Indonesian law and leality in the Delta : a socio-legal inquiry into laws, local bureaucrats and natural resources management in the Mahakam Delta, East Kalimantan

Simarmata, R.

6 The treasure of oil and gas: offshore and onshore mining

'Total's first principle is to respect the law and regulations'.
(Juli Rusjanto, Total's Head of Operations).

6.1 INTRODUCTION

On 28 August and 1 September 2011 members of the so-called Kutai Kartanegara District's Committee on Conflict Resolution (KKDCCR) gathered in the office of the District government. The meetings were also attended by a.o. some officials of Kutai agencies and offices, the official of the Port Administration Office, and local police officers. During both meetings, they discussed the functioning of ten tidal traps, locally called *julu*, which were installed across a river in Sepatin village of Anggana sub-district.[1] The disagreement started when a boat of Total crashed into one of the tidal traps. Suggesting that the installation of the tidal trap had violated the law on fishery and public navigation, the company sent separate letters of complaint to the regional police office and the Kutai District government. In the letter sent to the regional police office, the company reported that there had been a legal violation in the Mahakam Delta, which had disrupted their extraction operations. With legal violation they specifically referred to the fact that the tidal trap installation was not in accordance with a circular letter of the District Head from 2004 that forbids the instalment of any fishing gear which could obstruct public navigation and/or which is too close to installations of oil and gas companies (see below). According to Total's employees, the tidal trap gears were closely situated to their Gathering and Testing Satellite (GTS) G and TN G19. Meanwhile in a letter sent to the District government, in case KKDCCR, the company employees asked the officials to find a solution to the case, preferably through law enforcement.

Even though the meetings rested on the decision to take legal action, the KKDCCR actually failed to determine to which extent the instalment of the tidal trap had violated the law. Some participants of the meeting, in particular the

1 A tidal trap is a passive trap, which relies on the tide. A net, tied around poles, is dropped in the water during high tide and pulled up during low tide with trapped fish in it. Usually one long *julu* comprises of many *julus* which belong to a number of owners. It can therefore be larger than 50 meters long and four meters wide.

company's employees, argued that the instalment had violated District Regulation No. 03/1999 concerning Fishing within the Administrative Area of Kutai Kartanegara District, and a circular letter of the District Head from 2004 concerning the prohibition of gear instalment along a public shipping lane.[2] Both regulations prohibit any fishing gear instalment which could endanger public interest/a public shipping lane. The 2004 circular letter specifically added oil and gas exploration to the list of things that are not supposed to be endangered by any fishing gear instalment. In addition to these two legal documents, it was also suggested that the tidal trap instalment had violated another District Regulation: No. 36/2000 concerning Fishery Enterprise in Kutai Kartanegara District. This regulation requires that every traditional fisherman and farmer have a so-called registration letter on fishery in order to be allowed to fish and cultivate shrimp.

However, some participants of the meeting, notably the officials of the Kutai Secretariat, doubted that the tidal trap owners had really violated the regulations mentioned. The doubt rose when during inspection those participants did not see any clear boundary marks indicating a marine zone division. Given the absence of boundary marks, it was unclear whether the tidal trap instalment was situated on the public shipping lane or inside the fishing grounds. In addition, when the company employees were asked by the regional local officials which areas would have to be free from any fishing gear instalments, they could not answer that question.

Doubts as to the legitimacy of legal sanctions rose further when the participants of the meetings also found that the company's off-shore installations likely violated the law as well. It was apparent that the company did not hold any permit issued by a Port Administration Office, a regional technical implementation unit of the Ministry of Public Transportation (see Section 4.2 on technical implementation unit). An official of the Regional Agency therefore appealed to the participants to pay attention to the matter, saying:

> Before we come up with a decision whether to carry out legal sanctions or not, it is good to advise the company to arrange and obtain the permit ahead. The tidal trap owners will otherwise fight back by arguing the company had violated the law as well.[3]

Besides questioning as to whether the tidal trap had been installed illegally or not, the participants of the meetings also drew in the question as to whether the fishermen were sufficiently informed on related existing fishery regulations. This view suggested that the legal violation committed by the tidal trap owners had happened simply due to a lack of knowledge among the fishermen of

2 No. 100/287/Pem.A/VI/2004.
3 This was said during the meeting of 28 August 2009.

the prevailing law. According to this point of view, the trap owners could not fully be blamed for breaking the law, if they had indeed done so.

