Synchronization Of TRIMs Principles In The Legislation Of Mining Sector In Indonesia

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Abstract: The aims of this research are to know and explain synchronizing the principles of TRIMs at the foreign direct investment (FDI) and mining regulation in Indonesia. The research using normative research that conducted through library or document study such legal resources as primary sources, secondary, and tertiary sources that will be studied with applied legal approach, comparative, history and conceptual approach. Research results are revealing that synchronizing between the principles of TRIMs and Investment act 2007and Mineral and Coal act 2009 were not harmonized. It should be TRIMs and investment act 2007 have some similarity principles as harmonized even though Mineral and Coal act 2009 does not enough accessibility for the principles of TRIMs. Implication of the Mineral and Coal act 2009 raise a strong and real authority of the state even central or local government. Those policy results an overlap regulation caused state management system over natural resources ineffective.

Index Terms: Mining, Regulation, Synchronization, TRIMs

1 Introduction

Foreign investment is one of the driving wheels of economy in many countries, both developed and developing countries. Because foreign investment activity involving the state and transnational businesses it gives birth to a number of international legal instruments that govern them. M. Sornarajah mentions international agreements as the main source of international investment law. One type of foreign investment attracted the attention of many parties, namely investment in mining. The legal form of foreign investment in the field of mining is contract of work. Act No. 11 of 1967 on the General Provisions of Mining and Act No. 1 of 1967 on the Foreign Investment as a legal source. Since the birth of this contracts of work have caused a variety of problems, because it was inspired by the principle of liberal-capitalists that do not concern about the condition of its existence. Various facilities are provided by the state on the basis of the contract of work. Import tax exemption, total area of mine was fantastic; the time limit of contract is almost never end, states' full protection, and repatriation. The condition began to turn around when the Act No. 32 of 2004 on Regional Government issued by the government as a sign of regional autonomy era began. The regents and mayors began work on the potential of mining in its region through policies and regulations, and then there was overlapping on the right to mine management. The highlight problem occurs when the Act No. 4 of 2009 on Mineral and Coal set by the government, this provision removing all the pleasures that have been presented previously. Narrowing of area, necessity of devastation, the construction of smelter, increase in royalty, and a ban on the export of raw minerals (ore). Roughly, there are calling the governments' actions as the indirect nationalization.

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2. Identification of the Issue

This study will focus on the problem of synchronization of legislation in mining sector with the principles of free trade in capital investment (TRIMs). The formulation of problem is "how synchronization of TRIM principles in the legislation or mining in Indonesia"?

3. Literature Review

According to the theory of incorporation of interna-tional law can be applied into the national law auto-matically without any special adoption. International law is already integrated into the national law. This theory applies to the application of international customary law and universal international law. While the theory of trans-formation, stated that international law derived from the international agreements can be implemented in the national law if it is already transformed into the national law, both formally and substantively. The theory of transformation bases itself on the positivists' view, that the rules of international law cannot be directly and "ex proprio vigore" applied in the national law. And conversely, the international law and national law are legal system that is completely separate, and the structure is a different legal system. To be adopted into the national law needs special adoption process. Then, according to the theory of delegation, cons-titutional rules of international law delegating to each states' constitution, the right to determine; (1) when the provisions of international agreements applicable in the national law; and (2) how the international agreements created as national law. According to Article 2 of the Vienna Convention 1969 states, treaty is an international agreement in writing held by states and governed by international law. The agreement may be contained in a single instrument or more. Indonesian national law governing international agree-ment is Act No. 24 of 2000 on International Agreements (UUPI). According to UUPI in 2000, an international agreement was "an agreement, in the particular form and name, which is governed by international law which is created in writing and creates rights and obligations in the field of public law." In principle, this definition is similar to the definition in the Vienna Convention 1969. UUPI 2000 did not explicitly mention the international economic agreements as a field belonging to the object of UUPI. However, due to the international economic agree-ments are agreements that are generally subject to the principles of international agreements, it can be concluded that the field of international economic agreements are also subject to this UUPI in Indonesia. Article 1 TRIMs on the scope of

