

Disharmony of Domestic Refining Provisions for Mineral and Coal in Indonesian Laws and Regulations

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Abstract

Domestic refining practices of minerals and coal in Indonesia have not run efficiently and provided provisions for the country. The challenge of realizing the purification policy comes in turn, one of which is the problem of regulation. Hence, this study aims to examine and analyze mineral and coal (referred to as minerba) refining policy in the country in the laws and regulations, ranging from the level of legislation to implementing regulations. The research method used is normative legal research using a statutory and conceptual approach. The results showed that domestic minerba refining policies stated in many rules tends to be not one-way and is flexible, indicated by frequent changes in domestic refining policy. As a result, it causes disharmony between the Minerba Bill and the implementing regulations. Some implementing regulations, particularly Ministerial Regulations, are not in accordance with the principle of the obligation to increase the value-add by carrying out processing and refining domestically. Moreover, the regulation is considered contradictory due to providing opportunities for exporting minerals that have not been processed and refined, leading to reduced state revenues and impact on state losses.

A. Introduction

As a policy cover, regulations that cover policy configurations contain strategies and goals for the state's great ideals.¹ Nevertheless, policies tend to contain veils such as sectoral interests in which a few groups' interests responding to their issues and getting rid of national interests. These two sides are hard to detect, primarily when the policies are formed legally. Every legal product containing the policy will be legitimate and correct by law until a subsequent rule/decision stating that the rule is revoked/no longer has a binding legal force.

Several scholars widely define State Policy, one of them is George C. Edward and Iran Sharkansky: "*is what government say and do, or not do, it is the goals or purposes of government programs.*"² State policy purposes and has an orientation to achieve the public interest.³

The policy formulation will always be guided by the fundamental norms/values adopted in a country, such as Indonesia implementing NRI 1945 Constitution.⁴ In-

1 Abdul Wahab Solichin, *Analisis Kebijakan: Dari Formulasi Ke Implementasi Kebijaksanaan Negara* (Jakarta: Bumi Aksara, 2005), pg. 11

2 George C. Edwards III and Ira Sharkansky, *Implementing Public Policy* (Washington DC: Congressional Quarterly Press, 1980), pg. 22

3 Jean-Jacques Rousseau, *Du Contrat Social Ou Principes Du Droit Politique*, translated into Bahasa Indonesia by Sumardjo, *Kontrak Sosial*, (Jakarta: Erlangga, 1986), pg. 185

4 Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas,*



Indonesia is a wealthy country with abundant natural resources (SDA). For this reason, the Government has full sovereignty over the SDA. Kuswandi states that based on the 1945 NRI Constitution Article 33, in managing SDA, particularly Minerba Bill, the Government must represent the public interest as the highest sovereignty over the economic resources of Indonesia's natural wealth. Furthermore, as a sovereign over natural resources, Indonesia creates its derivative concept, "the right to control the state⁵."

Soepomo, the father of the 1945 Constitution, mentioned the term "under the power of the State" in Article 33 paragraph (3), meaning to regulate and/or organize and mainly improve and compute production.⁶ By this concept, the state obligates to regulate all activities regarding natural resources mining from upstream to downstream.

Therefore, this research focuses on the policies downstream of mineral and coal mining. Up to the present time, there are several rules regarding mining downstream, starting from the legislation to implementing rules. The following are two base for mining implementation: (1) Law No. 4 of 2009 on Mineral and Coal Mining (2009 Minerba Bill); and (2) Law No. 3 of 2020 on Amendment to Law No. 4 of 2009 on Mineral and Coal Mining (2020 Minerba Bill)

After ten years of implementation, Minerba Bill considered bringing changes compared to Law 11 of 1967 which was still facing several problems, one of which is domestic mineral and coal refining policy. Those problems are close to the mining business, namely, *mining, smelting, and refining*.⁷ Mining is in the upstream sector in the mineral and

Dan Aktualitas Pancasila (Jakarta: Gramedia Pustaka Utama, 2011), pg. 232.

- 5 Kuswandi, "Model Pengelolaan Sumber Daya Alam Untuk Sebesar-Besarnya Kemakmuran Rakyat," *Jurnal Mimbar Justitia*, Vol. 1 No. 2, July-December (2015): 532-49.
- 6 Nita Triana, "Pendekatan Ekoregion Dalam Sistem Hukum Pengelolaan Sumber Daya Air Di Era Otonomi Daerah," *Pandecta: Jurnal Penelitian Hukum* 9, no. 2 (2014): 157-58
- 7 Djoko Darmono, *Mineral Dan Energi Kekayaan Bangsa: Sejarah Pertambangan Dan Energi Indonesia* (Jakarta: Departemen Energi dan Sumber Daya Mineral, 2009), pg. 22

coal business, while *smelting* and *refining* are downstream. Meanwhile, downstream is interpreted as all the processes of smelting and refining mining products. Therefore, the downstream activities are the right choice, associated with the points formulated in the 1945 Constitution, because of involving people's participation certainly would bring more significant benefits for the people.⁸ Besides, the central policy is downstream of mining with refining obligations in the country. This obligation intends to increase and optimize the value-add of the products, the availability of industrial raw materials, the absorption of labor, and increase state revenue. In this regard, this arrangement of increasing the value-add is regulated in Articles 93, 94, 95, and Article 112 Number 4 letter c of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities.

While implementing the downstream policy, there were obstacles experienced by the company to integrating upstream mining operations and downstream mineral processing operations, both technically and financially. The next obstacle is resistance from foreign-owned mining companies (KK holders) due to *cash flow*. For instance, PT. Freeport Indonesia is building an underground mining project in Grasberg with an investment of US \$1,5 billion. Rules banning the export of raw minerals left many mining companies without the financial ability to build smelters. Due to declining revenue, PT. Freeport Indonesia has laid off some employees.⁹ One of the causes of the problem is the submission of material tests on Articles 102 and 103 of the Minerba Bill by the Association of Indonesian Mineral Companies (APEMINDO), followed by the discharge of APEMINDO, the Association of Bauxite Entrepreneurs of Indonesia (APB3I), and the Indonesian Mining Association (IMA)

⁸ Kementerian Energi dan Sumber Daya Mineral RI, *Kajian Suply Demand Mineral* (Jakarta: Kajian Pusat Data dan Informasi Kementerian ESDM, 2013), pg. 21

⁹ Juwana Hikmahanto, "Berdasarkan Ancaman Arbitrase Freeport?," Prosiding Workshop in *FREEPORT: QUO VADIS?* (Jakarta: Pusat Perancangan Undang-Undang Badan Keahlian DPR RI, 2017), pg. 9-16

of the Mineral Downstream Task Force formed by Kadin in mid-March 2014.¹⁰

The downstream obligation in the country also contracts pressure from abroad due to the need for mineral raw materials. For instance, Japan is thoughtful to challenge the policy of banning the raw materials exported to the World Trade Organization because they will be affected by the cessation of nickel supply from Indonesia. It is because the Japanese stainless-steel industry depends on 50% of the nickel supply from Indonesia¹¹.