Even though the participants of the meetings could not find satisfying answers to the question of (il)legality of the tidal trap instalment, and at the same time questioned the (il)legality of the company's installations, the meetings ended in the decision to carry out legal sanctions over the tidal traps. This decision seems to have been taken with an eye on the interests of the oil and gas extraction company, which boosted the revenue of the District substantially. In the introduction of a third meeting on 7 September 2011, the head of the KKDCCR emphasised that the company is the largest contributor to regional revenue. Any disturbance in its operations would therefore certainly imply a decline of the District's annual budget.

All stakeholders in the Mahakam Delta have long perceived the oil and gas extraction as an important source of income. Therefore, any discussion concerning the Delta usually ends with the conclusion that extraction activity should be sustained. That also explains why legislation and its implementation mostly favour oil and gas extraction. In the Mahakam Delta, the story about oil and gas extraction is a story about a resource use which most of the time is prioritised by state officials. Yet, given its commercial nature, its story is about vulnerability at the same time. The degree of certainty with which the company can run the extraction very much depends on the extent to which they can benefit other stakeholders, notably in terms of financial payments.

This chapter does not discuss the drafting or content of the oil and gas laws and regulations in a way as detailed as is the case in Chapter 5, 7, 8 and 9. With reference to the above tidal trap case this chapter examines the extent to which prioritization of oil and gas resource use has affected the drafting process as well as content of the legislation concerning oil and gas extraction. Has the prioritized status also affected the implementation of the law and/or the way in which local officers interact with private users? To what extent could the prioritized status have led to (in)consistence and (in-)coherence in relation to other sectoral regulations?

It should be underlined that the prioritization is not the only factor that may have influenced the drafting, content and implementation of the oil and gas legislation. Another factor is the fact that, according to the legislation, extracted and transported oil and gas should be regarded as state property, whereas contractors can only undertake exploration and exploitation. This state ownership over the extracted and transported petroleum is often used to effectively implement legislation on oil and gas resources.

6.2 LAW MAKING AND LEGISLATION: MAIN LAWS AND PROVISIONS

Rather than focusing exclusively on the legislation concerning the relationship between state agencies and oil and gas resource users, this chapter focuses

more on oil and gas legislation related to other resources users, notably land and fishery resource users. Departing from the main idea of this chapter, namely that oil and gas use has been prioritized, this chapter tries to figure out the extent to which the prioritized policy has affected the use rights of farmers and fishermen. Nevertheless, it is first necessary to turn to the description of the designation of state mining zone (Ind. *wilayah kuasa pertambangan* or *wilayah pertambangan*) or work area (Ind. *wilayah kerja*) in the Mahakam Delta. The designation is a legal instrument for the government to be able to apply oil and gas laws and regulations across the Mahakam Delta including the issuance of rights over the oil and gas resources. Only if the Ministry of Mining, presently the Ministry of Energy and Mineral Resources, has determined an area as a state mining zone or work area and has awarded a contractor, then formal rules on oil and gas apply.

One important background detail, which needs to be mentioned, is that in 2001, Law 22/2001 on Oil and Gas superseded Law 44 Prp/1960. Two changes occurred when the central government enacted Law 22/2001. First, the right to control mining resources was transferred from Pertamina to the central government, e.g. the Ministry of Energy and Mineral Resources. Second, a new supporting division of the Ministry of Energy and Mineral Resources, the Executive Agency for Upstream Oil and Gas Activities (Ind. *Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi*, henceforth Executive Agency) was introduced to take over some of the tasks traditionally performed by Pertamina (see Section 4.2 on the supporting division).[4] These tasks included representing the government in negotiating PSCs and supervising the operational management of oil and gas contractors.

