

Management of Mining In Indonesia: Decentralization and Corruption Eradication

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Abstract

This paper examines the management of mining in Indonesia from the aspect of decentralization of authority and corruption eradication in the mining sector. This study found that mining management paradigm refers to the concept of limited decentralization of authority. A number of mining legislation can not be applied consistently because of legal, economic and environmental problems which occur at the level of central government, regional government and the surroundings area of mining. The main problem which is now being uncovered is corruption in mining sector. Another striking issue is mal-administration in mining management accountability that may affect decreasing number of clients and Good Governance (the perspective of administrative law and constitutional law). This study successfully prepares a number of recommendations as a strategic step in eradicating corruption in that sector.

Keywords : Mining Management, Decentralization, Corruption Eradication

I. INTRODUCTION

Natural resources are the wealth of nature contained in the earth as a gift from God Almighty. Therefore, they must be used wisely by considering the balance of nature, good and right purposes for the prosperity of mankind. Based on the law perspective in Indonesia, the legal system of mining determines the separation arrangement of natural resources which are "underground" or "contained in the earth" in the form of minerals with the provisions which regulate plants (natural resources) on the surface of the earth, or in land under Indonesia jurisdiction. The legal regime of minerals is also distinguished, namely the mining law regime derived from carbon or oil content, geothermal, gas, and minerals with a solid shape. This paper will focus on the analysis description of coal and mineral resources in the legal perspective and recommendations regarding mining policy issues in Indonesia.

The constitutional foundation about natural resources is in Article 33 section (3) of Constitution of the Republic of Indonesia 1945 which reads:

The land, the waters and natural riches contained therein shall be controlled by the state and exploited for the greatest prosperity of the people.

This provision is the basis for the establishment of law on the management of natural resources, including minerals and coal. The law governing the mining of minerals is Law No. 4 of 2009 on Minerals and Coal (Law 4/2009), which revokes previously applicable mining law, namely Act Law No. 11 of 1967 about Principal Provisions of Mining (Law 11/1967). Law 11/1967 is no longer valid because it does not fit with the developments and future challenges, especially because it is centralized. With this change, a shift of paradigm in the control and management of mining in Indonesia occurs, especially the shift of Contract of Work system into Permit system by the state. This returns the original position of the state as the holder of the mandate of Indonesian people who own all the wealth of natural resources.

The potential of mineral and coal in Indonesia under Article 34 section (2) of Law 4/2009 is divided into four types (1) radioactive minerals, (2) metal mineral, (3) non-metal minerals, (4) rock. BATAN (National Atomic Energy Agency of Indonesia) notes that the potential of radioactive minerals for nuclear material throughout Indonesia reaches 70 thousand tons of uranium and 125 thousand tons of thorium. Areas with the greatest potential are West Kalimantan, Bangka, Mamuja, and Papua. In addition, metal minerals in Indonesia have increased from year to year where the highest number is nickel with more than 3 billion tons in 2012. Not only minerals, in Indonesia coal also has a huge potential. The data of Association of Environmental Observers reveals that Indonesia's coal reserve is only 0.5% of world reserve, but Indonesia's production is in the 6th position as a manufacturer with the total production reaching 246 million tons. This means, Indonesian mining is ranked as the world's second largest exporter with 203 million tons in total.

Mining sector becomes one of the main sectors that drive the economy of Indonesia. The visible indication is the contribution of state revenue which increases each year. In addition, mining sector also provides a multiplier effect of 1.6 to 1.9 or becomes a trigger in the growth of other sectors as well as providing employment opportunities for approximately 34 thousand direct labors. Although state revenue increases, the data from Indonesian Mining Association show that the contribution of mining is still low. Or it could be said

that the ratio of revenue from mining to the average state revenue is only 6.16%. The total of non-tax revenue (PNBP) from general and coal mining amounted to Rp 8.7 trillion (2007), 12.5 Trillion (2008), 15.3 trillion (2009), 18.6 trillion (2010) and 24.2 trillion (2011). Meanwhile, tax revenue of this sector amounted to 29.3 trillion (2007), 35.4 trillion (2008), 36.1 trillion (2009), 48.3 trillion (2010) and 70.5 trillion (2011). For general mining sector, state revenue from royalty and tax is small, with an average of 1% for the contract of work. Royalty from coal is better because it deposits at least 7% of royalty.

Management of mining that is currently running can not be separated from legal, economic, social and environmental problems. A case of corruption in the process of issuing mining permit is one mode of corruption in mining sector. Based on KPK (Corruption Eradication Commission) investigation conducted since 2014 on 10,900 mining permit (IUP) or mining authorizations (KP), there are 4,880 unclear IUP and KP. The problem related to permits is because they overlap and some mining entrepreneurs do not have Taxpayer Registration Number (NPWP).² Meanwhile, according to Sukhyar, the Director General of Mineral and Coal at the Ministry of Energy and Mineral Resources, from 10,776 IUP only 5,969 have the status of *clean and clear* (CnC) certification, whereas about 4,000 holders of IUP have not had CnC status.³ Lack of supervision from the central government and/or province on the mechanism of mining permit issue frequently happens. This opens the opportunity for a number of people to commit corruption.

Corruption is an extraordinary crime able to inhibit the development of a government in achieving development goals. The outbreak of corruption in the government sector is subversive, causing an effect on government policies that tend to have the orientation on elite and group interests. Therefore, corruption eradication is not just a law enforcement discourse, but it has evolved into a political discourse.⁴

Law No. 31 of 1999 on Corruption Eradication, explains the rules contained in the crime of corruption is

every person who is categorized as opposing the law, conducting actions to enrich oneself, benefiting oneself or another person or corporation, abusing authority or opportunity or means available to him because of his positions that could harm state finance or state economy.

From these provisions, the elements of corruption include:⁵ (1). Opposing the law; (2). abusing authority, opportunity or means; (3). benefiting oneself, another person, or corporation, and; (4). harming state finance or state economy.

Jack Bologna (in Haling, 2008) states there are four factors that cause people to corrupt, (often called GONE theory): (1). Greed: the factor of greediness, the main factor to cause crime. Every man according to this theory is likely to behave corruptly if he does not have a strong enough morality control. (2). Opportunities: the factor of opportunity or chance, it is related to organization or agency or community that opens up the opportunity to commit corruption due to certain circumstances. (3). Needs: the factor of necessity, with regard to the needs to support normal life. (4). Exposures: the factor of disclosure, related to the actions or consequences of committing corruption.

Referring to the GONE theory, corruption also involves interaction situation between corruptors and the system in their environment. It argues the importance of creating a system that is not permissive to corruption. Without it, the rules on corruption eradication will not be effective.⁶

This paper examines mining management in Indonesia from the aspects of decentralization of authority and corruption eradication. Analysis is based on the mining law, constitutional law and administrative law. Part II examines the management of mining. Several sections were studied, namely a general overview of the potential of mineral resources in Indonesia, control and responsibility of the state on natural resources, as well as prevailing legal mining system in Indonesia. Part III discusses decentralization of authority mining management at the regional level. In 2014, the Indonesian government imposed a new law about regional government. A number of provisions about the management of natural resources (mining) are elaborated in accordance with the new law and the new direction of government policy on mining sector. Part IV gives a description of a portrait of corruption in mining sector. This section also describes supervision of anti-corruption institutions, and a number of strategic steps that need to be implemented as efforts to eradicate corruption in mining sector.

II. Management of Mining in Indonesia

A. Overview of The Potential of Mineral Resources in Indonesia

Indonesia is a country rich in mineral resources. This is because *firstly*, the position of Indonesia is astronomically located in tropical areas with high rainfall which causes various varieties of plants can grow rapidly. *Second*, geologically, Indonesia is located at the point of shifting tectonic plates, so there are many mountains rich in minerals. Third, Indonesian waters are rich in food for various types of sea animals, and contain abundant mineral resources.⁷ This puts Indonesia as the country with the second largest biodiversity after Brazil. In addition, the Nagoya Protocol states that Indonesia can become the backbone of sustainable economic growth (green economy).⁸

The term ‘mineral’ can be paired with *mineral* in English, *Mineraal* in Dutch, and *mineral* in German.⁹ Experts have various definitions of mineral. Undeveloped Minerals Areas Act 2006 Canada formulates mineral which include metallic, non-metallic, coal, oil and natural gas.¹⁰ Meanwhile, according to Ernest H. Nickel, mineral is an element or chemical compound that is normally crystalline and that has been formed as a result of geological process.¹¹ In Indonesia, Law 4/2009 defines that minerals are inorganic compounds formed in nature, which have specific physical and chemical properties as well as a regular crystal structure that forms rock, either loose or integrated. Meanwhile, coal in this Law is the deposition of carbonaceous organic compound formed naturally from plant residue.

As already noted, Article 34 section (2) of Law 4/2009 divides the four types of minerals, namely (1) radioactive minerals, (2) metal mineral, (3) non-metal minerals, (4) rock. Here is a general overview of the mineral potential in Indonesia.

1. Radioactive minerals.

Article (2) section (2)A. Government Regulation No. 23 of 2010 states that the group of radioactive minerals is radium, thorium, uranium, monazite and other radioactive minerals. BATAN notes that radioactive mineral potential for nuclear material throughout Indonesia reaches 70 thousand tons, 125 thousand tons of uranium and thorium. Several areas with the greatest potential among others are West Kalimantan, Bangka, Mamuja, and Papua.¹² The spread of radioactive minerals is as follow:

Map of Radioactive Mineral Resources in Indonesia¹³

2. Metal minerals

Metal minerals in Article 2 section (2) Government Regulation 23/2010 are divided into a few commodities, namely lithium, beryllium, magnesium, potassium, calcium, gold, copper and so on. Metal minerals are scattered throughout Indonesian territory, such as copper, tin, iron and others in Sumatra island. Borneo island has a wealth of iron ore, bauxite, and zinc. In Sulawesi island the products of mining are manganese, copper, nickel and others. Meanwhile, in the eastern part of Indonesia, Jayapura stores mining fortunes like gold, silver, and several other mining products.¹⁴ The following are the potential of Metal mineral resources.