Furthermore, the Constitutional Court (MK), through Decree No. 10/PUU-XII/2014, has strengthened the provisions of Articles 102 and 103 of the Minerba Bill, which mainly requires downstreaming in the country to improve Indonesia's human resources capabilities in mining. This decree is in line with Indonesia's current low state of the mineral and coal downstream process.¹² In 2020, for example, domestic coal production used downstream was only 402 thousand tons or 0.07% of the total production of 560.7 million tons. It is recorded that only three companies have carried out downstream activities and commercially operated, namely PT. ZJG Resources Technology (coal upgrading), PT. Bukit Asam, and PT. Thiriveni (coal briquetting). The low downstream of coal is quantitatively seen from the portion of coal production used for increasing the value-add or downstream.¹³ Meanwhile, the potential of

the international trade market is relatively large. For instance, based on the data released by UN Comtrade Database, global demand for briquettes, ovoids, and solid fuels from coal in 2020 reached 1.65 million tons with a trade value-add of US\$168.15 million.¹⁴

The downstream mandate is a product of legislation that inevitably has to be run by the Government. However, there was a conflict between the Minerba Bill regulations and the implementing regulations, both at the Government and Ministerial Regulations.¹⁵ This situation adds to the blurry portrait of Indonesian regulations that are currently in a state of *hyperregulation*, in which the disharmony norm between one rule and another happens. Disharmony of regulations is a legal problem that occurs across legal norms, in which one legal norm contrasts with another. Consequently, it causes inconsistency of legal rules in regulating a particular problem.¹⁶

Accordingly, this study parses domestic refining policies in various levels of laws and regulations in detail. Thus, it is expected to obtain a description of the disharmony of the norms. The research method used is normative legal research using a statutory and conceptual approach. The data consists of primary legal materials covering legislation in Indonesia's mineral and coal refining sector, ranging from the 2009 Minerba Bill, the 2020 Minerba Bill, and the implementing regulations. In addition, the secondary legal materials include research reports, books, or articles related to the issues. The data is collected using library research and prescriptively analyzed to decipher and assess the suitability of the rules.

10 Asosiasi Pertambangan Indonesia, "Kontribusi Pertambangan Umum Masih Minim," https://www.lmaapi.com/index.php?option=com_content&view=article&id=1381:Kontribusipertambangan-Umum-Masih-Minim&catid=1:Ima-News&Itemid=86&lang=id, 2020., accessed on July 1 2021.

11 Ash Shiddiq, "Kebijakan Luar Negeri Pemerintah Indonesia Dalam Merespon Protes Pemerintah Jepang Terkait Penerapan UU Mineral Dan Batubara Periode 2014", (Jakarta: Thesis on Study Program of International Relations Faculty of Social and Political Sciences Universitas Islam Negeri Syarif Hidayatullah Jakarta 2014), https://repository.uinjkt.ac.id/dspace/bitstream/123456789/42832/1/ASH_SHIDDIQ-FISIP.pdf.

12 Febriansyah Ramadhan & Ilham Dwi Rafiqi, "Study of Constitutional Court Decisions Cancelling All Norms In The Law," *Legality: Jurnal Ilmiah Hukum* 29, no. 2 (2021): 232, <https://doi.org/https://doi.org/10.22219/ljih.v29i2.15434>.

13 Syahrir Ika, "Kebijakan Hilirisasi Mineral: Reformasi

Kebijakan Untuk Meningkatkan Penerimaan Negara," *Kajian Ekonomi & Keuangan* 1, no. 1 (2017): 43–45.

14 Sekar Arum Wijayanti & Deasy Dwi Ramiayu, "Perkembangan Dan Tantangan Hilirisasi Batubara," *Buletin APBN*, Vol. VI, 10th Ed. (2021): 12–14.

15 Febriansyah Ramadhan & Ilham Dwi Rafiqi, "Antinomy of Community Participation Rights in the Law on the Environmental Sector," *Jurnal Daulat Hukum* 4, no. 3 (2021): 171–88.

16 Evi Hastuti, Fance Wantu, Lusiana Margareth Tijow, "Penyelesaian Disharmoni Peraturan Perundang-Undangan Melalui Mediasi," *Gorontalo Law Review* 3, no. 2 (2020): 146.

B. Method

The research method used is normative legal research using a statutory and conceptual approach. The data consists of primary legal materials covering legislation in Indonesia's mineral and coal refining sector, ranging from the 2009 Minerba Bill, the 2020 Minerba Bill, and the implementing regulations. In addition, the secondary legal materials include research reports, books, or articles related to the issues. The data is collected using library research and prescriptively analyzed to decipher and assess the suitability of the rules.

C. Result and Discussion

1. Domestic Minerba Refining Policy

Domestic refining policy is a novelty obligation in Minerba Bill, thus, to carry out several regulations were formed by two regulations, Government and Ministerial. The following are the basis policy and downstream mining objectives by the laws and regulations outlined based on the level of regulations, from laws to implementing regulations.

a. *The Obligation of Domestic Mining Downstream in Law*

The replacement of Law Number 1967 to Law Number 4 of 2009 (2009 Minerba Bill) to answer challenges and problems becomes a milestone in the reform measures and arrangement of minerba mining management and business activities. Besides, the issuance of the 2009 Minerba Bill became the renewal model of Indonesian mining law. The establishment of the Bill, as stated in the considering section in each article, explicitly regulates the authority of minerba mining management either in Central, Provincial, or Regency levels. The authority mentioned is a breakthrough for the government organizers within regional autonomy. Tended to be centralistic, the 2009 Minerba Bill has shifted towards decentralizing authority.