In relation to the administration, the changes ended a 30 year-period (1971-2011), during which Pertamina held mining rights and economic rights combined. As the Law 21/2001 introduced liberalization in the oil and gas sector, the Ministry of Energy and Mineral Resources now shares the economic rights with a contractor (Patmosukismo 2011, p. 116). This explains why a contractor such as Total recently handled complaints from local pople in the way which will be described in the next sections as well as in Chapter 7 and 8.

6.2.1 The making of a mining zone or work area

Before describing formal procedures on determining state mining zones and work areas, I will first explain the two terms. The two terms, state mining zone and work area, have, in fact, the same meaning. They are areas that, based on surveys sponsored by the Ministry of Energy and Mineral Resources, contain mineral reserves. The term 'state mining zone' has been used since

4 The Executive Agency was established through the enactment of Government Regulation No. 42/2002.

the enactment of Law No. 44 Prp/1960 on Oil and Gas and was replaced by the term 'work area' following the enactment of Law No. 22/2001, which superseded Law No. 44 Prp/1960. In other words, the term 'work area' can also be defined as an area where oil and gas exploration and exploitation can take place.[5] During the period of Law 44 Prp/1960, the state mining zone was divided into: the state mining zone of Pertamina and the state mining zone of Pertamina's contractors.[6]

Provisions concerning the designation of state mining zones are not as detailed as in the forestry sector. Under Law No. 44 Prp/1960 on Oil and Gas and Law No. 8/1971 on Pertamina, it is clear that the Minister of Mining should declare (*penunjukan*) state mining zones before handing them over to Pertamina, a state-owned oil company.[7] According to Law No. 22/2001, the Minister of Energy and Mineral Resources shall declare the work areas before they are offered to companies to be explored and exploited.[8] To prepare the designation, the Minister of Mining has to carry out a general survey to figure out the potential reserves of oil and gas in particular areas. The Ministry of Mining can pass on the task of the general survey to particular companies.[9]

According to the abovementioned laws and regulations the designation of state mining zones or work areas is not necessarily followed by ground demarcation or delineation. It suffices to mark the boundaries of the zones or areas on paper; there is no need for actual boundary marks on the ground. However, over the designated zones and work areas, the state is already able to exercise its jurisdiction in which it determines who will obtain rights to explore and exploit oil and gas resources in those zones or areas.

This is still the case despite the fact that, according to the current oil and gas legislation, all the land in Indonesia has been arbitrarily designated 'legal administrative mining zones' (Ind. *wilayah hukum pertambangan Indonesia*).[10] A legal administrative mining zone is defined as an area where mining activities could be carried out. Such definition means that the whole of Indonesia is basically a legal administrative mining zone. It could encompass more land than merely Indonesia, because it could also apply to areas beyond the Indonesian maritime borders (Abdurrahman 1979, p. 105, Saleng 2004, p. 84) due to development of mining extraction technology. In any case, the legal

5 Article 1(16) of Law No. 22/2001.

6 By way of illustration, in 1974 the Minister of Mining awarded Pertamina state mining zones consisting of 224,000 km² (Tim Sejarah 1985, p. 87).

7 See Article 5 (2) of Law No. 44 Prp/1960 and Article 11(1) of Law No. 8/1971. Law No. 8/1971 has been superseded by Law No. 31/2003 concerning the change of legal status of Pertamina from a fully state-owned into a semi state-owned company.

8 Article 12(1) of Law No. 22/2001, and Article 2(2) of Government Regulation No. 35/2004 concerning Upstream Oil and Gas Activities.

9 Article 11,12 and 13 of Government Regulation No. 35/2004.

10 See Article 1(15) of Law No. 22/2001, and Article 1k of Law No. 11/1967 on Basic Provisions of Mining.

administrative mining zone does not automatically become a state mining zone or work area, only if the areas are expected to deposit oil and gas resources based on a general survey. According to Law No. 22/2001, work areas are located within a legal administrative mining zone.[11]