Image of Metal Mineral Resources for Nickel, Iron ore, Bauxite, and Lead Commodities from Year 2009 to 2012¹⁵

Image of Metal Mineral for Copper, Manganese, and Tin Commodities from Year 2009 to 2012¹⁶

3. Nonmetal minerals

Based on Government Regulation No. 27 year 2010, non-metal mineral resources or mineral for industries are included in group C. It includes diamond, corundum, graphite, arsenic, quartz sand, iodine, sulfur, and many others. Based on the data of the balance of mineral resource for fiscal year 2012, there are 3027 locations of non-metal mineral commodities throughout Indonesia, with 54 kinds of commodities in several regencies and cities. Below is the number of non-metallic resources.

Table of Balance of Non Metal Minerals in 2012¹⁷

Name of Commodity	RESOURCES				Amount of resources (TON)	Production (TON)	Resources (TON) (beginning of 2013)	
	Hypothetical	Inferred	Indicated	Measured				
1	2	3	4	5	6	7	8	
No								
1	Zeolite	85,002,000	113,100,000	49,908,000	27,000,000	275,010,000	304,897	274,705,103
2	Quartz sand	17,157,890,500	166,307,000	619,788,000	117,614,000	18,061,599,500	31,964,402	18,029,635,098
3	Kaolin	907,509,000	51,530,000	97,149,200	12,189,064	1,068,377,264	2,542,013	1,065,835,251
4	Bentonite	448,686,500	108,263,520	58,249,000	0	615,199,020	1,805,802	613,393,218
5	Clay	30,635,884,000	5,633,635,000	810,800,700	200,119,586	93,415,216,286	208,630,509	93,206,585,777
6	Feldspar	3,699,810,000	3,621,331,000	402,914,000	1,500,000	7,725,555,000	965,003	7,724,589,997
7	Marble	105,732,349,000	1,811,887,000	555,420,000	428,526,230	108,528,182,230	850,742	108,527,331,488
8	Limestone	512,932,352,000	94,544,305,000	7,063,260,750	2,297,258,867	616,837,176,617	510,898,288	616,326,278,329
9	Granite	53,284,227,000	4,023,522,000	592,708,000	0	57,900,457,000	99,576,258	57,800,880,742
10	Dolomite	2,171,021,000	163,800,000	4,837,106,000	0	7,171,927,000	2,714,221	7,169,212,779

4. Rocks

In the science of geology, rocks are grouped into three major groups: (1) igneous rocks, (2) sedimentary rocks, (3) metamorphic rocks or metamorphosis.¹⁸

Distribution of Mineral rocks in Indonesia¹⁹

Based on the data and distribution map, we can see that Indonesia has a huge mineral potential. Not only minerals, coal in Indonesia also has a huge potential. According to the data from Association of Environmental Observers, Indonesia's coal reserves is only 0.5% of world reserves, but Indonesia's production is in the 6th position as the manufacturer with a total production reaching 246 million tons. Indonesia is also ranked 2nd largest in the world as an exporter (203 million tons). Australia occupies the first position (252 million tons), and China as the world's largest coal producer, is only sitting on rank 7th as an exporter (47 million tons).²⁰ The following data reveal on the amount of coal in Indonesia from 2004 to 2012.

Table of Potential of Coal in Indonesia up to 2012²¹

B. State Control Over Natural Resources and Coal

Indonesia is a country that adheres to the legal system of civil law. The constitutional basis of mining regulation in Indonesia rests on Article 33 section (2) and (3) in Chapter XIV about National Economy and Social Welfare, which reads:

- (2) *Branches of the most important production for the state and those which dominate the life of people are controlled by the state.*
- (3) *The land, the waters and natural riches contained therein shall be controlled by the state and exploited for the greatest prosperity of the people.*

The decree of Constitutional Court No. 011-021-022/PUU-I/2003 gives the interpretation of the clause "controlled by the state", as the state in a broad sense which is sourced and derived from the conception of Indonesian sovereignty over the wealth of the land and the waters and natural riches contained therein, including collective ownership of the people on the sources of riches. Construction in the Constitution of the Republic of Indonesia 1945 is that people give a mandate to the state to perform its function in implementing policies (*beleid*) and administration (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*). Based on the regulation of Constitutional Court, natural resources in Indonesia should be managed by the state to realize *welfare state*.

The provision of the Constitution of the Republic of Indonesia 1945 gives the mandate to the state. The difference between state and government should be understood precisely. According to Bagir Manan,²² state is an abstract notion, while government is something concrete through its actions. Juridically there is a real difference where state is an entity (*lichaam*), while government is the tool that equips the state (*organ*). Then, the implication is that state control over natural resources is broader than government action.

The conception of regulation according to AP Parlindungan, state has the authority as follows:²³

- a. The state regulates and organizes designation, use, supply and maintenance of land, water, and space,
- b. Determines and regulates rights on land, water and air space,
- c. Determines and regulates legal relations among persons and legal actions concerning land, water, and space.

In 1967 the Indonesian government enacted Law No. 11 of 1967 on Main Provisions of Mining (Law 11/1967) as the starting point of the open door policy in the field of mining. At the same time, the government issued Law No. 1 of 1967 on Foreign Investment.

The dynamics of developments is responded by issuing the Law No. 4 of 2009 on Mineral and Coal Mining (Law 4/2009) which revokes Law 11/1967 about Main Provisions of Mining. Furthermore, the content of Law 11/1967 is centralized and is not in accordance with the development of present situation and future challenges. In addition, mining development must adapt to strategic environmental changes, whether national or international, in which the main challenges faced by mineral and coal mining are the impact of globalization which encourages democratization, regional autonomy, human rights, environment, development of technology and information, intellectual property rights as well as the increasing demands of private and public roles.²⁴

The revocation of Law 11/1967 simultaneously shifts the paradigm of state sovereignty over natural resources. The most visible change is the transformation of Contract of Work system into Mining Permit (IUP) which can be seen in the following comparison:

Table of Comparison between Permit Regime and Contract Regime²⁵

Subjects	Permit Regime	Contract/Agreement Regime
<i>Legal relationship</i>	Public, state administration legal instrument	Civil
<i>Application of the law</i>	By the Government	By both Parties
<i>Law Option</i>	Law option is not applicable	law option of is applicable
<i>Legal Consequence</i>	Unilateral	Agreement between both parties
<i>Dispute resolution</i>	PTUN (high court)	Arbitration
<i>Legal certainty</i>	More Secured	Agreement between both parties
<i>Rights and Obligations</i>	Government rights/ obligations are larger	Rights/obligations of both parties are relatively equal
<i>Legal Sources</i>	Legislation	Construct/agreement itself

The table above shows the reinforcement of The Right of State Control (HPN), including control of natural resources. Contract of Work (CoW) regime applied before Law 4/2009 is considered degrading government position as it is parallel to the position of a contractor. Thus, the implication of the emergence of Law 4/2009 is to restore the principles of HPN in constitutional position toward the collective ownership of natural resources in state administration.

C. State Responsibility on Mineral Resources

In Indonesia, the term "state responsibility" is used to represent two terms, which are generally distinguished in the discussion of international law, namely *State Responsibility* and *liability of states*.²⁶ In the context of the management of mineral resources and coal, the term "state" in the formulation of "state responsibility" means "government" together with "society" in the form of general community and legal community (legal entity). This concept is based on the theory of the elements of the state, that the government and the people who inhabit a territory is the element of the state. Mineral resources and coal within the boundaries of the state are natural wealth controlled by the state as the supreme organization that has full sovereignty over what is inside its territory. The management of mineral resources and coal in a country must be in line with the goals and the ideals of the country. This management should be as optimal as possible with the good and right principles and objectives, and intended for the greater prosperity of the people.

A shared responsibility between government and society, including the person in charge of business (entrepreneurs) in the management of mineral resources and coal is the implementation of democratic principles in environmental management.²⁷ The argument is that mineral resources and other non-renewable natural resources are the order of elements of the environment that consists of biological resources and non-biological resources which form an ecosystem. Therefore, the right to a good and healthy environment, free from contamination and/or damage to the environment is essentially the obligation of every person, community, businessman, and government.²⁸

The constitution of Republic of Indonesia 1945 Section 33, asserts that the land, the waters and natural riches contained therein shall be controlled by the state and exploited for the greatest prosperity of the people. This provision is reaffirmed in the preamble of Law no. 4/2009 that minerals and coal contained within mining jurisdiction of Indonesia are nonrenewable natural riches God Almighty has granted. Mineral deposits and coal have important roles in meeting the life of many people; therefore, the management thereof is subject to control by the State in efforts to arrive at public welfare and prosperity in a just manner.

The constitution of Republic of Indonesia 1945 mandates the state to establish policies (*beleid*) and administration (*beheersdaad*), regulation (*regelendaad*), management (*beheerdaad*) and supervision (*teozichtoudensdaad*) of mineral resources and coal for the purpose of the welfare of the people.²⁹ In Indonesia's legal system, the principle of state responsibility has got its shape as implemented in a number of national legislation. Based on the explanation of Article 2a of Law No. 32 of 2009 on the Protection and Environmental Management, what is meant as the principle of state responsibility is:

- a. The state guarantees the utilization of natural resources will bring great benefit for the welfare and the quality of life of the people, both present generation and future generations;
- b. The state guarantees citizens' rights to a good and healthy living environment; and
- c. The state prevents the utilization of natural resources that cause pollution and/or damage to the environment.
- d.