The arrangement of the law in the downstream mining sector develops from the previous rules. Article 1, paragraph 20 explains: Processing and Purification are elements of the mining activities to impro-

ve mineral and/or coal quality, as well as to exploit and obtain any derivate minerals. In this law, a new concept is embraced, namely the concept of licensing by the state c.q. Government to business entities, cooperatives and individuals in conducting mining business. This concept obliges every Mining Efforts License (referred to as IUP) and Special Mining Efforts License (referred to as IUPK) holder to increase the value-add of mineral resources in the implementation of mining, processing and refining, as well as the utilization of minerals and coal. Further, the processing and purification of mining products must be conducted domestically. Each IUP and IUPK holder is not independently operating but cooperating with business entities, cooperatives, or individuals who have already obtained an IUP/IUPK.

This obligation is a manifestation of the 2009 Minerba Bill principle, particularly regarding the principle of benefits. The policies are expected to provide great benefits to the growth of the Indonesian economy and support the greatest prosperity of the people. Additionally, the concept aims to achieve the goals of the 2009 Minerba Bill, namely to guarantee the effectiveness of implementation and the control of mining business activities in an efficient, useful, and competitive.¹⁷ In addition to IUP and IUPK holders, the work contract holders must carry out domestic purification. It is stipulated in Article 170, "The holder of a work contract as stated in Article 169 which has already commenced production is required to begin purification as stated in Article 103 paragraph (1) no later than 5 (five) years from the enactment of this Law."

The 2009 Minerba Bill has become a legal basis and guideline for implementing and managing mineral and coal mining nationwide. The main challenges in organizing and managing include the strong influence of globalization and the development of information and technology. It is becoming a phenomenon that continues to encourage strengthening respect for human rights, environmental insights, and intellectual property

¹⁷ Marulak Pardede, "Implikasi Hukum Kontrak Karya Pertambangan Terhadap Kedaulatan Negara," *Jurnal Penelitian Hukum De Jure* 18, no. 1 (2018): 1

rights. Moreover, these circumstances further strengthen the demands for the implementation of democratization, regional autonomy, and increased private and community roles. The Bill has seven times applied for judicial review applications to the Constitutional Court in its implementation. However, only four requests were granted either in part or in whole. The amendment of the Bill remains the philosophical principle and objective as stated in the 2009 Minerba Bill; however, in some provisions, in particular, the provision of mining downstream, there are many significant changes.

Initially, Article 102 changes the provisions regarding the obligations of IUP and IUPK holders to increase the value-add of minerals in production operations activities through various ways based on the limits and provisions in article *a quo*. One of the ways to increase the value-add is implementing the processing and/or purification by meeting the minimum limit based on the increasing economic value considerations.

The following change is stated in Article 103, the addition of articles, phrases, and/or: "The holder of IUP and IUPK as stated in Article 102 is obligated to undertake processing and purification activities on domestic mine products. This addition creates a new interpretation: *first*, this article obliges the Production Operations IUP and IUPK to undertake domestic processing and/or purification.

Both processing and refining activities are different. Processing is to improve the quality of commodities that produce physical and chemical properties that are unchanged from the nature of the original mining commodity, while the results of refining process are different from the original mining commodities. *Second*, the phrase 'and/or' makes these two things an alternative and cumulative choice. It can be done alternatively as stated in word 'or', and can also be done cumulatively or both as stated in word 'and'.¹⁸ Both are legitimate. As a result, the Law based on Article 103 is opening up the opportunity to undertake purification not domestically. The next change regarding mining downstream is 18 Sasangka Sry Satriya Tjatur Wisnu, "Bahasa Indonesia Dalam Perundang-Undangan," *Jurnal Kajian*. Vol. VII hal 1-22, Jakarta 2011, pg. 54.

about cooperation in processing/refining stated in 104 of the 2020 Minerba Bill.

Apart from the provisions mentioned above, the 2020 Minerba Bill again negotiates the term of domestic purification and relaxation policies as the non-optimal construction of domestic processing and refining facilities. It is mentioned in Article 170A of the 2020 Minerba Bill as an additional article

b. The Obligation of Domestic Mining Downstream in the Implementing Regulations

The president holds the power of government and is assisted by the ministers. Laws, the result of joint policies between the President and DPR (People's Representative Council), have an abstract/a general norm trait, and further regulations are needed to implement.¹⁹

The source of delegation authority in the laws and regulations creates a new product of legislation, often referred to as the Implementing Regulations. The implementing regulations serve as the implementers of laws or so-called delegated legislation as subordinate legislation because the determination authority comes from the authority delegated by the legislature as stated in law.²⁰

According to Jimly, every implementing regulation always has an order from a higher rule to be more technically regulated in its derivative rules. Otherwise, the regulation is no longer legitimate. The mining refining mentioned in Minerba Bill applies such provisions, which require further rules, as affirmed in Article 103 paragraph (3) of the 2009 Minerba Bill.

The mandate of the 2009 Minerba Bill is regulated in the Government Regulations and the Minister of Energy and Mineral Resources (referred to as ESDM) Regulations. The formation of this regulation at the implementing level becomes the authority of the executive power of a *sich*, which is no longer associated with the DPR. In this for-

¹⁹ Zaid Afif, "Pembentukan Peraturan Perundang-Undangan Berdasarkan Pancasila Dan UUD NKRI," *Jurnal Dialog* Vol. VII No. 1 September (2018), pg. 34

²⁰ Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Konstitusi Press, 2006), pg. 275

mation, the executive who carries out the formation of the implementing regulations is bound by the principles of establishing laws and regulations and controlled by judicial power through the regulations tested under the law by the Supreme Court. Moreover, every implementing regulation must be matched/harmonious with the law. This harmonization aligns one rule with another. Hence, a rule can be arranged systematically and overlapping.²¹ Such spirit, foundation, and purpose in the law are needed to maintain the proper implementing regulations. Here is a qualitative description of the provisions of purification in the implementing regulations established by President c.q, the relevant Ministry

Government Regulation (GR) Level

The first implementing regulation in this level of the Minerba Bill 2009 includes GR Number 23/2010 concerning regulating the minerba mining business. This regulation as the implementer rule on Article 5 paragraph (5), Article 34 paragraph (3), Article 49, Article 63, Article 65 paragraph (2), Article 71 paragraph (2), Article 76 paragraph (3), Article 84, Article 86 paragraph (2), Article 103 paragraph (3), Article 109, Article 111 paragraph (2), Article 112, Article 116, and Article 156.