object being regulated stated, "This agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs". The arrangement and determination of business areas for investment by the government, certainly as a hope of the government to direct investments in accordance with national development plans as well as the needs and development of the nation state of Indonesia. Although UUPMA and UUPP 1967 are based on the Article 33 of the Constitution of the Republic of Indonesia 1945, but both lead to conflict of laws in foreign investment in mining. On the other hand, state as holders of sovereignty over the land, water and its contents must comply with the agreement or contract has been made. The presence of Mining Act of 2009, it is partly seen as counter-productive in the Investment Act of 2007 as the Mining Act of 2009 has removed the form of contract of work as the basis and instrument of foreign investors in Indonesia. Instead UUPM of 2007 open space for foreign investors in Indonesia. Although the Mining Act of 2009 reap criticism but it has revoked UUPP of 1967 so that the governance in the field of mineral and coal mining should be subject to this legislation. A number of governments' authority in the mining sector has been outlined in both the central and regional levels. Furthermore, the application requires a number of implementing provisions vertically beside for compliance with legislation at the same level (horizontally).

4 METHOD OF RESEARCH

The method of research used is a normative-legal research by the search of legal materials through the study of documents/literature. Legal materials in the form of legal materials; primary, secondary, and tertiary studied through legislation approach, comparison, history and conceptual approaches. The approach used to discuss this study descriptively.

5 ANALYSIS AND DISCUSSION

5.1 Synchronization of TRIMs Principles in the Legislation of Mining in Indonesia

In principle, mining sector investment cannot be separated from investment regulatory regime in both the national and international levels. TRIMs are one result of international agreements within the scope of WTO. TRIMs can encourage the expansion and advancement of world trade liberalization and facilitating international investment to increase economic growth for all trading partners, particularly developing countries in free competition. For Indonesia, since 1967 has opened itself in free competition, where UUPMA and UUPP set. On the basis of these provisions Indonesia entered the first generation era of contract of work (1967-1968). There has been a seven-generation contract of work in the fields of minerals (other than coal) and then Perjanjian Karya Pengusahaan Pertambangan Batubara (PKP2B) (1981-1993). PKP2B there have been three generations. The openness of foreign investment in the mining sector due to change in governments' view of foreign investment. New Order government in 1967 saw foreign investment as a way to accelerate economic growth. It means Indonesia has indirectly recognized and implement the principles of free trade that is known to them as the principle of non-discrimination. Furthermore, this principle is also a principle of TRIMs. The implications of UUPMA were the commencement of the contract in the exploitation of minerals; the contract system resulted in the government (country) of Indonesia and the company in a position equivalent (being the parties). As stipulated in Article 10 and 15 UUPP 1967 and Article 8 UUPMA 1967. According to Abrar Saleng, the position of government is not very profitable because the government is the states' organ and executor the rights of state control. For a sovereign state as a subject of international law and part of the international community, the demand for investment protection is not only the ethics and standards in international relations, but also the obligations inherent to each country in accordance with the usual practice prevailing in the social and economic relations between countries. Protection to investor set out in Article 3, 4, 5, 6, 7, and 8 of UUPM, so that it can be said UUPM have adopted or at least adapted to the principles of international trade law more specifically, the principles of investment law foreign. This is consistent with the theory of delegation in international agreement law.

***Table 1**. The comparison of regulatory TRIMs/GATT, UUPM and UU Minerba 2009*

Provision Principles	TRIMs/GATT	UUPM 2007	UUMinerba 2009
Most Favored Nation	Art. I GATT	Ps.3 (1) d, Ps.4 (2) a, Ps.6 (1) (2)	-
National Treatment	Art. 2 TRIMs Art. III GATT	Ps. 6 (1),(2)	Ps.5 (2),(3), (5), Ps. 112,170
Expropriation	Art. 2 TRIMs Art. III GATT	Ps. 7 (1), (2),(3)	Ps.113 Ps.117 b
Performance Requirements	Art. 2.2 TRIM Art. III, XI GATT	Ps.10, 18	Ps. 102,103 Ps. 128-133
Full Protection and Security	Art. 2 TRIMs Art. III GATT	Ps. 7 (1)	Ps.169,171, 172
Minimum Standard	Art. XVII.2 GATT	Ps. 14. a.	Ps.2 a, c
Transfer of Funds	Art. 2 TRIMs Art. III GATT	Ps. 8 (1), (2), (3), (4),(5)	Ps. 141c, 144
Dispute settlement	Art. 8 TRIMs Art. XXI, XXIII GATT	Ps. 32 (1), (2), (3), (4).	Ps. 154.
Stabilization clause	Art. 9 TRIMs	Ps. 35, 36, 39.	Ps.173 (1),(2)