D. Mineral and Coal Mining Law

Mining law is a part of environmental law study, although some experts say it is a branch of *natural resources law*.³⁰ Natural resources are environmental elements that consist of biological resources and of non-biological resources which form a unified ecosystem.³¹ The management of environment, namely natural resources, will study/will deal with a wide range of disciplines and expertise as a means of fulfilling interests. Based on the diverse interests of environment, parts of Environmental Law can be differentiated into:

- a. Disaster Law (*Rampenrecht*);
- b. Environmental Health Law (*Milieuhygiënerecht*);
- c. Natural resources Law (*recht betreffende natuutlijke rijkdommen*) or Conservation Law (*Natural Resources law*);
- d. Law on Use of Space Division (*Recht betreffende de verdeling van het ruimtegebruik*) or a Spatial Law;
- e. Environmental Protection Law (*Milieubeschermingsrecht*)

The discourse of natural resources in the perspective of jurisprudence produces various sub-fields of study because the legal regime of natural resources include water, forests, waste treatment, plant vegetation, minerals, mining products, and other environmental elements. Mining is one area of law studies which experiences a rapid development in Indonesia. This can be observed with the enactment of various legislations that govern mining. Mining regulation in 1960s is Law No. 11 of 1967 on the Main Provisions of Mining, and at present the regulation is Law No. 4 of 2009 on Mineral and Coal.

Under this Law, mining is a part or all phases of activities within the framework of research, management and exploitation of mineral and coal which covers general investigation, exploration, feasibility studies, construction, mining, processing and refining, transportation and sales, and post-mining activities. Meanwhile, the definition of mining law is not found either in Law 4/2009 or in the implementing regulation. However, the overall rule of law in Law 4/2009 is a substance that organizes the regulation (law) of mining in Indonesia.

The term 'hukum pertambangan' can be paired with a term in English, namely *mining law*. In Dutch language it is called *mijnrecht*, and in German language it is called *bergrecht*. Ana Elizabeth Bastida³² expresses the definition of mining law, namely:

Mining law as the legal, regulatory, fiscal and contractual framework applicable to mineral investment and development, including mineral tenure (definition of ownership and the term for the acquisition, holding, transfer and termination of right to develop the activity), the applicable investment regime, fiscal terms, environmental regulation, social/community requirement, health and safety regulation, contractual practice and related aspects.

Salim HS divides mining law into two, namely (1) general mining law³³; and (2) special mining law. The discussion in this paper belongs to special mining law, specifically mineral and coal mining law, which set three kinds of relationships, they are: (1) governs the relationship between the state and mineral and coal; (2) governs the relationship between the state and legal subjects (corporate and/or community); and (3) governs the relationship between mining operators and the community.

In Law 4/2009, there are three essential elements contained in the preamble of the Law, namely: (1) the existence of natural wealth of mineral and coal; (2) control and the economic value of mine and mining products; and (3) the purpose of state control in order to ensure sustainable national development. The management of mineral and coal is subject to control by the State to bring real added value to the national economy in efforts to arrive at public welfare and prosperity in a just manner. The principles of the management thereof should be done independently, reliably, transparently, competitively, efficiently, and environmentally-sound.

Mineral and coal mining law as stipulated in Law 4/2009 utilizes various legal provisions, either administrative law, civil law, tax law, agrarian law, forest law, environmental law, and criminal law.

The administrative aspects of Law 4/2009 include:

- (a) The process of granting permit to the holder of the mining permit, small-scale mining permit and special mining permit;
- (b) Granting certain powers to regional authorities;
- (c) Preparation of standards, procedures, supervision, planning and guidance to the management of mining operations;
- (d) Supervision and control to the management of mining operations; and
- (e) Provisions of administrative sanctions to permit holders.

Meanwhile, the provisions of civil law include the completion of direct negative impacts of mining activities in the courts, such as the right to file a lawsuit to the court and the right to obtain adequate compensation under the provisions of the legislation. Aspects of criminal law enforcement in that Law is to introduce the maximum penalty, punishment for violations of mining permit holder, regulation of corporate criminal liability, integrated criminal law enforcement, additional punishment, expansion of evidence, and investigation authority by the investigating officers. Regarding the aspects of tax law, tax law covers state and

region revenue which consist of tax revenues and non-tax revenues. Tax revenues in the form of import duty and export duty and other taxes are under the authority of the government. Non-tax revenues are obtained through dues and compensation in accordance with the provisions of the legislation.

Mining control in construction activity includes research, management, control and protection of natural resources that have economic value. There are eight stages of mining activities, namely: (1) general investigation; (2) exploration (3) feasibility study; (4) Construction; (5) Mining; (6) Processing and refining; (7) Transportation and selling, and; (8) post-mining activities. Law 4/2009 classifies mining business into mineral and coal mining. Mineral mining is classified into (a) radioactive mineral mining; (b) metal mineral mining; (c) non-metal mineral mining, and (d) rock mining. Meanwhile, coal mining is mining of carbon deposition contained in the earth, including solid bitumen, peat moss and rock asphalt.

Mining activities should be carried out in a mining area which is based on Article 9 to Article 33 of Law 4/2009. Mining zone is the zone that has potential mineral and/or coal and is not bound by the limits of government administration as a part of national spatial planning. This region is decided by the government after determined by the regional government and consulted to the House of Representatives (DPR). Mining zone is divided into 3 (three), namely: (1) Mining Area (WUP); (2) Small-scale Mining Area (WPR), and; (3) State Reserve Area (WPN) as the following figure:

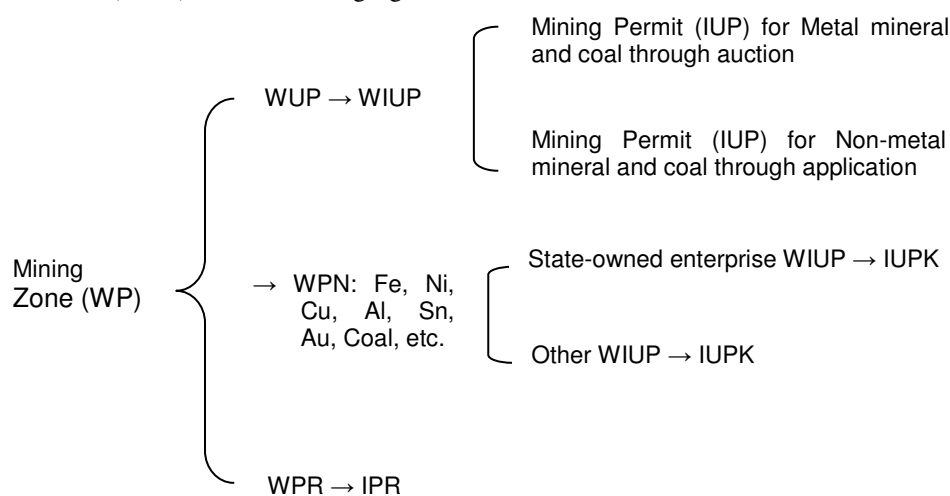


Figure 2. Mining Zone

Source: Simon F. Sembiring, *ibid.*

Mining business requires absolute presence of mining permit as stipulated in Chapter VII on Mining Permit Law 4/2009. Mining permit (IUP) is a permit to carry out mining business. IUP is implemented in the form of IUP of Exploration, IUP of Production Operation, IPR (Small-Scale Mining Permit), and IUPK (Special Mining Permit). The explanation of each is given below:

Table. Mining Permit According to Act 4/2009

Type of permit	Explanation	Fundamental of law (UU)
IUP of Exploration	Permit for general investigation, exploration, and feasibility study.	Article 36 section (1)a of Law 4/2009
IUP of Production Operation	Permit for construction activities, mining, processing and refining, transportation and sales.	Article 36 section (1)b of Act 4/2009
Small-scale mining area (IPR)	Permit for Small-scale mining area with limited area and investment. IPR can be given to individuals, community, and/or co-operative for a period of 5 years and can be extended.	Article 66-73 of Law 4/2009
IUPK a. IUPK of Exploration b. IUPK of Production Operation	Permit in a special mining permit area. Permit is given for one type of metal mineral or coal. This permit is given by the Minister of Energy and Mineral Resources. IUPK is given to Indonesian legal entities, whether state-owned enterprises, region-owned enterprises, and private enterprises.	Article 74-84 of Law 4/2009

Source: Author

E. Judicial Review of Law 4/2009

Until December 2014, Law 4/2009 is a law that has sought *judicial review* in the Constitutional Court of the Republic of Indonesia (MKRI) seven times since it was issued (2009).³⁴ The track record of judicial review in the assessment of Law 4/2009 against the Constitution of the Republic of Indonesia 1945 is as follows:

