QUESTIONING INDONESIA'S BAN ON EXPORT OF ORE POLICY UNDER INTERNATIONAL INVESTMENT AND TRADE LAW*

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Abstract

This paper discusses the position of Indonesia's policy to ban export of raw minerals under the international law, which questioned the balance between the concept of state sovereignty and the private entities rights. The issue mainly deals with the legitimacy of such law under international agreement which Indonesia party to. Analysis drawn on several government rules on mining sector which further linked with the obligation derived from international agreement in investment or trade law. The author concludes that Indonesia's rules on mining sector have several flaws which require improvement or the State would be prone towards any lawsuits and losses in the international tribunal.

Intisari

Makalah ini membahas posisi kebijakan Indonesia dalam larangan ekspor mineral mentah di bawah hukum internasional, yang mempertanyakan keseimbangan antara konsep kedaulatan negara dan hak-hak lembaga swasta. Masalah ini terutama berkaitan dengan legitimasi kebijakan tersebut dengan perjanjian internasional yang Indonesia sepakati. Analisis ditarik pada aturan pemerintah di sektor pertambangan yang dikaitkan dengan kewajiban dari perjanjian internasional di bidang investasi atau perdagangan. Penulis menyimpulkan bahwa aturan di Indonesia pada sektor pertambangan memiliki beberapa kelemahan yang memerlukan perbaikan atau Negara akan rentan terhadap segala tuntutan hukum dan kerugian di pengadilan internasional.

Keywords: ore export ban, WTO, investment, Indonesia.
Kata Kunci: *larangan ekspor mineral, WTO, investasi, Indonesia.*

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A. Introduction

It is commonly agreed by the international community that a State shall preserves permanent sovereignty over its natural resources and must use those resources for their national development and the well-being of its people (GA Res 1803, 1962). Affirming this notion, the Article 33(3) of Indonesia's Constitution mandated the State to use natural resources only for the prosperity of the people. Thus, It is inevitable that foreign investment or project in minerals sector would be heavily regulated by the host State as every state goal is to give prosperity to its people.

As a country that is well known for having abundant of natural resources, Indonesia trade and economy is highly dependent with the export of its natural resources with Nickel and Bauxite as the 'star'. Indonesia's exports in minerals generating USD 2 Billion for the state revenue amounting to 17% of the total export revenue (Ministry of Industry, 2011). In the international trade itself, Indonesia is considered as a major player in global metal market, amounted for around 20 percent of the global nickel supply and 10 percent of Aluminum supply.

However due to deficit on the trade balances, Indonesia is trying to add value to its mineral by imposing the Law No. 4 of 2009 concerning Mineral and Coal Mining which bans export of 'unprocessed' minerals. Bearing in mind the general sense of the Law, Indonesia implemented the notion through the Government Regulation No. 1 of 2014 and ESDM Regulation No. 1 of 2014 which set the motion of the banning policy per January 12th 2014.

Despite having permanent sovereignty over natural resources, the Host state of the project is also obliged to give favorable business climate for foreign investor through giving minimum standard treatment and certainty under international investment law. Besides that, a State is no longer fully sovereign to control its trade policy as far as the State ratified the WTO Agreements. Having in mind the aforementioned circumstances, shall Indonesia's policy banning export of raw ore be justified?

B. History and Regulations concerning Indonesia ore export bans

As mentioned before, the notion to restrict exports of raw ore firstly comes up within the Law No. 4 of 2009 concerning Mineral and Coal Mining ('2009 Mining Law'). The government claims that there are two motives behind the enactment of the law; firstly is that the government wanted to add value to their minerals, and the latter is to preserve the minerals for its domestic demand. The issue of the debate raised by two provisions of the Law which are the Article 103 and the Article of the 170 of the law. The Article 103 prescribed that "[the authorized company] shall process and purify the minerals domestically" which implicitly prohibits export of the raw materials. The Article 170 further regulates that any operational companies shall follow the obligation under the Article 103 no later than 5 (five) years after the law has been promulgated.

The enactments of the 2009 Mining Law later followed by several implementation regulations *inter alia,* Ministry of Energy and Mineral Resources ('ESDM') Regulation No. 7 of 2012 and Government Regulation ('GR') No. 24 of 2012 concerning Implementation of Mineral and Coal Mining Business Activities. The ESDM Regulation 2012 and the Government Regulation required company who wish to continue or planning to start business to build smelting facilities which increase the purity of the minerals no later than January 2014. The ESDM Regulation also regulates the minimum purity of the processed minerals that are allowed to be exported. To give 'breathing space' for sudden change of the business climate, the ESDM Regulation allowed companies with certain permit (IUP and 'IPR') prior the promulgation of the Regulation to export raw materials/ores after having recommendation from the Minister of ESDM.