As an implementing regulation, it is not necessarily to widen the new established norm, starting from Article 93, which regulates Production Operations IUP and IUPK to undertake the processing and purification activities to increase the value-add of minerals.

Furthermore, the transitional provisions stated in the GR level affirm that every mining power, regional mining permit, and people's mining permit given based on the laws and regulations before enacting this regulation remains in effect until the expiry of the period. The implementation includes the obligation to undertake domestic processing and purification no later than 5 (five years) since the 2009 Minerba Bill enactment.

Compared with the provisions in the Minerba Bill concerning the period and subject *adressat* of the regulated norms, this Government Regulation is expanding. While the Minerba Bill determined five years for the work contracts only, this regulation expands to mining power, regional mining license, people's mining license, IUP, and IUPK.

The second implementing regulation stated in the 2009 Minerba Bill is GR Number 24/2012 concerning Amendment (First) GR 23/2010 on the Implementation of Minerba Mining Business Activities. This basis background of the GR formation includes the development of domestic industries that need to realign the granting of mining business licenses for nonmetallic minerals and rocks. Next, it provides greater opportunities for Indonesians to participate in minerba mining business activities. Lastly, it is needed to require foreign capital to transfer some of their shares to Indonesian participants and realize legal certainty for Work Contract/Agreement holders.

The content material at the GR level is more about adding articles than previous articles amendments. The chapters consisting of changed material are regarding an IUP/IUPK, stock divestment, procedure to work contract extensions, etc. There is no provision of the norms mentioned regarding mining refining carried out domestically.

The third implementing regulation is GR Number 1 of 2015 concerning Amendment (Second) to GR Number 23 of 2010 on the implementation of Minerba Mining Business Activities. This GR is closely related to domestic refining issues and work contracts and agreements. It can be seen in the base that mandating the management and domestic refining of minerals can increase the value-add and benefit the people and regional development. Thus, it is in accordance with the goals of Pancasila and the constitution to realize social welfare.²²

Unlike the third regulation, the fourth implementing regulation covers GR Number

21 Soegiyono, "Pentingnya Harmonisasi Dalam Pembentukan Peraturan Perundang-Undangan," *Jurnal Kajian Kebijakan Dan Hukum Kedirgantaraan*, 2020, pg. 1–21, <https://doi.org/10.30536/9786023181339.1>.

22 Erika & Dewa Gede Sudika Mangun, "Politik Hukum Pancasila Dalam Paradigma Nilai-Nilai Sosial Kultural Masyarakat Indonesia," *Pandecta: Jurnal Penelitian Hukum* 9, no. 10 (2014): 38–4,

77/2014 concerning Amendment (Third) GR Number 23/2010; this regulation has been changed twice within a year in 2014 and the third time since 2010. This GR is formed considering the need for significant investments in processing and refining activities.

From the previous GR, Article 36 has been changed regarding the provisions of purification norms. It regulates that if the holder of the Production Operations IUP does not undertake the processing and refining activities, then it will be carried out by other parties who have Production Operations IUP with such facilities. In this rule, there is no fundamental change to the domestic purification policy, but it opens up alternatives to the permit holders that cannot carry it out on their own.

The fifth implementing regulation is GR Number 1/2017 on Amendment (Fourth) to GR Number 23/2010, which is formed when the period of obligation to build a refining facility as stipulated in GR 23/2010 is due. *In casu a quo*, domestic purification obligations are still not entirely undertaken by permit grants. Hence, this GR appears as the basic consideration to increase the value-add of metal minerals through processing and purification of metal minerals, as stated in the 2009 Minerba Bill. In this view, the government continually encourages the realization of the construction of domestic refining facilities.

Unlike the previous GR, this fifth implementing regulation expands its purification activities. Although Article 112C paragraph 2 confirms that the holders of Production Operations IUP are obliged to undertake domestic processing and purification, in the same article, the next paragraph, paragraph 4 (2), mentioned that the holder of IUP can export a certain amount after undertaking the processing activity. Based on the provisions of a *quo*, it is permissible to export only after the processing stage.

In public discourse, the relaxation of this regulation is a form of government authority through domestic purification policies that are not implemented optimally by stakeholders. It becomes the last GR on the

implementation of the 2009 Minerba Bill. According to the writer, of the various GRs in outlining further provisions of the Bill, especially regarding domestic purification, there is a significant wave of norms (outlined in the next sub-chapter), which impacts derivatives in the form of ministerial regulations.

The new regulations stipulate that local miners are allowed to apply to the Ministry of ESDM to export raw mineral concentrates (copper), washing ore (bauxite), and low-grade ore (nickel). However, as a requirement, they must amend the "Employment Contract" to be approved to export by the Ministry of Trade annually, and fulfil their obligation for their domestic supply to local refineries and processing plants.

The ESDM Ministry has indicated that the objective of this new regulation is aimed to be in line with the 2009 Minerba Bill. Therefore, raw mineral concentrate export permits will only be granted to companies with an IUPK, IUP, and those who have made progress in the development of refineries and processing infrastructure. Furthermore, the Ministry has also mentioned that the permit will be reviewed every six months and be revoked if the miner does not make sufficient progress in its development activities.

Ministerial Regulation (MR) Level

The domestic purification policy is firstly regulated in ESDM MR Number 7/2012. This rule fundamentally regulates more details about increasing the value-add of minerals, such as procedures to increase them based on the commodity group of mining, implementation of metal and non-metal categories and rock commodities, and details of commodity type.

Moreover, this regulation justifies a policy through a cooperation scheme when the obliged party gets into trouble or faces an economic problem. Suppose the holder of a Production Operations IUP/IUPK does not implement the processing and/or purification economically. In that case, they are allowed to cooperate with other parties who have mining licenses.