**Table of Judicial Review Verdict In Assessment of Law 4/2009
 (up to December 2014)**

No of Case	Applicant	Verdict	Explanation of the Amendment of Article in Law 4/2009
25/PUU-VIII/ 2010	Bangka Belitung People's Rights Defenders	Appeal is granted entirely	<p>Article 22 which reads The criteria to determine WPR is:</p> <ol style="list-style-type: none"> Having a secondary mineral reserve contained in the river and/or between the edge of the riverside Having a primary reserve of metal/coal with a depth of 25 meters Having terrace sediment, floodplains, and ancient river sediment WPR maximum size is 25 hectares Declare the type of mining commodity <p>Article 52 section (1) which reads Holders of IUP of metal mineral exploration are given at most 100,000 hectares WIUP</p>
30/PUU-VIII/2010	Johan Murod, et al	Appeal is granted partially	<p>Article 55 section (1) which reads Holders of IUP of non-metal mineral exploration are given at most 25,000 hectares WIUP</p> <p>Article 66 section (1) which reads Holders of IUP of Coal Exploration are given at most 50,000 hectares WIUP</p> <p>The phrase "by means of an auction" in article 51, article 60 and article 75 section (4) of Law 4/2009 is contrary to the Constitution of the Republic of Indonesia 1945 and does not have binding legal force if interpreted "Auction is conducted by equating the participants of WIUP and WIUPK in terms of different administrative/management, technical, environmental and financial ability to the object being auctioned".</p>
32/PUU-VIII /2010	Environmental Rights Advocacy Team	Appeal is granted partially	<p>Article 10b which reads Determination of WP as referred to in Article 9, section (2) shall be implemented:</p> <ol style="list-style-type: none"> Transparently, in a participatory manner, and responsibly. In an integrated manner by taking into account the opinion of relevant government, and it is <i>obligatory to protect, respect and fulfill the interests of the community whose region and land will be incorporated into mining activity, and communities that will be affected</i>, and by considering ecological, economic, social and cultural aspects, as well as environmental soundness; and By considering the aspirations of the region.
10/PUU-X/2012	H. Isran Noor (Regent of Kutai Timur)	Appeal granted partially	The phrase "after coordinating with regional government" in Article 6 section (1)e, Article 9 section (2), Article 14 section (1), and article 17 of

			<p>Law 4/2009 is contrary with the Constitution of the Republic of Indonesia 1945 and does not have binding legal force if not interpreted “after determined by the regional government”</p> <p>The phrase "coordination as referred to in section (1) is done by" in Article 14 section (2) of Law 4/2009 is contrary with the Constitution of the Republic of Indonesia 1945 and does not have binding legal force if interpreted "The determination as described in section (1) is carried out by"</p> <p>Article 6, section (1)e which reads Determination of WP is conducted after decided by the regional government and in consultation with the House of Representatives</p> <p>Article 9 section (2) which reads WP as referred to in section (1) is decided by the Government after determined by the regional government and consulted with the House of Representatives</p> <p>Article 14 section (1) which reads Determination of WUP is conducted by the Government after determined by the regional government and delivered in writing to the House of Representatives</p> <p>Article 14 section (2) which reads The determination as referred to in section (1) is conducted by the pertinent regional government based on the data and information owned by the Government and regional government.</p> <p>Article 17 which reads The width and limit of WIUP of metal minerals and coal are decided by the Government after determined by regional government based on the criteria owned by the Government</p>
113/PUU-X/2012	Drs. H. Hazil Ma'Ruf, MH	Appeal denied	-
108/PUU-XII/2014	Dr. Nunik Elizabeth Merukh, MBA	Provision	Granting the withdrawal of suppliant’s appeal or cancellation of the registration appeal
10/PUU-XII/2014	The Indonesian Association of Mineral Entrepreneurs and partners	Appeal denied	-

Source: quoted from the verdict of the Court of Law of the Republic of Indonesia on Law 4/2009

III. Decentralization of management mining authority at regional level

A. Authority of Regional Government in mining sector

There are several reasons behind the policy of decentralization in many countries. Rondinelli, Nellis and Cheema identify decentralization as: (1) a way to manage the development of national economic more effectively and efficiently; (2) a reaction to a technical failure in achieving the national development plan; (3) to improve the ability of the central government to get detailed information about regional conditions; (4) to make a more responsive regional planning program; and (5) to provide regional governments greater flexibility in

making policy as an effort to encourage community participation.³⁵

Shah suggests the key to success of decentralization policy is accountability and public participation.³⁶ Therefore, the implementation of regional autonomy should emphasize the principles of democracy, regional autonomy, improvement of community participation, equitable justice, and prosperity by taking into account the potential and diversity among regions.³⁷

According to Jazim Hamidi, decentralization not only involve the transfer of authority from top to bottom, but also needs to be realized on the basis of initiative from the bottom to encourage the independence of the regional government itself as a factor that determines the success of the regional autonomy policy.³⁸

Ups and down in the implementation of regional autonomy in Indonesia causes changes in the rules of decentralization policy in Indonesia. Since reformation took place up to now, the rules of the decentralization policy have not yet found the right format of democratization. Along with the governmental socio-political development, in order to realize the objectives of development and prosperity of the people, Law No. 23 of 2014 on Regional Government (Law 23/2014) that revokes the previous regional government law is composed, namely Law No. 32 of 2004 on Regional Government.

Regional government is required to improve services, empowerment and community participation, and to increase competitiveness of the region by the principles of democracy, equality, justice and the unique characteristics of the region. Decentralization is meant to strengthen the concept of broad, real and responsible authority.

Law 23/2014 brings a significant change to the system of regional government. The change is marked by shifting some authorities of regency or municipality government to provincial government. The authorities include authorities in the field of forestry, mining, and marine. Provincial government is expected to perform the functions of educating, controlling, supervising, monitoring and evaluating, and facilitating. Meanwhile, the government of regency/municipality is capable of running regional autonomy to perform optimal service to regional communities.³⁹

Therefore, in order to increase people's welfare, government should give attention to the natural resource sector, one of which is mining activities. Mining has a very significant role in the national economy, whether in the fiscal sector, monetary, and real sector. Thus, their management should add value to the national economy in order to achieve prosperity and welfare with the principles of benefits, equity and balance.⁴⁰

Mining is a part or all phases of activities within the framework of research, management and exploitation of mineral or coal consisting of general investigation, exploration, feasibility study, construction, mining, processing and refining, transportation and sales, and post-mining activities.⁴¹ Minerals are inorganic compounds that are formed in nature, which have certain physical and chemical properties and regular crystal composition, or their combination which forms rocks, either in loose or solid form.⁴² Meanwhile, mineral mining is mining of collection of minerals in the form of ore or rock, outside geothermal, oil and gas and groundwater.⁴³

The shift of authority to provincial government to manage mining sector is motivated by the principles of effectiveness and efficiency of supervision or control from the central government and provinces to regencies/municipalities in mining areas. Law violation is frequent in mining sector and it is prone to corruption. In addition, if managed by provincial government, it is expected that mining sector can reduce discrepancy in the regions and the overlapping mining management.⁴⁴ In that policy (*beleid*), it is mentioned that regents and mayors are no longer authorized to determine mining permit area (WIUP) as well as mining permit (IUP). The authority now belongs only to governor and the central government.

The provincial government has the authority to determine mining permit area (WIUP) in mining area in its region. On the other hand, inter-provincial mining area is under authority of central government represented by the Ministry of Energy and Mineral Resources (ESDM). What becomes the problem is the authority of mining management in Law No. 23 of 2014 on Regional Government has a different substance from Law No. 4 of 2009 on Mineral and Coal which mentions that the authority of mining permit is in the hands of the regents and mayors.

The authority of government affairs division in the field of energy and mineral resources is contained in the annex of Law 23/2014, namely:

Table 3
Division of Government Affairs between the Central Government
and Regional Government
in the Field of Energy and Mineral Resources

Sub Affairs	Central government	Province
Mineral and Coal	<ul style="list-style-type: none"> a. The determination of mining zone as part of a national spatial plan, which consists of mining area (WUP), small-scale mining area (WPR) and state reserve area (WPN), and special mining area (WUPK). b. The determination of WIUP for metal mineral and coal and special permit mining area (WIUPK). c. The determination of WIUP for non-metal minerals and rocks across provinces and sea area of more than 12 miles. d. The issuance of mining permit (IUP) for metal minerals, coal, non-metal minerals and rocks on: <ul style="list-style-type: none"> 1) WIUP located in areas that cross provincial Regions; 2) WIUP which directly borders with other countries; and 3) sea area of more than 12 miles; e. The issuance of IUP for foreign investment. f. Granting special mining permit (IUPK) for minerals and coal. g. Granting IUP registration and determining the amount of production of each province for metal mineral and coal commodity. h. Issuance of Production Operation special Mining Permit for processing and refining of mining commodities which come from other provinces, offsite processing and refining facilities, or imported commodities as well as foreign investment. i. The issuance of IUP and letter of registration for domestic investment and foreign investment that operates throughout Indonesia. j. The determination of standard price for metal minerals and coal. k. Management of mining inspectors and mining supervisory board. 	<ul style="list-style-type: none"> a. The determination of mining permit area (WIUP) for non metal mineral and rock in one (1) province and sea area up to 12 miles. b. The issuance of mining permit (IUP) for metal minerals and coal for domestic investment in regional WIUPK (special permit mining area) within 1 (one) province, including sea up to 12 nautical miles. c. The issuance of IUP for non-metal minerals and rocks in the framework of domestic investment in WIUP within 1 (one) province, including sea up to 12 nautical miles. d. The issuance of small-scale mining permit (WPR) for metal minerals, coal, non-metal minerals and rocks in WPR. e. The issuance of IUP for special production operation for processing and refining in the framework of domestic investment whose mining commodities are derived from one (1) province. f. The issuance of IUP and letter of registration

Source: Law 4/2009

Law 4/2014 has revoked the authority of the government of regency/municipality to be involved in the mechanism of granting mining permit. The regent of West Sumbawa, West Nusa Tenggara, Zulkifli Muhadli, argues that central government should not generalize the overlapping of IUP as a result of regions' inability in issuing permits. According to him, the revocation of authority is not a solution. It creates new problems instead because governor will face difficulty to reach all mining zone in regency/city. In addition, governor does not have the supporting capacity from the environment if there is social conflict at the mine.⁴⁵ Therefore, the significance of coordination and supervision of mineral and coal mining is to improve the administration of mining permit.