Despite the claims by the government that the mining companies had given certain flexibility, numerous companies still express hostilities towards the 2009 Law. As we can see in the 'Judicial Review' case that petitioned by Indonesia's Association of Minerals Entrepreneur ('APEMINDO') to the Constitutional Court in 2014 (Decision No. 10/PUU-XII/2014), where The Association challenged the Article 102 and 103 of the 2009 Mining Law that prohibits export of ore because its opposition towards the Article 1 of the Constitution which ensure legal certainty in Indonesia. The Association further argued that such provision would lead to thousands' layoffs and other detrimental effects towards numerous mineral companies. However, the Court deemed that the Articles were constitutional and within government powers to add value to its mineral resources. The Court further concluded that layoffs and other detrimental effect won't occur if the companies were committed to add value to Indonesia's minerals.

Despite having deemed constitutional, the government tried to take into account the entrepreneur's interests to create more favorable climate without abandoning the efforts to add value to Indonesia's mineral. This notion later implemented in the ESDM Regulation No. 1 of 2014 which gives more flexibility towards the entrepreneur. Through the Regulation, government allowed export of 6 commodities in form of concentrate which are Copper, Iron, Manganese, Lead, Zinc, Ilmenite and Titanium with progressive export tariffs until 2017 (Annex I of the ESDM Regulation 1/2014). However, the government still prohibits the export of particular minerals including gold, silver, bauxite, tin, nickel and chromium which only allowed to be exported once they reached certain level of purity. The government further adds, that they also allowed export of gold contained within concentrate of copper as it considered as 'side' mineral. However, despite the government efforts to adapt the Law, some enterprises still reluctant to abide the law as it remained considered as a sudden change in the business climate in the investment and trade area.

C. Reviewing policy in in international trade law

In general, there are two types of export restriction known in the international trade practices which are export taxes and quantitative restrictions. Export taxes include duties and charges which can take the form of and *ad valorem* tax specified as a percentage value of the exported tax. The general idea of the export taxes is to reduce the volume of exports by increasing final export prices. In the other hand, quantitative restrictions are widely used for social policy objectives including environmental protection or conservation of natural resources. The quantitative restriction may take form in export bans which totally prohibit the exportation of specified products and the export quota which limiting the number of product exported (Kim J., 2010:7).

It is generally agreed that there is no single GATT/WTO article that deals with the export restriction *per se*. The current GATT rules prohibit use of quantitative export restriction with some exceptions. It has been acknowledged that the current rule do not prohibit use of export of taxes or duties (Piermartini R., 2004:2). Currently, there are two GATT 1994 Articles that relevant to export restrictions [85] : Article XI on general Elimination of Quantitative Restriction, and Article XX on General Exceptions (WTO Report, 2010: 18).

The Article XI which is the key provision on export restriction stipulated that States may not prohibit export through quotas, import or export licenses, or other measures excluding duties, taxes or other charges. In this issue, Indonesia prohibits export of ore and obliges the investor to process such ore beforehand ergo violates the provision under Article XI.

Not only prohibit quantitative restrictions, the Article also gives leeway that allows several reasons of restriction which are supply shortage, standard compliances, and for agricultural product in order to avoid economic strains that might be caused by the GATT provisions. Akin to Article XI (2), Article XX of the GATT also provides leeway but applied generally for all GATT provisions. Among 10 exception clauses within the Article XX, notably there are only two clauses that relevant for the present issue, which are the point (g) and (i) which allowed restriction for conservation of exhaustible natural resources or as part of government stabilization plan towards failed vital domestic industry.

The *ratione* of the Government to ban ore exports are prescribed within article 3 of the 2009 Mining Law which *inter alia*, to ensure domestic minerals supplies considering mineral resources are exhaustible, ensure the mining industry to have sustainability and environment oriented viewpoint, and to add value towards domestic minerals for the prosperity of the people (emphasis added). However, among those *ratione* as aforementioned before, the government mainly concerned to add value to domestic mined minerals.

