to temporarily terminate the suspect from office;
- f. Request data on the wealth and tax details of a suspect or defendant from the relevant institutions;
- g. Temporarily halt financial transactions, trade transactions, and other forms of contract, or to temporarily annul permits, licenses, and concessions owned by suspects or defendants, assuming that preliminary evidence points to connections to a corruption case currently being investigated;
- h. Request assistance from Interpol Indonesia or the law enforcement institutions of other nations to conduct searches, arrests, and confiscations in foreign countries;
- i. Request assistance from the police or other relevant institutions to conduct arrests, confinements, raids, and confiscations in corruption cases currently under investigation.

All of the investigative actions mentioned should be guided by Law Number 08 Year 1981 Concerning Criminal Procedure Law.

To facilitate the task in eradicating corruption, CEC can coordinate with authorized institutions such as

the State Auditor, the Finance and Development Monitoring Agency (BPKP), the Commission to Appraise the Wealth of Government Executives (KPKPN), and inspectorates at each Department and non-departmental government agencies.⁵

B. Bribery Case Related to Mining Licenses

Since the enactment of Law Number 22 Year 1999 on Regional Autonomy and Law Number 25 Year 1999 on Financial Balance, the position of the sub-national governments became stronger, subsequently reducing the authority of the central government. With this new power, the sub-national governments began to initiate policies that were aimed at bringing the public administration services closer to communities and their constituents. In addition, it was perceived that by doing so, local problems could be rectified much quicker.

The law governing the mining of minerals is Law Number 04 Year 2009 on Minerals and Coal, which revokes the previously applicable mining law, namely Law Number 11 Year 1967 about Principal Provisions of Mining. Law Number 11 Year 1967 is no longer valid because it does not fit with the developments and future challenges, especially because it is centralized. With this change, a shift of paradigm in the control and management of mining in Indonesia occurs, especially the shift of the Contract of Work (CoW) system into a permit system by the state. This returns the original position of the state as the holder of the mandate of the Indonesian people who own all the wealth of natural resources.

In the mining sector, each level of government was provided with certain authorities such as deciding the mining areas, issuing mining authorization, issuing people's mining, supervising/reporting, etc. Nevertheless, the Contract of Work (CoW), still under the power of national government, were not easily manageable, and its implementation created further uncertainties in the regulatory environment surrounding mining license authority. That situation provided an opportunity for corruption.

1. Case Description

A former governor (NA) named as a suspect in August 2016 in an alleged corruption case involving abusing his position to enrich himself, others, and/or a corporation by issuing concessions and mining permits for AHB (a company/Ltd), a nickel-mining company that operates in two regency. Investigations were started after reports of suspicious transaction issued by the Financial Transactions Reporting and Analysis Centre (PPATK) in 2013, stated that NA is suspected of having received bribes amounting to IDR 40,2 billion from RCI (an overseas company). The bribes were transferred through a bank in Hong Kong, as well as through three insurance policies.

There was a conspiracy between WA, BH (a subordinate of NA) in issued Mining Business Area License, Mining Business Licence and Operation Production Mining Business Licence by using the name AHB. There was a series of actions carried out with several modus operandi:

- In 2009, NA asked BH and WA (NA's friend) to make a request letter in the name of AHB for getting a Mining Business Area License and Mining Business Licence on areas that were still legally within the territory of Nickel Int'l (Ltd) Contracts of Work (CoW), but NA ignored that.
- All of the documents had been backdated to avoid procurement processing as regulated by Article 51 Law Number 4 Year 2009 because it was as if the documents were published in the provisions of Law Number 11 Year 1967.
- Furthermore in the transition period of the regulation regime from Law Number 11 Year 1967 to Law Number 04 Year 2009, NA issued Operation Production Mining Business Licence for AHB even though his actions were contrary to the Circular Letter of Ministry of Energy and Mineral Resources of Republic of Indonesia number 03.E/31/DJB/2009 that regulated issuance of licences must be stopped until new regulations are issued. Other than that, the licence issued without getting permission from two regents because the area was existing in the two districts as regulated by government regulations.
- After AHB had all of the licences, NA conspired with WA and BH to take shareholding of AHB by BI

⁵ Article 6, Law number 30, year 2002 on the Corruption Eradication Commission.

