BARGAINING POWER AND RIGHTS OF THE CUSTOMARY LAW COMMUNITY (INDIGENEOUS PEOPLE) OVER NATURAL RESOURCES UNDER THE NEW MINING BUSINESS LICENSE REGIME IN INDONESIA

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ABSTRACT

The exploitation of natural resources in an area may threaten the existence of the customary law community (indigenous people) and cause environmental damage. This condition may also trigger the movements and rejection of indigenous peoples towards mining activities in a region. Various legal regulations that have been issued by the Indonesian Government are not generally effective in protecting the rights of indigenous and tribal peoples over their natural resources and the environment. The Mining Business License (IUP) provided under the Mining Law has positioned rights of indigenous peoples over their natural resources and natural environment in a weak bargaining position, and without considering the customary law community rights to enjoy the benefits of natural resources in their region. The IUP regime is more favorable in accomodating the interests of the mining companies and seems to 'forget' to protect the interests of indigenous and tribal peoples.

Keywords: communities, customary law, mining business license, indigenous people, Rights

INTRODUCTION

The conflict between indigenous people and mining company may appear in countries which are rich in natural resources, including Indonesia. In some mining areas in Indonesia, [1] conflicts often occur between local indigenous communities and mining companies due to the enormous destructive power of mining activities to the environment that deprives the right of local indigenous peoples to live in their natural living environment. [2]

The sustainable natural resources and evironment are rights of all people, including the customary law communities whose living and reside in that area. The indigeneous people live and depend their life by utilizing the land for the common interest of members in their community (*communal bezitrecht*).[3] Acknowledgment to indigenous people of their right to natural resources and environmental is a recognition of the existence of the customary law communities. The interaction between the indigenous peoples and the natural resources, such as land and forest is reflected in the management and utilization models of indigenous peoples over land, forests and the environment.

Recognition of the rights of customary law communities to natural resources and the environment in Indonesia has been provided under the Constitution and other laws and regulations,[4] however, the protection and enforcement to the rights of customary law communities to natural resources are still very weak, either in recognition of the existence of indigenous peoples as an institution,[5] as well as recognition of the rights of indigenous peoples to natural resources and environmental.

[1] Ciaran O'Faircheallaigh, *Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia, Development and Change*, Journal. Vol. 39, 2008, p. 25–51.

[2] One of the conflicts is between customary people To Karunsi'e tribe of Dongi Village, East Luwu Regency and PT Vale Indonesia as the holder of Mining Business Licence (IUP). PT Vale Indonesia is a mining company which from 1970 has been utilized the customary law land and conducted nickel mining activities in East Luwu Regency. See Munauwarah**,** *Conflicts of Interest in the Seizing of Mining Land in East Luwu Regency between Indigenous People of To Karunsi'e with PT. Vale Indonesia*. See The Politics: Jurnal Magister Ilmu Politik Universitas Hasanuddin Vol. 2 No. 2, July 2016, page 132. A similar case has also occurred in the nickel mining are, indigenous people of Woe Jarana, Woe Kobe and Kulo Jaya at Central Weda District closed the road constructed by PT Weda Bay Nickel and PT Tekindo, to show their objection to the mining activities which have disturbed their customary land. PT Weda Bay Nickel has a mining concession of 54,874 hectares (the largest in Indonesia) and around 35,155 hectares of the mining area is located in the protected forest. PT Weda Bay Nickel conflicted with the indigenous peoples of Sawai and Tobelo Dalam since the company start its mining activities in 1999. The two above-mentioned conflicts were recorded by Mongabay as cases of conflict with indigenous peoples in 2013. See, Ermy Ardhyanti, Anomali Konflik Pertambangan dan Pemenuhan Hak-hak Masyarakat Adat di Indonesia, http://article33.or.id/id/opini/anomali-konflik-pertambangan-dan-pemenuhan-hak-hak-masyarakat-adat-di-indonesia/. Accessed on 30 July 2020.