Shortly afterwards, regulation number

7/2012 was first changed to regulation number 11/2012 on May 21, 2012. The presence of this regulation is based on considerations to increase the effectiveness of mineral export control by prioritizing the processing and purification activities. A reasonably crucial addition in regulation number 11/2012, namely article 21A, regulates raw material or ore exports. This rule has widened the rules for exporting raw materials but is limited to holders of Production Operations IUP/IUPK.

The second amendment from the regulation number 7/2012 altered to number 20/2013 concerning the increase in mineral value-add through processing and purification activities. This rule is a follow-up of Supreme Court Decision No. 19/P/HUM/12 and is the implementation of mineral export control. This regulation, especially Article 21A, stipulates that the period of raw materials or ores export is carried out until January 12, 2014, as stated in Article 112 paragraph 4 letter c GR 23/2010.

Next is regulation number 1/2014 on increasing mineral value-add through domestic processing and purification. As stated in Article 5, this obligation stipulates the holders of Production Operations IUP/IUPK to undertake domestic processing and purification of mining products in accordance with the minimum limits of certain metal minerals. On the other hand, the relaxation of the policy to export remains in this regulation, even though the previous rules are due.

Regulation number 1/2014 lasted approximately three years. A regulation was made in 2017, namely regulation number 5/2017, which concerns the increase of mineral value-add through domestic processing and purification activities. The presence of these regulations revokes all previous implementing rules.

However, this regulation is not much different from the previous ones, which is also a form of relaxation policy to export the mining products without undertaking domestic processing and purification. Article 10 states that holders of IUP/IUPK Nickel Production Operations, IUP for nickel processing and/or refining, and other related parties must utili-

ze nickel with the level of <1.7%, as stated in Article 9 paragraph 2 letter a. There mentioned that at least 30% of the total input capacity of nickel processing and refining facilities is owned. In addition to nickel, the IUP holder is permissible to conduct sales on bauxite based on Article 10, paragraph 3.

Regulation number 5/2017 widely opens the relaxation policy. Thus, further rules regarding the technical export of minerals are needed. It becomes the reason for regulation number 6/2017 concerning procedures and requirements for providing a recommendation for the implementation of mineral export as a result of refining management. This regulation was promulgated simultaneously with regulation number 5/2017 on January 11, 2017.²³ The relaxation of mineral export policies is similar to the previous ones stipulated in this regulation.

In the same year, on March 31, 2017, the ESDM Ministry changed regulation number 5/2017 through regulation number 28/2017 concerning changes to regulation number 5/2017 on increasing the value-add through domestic processing and purification activities. This regulation does not change much on the export policy but focuses on changing the form of the mining business, from the Work Contract to Production Operations IUPK.

Shortly after 2017, regulation number 5/2017 was revoked through regulation number 25/2018 on May 3, 2018. This regulation maintains the policy of processing and refining products. Indeed, the regulation obliges to undertake to refine as stated in Article 17-19, but in other provisions, it still provides to conduct export until January 11, 2022.

In the same year, regulation number 25/2018 has changed through regulation number 50/2018 on December 6, 2019. One of the crucial points is the provisions for granting mineral export licenses for the holder of Production Operations IUPK. Article

²³ Bisman Bhaktiar, "Menggugat Kebijakan Izin Ekspor Tambang Mineral Mentah (Tinjauan Juridis PP 1/2017 Serta Permen ESDM 5/2017 Dan Permen ESDM 6/2017)," *Jurnal Universitas Pancasila* 1, no. IV (2020): 653, <http://journal.univpancasila.ac.id/index.php/selisik/article/download/653/388>.

51 paragraph 2 states that export permits are granted under the construction of a smelter met the physical progress, in accordance with verification plans by an independent verifier. While in the previous rule, there must be two requirements to conduct exports. First, the plan for the construction of domestic refining facilities is conducted by independent verifiers. Second, conducting verified physical progress of the refining facilities by independent verifiers.²⁴

Furthermore, the Government disallowed the policy of nickel ore export from December 31, 2021, to December 31, 2019, which is stated in the ESDM MR Number 11 of 2019. This regulation is the second change to regulation number 25/2018 concerning the mineral and coal mining business. There are two revised articles, Articles 46 and 62A. Article 46 in regulation number 25/2018 mentions the export of nickel ore and bauxite. However, the regulation amended to number 11/2019, which eliminates the provisions for nickel ore exports. This regulation only regulates the export of bauxite that has been washed with the levels of A1203 > 42% in a certain amount employing HS (Harmonizes system)/tariff post. Nevertheless, the bauxite ore exports are valid until January 11, 2022.

Since the beginning of MR Number 1

24 Fariha Sulmaiati, "Aturan Baru, Izin Ekspor Terbit Jika Pembangunan Smelter Capai Target," <https://katadata.co.id/Berita/2018/12/26/Aturan-Baru-Izin-Ekspor-Terbit-Jika-Pembangunan-Smelter-Capai-Target/>, 2018.

of 2014, which regulates export provisions, there has been a government alignment with some permit holders. The regulation prohibits the export of raw minerals except for certain low-grade minerals, such as iron, iron ore, lead, copper, iron sand, zinc and manganese. Therefore, the Indonesian Mineral Entrepreneurs Association (APEMINDO) stated that the policy benefits IUP companies and holders of the work contract. Some companies, such as PT. Freeport Indonesia and PT. Newmont has been managing with this regulatory model

2. Disharmony of Domestic Refining Provisions for Mineral and Coal in Laws and Regulations

The previous discussion showed that the regulation of domestic purification is zig-zag and disharmony. The implementing regulations and laws are not matched. The following are the description to obtain the whole picture.

As a wealthy country that has diverse resources such as nickel, copper, silver, gold, lead, bauxite, manganese and others spread throughout the Indonesia archipelago, it needs to be adequately managed, especially its processing and refining facilities, to increase the value-add of the mining products.²⁵

This goal is in line with the Minerba Bill, na-

25 Ilham Dwi Rafiqi, "Pembaruan Politik Hukum Pembentukan Perundang-Undangan Di Bidang Pengelolaan Sumber Daya Alam Perspektif Hukum Progresif," *Bina Hukum Lingkungan* 5, no. 2 (2021): 320–21, <https://doi.org/https://doi.org/10.24970/bhl.v5i2.163>.