B. Sharing of mining revenue between central government and regional government

Sharing of mining revenue between central and regional government is regulated in Law 4/2009. The division of revenue sharing is managed in the scheme of Revenue Sharing Fund (DBH). DBH applied in

Indonesia is still far from expectation as it tends to be unfair and there is impression that discrimination still occurs, particularly in the sharing of revenue from oil and gas mining, gold and coal. This injustice can be seen from the small amount accepted by the region as the site where the mine is located, while in contrast the region also holds responsibility of all the risks/impact of mining sector, e.g. environmental damage due to mining.

As to the injustice regarding Revenue Sharing Fund (DBH), it is related to the regulation that governs it, namely Article 14c of Law No. 33 of 2004 on Financial Balance which only gives 20 percent of the general mining for the producing region, and 80 percent for central government. In fact, in Article 14e of the same Law, petroleum mining gives even less to the region which is only 15.5 percent, while the rest is paid to central government. In the same Article, Article 14f, which regulates revenue sharing for natural gas mining, gives a slightly bigger profit to the region that is 30.5 percent for the producing region. The most profitable is the region producing geothermal. The region can enjoy revenue from geothermal mining as much as 80 percent as regulated in Article 14g in Law No. 33 of 2004⁴⁶.

Riau is one of the mining zones (WP) that receives direct impact of juridical implication. Aceh province which is rich in natural gas, Papua with its abundant copper mining, and Kutai Kertanegara which has a huge deposit of oil should certainly acquire rights to their land that have been taken by the central government through the contract of revenue sharing with foreign companies. Therefore, the disbursement of DBH to regions is expected to answer the process of returning the rights of region's potential.⁴⁷

Financial balance between central government and regional government related to mining products is strictly regulated in Law 4/2009. This legislation gives fresh air for the producing regions. Article 129 section (1) in aforementioned Law gives six (6) percent of the net profit to the region, and four (4) percent to the central government.⁴⁸

This revenue sharing is very much different from the revenue sharing for Land and Building Tax (PBB), the Tax on Acquisition of Land and Building (BPHTB) and revenue sharing for Income Tax (PPH). From PBB and BPHTB, the regional government gets a significant portion of the tax, that is 90 percent for the revenue from PBB and 80 percent from BPHTB. As for Income Tax, regional government only gets 20 percent.

The distinction in revenue sharing between one source of income and another would result in discrepancy of regional revenue. The regions that have natural resources such as mining will feel that this practice is unfair. It is because the biggest source of income is derived from the mining sector, while the income from PBB or BPHTB sector can not be maximized due to human factor and lack of understanding of the community to pay taxes. This policy will automatically benefit regions whose land administration is well-ordered; furthermore, it is more profitable for densely populated areas such as Jakarta and Java island. On the contrary, areas outside Java island, where many of the citizens do not have certificate for their land as well as Building Permit (IMB), obviously have not been able to maximize potential of revenue from this sector. Looking at the amount of money that has been distributed to each region as Regional Revenue (PAD), it is obvious that this legislation is more favorable for the regions in Java island in comparison with the regions outside of Java.⁴⁹

C. *Protection and community participation*

Community participation is essential in the process of preparation and implementation of mining management policy. Such participation is meant that the policies and regulations made by the government conform to the interests of the majority of the society and strengthen the role of community control over the implementation of mining management. In relation to decentralization, community participation serves to minimize the environmental impact due to the implementation of regional autonomy policy.

Sony Keraf, former Minister of Environment, says that regional government has an obligation to provide access for the public to engage in the manufacture of EIA (Environmental Impact Assessment) on each development activity. In addition, it is also important to empower *civil society* to solve environmental problems. In other words, regional governments have an obligation to democratize the implementation of environmental management in their regions. But, Keraf also conveys that from institutional aspect, the current regional governments are not ready to open up access to public participation in natural resource management.⁵⁰

However, the importance of community participation in mining sector is not expressly stated in Law 4/2009 and delegated legislation. Therefore, in 2010, WALHI filed a *judicial review* to the Constitutional Court against the provisions of Law 4/2009 related to public participation in determining mining zone (WP). The Constitutional Court decides that the phrase "*pay attention to public opinion*" in Article 10b of Law 4/2009 is contrary to the Constitution of Republic Indonesia with the requirement that it is not interpreted as obligatory to protect, respect and fulfill the interests of the community whose regions and land will be incorporated into mining areas, as well as the community that will feel the impact.

Based on the decision of the Constitutional Court, a member of WALHI research team, Asep Yunan Firdaus, says WALHI has the concern to encourage the government to follow up on the decision by issuing government regulation (PP) which specifically regulates public participation in mining sector.⁵¹ Asep adds that in general the level of community involvement is very low. Regional governments have not optimally invited their citizens to participate in the discussion about short and long term plans. All this time, regional governments only

do socialization or meeting regardless the input and suggestions from the community.⁵²

Regional governments shall implement participatory measures in managing mining zone (WP), such as by conducting Strategic Environmental Assessment (KLHS) and spatial planning, and determining mining zone and permit for utilization of natural resources. Take for example, people are not involved in the implementation of Strategic Environmental Assessment (KLHS) in Batu Gosok region. For development planning, the government focuses more on tourism sector, but in the discussion process about planning in village level, people are not given the space to discuss mining sector.⁵³

Throughout the years of 2011-2012, WALHI reported that there were 203 cases related to the establishment of mining zone (WP).⁵⁴ Asep believes that it happens because of minimum community participation. On that basis, WALHI prompts the government to immediately issue regulations governing public participation in mining sector.

On the same occasion, the Executive Director of WALHI, Abetnego Taringan, says that the research is carried out to continue WALHI's advocacy on Law 4/2009. Abet sees that all this time mining zone (WP) is designated by the government through the Ministry of Energy and Mineral Resources. Given that land clearing often pertains to the residents in the area, Abet suggests that community participation is needed.⁵⁵

IV. Problems in management of mining in Indonesia

A. Corruption in Mining Sector

Mining sector has a great potential for corruption. This potential is due to several things, including: *first*, weak supervision on the process of obtaining permit, *second*, overlapping regulations on mining. Weak supervision from the central government and/or provincial government on the mechanism of mining permit issue frequently happens. Tamsil as a legal practitioner further explains it is common knowledge that investors in the mining sector, when arranging administration of mining permit, can only proceed to the next stage if willing to hand over some money to unscrupulous Regional Head. Overall, to acquire mining permit until the mining is ready to operate at least Rp 3 to 10 billion bribe is spent. The money is usually distributed to regional heads and some elements in the National Land Agency, police, prosecutors, military, and even hoodlum so that the business continues to run as expected.⁵⁶

Corruption can occur through unpaid taxes to the state. The Vice Chairman of the Corruption Eradication Commission (KPK), Adnan Pandu Praja said tax revenues in the mining sector and coal which are not optimal is sourced from the aspects of administration, regulation, and human resource management in the Directorate General of Taxation.⁵⁷ Dada Suwarna, Director of Investigation and Billing of Directorate General of Taxation, states there are about 70 percent out of 7709 mining companies as the holders of Mining Permit (IUP) that do not pay income tax. In fact, more than 1,300 holders of IUP have not been identified. This is mainly because there is no accurate data related to IUP holders from the Ministry of Energy and Mineral Resources as well as Regional Government, so that tax officials can not impose IUP holders to meet their obligations.⁵⁸

Based on the investigation of the Corruption Eradication Commission (KPK) since 2014 toward 10,900 mining permit (IUP) or mining authorizations (KP), there are 4,880 unclear IUP and KP. This permit problem is because of overlapping IUP and because they do not have Taxpayer Registration Number (NPWP).⁵⁹ The Director General of Coal and Mineral at the Ministry of Energy and Mineral Resources, Sukhyar, confirms that from 10,776 IUP, only 5,969 which have the status of clean and clear (CnC) certificate, while approximately 4,000 holders of IUP do not have CnC status.⁶⁰

The issuance of mining permit (IUP) is often carried out without coordination with other agencies and other levels of government, and not in accordance with the administrative standards (Director General of Coal and Mineral at the Ministry of Energy and Mineral Resources, 2013). From socio-political aspect, that condition can lead to the emergence of conflicts and social disharmony among public, among mining entrepreneurs, or between the public and mining entrepreneurs. Consequently, there is no commitment and responsibility of the mining entrepreneurs to do post-mining reclamation (Permit Policy Studies of Mineral and Coal Mining, 2012).

It is the homework for provincial government and/or regency/municipality government to improve the administration of Mining Permit (IUP). KPK chairman Abraham Samad, concerns that IUP is often abused. From the data obtained by the Commission as many as 50 percent of IUP do not have Taxpayer Registration Number (NPWP).⁶¹ The potential for corruption in the mining sector can be considered vulnerable. However, it should be observed that the problem of corruption in the mining sector is quite difficult to disclose. In the period from January to June 2010, there are only two cases of corruption in the mining sector revealed, while in regional finance sector, there are 38 cases of corruption (Indonesia Corruption Watch (ICW), 2010)

Corrupt behavior of Regional heads in relation to the issuance of mining permit shows moral degradation of regional heads. A regional head can fully revoke and issue a mining permit in a certain mining zone, despite knowing that there has been a mining permit in that mining zone with a variety of reasons.⁶²

On the other hand, the demands to increase regional income and regional finance made regional mining as a strategic source of income for the region. The implication is regional government race to issue mining

permits (Permit Policy Studies of Mineral and Coal Mining, 2012).