***Source:** Result of Primary Data, 2015*

The table above can be seen that both TRIM, GATT, and the UUPM adheres to the principle of freedom of trade (most favored nation) while UU Minerba 2009 confirmed that the natural resources of minerals and coal are controlled by the state and its utilization for the benefit of the Indonesian people so that the principle of freedom of trade can otherwise closed in the provisions of UU Minerba 2009. The principle of national treatment can be seen in Article 2 of TRIMs and Article III of GATT and Article 6 paragraph (1) and (2) of UUPM 2007. Instead in UU Minerba 2009 on Article 5, paragraph (2), (3), and (5), and Articles 112 and 170 confirms that the country's national interests control the production and export of minerals and coal. So it appears to be a contradiction of UU Minerba 2009 with three other provisions. The principle of nationalization (expropriation) on Article 2 of TRIMs and Article III of GATT, and Article 7, paragraph (1), (2) and (3) of UUPM 2007 guarantees no nationalization in foreign investment. But at UU Minerba of Article 113 and 117 is not expressed as nationalization, but in respect of termination and revocation of

a mining permit that in accordance with Article 169 letter b of UU Minerba, the existing status of contract of works experiences the similar thing. The principle of performance requirements is prohibited by Article 2 paragraph (2) TRIMs, Article III and XI of GATT, and Articles 10 and 18 of UUPM regulate employment and tax facilities that relieve investors but in UU Minerba 2009 Article 102 and 103 confirmed that in order to increase the value-added so processing and purification must be conducted in the country. The principle of full protection and security for investors is the guarantee given by the capital recipient country and it is regulated through international and national provisions such as; Article 2 TRIMs and Article III of GATT, and Article 7, paragraph (1) of UUPM 2007 but in UU Minerba Article 169, 171, 172 confirmed the legal status of the contract of work continues to be recognized until the completion of the contract, meaning that the policy of full protection and security provided by the previous remains in force. The principle of minimum standards for the implementation of foreign investment as stipulated in Article XVII paragraph (2) of GATT that trade remains refers to the principle of non-discrimination and Article 14 letters a UUPM 2007 stated that the investor is entitled to rights, legal and protection. While UU Minerba 2009 Article 2 letter a and c states that mineral and coal mining are managed based on; the principle of utility, fairness, and balance, participation, transparency, and accountability. It can be said that the principle of minimum standards that exist in the international regulations have been in sync with the provisions of foreign investment, but the provision of mineral and coal mining is more pronounced as the principles and purposes of mineral and coal mining. The principle of repatriation on the benefit of the investors is a principle which applies in international trade law, as is generally set forth in Article 2 of the TRIMs and Article III of GATT, Article 8 (1), (2), (3), (4) and (5) UUPM 2007, while under Article 141 letter c UU Minerba 2009 is only regulates the financial supervision based on Article 144 shall be regulated by government regulation. This means before it is regulated, the previous provisions are applicable and free to transfer profits to their home countries. The principle of dispute settlement under Article 8 of TRIMs about the consultation and dispute settlement and Article XXI and XXIII of GATT respectively regulate the security exception and nullification or impairment, Article 32 paragraph (1), (2), and (4) of UUPM 2007 that the event of a dispute between the investor and the government then pursued settlement amicably otherwise unattainable forwarded to an alternative solution or international arbitration, while UU Minerba in Article 154 state any disputes that arise in the implementation of IUP, IPR, or IUPK are settled through the courts and arbitration in the country in accordance with the provisions of the legislation. The principle of stability clause set out in Article 9 of TRIM, while Article 35 and 36 of UUPM 2007 states that all international agreement in the field of investment remains in effect until the expiration of the agreement. Being in Article 173 paragraph (1) and (2) UU Minerba 2009 stated that UUPP 1967 is repealed, but the implementation of regulation remains in force as long as not contrary to the UU Minerba 2009. It can be said there has been a disagreement between UU Minerba UUPM 2007 and 2009.