Table 1. Provisions on the Subject and Object of Domestic Mineral and Coal Refining Policy

No	Regulation	Subject (KK, IUP, IUPK, IPR, etc)	Policy Object	Compensation Time Duration	Contents of the article
1	2009 Minerba Bill	KK (art.170)	Domestic refining obligations	5 years, until 2014. (art.170)	The holder of the work contract as referred to in Article 169 who is already in production is required to carry out the purification as referred to in Article 103 paragraph (1) no later than 5 (five) years after the promulgation of this Law.
		IUP (art.103)	Domestic refining obligations	-	Holders of IUP and IUPK Production Operations are required to process and purify mining products domestically.
		IUPK (art. 103)	Domestic refining obligations	-	Holders of IUP and IUPK Production Operations are required to process and purify mining products domestically.
		IPR	-	-	Holders of IUP and IUPK Production Operations are required to process and purify mining products domestically.

2	GR number 23/2010	IUP	Domestic obligations	5 years (Article 112 paragraph 4 letter C. 2009-2014)	Article 112 paragraph 4 letter C processing and refining domestically within a period of no later than 5 (five) years after the enactment of the 2009 Minerba Law
		KK IPR	- Domestic obligations	- 5 years (Article 112 paragraph 4 letter c)	- Article 112 paragraph 4 letter C processing and refining domestically within a period of no later than 5 (five) years after the enactment of the 2009 Minerba Law
		IUPK	-	-	-
3	MR number 07/2012	IUP (chapter 7 paragraph 1)	Domestic refining obligations	5 years (article 24)	<p>Holders of IUP Operations for metallic minerals are obligated to process and purify domestic mining products for certain metal mineral mining commodities as referred to in Article 3.</p> <p>At the time this Regulation comes into force, the holders of Production Operation IUP and IPR issued prior to the entry into force of this Regulation are prohibited from selling mineral ore (raw material or ore) abroad within a period of no later than 3 (three) months after the entry into force of this Regulation.</p>
			Prohibition of selling mineral ore abroad for a period of no later than 3 months. Article 21.	3 Months since the rule.	
		IUPK (Article 7 paragraph 1)	Domestic refining obligations	5 years 2009-2014	Holders of IUP Operations for metallic minerals are obligated to process and purify domestic mining products for certain metal mineral mining commodities as referred to in Article 3.
		IPR	Prohibition of selling mineral ore abroad for a period of no later than 3 months. Article 21.	3 months since the rule was enacted	At the time this Regulation comes into force, the holders of Production Operation IUP and IPR issued prior to the enactment of this Regulation are prohibited from selling mineral ore abroad within a period of no later than 3 months after the entry into force of this Regulation.
		KK	-	-	-
4	MR number 11/2012	IUP	Can sell mineral ore abroad Article 21A	-	The holders of IUP Production Operations and IPR as referred to in Article 21 may sell mineral ores abroad if they have obtained a recommendation from the Minister c.q. Director General.
		IPR	Can sell mineral ore abroad Article 21A	-	The holders of IUP Production Operations and IPR as referred to in Article 21 may sell mineral ores abroad if they have obtained a recommendation from the Minister c.q. Director General.
		IUPK KK	-	-	-
5	MR number 20/2013	IUP	Can sell mineral ore abroad Article 21A	January 12, 2014	The holders of IUP Production Operations and IPR may sell mineral ore abroad until January 12, 2014 in accordance with the provisions of Article 112 number 4 letter c of PP Number 23 of 2010 concerning the Implementation of Mining Business Activities.
		IUPK KK	-	-	-
		IUPR	Can sell mineral ore abroad Article 21A	January 12, 2014	The holders of IUP Production Operations and IPR may sell mineral ore abroad until January 12, 2014 in accordance with the provisions of Article 112 number 4 letter c of PP Number 23 of 2010 concerning the Implementation of Mining Business Activities.
6	MR number 1/2014	Article 5 paragraph 1 and Article 12 paragraph 3	Domestic and refining obligations	-	<p>Article 5 paragraph 1</p> <p>Holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK are required to carry out domestic processing and refining of mining products in accordance with the minimum limits for processing and refining certain Metallic Minerals as referred to in Article 3 paragraph (4)</p>

					Article 12 article 3 Holders of Metal Mineral Production Operation IUP as referred to in Article 112C number 4 PP Number 1 of 2014 concerning the Second Amendment to PP Number 23 of 2010 concerning the Implementation of Minerba Mining Business Activities may sell abroad a certain amount of processing results including purification results after meeting the limits. Minimum processing and refining as stated in Appendix I which is an integral part of this Ministerial Regulation.	
	IUPK paragraph 1	Article 5	Domestic refining obligations	-	Article 5 paragraph 1 Holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK are required to carry out domestic processing and refining of mining products in accordance with the minimum limits for processing and refining certain Metallic Minerals as referred to in Article 3 paragraph (4)	
	KK chapter 12 verse 1		Can do sales abroad	-	Article 12 paragraph 1 "The holders of the Metal Mineral Contract of Work as referred to in Article 112C number 3 of PP Number 1 of 2014 concerning the Second Amendment to PP Number 23 of 2010 concerning the Implementation of Minerba Mining Business Activities may sell abroad a certain amount of processing results including the results of purification after meeting the minimum processing and purification limits as referred to in Appendix I which is an integral part of this Ministerial Regulation".	
	IPR			-	-	
7.	GR number 1/2014	KK chapter 12C verse 1	Overseas Sales, after carrying out refining activities. Article 112C	Domestic refining obligations	-	Article 112C paragraph 1. The holder of the contract of work as referred to in Article 170 of the 2009 Minerba Law concerning Mineral and Coal Mining is required to purify the mining products in the country. The holder of the contract of work as referred to in number 1 who carries out metal mineral mining activities and has carried out refining activities, can sell abroad in a certain amount. Article 112 C paragraph 2 holders of Mining Business License (IUP) for Production Operation as referred to in Article 112 number 4 letter a of this PP are obligated to process and purify domestic mining products.
		IUP pasal ayat 2		Domestic refining obligations	-	
		IUPR		-	-	
		IUP		-	-	
8	GR number 77/2014	KK		-	-	
		IUPR		-	-	
		IUP		-	-	
		IUPK		-	-	
9	GR number 1/2017	KK Article paragraph 1		Domestic refining obligations	-	Article 112 paragraph 1 The holder of the contract of work as referred to in Article 170 of the 2009 Minerba Law is obliged to purify the mining products in the country
		IUP Article paragraph 2		Domestic refining obligations	-	The holder of a Production Operation IUP as referred to in Article 112 number 4 letter a of this PP is required to process and purify mining products domestically.