It may seems that government's action is legitimate, however as has mentioned before that unfortunately the GATT/WTO only allowed several exception towards export restriction. And among the previously mentioned *ratione*, perhaps only one reason that is in line with the GATT exception which is the point (g) of the Article XX. The Article XX (g) allowed export restriction for the purpose of preserving exhaustible natural resources which might be in-lined with the government excuse "to ensure the domestic supplies". Nevertheless, the Article also prescribed that the State also needs to restrict domestic production or consumption which the government did not do in this instance. This notion affirmed within the both ESDM Regulation 1/2014 and the GR 1/2014 that the government intended to strictly prohibit export of raw materials and only allowed processed or refined or purified minerals. Thus, Indonesia cannot invoke the Article XX (g) as the ground to prohibit export of ore.

Other than the Article XX (g), there is no other provision that might exempted the government since neither the government action taken based on shortage of supplies nor as part of stabilizing vital domestic industry nor taken as compliances towards certain standardization of minerals. Therefore, the current government mining regulation is prone to be brought to Dispute Settlement Body under WTO.

Learning from China case

Great lesson perhaps must be learned from the recent WTO DSB case involving China and United States concerning China rare earth mineral's export restriction in 2012. Akin to the

[85] In addition to the General MFN Provision under Article I GATT.

present situation in Indonesia, China tried to restrict export of 17 elements including tungsten, neodymium, lanthanum and molybdenum which collectively known as rare earths and commonly used for production of various types of electronic apparatus. Similarly to Indonesia, China argued that the restrictions are related to the conservation of exhaustible natural resources, and necessary to reduce pollution caused by mining. Supporting those arguments, China imposed three types of restrictions on export of the rare earths which through export duties, export quota and certain limitation on permitted enterprises to export the minerals (WT/DS431/R, 2014: 24).

After careful observation, the Panel decided that China's export quotas were design to gain industrial policy goals rather than conservation, bearing in mind that china's domestic industry which heavily relied on the rare earths minerals did not affected by the law. The Panel further noted that China had failed to fulfill the 'even-handedness' required by the Article after seeing that the restrictions would encourage domestic extraction and secure preferential use of those minerals by Chinese manufactures.

The Panel discussion on the Article XX (g) should be noted by the Indonesia government since what Indonesia do in the 2009 Mining Law is similar to what China did in 2012. Should Indonesia wish to invoke the Article XX (g) to justify its action, Indonesia required to demonstrate tangible evidence that there is need of preservation of those natural resources and also demonstrate that the domestic market are equally affected by the regulation or at least incurred some losses as required by the last sentence of the Article.

D. Reviewing policy under International Investment Law

State's export restriction might be *prima facie* has nothing to do with the International Investment law. However due to the nature of a mining project, mining projects or minerals extractions might entitled towards particular treatment and protection which regulated under the investment law. Since the project in mining sector are usually conducted in long term basis, made significant contribution to the host state economic development, and exposed to several risk during the projects and therefore fulfill the 'Salini test' established by the ICSID Tribunal and further entitle towards standard treatment (Salini v. Morocco, 2001:52).

It is commonly agreed under international investment law that foreign investors are entitled towards certain minimum standard of treatment and protection from the Host State. One might argue that there are several minimum standard treatments under international investment law; however the fair and equitable treatment standard become more relevant as it's contained in nearly all bilateral and multilateral investment treaties (Dolzer/Steven, 1995: 8). The treatment defined broadly that investors entitled to be treated fairly and equally to other investors by the Host state. The Tribunal of International Centre for Settlement of Investment Disputes ('ICSID') in *Tecmed v. Mexico* has established that the Principles required the host state to act in consistent manner, free from ambiguity, and totally transparent in relation with the foreign investors (Tecmed v. Mexico, 2003:154).

Although it is difficult to generalize the core treatment provided by the principle, August Reinich had noted that there are 2 key treatments under the principle *inter alia* a) Due Process of Law, and b) Legitimate Expectation (August Reinich, 2009: 41)

i. Due Process of Law

The ICSID Tribunal had established that the existence of the due process element under the FET principles is to prevent potential injustice or any procedural irregularity conducted with bad faith intention (Alex Genin v. Estonia: 2001:371). Within the process of the enactment of the 2009 Mining Law, it seems that the government did not invite all *stakeholders*, particularly mining companies that would be mostly affected by this regulation later. This conception grows as the numerous reluctances from the mining company shown through the initiation of the 'Judicial Review' towards the 2009 Mining Law especially prior the enactment of the ESDM Regulation 1/2014. Those reluctances show that investor interest had not been taken into account when the government made the policy. The Tribunal also noted that investor lacks of opportunity to express its concern on the regulation enacted by the host state may lead to breach of due process principles (Metalclad v. Mexico, 2000:91). Thus Indonesia might be deemed to have breached the due process principle since its failure to transparently discuss the intention and the substance of the regulation.