(a company/Ltd) and for this he got a luxury car and a luxury house that was paid for by BI which is worth IDR 2,7 billion and by using someone else's name.

- Until 2014 AHB had produced Nickel as many as 7,161,090 Wet Metric Tons (WMT). Then AHB sold the Nickel to RCI in Hong Kong, but the payment for the sale was addressed to the account of Bank Chinatrust Indonesia in the name of BI for a total of approximately IDR 2 trillion.
- Investigation revealed that NA received money of USD4.2 billion or IDR 40.2 billion from RCI through three insurance policies and in order for NA to be able to have the said bribe money without being detected he asked Bank Mandiri to move the money of IDR 30 billion to three insurance policies whereas IDR 10.2 billion was transferred to his account in Bank Mandiri. He also disguised receipt of the money by making an investment agreement with RCI.
- Then in not too long a period of time, he applied for cancellation of the three insurance policies and requested money from the cancellation to be transferred to the National Bank of Indonesia (BNI). Furthermore, NA asked BNI to transfer the IDR 30 billion bribe money to several companies owned by his friends namely STM, BP and UN.

By the prosecutor of the CEC, NA was prosecuted and sentenced to 18 years in prison for violation of Article 2, paragraph 1 in connection with Article 18 and Article 12B of Law Number 31 Year 1999 as amended in Law Number 20 Year 2001 concerning the Eradication of Corruption in connection with Article 55, paragraph 1, point 1 of the Criminal Code. He was also prosecuted for gratification of IDR 40.2 billion from RCI, misusing his authority for the purpose of self-benefit by IDR 2.7 billion and for BI by IDR 1.5 trillion, and resulting in the state's financial losses of IDR 4.3 trillion derived from environmental damage of IDR 2.7 trillion and state's losses of IDR1.5 trillion and revoked his right to be elected for 5 years, as additional penalties.

Furthermore, there were differences between the prosecutor's demands and the judge's verdict. According to the judge, NA was only proven to have received IDR 2.7 trillion in violation of Article 12B of Law Number 31 Year 1999 as amended in Law Number 20 Year 2001 concerning the Eradication of Corruption which sentenced him to 12 years of imprisonment, to pay a fine of IDR 2,7 billion or substituted to 1 year of prison sentence, and revoke his right to be elected for 5 years, as additional penalties. Meanwhile, the judges stated that his actions did not prove the state's loss as required by Article 2, paragraph (1) or Article 3.

2. Obstacles in Handling the Case

The main challenge in handling the case is to prove environmental damage as a form of state's financial losses. The CEC had not previously used environmental damage as a form of financial loss of the state or state economy as set forth in Article 2 Paragraph (1) or Article 3 of the Anti-Corruption Eradication Act. From those articles, there are some elements of how an act can be classified as a corrupt act, those are: the subject is anyone; there must be an illegal act; the aim is to enrich themselves; creating loss to the state finance or state economy. In judicial practices the element of state's financial loss is not interpreted as an estimate (potential loss) but must be interpreted as actually having happened or actual (actual loss) in corruption.

In NA's case, CEC presented two experts at trial for calculating the state's financial loss. First, an expert on environmental degradation who told the court that the illegal mining activities by one of the companies that received a permit from NA had led to deforestation and resulted in IDR 2.7 trillion in combined ecological losses, environmental economic losses, and the cost of repairing the damage. Second, an expert from the Finance and Development Monitoring Agency (BPKP), an institution authorized to calculate state's financial losses. According to BPKP's expert, the state's financial losses are defenmined by calculating the value of nickel that has been sold at IDR 1,5 trillion.