As for the general survey, there are no provisions concerning local people's involvement in the survey. This is different from Law No. 4/2009 on Coal and Mineral Mining which stipulates that people's opinions must be heard before the mining zone is finally designated (Sudrajat 2010, p. 61).[12] To conduct a general survey of potential oil and gas extraction, the regulations require that the Ministry of Mining consults with provincial governors ahead of when the work areas are located. The consultation does not need approval from the governors, but it should notify the governors that there are particular areas within the province which may deposit oil and gas and which would probably be designated as work areas.[13]

The absence of people's engagement in the general survey or in the making of a mining zone could probably be linked to the status of oil and gas as 'strategic mining' as stated in Law on Basic Provisions of Mining No. 11/1967. Oil and gas are regarded as strategic for the state economy and therefore are considered to affect the livelihood of the greatest number of Indonesian people (Saleng 2004, p. 86). Oil and gas are also important sources of energy and state revenue as well as raw materials for the chemical industry (Simamora 2000, p. 81).

The exercise of state jurisdiction over oil and gas resources in the Mahakam Delta commenced later than on the mainland: in the mid-1960s.[14] In 1967 the Indonesian central government e.g. the Minister of Mining awarded to the company Japan Petroleum Exploration (hereafter Japex) a large offshore area of the Mahakam Delta, including the small island of Bunyu, adjacent to Tarakan Island. The area comprised of 34,125 km², and was called the Mahakam-Bunyu block (Idham 1974, p.125, de Janvry and Loiret 1992). The award included an exploration contract between Japex and the state-owned company Pertamina. Based on this contract, from 1966 onwards Japex undertook an exploration of the work area, but failed to discover any oil (Idham 1974, p.125). In 1970, Japex (now renamed Inpex Corporation) handed over the work area to the French company Total E&P Indonesie, with an agreement between Inpex Corporation and Total E&P Indonesie that the latter would be the operator and each company would have a 50% share.

11 Article 1(16) of Law No. 21/2001.
12 Sudrajat (2010).
13 Article 2 (2 and 3) of Government Regulation No. 35/2004.
14 On the mainland, petroleum exploration commenced in the late nineteenth century (Lindblad 1988, p. 32; Lindblad 1989, p. 53; Magenda 1991, p. 10). In 1888 the Sultan of Kutai granted a large concession to a Dutch engineer, J.H. Menten, which was later split into three concessions, situated in the Sanga-Sanga district (Wortmann 1971, p. 6; Idham 1974, p. 119).

Up to 2011 Total has been awarded four production sharing contracts (PSC) by the Indonesian government: Mahakam PSC (1970); Tengah JOB PSC (1988); Saliki PSC (1997); and Southeast Mahakam PSC (1998), covering an area of 5,962km². In accordance with laws concerning foreign investment[15] each of the PSCs is valid for thirty years with the option of renewal for another twenty years.

On what legal grounds did Japex and Total obtain the contracts according to Indonesian law? As the contracts were signed before 2001, the way they obtained the contracts was mainly ruled by Law No. 44/1960 on Oil and Gas and Law No. 11/1967 on Basic Provisions of Mining. According to the Oil and Gas Law of 1960, the companies were contracted by a state-owned oil company, in this case Pertamina.[16] The Minister of Mining at the time appointed the contractors. Not only was it governed by legislation, the relation between Pertamina and its contractors was also governed by a contract (*kontrak kerjasama or perjanjian karya).* Pertamina signed different types of contracts with Japex and Total, a 'contract of work' with the former and a PSC with the latter.[17]

As a contractor in production sharing, Total basically has two rights: to carry out exploration and exploitation in a specific work area, as stipulated in the contract, and to get reimbursement of all operational costs (popularly named cost recovery) as well as share the profits. In this respect, as a contractor, Total is entitled to obtain economic rights (see footnote 18). Thus, Total is not entitled to either mineral rights or mining rights (Saleng 2004, p.159).[18] Cost recovery is generally defined as including all expenditures that contractors

15 Law No. 1/1967 as has been replaced by Law No. 25/2007.

16 Pertamina actually originates from a merger between PN Pertamin and PN Permina, two other state-owned oil and gas companies. The merger was detailed in Government Decree No. 27/1968. See Tim Sejarah (1985, p. 85); Simamora (2000, p. 30), and Hasan (2009, p. 73).