[3] Sjahmunir AM, *Pemerintahan Nagari dan Tanah Ulayat*, Andalas University Press, Padang, 2006, p. 150.

[4] Regulations which acknowledge the existence of customary law society are provided under several laws, such as Law No. 5 of 1960 regarding Main Provisions of Agrarian, Law No. 24 of 1992 regarding Spatial, Law No.41 of 1999 regarding Forestry, Law regarding Environmental, Law regarding Oil and Gas, Law No. 33 of 2020 regarding Mineral and Coal and any other regulations.

[5] Article 18B paragraph (2) of 1945 Indonesian Constitutional Law provides that: "the State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia." This provision shows conditional recognition from the State to the existence of the customary law community. The conditions are a) as long as the indigenous people are still alive; b) in line with the development of society and the principles of the Republic of Indonesia; and c) regulated by law. Compare with Jawahir Thontowi, etc, *Aktualisasi Masyarakat Hukum Adat (MHA): Perspektif Hukum dan Keadilan Terkait Dengan Status MHA dan Hak-hak Konstitusionalnya*, Centre

In the perspective of Human Rights and in particular the recognition of the rights of indigenous peoples, Article 6 paragraphs (1) and (2) of Law No. 39 of 1999 regarding Human Rights provides that in the interests of upholding human rights, the differences and needs of indigenous peoples must be taken into consideration and protected by the law, the public and the Government. Further, it states that the cultural identity of indigenous peoples, including indigenous land rights, must be upheld, in following the development of the times.

However, the Indonesian government legal obligations related to the recognition and acknowledgement to the rights of indigenous peoples, either based on the constitution or any implementing regulations, have not yet concretely reflected in the practice of mining activities. Legal instruments and regulations, especially in the mineral and coal mining sector, still can not protect the position of the indigenous peoples in mining activities that exploit the natural resources and the environment where the indigenous people reside and rely on their life from nature.

The indigenous peoples in Indonesia do not have a strong position over the nature and natural resources against the mining companies and Indonesian government that holds the responsibility to protect the interests of indigenous peoples. Further, Law No. 4 of 2009 regarding Mineral and Coal Mining which recently been amended by Law No. 3 of 2020 (the "**Mining Law**") have not covered and protected the rights of indigenous peoples over their land and nature. The mining law only regulates the legal relationship between the mining company as an investor and the Indonesian Government as the authority.

1. Customary Law Society Rights over Natural Resources from the perspective of Indonesian Laws

The customary law society is an autonomous customary community unit that determines their life system and outonomy (law, politics, economy, etc.). It is a customary community that was born/formed by the community itself, not formed by other forces such as village unity with its official organizations.[6]

Hazairin defines customary law communities as "community units that have the necessary features to be able to stand independently, namely having a legal entity, an entrepreneurial union and an environmental unit based on common rights to land and water for all its members. Meanwhile, Surjono Wignjodipuro also said that customary law communities are units that have an orderly and eternal structure and have their management and own wealth, both material wealth and immaterial wealth. [7]

Recognition to the existence of customary law communities has been regulated in various legal instruments, whether nationally or internationally.[8] In the context of international law, recognition of indigenous peoples as part of the people of a nation or state must be respected by the government or state, especially with the utilization of natural resources.

Article 1 paragraph (1) point 2 of Resolutions of General Committee of United Nations No. 41/128 regarding Declaration on The Right to Development provides that:

> *"The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedom can be fully realized*."

Further, Article 2 paragraph (3) provides that:

> *"States have the right and duty to formulate the appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningfully participation in development, and in the fair distribution of the benefits resulting there from."*

The above provisions indicate that the State is obliged to fulfil the needs of the people in all aspects, as an individual and group. Additionally, the State is obliged to involve the people in the development process, and equally distribute the results of development to all people, including the indigenous people.[9]

The Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), which is the first legally binding international legal instrument, has also mentioned regarding the rights of indigenous peoples. ILO Convention 169 established basic principles concerning indigenous peoples and tribal peoples. This Convention applies to the indigenous and tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other elements of the national society and whose status is governed in whole or in part by their customs or traditions or by law or regulation or special regulations.[10]

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of Case Research and Review, Informatic Technology and Communication of Constitutional Court of Republic of Indonesia in cooperation with Centre for Local Law Development Studies (CLDS) of Faculty of Law of Universitas Islam Indonesia, Jakarta, 2012, p. 32.