Directorate General of Coal and Mineral at the Ministry of Energy and Mineral Resources states that mining permits with the status of non-clear and clean until 26 February 2013 are 5,288. Meanwhile, mining permits having clear and clean status are amounted to 5,502. Based on the categorization of the Ministry of Energy and Mineral Resources, mining permits with the status non-clear and clean can be divided into three, namely overlapping regions, overlap with the same commodities, and overlap with different commodities. The data below shows the summary of mining permit of non clear and clear categorization and the total number (Directorate General of Coal and Mineral, Ministry of Energy and Mineral Resources, 2013).

From the investigation, the Commission found state losses in the mineral and coal mining sector is amounted to Rp 6.7 trillion in the period 2003-2011. Meanwhile, potential state loss during the period 2010-2012 is estimated at US \$ 2.22 billion (Rp 22.2 trillion). The potential loss lies on the five largest types of minerals, namely nickel, iron ore, bauxite, lead, and manganese in 2011.⁶³

In the context of overlapping regulations, Chairman of the Indonesian Association of Mining Entrepreneurs (APEMINDO), Poltak Sitanggang, confirms that the issue of land overlap arises as a consequence of the lack of control and supervision from central government to the mining permit issuance mechanism. All this time, regional head has the sole authority and dominance in the issuance of mining permit. In addition, the government is considered negligent in providing technical assistance to regional governments; therefore, there is no understanding between regional and central government (hukumonline.com, July 24, 2012).

Table 1
Overlapping Mining Permit Categorization

No.	Overlap Category	Number
1	Administrative Region	188
2	Different commodities	388
3	Similar commodities	432
	Total	954

Source: Directorate General of Mineral and Coal, Ministry of Energy and Mineral Resources, 2013

In general, the source of conflict that resulted in overlapping mining permit is due to several factors, including: *intervening/mediating* causes, i.e. regional expansion factor, corruption committed by regional head, carelessness of the regional head, and/or lack of infrastructure for keeping mining permit (IUP) record digitally, and the root causes, namely territory dispute, falsification of the date of mining permit (IUP) issuance, change of the regional head, and so on.

Another phenomenon of corrupt behavior of regional heads which leads to the emergence of overlapping mining permit is so-called *back-dating* or falsification of the date of mining permit issuance. This kind of corrupt behavior is mostly done by regional heads when Law 4/2009 comes into force. This Law confirms that after January 12, 2009 regional head is no longer allowed to issue IUP or mining permit, especially exploration mining permit until the establishment of the Mining Area (WUP). If Mining Area has been formed, mining permit will be granted through public tender mechanism. To avoid having to follow a public tender mechanism, many regional heads knowingly issue mining permit which basically takes place after 12 January 2012 as if the permit is published before that date (Purwono and Partners, 2011).

B. *Supervision of Corruption Eradication Commission (KPK) in natural resource sector*

Coalition of Anti-Mining Mafia discovers many violations of the results of coordination and supervision conducted by KPK in mining sector, namely⁶⁴: *First*, there are 4,672 IUP which do not have CnC (*Clean and Clear*) certificate or as many as 43.87% of the total 10,648 IUP (Data of December 1, 2014). This shows the weakness of Indonesian mining permit system and administration. *Secondly*, 1.372 million hectares of mining permit is in the area of forest conservation which consists of 1.16 million hectares of forest land use permit (IIPKH) for IUP; 110,210 hectares for Contract of Work (COW); and 101,990 hectares for Coal Contract of Work (PKP2B) in the area of Forest Conservation (Directorate General of Planology at the Ministry of Forestry, 2014). *Third*, 13 mining permits are in protected areas, and the Directorate General of Mineral and Coal and the Ministry of Forestry need to supervise the mining practice according to regulation.

Fourth, the majority of IUP holders in 12 Provinces have not meet Reclamation Warranty and Post-Mining Obligations. *Fifth*, based on the data, only about 50% of the total published IUP is known to have NPWP. *Sixth*, based on the recapitulation of data of the Directorate General of Mineral and Coal processed by the Coalition of Anti-Mining Mafia, in 12 provinces potential state revenue from underpayments of 4,631 IUP is found to reach Rp 3,768 trillion. *Seventh*, Based on the calculation of the Coalition of Anti-Mining Mafia, potential loss of state from land rent which refers to Government Regulation No. 9/2012 on Tariffs and Non-Tax Revenue, there is a significant difference between potential regional revenue and its realization in 12 provinces that become the focus of KPK's coordination and supervision. The difference between actual revenues and the

potential is referred to as potential loss of revenue. The magnitude of the potential loss of revenue in 12 provinces from 2009 to 2013 is estimated to reach Rp 574,94 billion in Kalimantan, Rp 174,7 billion in Sumatra, and Rp 169,487 in Sulawesi and Maluku. Thus, the total potential loss of revenues in 12 provinces of mineral and coal coordination and supervision is more than Rp 919.18 billion.

Corruption is crime that must be handled with extraordinary methods. Some of the methods are by sentencing death penalty and confiscating the money obtained through corruption. This can be done by implementing social costs of corruption (social cost of corruption) that is currently in the process of conception consolidation by KPK. The concept of social cost of corruption not only sees/measures the economic loss suffered by the state due to corruption. Crime economics or law and economics is the branch of economics that studies the various aspects of economy that emerge from various legal phenomena.⁶⁵

Brand and Price divide social costs into three main groups.⁶⁶ *First*, the costs of anticipation of crime. This is done by socializing the latent danger of corruption, such as by making stickers, public service advertisement and anti-corruption pocketbooks. *Secondly*, the costs of crime, namely all costs or losses borne by society as a result of corruption, either direct (explicit) or indirect (implicit or opportunity cost). For example, when Mr. X embezzled BLT (direct technical aid) fund as much as Rp 10 million for his own purposes, the total loss to the state is not only Rp 10 million, because the implicit cost (opportunity cost) of corruption is calculated as lost economic multiplier. *Third*, the components of the costs are relevant to be applied in cases of corruption. These costs include the cost of the investigation by the police, the costs incurred to bring a case to court and to lodge an appeal and for judicial review.

Rimawan Pradipto divides social costs of corruption into four types which are described in the pyramid below.⁶⁷



Image of Social Costs of Corruption

Social costs of corruption have been applied in various countries around the world, among others UK, USA, Australia, and the Netherlands.⁶⁸ The purposes of calculating the social cost of crime (*social cost of crime*) are: *First*, the fact that the consequences of criminal Law (corruption) are borne by the society (taxpayers); *Second*, to combat the crime and minimize its social impact, calculation of the social costs of crime as part of evidence-based policy is needed.⁶⁹

Iwan Gardono Sutjatmiko briefly explains the opportunities and challenges of the implementation of social costs of corruption in Indonesia. Opportunities to implement social costs of corruption are widely opened if the judicial process involving prosecutors and judges really apply a just or manifold financial penalty against the losses caused by corruptors. During this time people do not get clear information. If the information is available, they will be more supportive of a more severe punishment of corruption (including financial penalty). Moreover, the challenges of its implementation are relatively none. If the effort to commit corruption involves many parties, the network will attempt to localize the corruption.⁷⁰

C. *Strategic measures in Corruption Eradication in Mining Sector (An Offer)*

A number of issues that have been suggested are a description of the management of mineral and coal mining sector which has not been run optimally and fairly for the sake of people's welfare. The problems in mining sector not only include the problem of corruption, but also inefficiency of bureaucracy, supervision and internal controls; a weak administration; and political issues, legislation and others. Based on the experience in Indonesia, a number of issues that become a major challenge are the fight against corruption and the effort to carry out administrative and reporting mechanisms in accordance with the correct and transparent procedure and corresponding to the principles of *good and clean government*.

A number of strategic steps that need to be pursued to overcome these problems are:

1. *Encourage government and mining companies to be more transparent in reporting all of their activities, including profits*

This action requires regulatory support and guarantee of the freedom of the press to participate in monitoring and supervising the management of mining. Press has access to financial statements prepared by mining companies and the government in accordance with the statutory provisions of disclosure of public information. Policies designed to increase transparency in government can be issued as guidance and encouragement to implement it. Mark Pieth, professor and former chairman of the OECD Working Group on Bribery, supports this strategy through expanded use of high-level reporting mechanisms.

Transparency and effective monitoring mechanisms will minimize corruption because it will reduce closed transaction between government and mining entrepreneurs. Result of monitoring of mining activities can be used as a complaint report to the government when mining companies consistently damage the environment, without any recovery efforts.

To conduct business activities in the mineral and coal mining sector, it requires a very large cost (high capital), high risk, high technology, and the competence of qualified human resources in the field of mining and management. Therefore, transparency at all stages of mining process is very important. This is due to the fact that it is not a secret that large construction projects in the mining industry are prone to various forms of corruption, bribery or facilitation payments. Large amounts of money are invested over a relatively long period of time and distributed among numerous contractors and subcontractors.

More coal mining will mean more deforestation, since most Indonesian coal extraction is done through open-pit mining. This involves clearing forest or farmland, removing the top soil and then progressively digging out the coal seams, which can be a few meters to tens of meters from the surface. Once the coal is extracted, the top soil is backfilled into the hole and a new pit is dug. In addition to this, increasing mining activities will also result in more water pollution and health risks for regional communities. This violation occurs because of poor oversight and corruption. Common examples of graft involve district chiefs offering mining permits in return for bribes, and police and mining department officials ignoring threats and intimidation to villagers by mining firms seeking to acquire land.

Transparency in the management of mining should be taken into account by the government. We also need to foster an environment in which people understand their role as citizens supervising the government, as well as understand the information they will have access to and learn how to sort it.