17 Basically, contracts between a state and an oil and gas company are based on two schemes. The first is a concession, and the second is a contract. A PSC is one type of contract besides a service contract. A PSC is known as a concept adopted from *adat* law (Simamora 2000, p. 59, Hasan 2009, p. 54). Indonesia formally applied a PSC just when the central government founded Pertamina in 1971. However, in practice, the PSC had been practiced as of 1966 when Permina signed a contract with the Independent Indonesian American Oil and gas Company Organization (IIAPCO). Before that Indonesia applied another type of contract, called 'contract of work'. In practice, the 'contract of work' had been gradually changed into a PSC because it was perceived as disguised concession. The concession itself was a Dutch government legacy which was abolished by the Oil and Gas Law of 1960 due to state sovereignty reasons (Salim 2005, Hasan 2009).

18 Conceptually, mineral rights (*kuasa mineral*) are rights to control oil and gas resources. According to the Indonesian oil and gas law, these rights belong to the state and are closely related to the country's sovereignty. The state awarded the executive with mining rights (*kuasa pertambangan*) to administer, namely to regulate and supervise, oil and gas exploration. To carry out oil and gas exploration and exploitation, the executive established a state-owned company and granted it economic rights (*kuasa usaha pertambangan*). See Patmosukismo (2011, p. 41 and 115-117).

have made to carry out the exploration and exploitation. More specifically, cost recovery should not exceed 40% of the value of the extracted oil and gas. The revenue from selling the oil and gas, which excludes cost recovery, is shared between the Government of Indonesia and the contractor. Revenue on oil is divided 85:15 between the Government of Indonesia and the contractor respectively, while revenue on gas is shared on a 65:35 basis.

In this particular case, however, Pertamina enjoyed broader rights than the contractors. Pursuant to the Oil and Gas Law of 1960 and Law No. 8/1971 on Pertamina, the Indonesian government awarded Pertamina so-called rights to carry out mining (*kuasa pertambangan)*. With these rights Pertamina was entitled to carry out all activities associated with mining, namely undertaking a general survey, exploration, exploitation, refinery, transportation and sale (Ascher 1999, p. 60; Salim 2005, p. 63). Yet, according to Simamora giving such *kuasa pertambangan* did not mean that the state also granted Pertamina the right to control oil and gas resources (mineral rights).[19] The *kuasa pertambangan* allowed Pertamina to carry out mining activities but not to control or own the oil and gas resources (Tim Sejarah 1985, p. 36; Simamora 2000, p. 78-79). Those rights were still with the state, because Pertamina only had mining rights (Hasan 2009, p. 72-73; Patmosukismo 2011, p. 41).[20]

Despite the limited scope of the *kuasa pertambangan*, it paved a way for Pertamina to play a role as a regulatory and supervisory body. The fact that Pertamina in reality evolved to be a regulatory and supervisory body suggests that the rights that the government awarded to Pertamina were not merely economic rights, but were combined with mining rights (see footnote 18).

6.2.2 Some main provisions

Related to Land Resource Use

According to the 1960 and 2001 Acts on Oil and Gas, rights to explore and exploit oil and gas resources (economic rights) do not include rights over land. If the land, which is to be used by contractors, is privately owned or state land that is being cultivated, the Act stipulates that contractors shall acquire the land through purchase, exchange, compensation, recognition, or another form of exchange, in negotiation with the land rights holders (*pemegang hak atas*

19 See also General Elucidation of Law No. 44/1960.

20 State ownership over resources would end only if the extracted resources are at the point of export or sale. See the Indonesian Constitutional Court verdict No. 002/PUU-I/2003 concerning judicial review on Oil Gas Act No. 22/2001, p. 153. See also Simamora (2000, p. 97), and (Hasan 2000, p. 55).

tanah) or users of state land (*pemakai tanah negara*).[21] For the process of acquiring land the contractors, working supposedly on behalf of the government, need a letter of authorization from the Executive Agency.