[6] Martua Sirait, Chip Fay and Kusworo, *Bagaimana Hak-Hak Masyarakat Hukum Adat dalam Mengelola Sumber Daya Alam Diatur*. Southeast Asia Reseach Working Paper, No, 24, p. 5

[7] Soerjono Seokanto, *Kedudukan Kepala Desa Sebagai Hakim Perdamaian*, Cetakan pertama, Rajawali Press, Jakarta, 1986, p. 11. See also *Surojo Wignjodipuro*, *Pengantar Azas-azas Hukum Adat*, Ed. II, Alumni, Bandung, 1973, p. 84. Dalam, Zayanti Mandasari, *Politik Hukum Pengaturan Masyarakat Hukum Adat* (Studi Putusan Mahkamah Konstitusi), Jurnal Hukum Iusquia Iustum No.2 Vol. 21, April 2014, p.228.

[8] James S. Phillips, *The rights of indigenous peoples under international law*, Global Bioethics, Vol. 26 No. 2, May 2015, p. 120-127.

[9] Muazzin, *Hak Masyarakat Adat (Indigenous Peoples) atas Sumber Daya Alam: Perspektif Hukum Internasional***,** Padjadjaran Jurnal Ilmu Hukum, Volume 1 - No 2 - Tahun 2014, p. 330-331.

[10] Article 1 paragraph (1) point a of ILO Convention 169.

In Indonesia, national legal arrangements regarding the recognition of the existence of customary law communities are fundamentally regulated in the 1945 Constitution of the Republic of Indonesia. Recognition and protection to the existence of indigenous peoples have been provided under Article 18B paragraph 2 and Article 28 I paragraph 3 of the 1945 Constitution which confirms that the Republic of Indonesia recognizes and respects customary law society with their traditional rights as long as they are still alive and in line with the principles of the Republic of Indonesia.[11]

Further, the recognition of the rights of indigenous peoples to natural resources and the environment also been provided in various regulations related to the natural resources and environment. One of them is Article 2 paragraph (4) of Law Number 5 of 1960 concerning Basic Agrarian Provisions which states that:

> *"The implementation of the right of control by the State [Republic of Indonesia] may be delegated to the autonomous region and customary law communities, if deemed necessary and not being in conflict with the national interest in accordance with the provisions of government regulation."*

Thus, the right of customary law communities to manage forest resources is a right which according to national law derives from the delegation of authority over the right to control the state to the customary law community concerned.

Furthermore, recognition of the rights of indigenous peoples is reflected in the provisions of Article 1 paragraph 6 of Law No. 41 of 1999 concerning Forestry affirms that; "Customary forest is state forest that is within the community's territory under the customary law". From this provision, it is implied that although the customary forest is classified as a state forest area, however, the State recognizes its as the f indigenous peoples' territories. [12]

Another law that recognizes the customary law communities right over natural resources and environment is Law No. 24 of 1992 concerning Spatial Planning. The Elucidation of Article 4 paragraph 2 of the said law states that appropriate compensation shall be given to the injured person as the right holder of the land, **rights to utilize the natural resources such as forests**, mines, minerals, fish and/or space which can be evidenced that they are directly harmed as a result of the implementation of development activities as per the spatial plan and by changes in spatial value as a result of spatial planning. These rights are mandated by the prevailing laws or **by the applicable customary law**. One of them is Law No. 1 of 2004 regarding Water Resources and Law No. 18 of 2004 regarding Plantation.