10 MR number 5/2017	IUP Article 5 paragraph 1 and paragraph 3	Domestic refining obligations	-	<p>Article 5 paragraph 1. Holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK are obligated to process and purify domestic mining products in accordance with the minimum limits for processing and refining certain Metallic Minerals as referred to in Article 3 paragraph 4.</p> <p>Paragraph 3. Holders of Mining Business License (IUP) for Production Operation and IUPK Production Operation in conducting processing and/or refining of mining products in the country as referred to in paragraphs 1 and paragraph 2 can be carried out alone or in collaboration with other Production Operation IUP holders, and/or IUP holders. Production Operations specifically for processing and/or refining.</p> <p>Article 5 paragraph 1 Holders of Mining Business License (IUP) for Metal Mineral Production Operation and Special Mining Business License (IUPK) for Metal Mineral Production Operation are required to carry out domestic processing and purification of mining products in accordance with the minimum limits for processing and refining certain Metal Minerals as referred to in Article 3 paragraph 4.</p>
11 MR number 6/2017	IUP Article 2 paragraph 1	-	-	<p>Article 2 paragraph 1 reads "The holders of Production Operation IUP, Production Operation IUPK, Production Operation IUP specifically for processing and/or refining, Production Operation IUP specifically for transportation and sales, and Contracts of Work may sell overseas:"</p> <p>Article 2 paragraph 2 "Holders of Metal Mineral Production Operation IUPK, Metal Mineral Production Operation IUP, and Production Operation IUP specifically for processing and/or refining may sell Processing results abroad in a certain amount after obtaining Export Approval from the Director General of Foreign Trade. State, Ministry of Trade"</p> <p>"The holders of IUP Production Operations, IUPK Production Operations, IUP Production Operations specifically for processing and/or refining, IUP Production Operations specifically for transportation and sales, and Contracts of Work may sell overseas: a. Metallic Minerals that have met the minimum requirements for Purification; and/or b. Non-Metal Minerals or Rocks that have met the minimum processing limit, using Tariff Post/HS (Harmonized System) in accordance with the provisions of the legislation"</p>
12 MR number 25/2018	IUPR IUP Article 17 paragraph 1 and Transitional Provisions in Article 44 letter b	-	-	<p>Holders of Production Operation IUP, Production Operation IUPK, and Production Operation IUP specifically for processing and/or purification of metallic Minerals, non-metallic Minerals, or rocks prior to conducting overseas sales activities are obligated to increase Added Value through Processing and/or Purification activities. according to the minimum limits for Processing and/or Purification are listed in Appendix I, Appendix II, and Appendix III which are an integral part of this Ministerial Regulation.</p>

				Article 44 letter b “The holder of the Mining Business License (IUP) for the Production Operation of Metallic Minerals can sell the processing results abroad in a certain amount no later than January 11, 2022 after paying the export duty in accordance with the provisions of the legislation and meeting the minimum processing limits listed in Attachment I which is an integral part of this Candy;”
	IUP special production operation	Overseas	4 years (2018-2022)	Article 44 letter C “The holder of a Production Operation IUP specifically for the processing and/or refining of metallic Minerals that was issued before the enactment of PP Number 1 of 2017 and has produced processed products may sell the processing results abroad in a certain amount no later than the 11th. January 2022 after paying the export duty in accordance with the provisions of the legislation and meeting the minimum processing limits listed in Attachment II which is an integral part of this Ministerial Regulation;
	In the transitional provisions of Article 44 letter C			
	KK Article letter a	44 Overseas	4 years 2018-2022	Article 44 letter C “The holder of a Production Operation IUP specifically for the processing and/or refining of metallic Minerals that was issued before the enactment of PP Number 1 of 2017 and has produced processed products may sell the processing results abroad in a certain amount no later than the 11th. January 2022 after paying the export duty in accordance with the provisions of the legislation and meeting the minimum processing limits listed in Attachment II which is an integral part of this Ministerial Regulation;
	IUPK chapter verse 1	Domestic refining obligations	-	Article 17 paragraph 1 “Holders of Production Operation IUP, Production Operation IUPK, and Production Operation IUP specifically for processing and/or purification of metallic Minerals, non-metallic Minerals, or rocks prior to conducting overseas sales activities are required to first increase the Added Value through activities Processing and/or Purification according to the minimum limits for Processing and/or Purification are listed in Appendix I, Appendix II, and Appendix III which are an integral part of this Ministerial Regulation.” Paragraph 3 “By-products or residual results of the Purification of mining commodities, Metallic Minerals of lead and zinc in the form of gold and silver, must be purified domestically in accordance with the minimum limits.
13	MR number 50/2018	IUPR KK	- -	- -
		IUPR IUP IUPK	- - -	- - -
14	2020 Minerba Bill	IUP Article 103 paragraph 1 and Article 170A paragraph 1	Domestic refining obligations	Term of 3 years (article 170 A paragraph 1). 2020-2023 Article 103 paragraph 1 reads “IUP or IUPK holders at the Mineral Production Operation stage as referred to in Article 102 are obligated to process and/or purify Minerals resulting from domestic mining” Article 170A paragraph 1 “Holders of KK, Production Operation IUP, or metal Mineral Production Operation IUPK who;....., can sell certain unrefined metal Mineral products abroad in a maximum period of 3 (three) years. since this Act came into force.

IUPK 103 paragraph 1	Article Domestic purification obligations	-	-	Article 103 paragraph 1 reads "IUP or IUPK holders at the stage of Mineral Production Operation activities as referred to in Article 102 are obligated to process and/or purify Minerals resulting from domestic mining" Article 170A paragraph 1 "Holders of KK, Production Operation IUP, or metal Mineral Production Operation IUPK who:....., may sell certain unrefined metal Mineral products abroad in a maximum period of 3 (three) years. since this Act came into force.
IUPR KK chapter 170 - A verse 1	-	-	Term of 3 years so 2020- 23	Article 170A paragraph 1 "Holders of KK, Production Operation IUP, or metallic Mineral Production Operation IUPK who:....., can sell certain unrefined metal Mineral products abroad in a maximum period of 3 (three) years as of This law comes into force."

mely maintaining the availability of raw materials for domestic resources, increasing state revenue and growing the domestic manufacturing industry. Besides, the Minerba Bill aims to provide the value-add of mining products to the people of Indonesia to increase the growth of the domestic product. Even if the derivative regulations are implemented correctly, they will open up local communities' job opportunities by setting up smelters without exporting products.