Government Regulation No. 35/2004 on Upstream Oil and Gas Activities broadly defines the concepts of land rights holders and users. These terms do not only include those who have certificate and possessory evidence (on possessory evidence see Section 8.2), but also those who have actual control over particular state and private land.[22] The regulation gave different names to those two groups, using the words 'owner' or 'holder' (*pemegang*) for those who have written evidence, namely certificate and possessory evidence, and 'user' (*pemakai*) for those who have no written evidence. In this book, I use the word 'possessor' to refer to those who have written evidence of land rights but not a certificate. Those who have a certificate, I call 'land owner'. I realize that this is different from some Indonesian literatures which call those who have possessory evidence, 'land owners'.[23] Following the concepts defined in previous literatures, I here understand 'possession' as actual control over a piece of land or other form of natural resources with or without someone necessarily having a legal right. Yet 'possession' may have legal consequences when someone possesses land for a long time with or without the owner's permission and acts like the owner. In this respect, someone would obtain ownership of land through prescription (Bruce 1998; FAO 2002).[24]

According to Law 11/1967 on Basic Provisions of Mining and Law 22/2001 on Oil and Gas no land owner/holder can refuse to sell his land to contractors or to receive compensation. There have been legal scholars who argue that the provision indicates that a land owner/holder is only obliged to hand over the land to the contractors if the contractor commits to do two things (Salim 2005, p. 251). First, he needs to present the valid original or copy of the PSC to the land owner/holder, explain the objective and point out in which areas the extraction would take place. Second, he needs to acquire the land that

21 These provisions can also be found in Presidential Directive No. 1/1976 concerning synchronization of land affairs with respect to forestry, mining, transmigration and public works, Government Regulation No. 35/2004, and the decree of the head of the Executive Agency No. KEP-0113/BP00000/2007/S0.

22 Elucidation Article 62(1) Government Regulation No. 35/2004.

23 An example of this literature is Sutedi (2007, p. 79, 129 and 130).

24 There is literature which perceives 'possession' as similar to 'holding' (see Bruce 1998 for instance). Yet, I here distinguish between these two terms, for I understand 'holding' or 'holdership' as what Indonesian land law as well as practices recognize as '*garapan*' or '*penyakapan*'. Indonesian land law uses the term 'holdership' to refer to a contract between an owner and user (*penggarap*) in which they agree on sharing the benefits of utilizing the land. See Law No. 2/1960 on Contract of Sharing of Benefits and Government Regulation No. 224/1961 on Land Distribution and Compensation. Yet, recent Indonesian land law regulations use the term without linking it to the mere sharing of benefits. It now refers to a situation where someone utilizes land with or without the owner's permission. See the Letter of the Head of National Land Agency No. 2/2003.

would be used or at least provide a guarantee that the land would be acquired at a later stage. The land can only be acquired with the consent of the land owner/holder. Deliberate consultation (*musyawarah*) between the contractor and land owner/holder is strongly suggested to acquire the land succesfully. A third party consultation is not needed.

As to what should be done if the consultation fails, Law 1967 on Basic Provisions of Mining and Law 2001 on Oil and Gas differ. According to Law 2001 on Oil and Gas, an attempt to come to an agreement can be made with the help of a third party. The third party consists of a team or committee established by the regional government. A lower regulation by the Head of the Executive Agency of 2007 concerning guidance for a PSC contractor in acquiring land seems to have interpreted the provision of Law 2001 on Oil and Gas differently.[25] According to this document, the contractor can invite the heads of the sub-district to mediate the dispute in case the consultation has failed. If the mediation fails too, the contractor can invite the district head/mayor or governor to mediate. If all government officials fail, the contractor can report the dispute to the Executive Agency, asking for necessary follow up. Thus, rather than stipulating the mediation to take place with the help of a local team or committee, the lower regulation relies on individual government officials to settle the dispute.

Unlike Law 2001 on Oil and Gas and the 2007 regulation, Law 1967 on Basic Provisions of Mining neither suggests the establishment of a local team or committee nor does it stipulate to bring the dispute to higher government levels, if the consultation has failed. Instead it states that the Minister of Mining will take a decision on the dispute. If the land owner/holder does not accept the decision of the Minister, district courts will make the final judgment. This means that the dispute will be settled through a judicial process.