Recognition to the rights of indigenous peoples over natural resources and the environment regulated in various sectoral laws products as mentioned above shows that the Republic of Indonesia respects and recognizes the existence of indigenous peoples in all aspects, including the customary law system, economy rights over the environmental in the teritory of customary law communities, and customary rights over land ownership (*hak ulayat*).

However, up to date, the mandate to protect the rights of the indigenous people in Indonesia is not implementing well. Some laws have 'took away' the rights of indigenous peoples from their sources of life and harm the rights of customary communities to land, forests and other social economic rights. The current laws are not fully in favour of indigenous peoples, since the law are overlapped each other and in favour to the capital owner, and therefore if there is a conflict of interest between investment and the indigenous people rights, the investment interests will be precedence over the customary law communities interest. The interests of customary law communities are often marginalized in mining activities to gain economic interests.

Ideally, there should be a law which adopts adopting ILO Convention 169 and specifically regulates regarding the customary law community and protection to the rights of indigenous people. Law on customary law community is important to restructure the relationship between the indigenous peoples and the State in the future by considering the principles of justice, transparency, human rights, no discrimination, and pro to the gree environment. This special law must also be able to overcome the sectoral problem that has so far occurred in various government institutions dealing with the indigenous peoples.

In the context of recognition of the rights of indigenous peoples over the natural resources and environment, this special law will regulate, among others: rights over the land and other natural resources, rights to culture, rights to self-determination, rights of freedom, prior and informed consent (FPIC). [13] The right of FPIC is the right of indigenous peoples to freely determine whether a development plan can be conducted the territory of indigenous peoples or not. As in Australia[14] and Canada, [15] those countries have a mechanism to involve the indigenous peoples in mining activity implementation plan. The recognition to the rights of indigenous peoples over natural resources further been regulated separately in statutory law, so that the indigenous peoples, individually and institutionally, have a bargaining position to negotiate their interests against mining companies wishing to carry out mining activities in their customary territories.

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[11] Helza Nova Lita and Fatmie Utarie Nasution, *Perlindungan Hukum Masyarakat Adat di Wilayah Pertambangan*, Lex Jurnalica Volume 10 No 3, December 2013, p. 208,

[12] Martua Sirait, *Op.cit*, p.8

[13] Bernadinus Steni, *Mengenal Free and Prior Informed Consent (FPIC*), Perkumpulan HuMa, 23 July 2014.

[14] Michael W Hunt, Mineral Development and Indigenous People—The Implications of the *Mabo* Case, Journal of Energy & Natural Resources Law, Vol. 11, No. 3, p. 155-178.

[15] William J. Couch (2002) Strategic resolution of policy, environmental and socio-economic impacts in Canadian Arctic diamond mining: BHP's NWT diamond project, Impact Assessment and Project Appraisal, Vol. 20, No.4, p. 265-278

2. Customary Law Community versus Mining Company in Indonesian Mining Law

The Mining Law seems unresponsive to recognize the rights of indigenous peoples over the natural resources and environment. This situation is in contrary with the concept of 1945 Indonesian Constitution Law, which mandated that the land, water and any natural resources contained should be utilized for the greatest of the people of Indonesia, including the indigenous people. The mining law directly relates with the interests and rights of indigenous peoples over natural resources and environment, and in another side, the mining activity can eliminate the existence of indigenous peoples over their territories and environment. [16]

The prevailing mining law prior to the enactment of Law no. 4 of 2009 regarding Mineral and Coal Mining, which was later amended by Law No. 3 of 2020, is Law No. 11 of 1967 regarding Basic Mining Provisions. Under the regime of Law No. 11 of 1967, there are no provisions that explicitly protect the rights of indigenous peoples over the natural resources and environment. Likewise with the current mining law, i.e. Law No. 4 of 2009, this law also not acknowledge the rights of indegenous people against mining activities. The General Provisions of Law No. 4 of 2009 does not even mention at all about indigenous peoples and their communal rights over natural resources, land or forests, even though many of mining areas have overlapped with the customary land/forest. [17]