2. *Improve the quality of the bureaucracy*

Quality of the bureaucracy that puts the principles of good and clean governance will reduce the opportunities for corruption at the level of bureaucracy. Permit services should be made better, more efficient and more transparent through one-stop permit services. This consideration is based on global conditions that globalization is responsible for an increasingly sophisticated forms of corruption. Corruption-fighting solutions have kept pace with the integration of financial systems, global supply chains and multi-jurisdictional entities. This can be done by; (a) strong internal controls; (b) Requiring the companies to meet international accounting standards and publish independently audited accounts; (c) the integration of financial systems; (d) Implementation of open government initiative, which defines its goal as being to "push for full transparency and citizen participation in the management of public affairs, in order to guarantee the right to a fair, democratic and prosperous society; (e) Promoting digital recording system in the Ministry of Energy and Mineral Resources, Ministry of Finance and other ministries concerned; (f) Promoting salary increase for staffs who administer mining permit. Higher Salaries should be combined with rigorous monitoring and auditing systems to deter corruption; and (g) Replacing or mutating officials indicated of corruption.

3. *Implementation of strict punishment*

In the case of illegal miners the government must Law firmly by means of recollecting data for the whole mining permit. Then, the government should take firm action to impose sanctions on officials and businessmen of illegal mining who are involved in legalizing mining activities. State losses due to illegal mining are quite significant. The officials of state-owned Company (BUMN) complain about the illegal mining case that has cost the state up to Rp 800 billion since two years ago.

There are three major disadvantages caused by illegal mining activities. The first is the environmental damage due to the use of chemicals by illegal miners such as mercury, without setting the dose so that in the long-term its use can cause contamination. The second disadvantage is the damage to market prices on commodities that are mined illegally. The third is the loss of state revenue potential because illegal miners do not invest in exploration, EIA (Environmental Impact Assessment) license, business feasibility permit and so on. They sell mining products more cheaply without entering formal commodity exchanges; therefore, it could potentially ruin the market price and lead to losing state revenues.

4. *Renegotiating mining contract to provide the greatest benefits for national interest*

The central government is in the process of reconciling and renegotiating Hundreds of licenses and contracts issued by central and regional administrations, focusing on overlapping permits and unpaid taxes and royalties. According to the mining and trade ministries, less than 80 of the roughly 1,450 coal producers in

Indonesia were registered as of this week. Some 400 of these would not be eligible anyway because their permits had not been certified "Clean and Clear" as a prerequisite for export registration. According to Sukhyar, 171 coal mining permits had been annulled this year, "many of them in production", as part of a broad effort to improve governance in the sector.

The Indonesian government is currently taking stock of renegotiating hundreds of licenses and contracts with mining companies to examine overlapping permits and unpaid taxes and royalties. Six points in the renegotiation of the Contract of work are related to state revenue, the construction of the smelter, increased regional content, the width of the area, stock divestment, and the certainty of Contract extension. There are two things that have not been agreed, those are state revenue and the certainty of contract extension. The government and mineral company PT Freeport Indonesia are still discussing the amendment of the Contract of work.

In addition to 6 points of renegotiation of contract that are often discussed, there are 4 new requirements that need to be included as part of the contract, namely (1) occupational safety issues. Safety issues must be the top priority of large companies, especially gold mining companies because dozens of miners die each year; (2) Amendments to the contract, namely the increase in the use of regional content in mining companies should rise at least 5% per year; (3) The program of corporate social responsibility should provide a real impact on improving people's welfare, especially people who live in disadvantaged areas and areas close to the mine; (4) additional amendments of contract regarding full authority of the supreme leader of foreign mining companies in Indonesia. All this time, the leaders of a foreign company that has mining permit in Indonesia does not have the authority to decide or agree on the results of the renegotiation of contract because they have to wait for the decision of the leaders of the parent company abroad.

5. *Increase public participation in monitoring the management of mining*

The role of public in the supervision of the management of mining is very crucial. The problem of corruption can not be solved only at the level of regulation and top-down policies. It should involve the community to control and oversee government policies and mining activities that harm people's rights and the environment. The guarantee of access to public information should be completely conveyed to the public because the accessibility of information can empower citizens. Public needs to call on our politicians and public officials to be accountable for their actions. Also, this could have gone unresolved if it were not for a Courageous senior government official who decided to face the problem, risking a political scandal for disclosing corruption, rather than sweeping it under the rug. Empowering citizens can be done by informing the greater public of its rights and duties and those of the public servants, and disclosing government documents and proceedings to allow for public oversight.

6. *Supervision from Anti-Corruption Institutions*

Coordination with the Corruption Eradication Commission (KPK) should be intensified continuously because supervision and monitoring of mining permit can serve as an example of transparency. With intensive coordination with the anti-corruption agency, non-tax state revenues (PNBP) from the mining sector are expected to increase. In Indonesia, the Director General of Mineral and Coal at the Ministry of Energy and Mineral Resources, R. Sukhyar, notified that PNBP from mining sector until November 2014 had the value of Rp 30.5 trillion, higher than last year which only reached Rp28 trillion. Supervision from the anti-corruption agency should not be limited to high-level state institutions (Ministry and National Institute), but also regional government institutions.

7. *Enacting mining legislation consistently*

Since January 12, 2014, the Indonesian government has banned the export of raw minerals. The government has recently changed its mining laws that require value-added processing to minerals before export. This will mean mining firms will have to build energy-hungry smelters, another source of coal demand. The new regulations, intended to stamp out illegal mining and ensure ample coal supplies for domestic power plants, require exporters to get approval from the mining and trade ministries. In October 2014, companies attempt to obtain export permits demanded by new regulations. New regulations designed to retain domestic coal for power generation and reduce illegal mining, require that coal mining companies must have approval from the Indonesian mining and trade ministries in order to export product. For the moment, Indonesia's largest overseas customers are India, China, South Korea, Japan and Taiwan, but demand from Southeast Asia is expected to pick up quickly.

There are several measures that must be taken by the government in addition to issuing a policy conducive to the current situation, namely⁷¹

- a. The government must prepare a good infrastructure at smelter sites, including the adequacy of electricity; the availability of ports, airports, road network and or railway, and a telecommunications network reliable to lower production costs of the mining companies. Improved infrastructure is expected to improve efficiency in smelter cost structure.
- b. There should be a government policy that regulates the limit of content and value that is suitable with economic calculations

- c. The Government should set up a policy that can create fair competition in the construction of smelter appropriate for the necessity of holders of IUP/K and Contract of work for mineral and coal. In addition, the government must avoid giving permission to 'loan sharks'. They commonly have letter of appointment and letter of authorization from State entrepreneurs, but in fact they have no capital.
- d. The government should not direct the holders of IUP and Contract of Work to collaborate with certain companies owned by a group of "loan shark" to build a smelter, because at the end the high cost structure causes the selling price of concentrate manufactured by domestic smelter uncompetitive in the global market.
- e. Fifth, the government should encourage the growth of downstream industries for users of condensate from domestic smelter through the production of Road Map of Concentrate Market, so the concentrate produced by regional smelter is feasible and its products can be absorbed by the market.
- f. In terms of legislation in Law 4/2009, there is no Article or section that includes the levels of concentrate that must be met by the mining industry. The amount of condensate content of 99.99% with a value of 100% is regulated in ESDM Minister's Regulation No. 7 of 2012 on Mineral Added Value through Mineral Processing and Refining Activities. However, because this ESDM Minister's Regulation has been annulled by the Supreme Court (MA) through MA Decree No. 13/P.HUM/2013. The provision of the amount of content and value are no longer valid and are not a policy reference. Therefore, it is necessary to issue another regulation to regulate it.
- g. Law 4/2009 regulates more issues in coal mining sector rather than mineral. On that basis, the Government needs to issue implementing regulations to set more detailed provisions regarding other mining sectors. If necessary, the government should amend Law 4/2009 by engaging public aspirations in addition to mining companies and government.

8. *Strengthening the independence of the judiciary*

Combating corruption will not be effective if there is no independence support from corruption judiciary. A number of steps need to be taken to ensure the independence of the judiciary, among others: government needs to involve anti-corruption agency in the selection of judges and attorney general of corruption. Meanwhile, to maintain the integrity and morality of the constitutional judges, the nomination of constitutional judges must be transparent and participatory. Complaints and criticism to the integrity of judge candidates and elected judges should be accommodated by judicial superintendent, namely Judicial Commission and the Board of Ethics of the Constitutional Court.

Board of Ethics is formed in order to maintain honor, dignity and behavior of the Constitutional Judges as well as to uphold the Code of Ethics and Code of Conduct of the Constitutional judges. The board is also authorized to give judgment on the behavior of the Constitutional judges. Conversely, when there are actions that are considered dubious or potentially violate ethics, the Constitutional judges can ask the Board of Ethics.

V. Conclusion

Mining management in Indonesia is regulated in Article 33 section (2) and (3) of the Constitution of the Republic of Indonesia 1945, where the land, the waters and natural riches contained therein shall be controlled by the state and exploited for the greatest prosperity of the people. Mineral and coal mine regulations are stipulated in Law No. 4 of 2009. The birth of Law 4/2009 also changes paradigm on mining, mainly the control of natural resources by the state. The most visible is shift of regime from contract of work to permit regime. In terms of mining management, the state is responsible for the utilization of natural resources in order to achieve prosperity and increase the quality of life of the people, ensure a good and healthy environment, and prevent environmental damage.