With an eye to the side of the land owner/holder, he/she is required to present three documents to be able to obtain compensation. First, land documents, e.g. a certificate in the case of a land ownership and a land letter (*surat tanah*) in the case of a land possession. Second, a letter declaring that the land is not disputed. Third, an identity card and family card (*kartu keluarga*). Only after a land owner/holder has presented all the necessary documents, the contractor provides compensation.

If the land owner/holder can present the necessary documents, and the consultation leads to an agreement on the amount or type of compensation, the land rights will be transferred from the land owner/holder to the government. That means the land is now state property.[26] As far as the oil and gas legislation is concerned, the acquired land becomes state land because the contractor will account for the expenses of land compensation as cost re-

25 See the decree of the head of Executive Agency No. KEP-0113/BP00000/2007/S0.

26 This is different from Law 1960 on Oil and Gas which states that the land shall be returned to the original owner/holder after the PSC expires.

covery.[27] After the acquired land has become state land, the contractor is required to apply for the use rights from the National Land Agency (Salim 2005, p. 251).

Related to Fishery Resource Use

It is interesting that, whereas the oil and gas regulations address land use specifically, they do not do so with regards to fishery resource use. The regulations only concern the protection of the coastal environment by prohibiting any oil and gas exploration and exploitation in areas with a nursery and/or coral reefs.[28] This 'gap' may come from the perception that the sea is open access. Therefore, the oil and gas legal framework mostly uses policy rules to refer to fishery regulations instead of using legislation.

On a national level, the first policy rule concerning petroleum-fishery resource use was put in place in 1975, two years after Total started its first exploitation, when a circular letter of the Directorate-General for Fishery of the Ministry of Agriculture No. E.V/2/4/15/1975 concerning the Prohibition to Sail or Fish in the Ficinity of Oil and Gas Platforms was passed. The circular letter stipulated that within a radius of 500 meters from the installation it was forbidden to sail or to fish, and that within 1 mile sailing and fishing were restricted. Ships or boats were totally prohibited to enter the inside area, yet in the restricted area ships or boats were still allowed to pass by as long as they did not drop their anchor in the area.

After the 1975 circular letter was in force for 29 years, the Deputy Head of Kutai District reiterated its content in 2004 by issuing a new circular letter No. 1000/287/Pem.A/VI/2004, which prohibited the installation of a fishing gear across a public navigation zone. According to the circular letter, the KKDCCR had noticed that in some coastal areas of Kutai the fishing gear instalments had endangered public navigation zones. Interestingly, even though the 1975 circular letter did not mention oil and gas platforms as places that had been endangered by the fishing gear installations, the 2004 circular letter included the platforms as places that shall not be endangered by such installations.

27 For the list of expenditures that cannot be included in cost recovery see the decree of the Minister of Energy and Mineral Resources No. 22/2008 concerning the list of expenditures that cannot be reimbursed by contractors.

28 The provision is stated in Government Regulation No. 17/1974 concerning the Implementation of Monitoring of Offshore Oil and Gas Exploration and Exploitation.

Related to Forest Resource Use

Law 1960 on Basic Provisions of Mining introduced the principle that mining use had to be prioritized in case it conflicted with another resource use. This provision was subsequently reiterated by a 1976 President Directive:

> The Minister of Mining and governors have to avoid overlapping with other resource uses when issuing a mining permit. Yet if the overlapping can not be avoided the mining permit issuance should be prioritized.[29]

The above principle further influenced subsequent regulations on oil and gas and forests. Government Regulation 1985 on Forest Protection is an example. This regulation guaranteed the continuation of mining exploration and exploitation which had existed before a forest designation was undertaken.[30] As mentioned before, for the continuation of such oil and gas extraction, the contractor was required to have a forest permit use from the Minister of Forestry (see Section 5.2).