It seems that the Mining Law is designed to be more favourable for the interests of capital owners rather than the interests of public welfare as mandated by Article 33 of the 1945 Constitution. Article 5 of the Mining Law states that "For national interests, the Government after consulted with the Indonesian Parliament, may determine policies that prioritize minerals and/or coal for internal purposes of the country".[18] Further, the law silent on the narrative about the 'national interest' and the so-called 'national interest' cannot be seen in the practice of mining investment activities. In exploiting mineral and coal resources, the national interest should be defined mainly as the interests of the State and the people of Indonesia. [19]

With regard to the mining area determination, Article 10 of Mining Law has implied a responsive gesture by stating that the determination of mining area shall be conducted: "a) in transparent, participatory, and responsible manners; b) integratedly with due regard to the opinions of the relevant government agencies, the public, and in consideration of ecological, economic, and socio-cultural aspects as well as environmental-soundness; and c) with due regard to regional aspirations." However, the Mining Law does not provide specifically the technical or guideline regarding the model and mechanism to adopt aspiration of indigenous people and involve their participation in planning and granting decision of mining activities. Furthermore, there is no implementation regulation to the Mining Law which provides the same.

The existence and recognition of indigeous people and local communities for their rights to natural resources and the environment is increasingly not getting a place in the revision of the Mining Law No. 3 of 2020 concerning Mineral and Coal Mining. The amendment to Mining Law gives more privileges to mining concession holders than the previous Mining Law. In this amendment, the arrangements regarding the extension of the Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B) can be carried out without going through an auction. [20]

Article 169A provides that the Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B) are guaranteed to automatically renew for 2 times 10 years without having to reduce their mining area. This provision is unfair from the perspective of indigenous people and local community and violates their rights, especially communities whose customary territories are currently facing conflicts with mining concessions. In addition, the new Mining Law also regulates that Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B) holders in applying for a Special Mining Business License as the continuation of Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B) can submit an application for an area outside the Mining Area for the production operation activity stage to the Minister of Energy and Mineral Resources to support the mining business activities. This article provides other privileges for the Special Mining Business License holders to obtain additional concessions. This provision threatens the rights of indigenous peoples and their territories, especially in this regime of uncertain legal recognition and protection for Indigenous Peoples and their territories.[21]

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[16] Many Indigenous Peoples have to lose their customary territories which eliminate their identity. One of ongoing case is the vanished of the area of the Cek Bocek customary law community due to the issuance of a license from the Indonesian Government to PT. Newmont Nusa Tenggara, which has now changed its name to PT. AMNT. The damage was immeasurable. Ancestral graves, gardens, rivers, and sacred places were damaged by the gold mining project. The Cek Bocek indigenous people are in danger of losing their homes, areas of management and identity. See, Andre Barahamin, 5 Masalah UU Minerba Bagi Masyarakat Adat**,** *Kertas Posisi Aliansi Masyarakat Adat Nusantara (AMAN) atas Perubahan Undang-undang No.4 Tahun 2009 tentang Mineral dan Batubara*, http://www.aman.or.id/2020/06/5-masalah-uu-minerba-bagi-masyarakat-adat/. Accesed on 30 July 2020.

[17] Mongabay, *"Masyarakat Adat Maeko Berjuang Mengembalikan Hutan yang Terampas",* hp://www.mongabay.co.id/2013/07/30/masyarakat-adat-maeko-berjuang-mengembalik an-hutan-yang- terampas/, accesed on 3 February 2017.

[18] Article 5 of Law No. 4 of 2009 regarding Coal and Mineral Mining.

[19] Mirza Satria Buana, *Hak Masyarakat Adat atas Sumber Daya Alam: antara Doktrin Pembangunan dan Hukum Hak Asasi Manusia Internasional*, Padjajaran Jurnal Ilmu Hukum, Volume 4 No. 2 Year 2017, p. 355.