5.2 Synchronization of States' Authority on the Management of Mining in Indonesia

Although the control of state in the field of natural resource management has been arranged in Article 33 of the Constitution 1945, but with the birth of UU Minerba, particularly Article 8, the states' control over natural resources is transferred to local government, district/city. The existence of central and local government authorities are accompanied by a lack of coordination between the central and local governments, resulting in the issuance of IUP and overlap mining areas. The policy contains the obligation for foreign mining companies for divestment of 51% after the production period for 5 to 10 years based on Government Regulation No. 24 of 2012. The governments' policy has been sued to ICSID because investors are still holding on the contract of work or work agreement that had been be binding on the parties. The conception of contract system is no longer relevant and needs to be replaced with the concept of state sovereignty over natural resources. Post-establishment of UU Minerba of 2009, the contract of works, PKP2B and KP are eliminated and replaced by the Mining Business License as stipulated in Article 36 of UU Minerba which consists of two phases: Exploration IUP covering general investigation, exploration and feasibility studies and Production Operations IUP which include construction, mining, management and sales. The following is presented the arrangement of mining sector investment, as described in Table 2.

***Table 2**. Comparison of status and states' authority to the foreign investment in mining*

No	Substance	Contract of Works	Mining Business License
1	Position	Equivalent	Sovereign
2	Authority	Ambivalent	Full (issued, not issued and revocation of IUP.
3	Dispute	Discussion, court	Warning and action
4	Violation	Conflict of interest	Investigation, stopping temporary activities, and/or revocation of IUP
5	States' right	Royalty, retribution, taxes	Royalty, retribution, taxes
6	States' revenue	Royalty, 2,5% - < 10% proportional tax	Shall re-formulated Ranging from (4 - 6%)
7	Local authority	No	Clear authority, both establishment of WP or IUP
8	Role of community	No	Involved when the establishment of WP until performance surveillance

***Source:** Result of research, adapted from Nandang Sudrajat (2010).*

As table above it can be seen that in terms of the substance of the arrangement between the contract of work and the Mining Business License there are significant differences, such as: the position of parties is no longer equal, that state as sovereign owner over its natural resources. So that, the authority to permit an existing mining are only in the state that can be delegated to local governments. In licensing regimes, the state as a natural resource managers occupy a stronger position than the investor/mine company, given the state has the authority to apply administrative sanctions ranging from a

temporary suspension of mining activity even revocation of IUP as stipulated in Article 151 paragraph (2) UU Minerba. While the transfer of authority or control of natural resources of the state to the local has led to contradictory regulations, particularly on the issuance of mining license. The implication, ambiguity of the mining business license at the central and local level cannot be avoided. Discrepancies in the regulation of the mining license have resulted in the issuance of mining license. It can be said that the arrangement of foreign investment in the field of mining after the enactment of UUPM of 2007 and UU Minerba of 2009, including Government Regulation No. 24 of 2012 on Divestment of PMAs' Shares, the Presidential Decree No. 36 of 2010 on List of Closed and Open Business by Terms, the regulation of Minister of Energy and Mineral Resources of the Republic of Indonesia No. 01 of 2014 on the provision of mining product of processing and purification result, and the regulation of Minister of Finance of the Republic of Indonesia No. 4 of 2014 on Progressive Export Tax for Mineral. As described above, the implications of the provisions lead to a system of state administration in the field of natural resource management is not effective. Hence, the need for synchronization between the contents of investment agreement (TRIMs) with the establishment of policies and legislation in force, especially in the field of mining.

6 Conclusion

The principles of TRIMs can be said that it has adopted by UUPM of 2007 through the inclusion of a chapter of investor protection, this is in accordance with the theory of delegation in the international agreement law. Hence, it can be said that there is synchronization between the contents of the investment agreement (TRIMs) with the establishment of UUPM 2007, but the birth of UU Minerba 2009, it restricts the access of foreign investment in mining, so that the synchronization of foreign investment in mining is not optimal. The implications of UU Minerba 2009 which give a real and powerful authorities to the state/government and further implemented into various policies and related-legislations, its implications occur from overlapping arrangement and causes the system of state administration in the management of state in the field of natural resources are not effective. The synchronization of TRIMs principles on the regu-lations of foreign investment needs to be explored further their conformity and nonconformity. The principles of TRIMs that are relevant need to be accommodated in the establishment or modification of foreign investment legislation in the field of mining. Meanwhile, to avoid overlapping or collision/conflict in the legislation of mining, then the governing of authority between agency both vertical and horizontal needs to be synchronized with each other.

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