The ups and down in the implementation of regional autonomy in Indonesia lead to changes in the rules of decentralization policy in Indonesia. There is a shift of authority to provincial government to manage mining sector by the principles of effectiveness and efficiency of supervision or central and provincial government control to regencies/municipalities in mining areas. Law 4/2014 has revoked the authority of the government of regencies/municipalities to involve in the mechanism of granting mining permit. Another thing to highlight is the share of mining revenue between central and regional government stipulated by the Law 4/2009. Meanwhile, the imbalance of Revenue Sharing Fund (DBH) can not be separated from the regulation that governs it, namely Article 14c of Law Number 33 of 2004 on Financial Balance which only provides 20 percent of the general mining result for the region, and 80 percent for the central government ,

The mining sector contains a great potential for corruption. Among them: *first*, weak oversight in the process to obtain permit, *second*, overlapping regulations on mining. A step forward made by KPK is supervising the mining sector and the discourse of imposition of social costs of corruption to corruptors as a form of impoverishment against corruptors. However, this measure should be coupled with a variety of strategic steps below, namely: (1) Encouraging the government and mining companies to be more transparent in reporting

all of their activities including profits. (2) Improving the quality of the bureaucracy. (3) Implementation of strict punishment, (4) renegotiating mining contracts to provide the greatest benefits for the national interest, (5) Increasing public participation in monitoring the management of mining, (6) Supervision of Anti-Corruption agencies, (7) Enacting mining legislation consistently.

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³ <http://www.ti.or.id/index.php/news/2014/10/31/4000-izin-pertambangan-bermasalah-terancam-dicabut>

⁴ Ardian Maulana and Hokky Situngkir, *Dynamics of the Corruption Eradication in Indonesia*, Dept. Computational Sociology, Bandung Fe Institute as represented by the Surya Research & Education (SURE) Indonesia and the National Law Reform Consortium (KRHN). (p. 7)

⁵ Busro Muqodas, *Strategi Pemberantasan Korupsi di Indonesia*, Komisi Pemberantasan Korupsi, Bandung Institute of Technology, March 9, 2011 (power point).

⁶ Moh. Fadli, *Desentralisasi dan Potret Korupsi di Level Lokal di Indonesia*, Journal of the Faculty of Law UB, the results of Prime Research Universities in 2013 conducted by Moh Fadli and team, with the title "*Membongkar Korupsi Politik di Daerah di Balik Fatsun Gerakan Bias Gender (Rekayasa Model Alternatif Indeks Kerentanan Korupsi)*" -Year I, p. 4

⁷ Kadek, 'Natural Resources in Indonesia' (2008) <http://sudarsana.net/articles/natural-resources-in-indonesia/>, accessed on 13 January 2015

⁸ Jimmy Hitipeuw, 'Indonesia, The World's Second Mega Biodiversity Country' (2011) <http://english.kompas.com/read/2011/05/16/0725522/Indonesia.The.Worlds.Second.Mega.Biodiversity.Countr>y, accessed on 13 January 2015

⁹ Salim HS, *Hukum Pertambangan Mineral dan Batubara* (Sinar Grafika, 2012) in Moh. Fadli et al, *Mozaik Sumber Daya Mineral Indonesia (Diskursus Tanggung jawab Negara)* (UB Press, 2014) 35.

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¹² Vicharius dianjiwa, '*Limbah Yang Jadi Barang Mahal*' (2014) <http://www.tambang.co.id/limbah-yang-jadi-barang-mahal-1292/> accessed on 13 January 2015

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¹⁴ Victor Emmanuel Williamson Naille Rights, '*Menguasai Negara atas Mineral dan Batubara Pasca Berlakunya Undang-Undang Minerba*' (2012) *Constitution Journal* vol 9 number 3 September 474.

¹⁵ Geological Agency, *Neraca Mineral Logam* 2012, (2012) http://psdg.bgl.esdm.go.id/index.php?option=com_content&view=article&id=1025&Itemid=640, accessed on January 13, 2015

¹⁶ Ibid.

¹⁷ Geological Agency, *Neraca Mineral Bukan Logam*, 2012, (2012) http://psdg.bgl.esdm.go.id/index.php?option=com_content&id=1030 accessed on January 13, 2015

¹⁸ Ismono Wahyu Widodo, *Mineral dan Batuan* https://www.academia.edu/7025022/MINERAL_DAN_BATUAN accessed on January 14, 2015.

- ¹⁹ Ministry of Energy and Mineral Resources, *Mineral Strategis di Kabupaten dan Kota*, (2013) <http://webmap.psdg.bgl.esdm.go.id/geosain/neraca-mineral-strategis.php?mode=administrasi> accessed on January 14, 2015.
- ²⁰ Association of Indonesian Environmental Observers, *Potensi Batubara Indonesia*, <http://www.hpli.org/tambang.php>, accessed on January 14, 2015 date.
- ²¹ Ministry of Energy and Mineral Resources, *Pasokan Batubara 2014-2012* <http://prokum.esdm.go.id/Publikasi/Statistik/Statistik%20Batubara.pdf>, accessed on January 14, 2015.
- ²² Bagir Manan, 'Asas, Tata Cara dan Teknik Penyusunan Peraturan Perundang-undangan, dan Peraturan kebijakan', 1994 Papers, Department of Mines 6-7.
- ²³ Victor Emmanuel Williamson Nalle, 'Hak Menguasai Negara atas Mineral dan Batubara pasca Berlakunya Undang-Undang Minerba' Constitution Journal Volume 9 Number 3, 8.
- ²⁴ See General Explanation of the Law of the Republic of Indonesia No 4 of 2009 on Mineral and Coal Mining.
- ²⁵ Robert Endi Jaweng, , 'UU Minerba: Perubahan Krusial, Aneka Pertanyaan' (2009) Regional Autonomy Implementation Monitoring Committee (KPPOD) 4.
- ²⁶ Although it is not always the case. Check the "Encyclopedia of Public International Law", in Ida Bagus Wyasa Son, *Tanggung Jawab Negara terhadap Dampak Komersialisasi Ruang Angkasa*, Refika Aditama, Bandung, 2001, p 53. Responsibility includes not only the obligation to fulfill "legal responsibility" but also "moral responsibility" associated with specific actions, decisions, or expertise (profession) which have been carried out.²⁶ The term 'liability' means a condition to carry out certain duties. The term 'liability' can not be separated from "obligation" (obligation; duty). For this reason, the use of the term "responsibility" can not be separated from the term "liability". (Abdul Rokhim, op.cit., P 78.)
- ²⁷ A. Sonny Keraf, "Pembangunan Berkelanjutan atau Berkelanjutan Ekonomi", in *Hukum dan Lingkungan Hidup di Indonesia: 75 Tahun Prof. Dr. Koesnadi Hardjosoemantri, SH, ML*, Graduate Program at the Faculty of Law, University of Indonesia, Jakarta, 2001, pp 9-15. See also, A. Sonny Keraf, 'Etika Lingkungan', Kompas, Jakarta, 2002, pp 175-.
- ²⁸ Abdul Rokhim, op.cit., P 78.
- ²⁹ Ibid, pp 208-209.
- ³⁰ Some experts argue the scope of the assessment of environmental law with natural resources law. Natural resources law stands on two areas of law, the administrative law and common law property. Natural resources law in its early development was a variety of studies in property law. Robert L. Fischman in "What is Natural Resources Law" wrote the main problem in natural resources law is basically ecosystem management. He also wrote, "Natural resources law is more than merely a class of advanced topics in environmental law or property law. Thought the current casebooks vary, ... key issue related to extraction, interpretation, ecosystem management, and property rights that are peripheral to typical environment law curriculum. While affirming the centrality of public land management to natural resources law , In particular, the emerging principles of ecosystem management are difficult to teach without drawing upon the materials of public land law. The public resources are natural capital for generating good and services."
- Robert L. Fischman, *What Is Natural Resources Law?* Research paper 43, University of Colorado Law Review, HeinOnline 78 U.Colo L.Rev 717, 2007, pp 717, 718, 720, and 748. See also, Berkshire, *Natural Resources Law*, Berkshire a global point of reference, 2011.
- ³¹ Article 1 point 9 of Law 32/2009
- ³² Ana Elizabeth Bastida, "Mining Law in the Context of Development: An Overview", in Philip Andrews-Speed (Ed), *the International Competition for Resources: The Role of Law, the State and of Markets*, Dundee University Press, Dundee, UK 2008, pp 102.
- ³³ General mining law examines geothermal, oil and gas, radioactive minerals, minerals and coal, as well as groundwater. Meanwhile, special mining law only regulates certain aspects of mining products, such as

mineral and coal mining, as in Law 4/2009. See Salim HS, *Hukum Pertambangan: Mineral ...*, op.cit., P 15.

- ³⁴ Constitutional Court of the Republic of Indonesia (MKRI) has 4 (four) authorities and one (1) obligations as stipulated in the Indonesian constitution. The Constitutional Court has the authority to hear at the first and final state, and its verdict is final for: (1) Assessing laws against the constitution of Indonesia; (2) Resolving the dispute of authority between state institutions that obtains their authority from Indonesian Constitution; (3) Deciding the dismissal of political parties, and; (4) Resolving disputes about election results.
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- ³⁸ Jazim Hamidi, *Paradigma Baru Pembentukan dan Analisis Peraturan Daerah (Studi Atas Perda Pelayanan Publik dan Perda Keterbukaan Informasi Publik)*, Journal of Laws No. 3 Vol July 18, 2011, pp 336-363.
- ³⁹ Notes from Public Hearing of Committee I DPD RI with Dr. Made Suwandi and Prof. Irfan Ridwan Maksum about Regional Government, Thursday, November 6, 2014.
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- ⁶³ Sinar Harapan, August 13, 2013, *Audit Dana Hasil Ekspor Tambang*
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