[20] Andre Barahamin, *5 Masalah UU Minerba Bagi Masyarakat Adat*, *Op.cit*,

[21] *Ibid*

3. Bargaining Position of Customary Law Community in the New Era of Mining Business License

As previously mentioned, the legal basis related to the recognition of the rights of indigenous peoples to natural resources and environmental against mining industry interest is weak. One of the possible way to accommodate protection to the interests of indigenous and tribal peoples in mining activities is by negotiation and enter into a tripartite agreement among the Indonesian Government, representative of the customary law community, and the mining company itself. This tripartite agreement shall cover the rights of indigenous peoples that are directly related to mining investment activities and the responsibilities of the government and mining companies to protect and maintain nature sustainable and the living rights of the indigenous people and local community.

For example, the Government of Canada should actively participate to negotiate with local indigenous peoples when a mining company entered into a territory which has been stipulated as the territory of indigenous peoples or customary law community. Negotiation needs to be conducted to protect the enviroment and nature sustainability which is affected by mining activities.

The Canadian government has to consult with indigenous peoples as indigenous peoples in the region regarding mining operations. Aboriginal communities in Canada even have the opportunity to change a decision that has been taken regarding the implementation of mining investment, provided that only the Canadian Government determines such regulation. There is a legal requirement to accommodate indigenous peoples' voices when negotiating and ratifying international treaties, especially those related to the environment. Formal legal consultations with indigenous peoples on a country's international negotiating position for agreements that have the potential to impact indigenous peoples' rights may have the power to constitute a significant change in government discretion. [22]

The similar situation is also adopted in the Philippines. The existence of indigenous peoples is strongly recognized through Act of the Republic of the Philippines No. 8371 of 1997 regarding the Indigenous Peoples Right Act (IPRA). Also, mining regulations in the Philippines are closely related to indigenous people systems. Part 16 of the Philippine Mining Act of 1995 provides that “No Ancestral land shall be opened for mining-operations without the prior consent of the indigenous cultural community concerned”. The Free, Prior, Informed Consent (FPIC) [23] process must be passed by the company as an initial stage to start the mining process. The customary community is the party that determines whether mining activities are approved or not. According to this law, in terms of income from mining activities, indigenous peoples have the right to a minimum of 1% of the gross output of mining operations in their customary territory (ancestral domain).

The tripartite negotiations in Canada and Philipilipines may be visible to be implemented than in Indonesia since the standard of recognition of the rights of indigenous peoples is regulated under the national law. The two countries have ratified the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), which is the first international legal instrument regulating the rights of indigenous peoples.

The ILO Convention 169 stipulates that indigenous and tribal peoples have **rights to natural resources** in their territory, including among others:

a. The right to participate in the use, management, protection and preservation of these various resources.
b. The right to be consulted before natural resources on their land are explored or exploited.
c. The right to study studies regarding the impact of exploration and exploitation.
d. Benefit rights to the benefits resulting from the exploitation and use of any natural resources.
e. The right to receive compensation from the government for all damage caused by such activities.

In general, negotiations carried out in countries producing mineral and coal natural resources conducted based on the type of contract, or agreement underlying the mining investment activities. In some cases, a contract or type of cooperation that has been agreed between the government and the mining company can be amended if the contract conflicts with the rights of indigenous peoples. Unfortunately, such conditions have never been found in Indonesia, even in the previous mining law regime, i.e. in the Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B).

Ideally, through Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B), the government had the opportunity to negotiate all interests of the State including the interests and rights of indigenous peoples over natural resources and the environment in mining investment activities and to ensure the survival of indigenous peoples. The negotiations should be able to protect: [24]

1. Natural resources of the indigenous peoples.
2. Their traditional practices in using, managing and maintaining the natural resources

The model of cooperation through a work contract further underwent a very significant change in the 2009 Mining Law which change the Contract of Work (KK) and Coal Mining Exploitation Work Agreement (PKP2B) with Mining Business License concept. However, the change from contract to license has not yet provided a strong place and position for the existence of indigenous peoples in the mining industry activities. This can be seen from the provisions regarding the requirements for companies holding Mining Business License (IUP) and Special Mining Business License (IUPK) which are very ‘brief’ and not detail on the

[22] Risa Schwartz, Realizing Indigenous Rights in International, Environmental Law: A Canadian Perspective, Centre for International Governance Innovation, CIGI and the CIGI globe are registered trademarks, p.1

[23] Free Prior and Informed Consent in the Philippines, Regulations and Realites, Oxfam America Briefing Paper, September 2013.