A heated debate occurred during the trial in an effort to analyse whether the state's financial losses as reported by the two experts were actual (actual loss) or an estimate (potential loss). To support those two experts, we also involved an expert in the field of remote sensing from the National Institute of Aeronautics and Space (LAPAN), an expert in the mining sector from the Ministry of Energy and Mineral Resources (ESDM) and a legal expert from the Faculty of Law of Indonesia University (UI).

Another challenge in handling the case is there was limited access in revealing the flow of money entering and leaving RCI, which was located in Hong Kong, because Indonesia and Hong Kong do not have a mutual legal assistance cooperation treaty in place. Realizing that formal mutual legal assistance cooperation with a foreign jurisdiction would take a long time, the time for conducting investigations is limited. We then employed a *non-formal* cooperation with the Independent Commission Against Corruption (ICAC) in Hong Kong with all the limitations of authority for CEC to make forced efforts. Therefore, not much information of CEC's got to reveal the role of RCI in Hong Kong in this case. ICAC can only provide information that there really was a company with the name RCI in Hong Kong, but the CEC could not conduct an investigation of its management and track its financial transactions.

The investigation of this case was quite complicated with time limited due to related to the duration of detention of a suspect; on the other hand we had to go to Kabaena's Island many times which takes a long time to get to the location. There we measured the mining area and took several samples of soil, plants and water assisted by experts for research in the laboratory, and we also carried out investigation on several witnesses.

3. Countermeasures

The mining sector contains a great potential for corruption. Among them: first, weak oversight in the process to obtain permits; second, overlapping regulations on mining. CEC has been supervising the mining sector and the discourse of imposition of social costs of corruption to corruptors as a form of impoverishment against corruptors. However, this measure should be coupled with a variety of strategic steps below, namely: (1) Encouraging the government and mining companies to be more transparent in reporting all of their activities including profits. (2) Improving the quality of the bureaucracy. (3) Implementation of strict punishment, (4) renegotiating mining contracts to provide the greatest benefits for the national interest, (5) Increasing public participation in monitoring the management of mining, (6) Supervision of Anti-Corruption agencies, (7) Enacting mining legislation consistently

From handling the case, we learned that cooperation among law enforcement apparatus in handling and completing criminal investigation and prosecution is very important, and law enforcement is a process that can be done without coordinate with authorized institutions including in involving experts in corruption cases related to various sciences such as the mining sector. We are often faced with the fact that to reveal a case is not enough just to rely on evidence obtained during the investigation process but the evidence needs to be explained by experts who know it. Since pre-investigation, the investigator must be able to think what experts are needed to solve the case. As mentioned before, in this case we were assisted by several experts who each have expertise in the science.

Investigating money flows that occur in other countries is a time-consuming, challenging and complex effort that requires considerable mobilization of resources and expertise and active cooperation from various foreign jurisdictions. In most cases, both investigators and prosecutors do not have the capacity and instruments to uncover these practices. Moreover, law enforcement apparatus will also need to enhance their ability to recognize the corruption perpetrators, methods of receiving bribe money, reinforce their ability to follow the money trails and develop good cooperation with other law enforcement in foreign countries.

III. CONCLUSIONS

1. Overlapping regulations in the mining sector make this sector vulnerable to corruption, especially in issuing licenses. The investors would do whatever it takes to get a license and justify any means including by bribing officials in either the central government or in the regional government. Corruption in the mining sector not only has an impact on the state's financial losses but also an impact on environmental damage. Therefore, a serious effort is needed to prevent and eradicate it.
2. Bribery related to mining licenses as a method of corruption is conducted to disguise the bribe transactions in order to avoid being detected by law enforcement. Thus, the perpetrators made the bribe transactions as complicated as possible involving overseas companies which have business relationships with Indonesian companies, so that the transactions appear as legal transactions. Therefore, investigations as early as possible have been able to detect and build networks with other

countries, whether conducted through formal or informal mechanisms.