ii. Legitimate Expectations

This principle or element mainly deals with the predictability and the stability of the investment climate in the host state since those two element is crucial for investors in making their investment decisions or what kind of situation that being expected by investors. The Tribunal noted that the legal framework of investment in the host state shall not be unreasonably changed in contradiction to a particular assurance (El Paso v. Argentina, 2011: 364). Perhaps this principle would be the source of investment dispute for Indonesia in the future, since there has been sudden change in the regulation in mining in 2009. Prior 2009, notably there are only 4 regulations that deals with the mining issue which lastly updated in 2001. However, up to six years after 2009 there have been more than 13 regulations that complemented the 2009 Mining Law.[86] Not only suddenly changed the law, the government also shows several inconsistencies while enacting the implementing regulations. Those aforementioned 13 regulations are not enacted as a new law but some of them were revising the previous regulation. And among those revisions, the inconsistency of the government had shown through the enactment of the ESDM Regulation 1/2014 which suddenly allowed export of certain minerals with certain degree of purity or forms that also allegedly intended to benefit certain enterprises.

Potential dispute concerning this issue has shown by the Japanese government intention to bring this issue to the WTO as Japan highly dependent to the Indonesian raw nickel (Nikkei Asian Review, 2014). Japan would probably base their argument with the article 63 and 99 of the Indonesia-Japan Economic Partnership Agreement which prescribed that the parties are not allowed to impose law concerning trade and investment to achieve given level or percentage of domestic content and prohibits Indonesia to enact law that violates legitimate expectation of investors. Additionally, Japan also may add TRIMs Agreement which prohibits certain manufacturing requirements. Thus, Indonesia needs to reevaluate the law so it

[86] The regulation take form in Government Regulation or Ministerial Regulation (particularly, Ministry of Energy and Mineral Resources, Ministry of Finance, Ministry of Trade).

would not counterproductive with the aim of Indonesia to invite more investors.

iii. Indirect Expropriation

Aside from the obligation to follow the standard treatment rules, the government action also must not intended to interfere with the investor's rights on property prescribed under the BIT. Prohibition of expropriation as common ground norm under investment law dictates that the host state shall not either directly or indirectly nationalize or expropriate an investment of the investor except for public purposes and with appropriate compensations (Schreuer, 2005: 1; Sornarajah, 2008:364-365). Despite the real intention, interference of government on these rights of investor might look like a shy of expropriations. Among many form actions that a government might amounted to expropriations, Brownlie pointed out that the decisive element in an indirect expropriation is the substantial injury on control or economic value of an investment without a physical taking (Brownlie, 2003: 509).

The imposition of ore's ban policy might appear legal since it does not hamper the investor rights on property or undermine the economic value of the investment. However, expropriatory measures are not only limited to single policy measures, but also include step-by-step measures taken by government (Philips Petroleum Co. v. Iran, 1989). Thus, the ban's policy might be amounted to expropriation if it's corroborated by other policy that substantially deprived rights of the investor on property or irreversibly undermine the economic value of investment.

E. Closing

Although States generally owned permanent sovereignty over natural resources, the balance between the States and enterprises interest are required to fully gives the prosperity to the people since states might not able to explore and exploit natural resources by themselves. By joining into WTO or enter into investment agreement with other states, a State may not arbitrarily enact regulation that may impair interest of others.

Notwithstanding the government ability to create policy, the interest of investor also plays vital role as their rights and interest are protected by the law and shall not arbitrarily deprived. To avoid unnecessary legal dispute and losses, the government need to find mutual solution that could both add the value of Indonesia natural resources and economically beneficial to the investors.

The government of Indonesia needs to create stable and predictable legal framework to convince the enterprises that its action was not only beneficial to certain party hence create unfair trade. This notion arises due to several inconsistencies during 5-years after the enactment of the 2009 mining law. Within 5 years, the government had revised the implementing regulation on Government Regulation level for 3 times, in 2010, 2012 and in 2014, while the ESDM Minister had revised its regulation twice in 2012, and once in 2014. A stable and predictable legal framework not only could prevent economic volatility of the state macroeconomics but also safeguard the state from economic crises.

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