[24] ILO Convetion on Customary Law Community, 1989 (No. 169): Geneva Guideline, International Labor Office, 2003, p. 44.

company's obligations to resolve land disputes, and the obligation to perform development and empowerment of communities around the mining area. [25]

The above-mentioned regime change, from a contract system to a licensing system, is a radical step taken by the Indonesian Government because in principle it creates a change in the position of the government and investors. In the contract system, the position between the government and investors is equal, as counterparts where the government acts as a business actor (player). Meanwhile, in the license system, the position of the government changes to be higher than that of investors where the government acts as a regulator.

Through this change of system from the contract system to the license system, the Indonesian government wishes to return its position as a regulator, not as a contract partner. In this position, it is the opportunity for the government to play its role to protect the interests of the state and society, including indigenous peoples, whose having a weak position in mineral and coal mining investment activities. Furthermore, it is difficult to hope the foreign investors to contribute on a voluntary basis without any legal rules regarding their obligations and liabilities since foreign investors are the profit-oriented companies.

Therefore, the role of the government is very important to formulate legal rules related to mining and coal that can strengthen the bargaining position of the customary law community and accommodate the interests of the parties involved either directly or indirectly in the mining investment activity. Without any strong legal basis, one party can easily violate the rights of the other parties having weaker power. The good relationship between the mining company and the customary law community is important to ensure that the mining activities operate well.

4. Conclusion

The bargaining position of customary law community rights over natural resources and enviromental in mining industry activities based on Mining Law in the Mining Business License (*Ijin Usaha Pertambangan* - IUP) and Special Mining Business License (*Ijin Usaha Pertambangan Khusus* - IUPK) regime is still weak. This is due to the basic rules acknowledging the existence and rights of customary law communities have not been specifically regulated as an implementation of the provisions of Article 18B paragraph (2) of the 1945 Constitution. Recognition of indigenous peoples' rights to natural resources is only provided sporadic sectorally. In a certain position the interests of the customary law community can be neglected when dealing with the interests of mining companies that are more oriented towards economic benefits to exploit natural mineral and coal natural resources.
The Mining Law which adopts the licensing system in mining businesses, has not clearly addressed the involvement of the customary law community to determine their options in a mining activity plan in the territory of the local customary law community. The change from the previous regime, i.e. the Contract of Work system to the Mining Business License system, does not strengthen the position of customary law communities in Indonesia but weakens the position of customary law communities rights over mineral and coal natural resources instead.

5. Suggestion

The Indonesia Government as the authority granting the Mining Business Licenses (*Ijin Usaha Pertambangan* - IUP) and the Special Mining Business Licenses (*Ijin Usaha Pertambangan Khusus* - IUPK) should pay attention to the rights of customary communities in Indonesia, especially in the implementation of mining. And mineral resources investments. The mining industry has the potential to displace and eliminate the rights of indigenous peoples from those who have been occupied for decades from generation to generation. To strengthen the existence and recognition of the rights of customary law communities over natural resources, the government should seriously pass the Bill on Indigenous and Tribal Peoples. The existence of this customary law community is important as a way to protect the existence of customary law communities throughout Indonesia.

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[25] mining business license consist of:
a) company profile;
b) location and size of are;
c) type of mining comodity;
d) obligation to deposit guarantee money for Exploration;
e) working capital;
f) period of mining business license;
g) rights and obligations of mining business license holder;
h) extension of mining business license;
i) obligation regarding land settlement;
j) obligation to pay retribution to central and local government, including dead rent and production fee;
k) obligation for reclamation and post mining;
l) obligation to prepare environmental document;and
m) obligation to conduct development and utilization for local society.

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