The prohibition of raw material exports stated in the Bill is one of the implementations of legal substance and legal structure for IUP, IUPK, and/or KK holders to be required to build smelters and undertake processing and refining of mining products before being exported. However, the ESDM MR Number 5 of 2017, which was amended to Number 28 of 2017, is disharmony with the Minerba Bill, namely granting of export permits of minerals that have not been processed and refined, as stated in Article 10 ESDM MR 5 Number 7 jo and Article 2 ESDM MR Number 6 of 2017. It is contrary to the Minerba Bill that: Sovereignty of the constitutional rights of the Indonesian nation, which universally defends the nations to manage and utilize all-natural wealth, including mining sector purposes for the greatest prosperity of the community.

The utilization of governance in the mining sector will be submitted through DPR (People's Representative Council) to be implemented in the laws and regulations so that they can be carried out properly, orderly, transparent, effective and efficient (good

governance). Expectedly, it positively impacts the mining sector and prevents damage and losses.

A smelter industry in the mining sector is a new and essential thing as structural reform. Domestic processing of raw goods into finished ones is beneficial for the growth of the country.²⁶ Efforts to accelerate the construction of smelters are a means of increasing the value-add of minerals. Hence, the Government seeks to provide the facilities by issuing ESDM MR Number 5 of 2017, which was amended to Number 28 of 2017, namely to increase the value-add and competitiveness of mining products. In this accord, the Government implements a seemingly comprehensive program for the development of downstream industries to create mining products that have a value-add and high competitiveness.

One of the Government efforts supporting the program is through a policy that allows to process and refine abroad but only a certain level of mines, as stated in the ESDM MR 5 Article 10 Number 7 jo and ESDM MR Article 2 Number 6 of 2017. Regulation number 5 of 2017, amended to number 28 of 2017, agrees on mining products with specific content restrictions to export. If the level has been met, an export permit will be granted. Regulation Number 28 of 2017 Ar-
26 Kartika Sari Dian Pratama dan Chyntia Damayanti, "Urgensi Pembangunan Smelter Oleh Perusahaan Tambang Di Indonesia Sesuai Amanat Undang-Undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral Dan Batubara," *Privat Law* 2, no. 6 (2014), pg. 2

Article 10 states that the regulation of domestic processing and purification is inconsistent and contrary to the obligation to increase the value-add undertaken domestically. It is stated in Articles 102, 103, and 107 of the Minerba Bill. Based on the policies mentioned, the writer concludes that the regulation of undertaking domestic processing and purification activities has diverse rules with diverse subjects. It is also different from the laws and regulations.

As previously discussed, four license regimes become the subject of domestic processing and purification activities, the holder of KK, IUP, IUPK, and IPR. Each of which has different purification provisions in each rule. For instance, the KK regime is the only regime permissible to have compensation time undertaking the domestic processing and purification activities until 2014. This is different from IUP and IUPK. In Government Regulation Number 23/2010, KK IUP, IUPK, and IPR received their compensation times to refine until 2014. Furthermore, KK received more relaxation policies than others through Government Regulation Number 1/2014 and ESDM Ministerial Regulation Number 1/2014, which permits them to export mining products. It re-occurred in 2018, and the policy was subjected to the realities where the business actors did not follow the instructions correctly, which affected incapable of undertaking domestic refining due to non-optimally building the facilities/smelters. Therefore, the Government Regulation in 2018 was re-issued to permit exporting the mining products without domestic refining until 2022.

The various dynamics of laws and regulations show the tide of implementing regulations driven by empirical reasons due to the incapability of supporting mining downstream, both micro and macro. This is also due to problems that have become a tradition of Indonesian legislation, in which the discretion of officials authorized to draft implementing regulations flexibly without regard to whether the regulation is able to support the purpose of the norm, which in this case is the downstream as stated in the

Minerba Bill.²⁷ In this view, the disharmony of the implementing regulation hinders the achievement of the ultimate goal of all mining sectors, namely the greatest prosperity of the people.

From legal political point of view, the formation of policy by the government is very responsive and adaptable to follow the field actors.²⁸ The absence of firmness and authority of stakeholders eventually impacts state losses. The firmness only appears in the 'provision' of the legal product. For instance, on each due date of compensation time given by the law, there are already new regulations that revoke and replace the previous rules even before the due. For the last ten years, there has been no implementation regulation or revision of the law that supports the goals of the 2009 Minerba Bill

D. Conclusion

The domestic purification policy is regulated by 13 implementing regulations, including 3 Government Regulations and 10 Ministerial Regulations. These regulations tend to be flexible and not one-way. Unfortunately, it causes the companies to undertake refining activities abroad, ideally carried out domestically. Industrial pressures also cause another factor to amending the regulation. It is recorded that the regulations change three times in a year.

The disharmony of the rules is stated in diverse regulations, such as ESDM MR Number 5 of 2017 amended to ESDM MR Number 28 of 2017. This regulation contradicts the obligation to undertake processing and refining domestically to increase the value-add, as stated in Articles 102, 103, and 107 of the Minerba Bill. The regulation is considered contradictory due to the permissible to export minerals that have not been processed and refined. This disharmony case is due to flexible regulation and many licensing regi-

27 Suparji & Rafiq Mizi, "Penataan Regulasi Mineral Dan Batubara Untuk Kesejahteraan Rakyat," *Jurnal Magister Ilmu Hukum Universitas Al Azhar Indonesia* IV, no. 2 (2019): 1–10.

28 Ricca Anggraeni, "Pola Persaingan Antara Hukum Dengan Politik Dalam Pembentukan Peraturan Perundang-Undangan," *Pandecta: Jurnal Penelitian Hukum* 11, no. 2 (2016): 207–9

mes subjects. Each subject has different provisions in every rule, which inappropriately such conditions can reduce state revenue and impact state losses

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