6.3 Legislation: identification of some problematic issues

Whilst forestry legislation was made compatible with already existing oil and gas regulations, this is not the case the other way around. Petroleum regulations which were enacted after 1983, the year of the forest designation for the Mahakam Delta, seemed to be unaware of the difference between forest and non-forest area. In Law 2001 on Oil and Gas and its following implementing regulations there is no article which stipulates that for land, which is situated inside forest area, there is no right to compensation given that the land is state property. The provisions of the oil and gas regulations are aimed to apply to the whole of Indonesia, regardless of whether the area is located inside or outside a forest area.

In the case of the Mahakam Delta the vagueness of the provisions casts doubts on whether Total's employees and officials of the Ministry of Mining and the Executive Agency truly acknowledge the 1983 forest designation or not. Some behaviour shows acknowledgement of the designation, whereas other behaviour shows denial. Looking at the Forest Area as state land and recent arrangements to obtain a forest use license from the Minister of Forestry are two examples showing that the company's employees acknowledge the designation. Meanwhile the common perception that all land which is located in the Mahakam Block belongs to the Ministry of Mining points rather to a

29 Section II (11) President Directive No. 1/1976. See also Abdurrahman (1979, p. 115) and Saleng (2004, p. 94).

30 Article 7(2) Government Regulation No. 28/1985.

denial. This claim of ownership mainly emerged when Pertamina was at its most successful period (1968-2002). In the mid 1980s, Pertamina persuaded a company, which intended to construct large-scale shrimp ponds on two islands of Muara Badak sub-district, to cancel its plan. Pertamina suggested that the land of the islands belonged to them. However, Pertamina advised the company to apply for use rights on the condition that the company would allow Pertamina to take back the land any time Pertamina needed it, with no obligation for Pertamina to pay compensation to the company.[31]

Even if the oil and gas regulations and the behaviour of Total's employees and central government officials to some extent acknowledge the jurisdiction of forestry regulations over the Mahakam Delta, this is not the case for the jurisdiction of fishery regulations. In the tidal trap nets case as described earlier, few of the participants of the meetings were aware of the fishery regulations which actually allow tidal trap owners to fish within 0-3 miles, known as the traditional fishing zone (see Section 7.2). The lack of clear acknowledgement leads to uncertainty amongst the fishermen, as they are told that on one hand they are allowed to fish within the 0-3 mile zone, but on the other hand they are not allowed to do so if there are oil and gas platforms within the traditional zone. The uncertainty of the fishermen's rights increases when regulations concerning public navigation are taken into consideration as well. Given that there are no marks signing the boundaries yet, separating the fishing area from the zones of public navigation and work area of the oil and gas extraction, certainty is almost impossible to obtain (see Section 1.3.2 on certainty).

The effort to reduce the uncertainty through issuing the 1975 and 2004 circular letters was not very successful. The situation might derive from the fact that the circular letters are policy rules. From the point of view of the hierarchy of legislation, the circular letters have weak legitimacy (see Section 4.3). The fact they are only circular letters had another implication for the extent to which the letter was publically legally binding. It is true that in terms of the content, the circular letters were meant to be generally binding (Ind. *mengikat secara umum*), not just to a particular individual. Yet, the form of a circular letter which in public administration practices became a legal instrument to carry out administrative duties, meant that the circular letters were merely publically binding in an indirect way.

Given its weak legal binding it is not surprising that the subsequent regulations, whether on oil and gas or fishery, did not conform to the two circular letters. Law 2001 on Oil and Gas and its subsequent regulations do not have any provisions concerning the forbidden and restricted areas. The same applies to the Fishery Law No. 31/2004, and its subsequent implementing regulations.

31 The names of the two islands are Letung and Lerong. Interview MK, a Head of Section for the Fishery Resource Survaillance of the Kutai Fishery Agency, 11/8/2008.

None of the Kutai fishery regulations issued in the course of 1978-2000 recall the 1975 circular letter (see Section 7.2).

Though the oil and gas regulations are incompatible with forestry protection regulations, this does not seem to apply to land regulations. As already mentioned, this is due mainly to the exclusion of land rights from mining rights. As a result, any plot of land which is located within the work area of a PSC is under the jurisdiction of land regulations. These stipulations provide certainty to land owners/holders in the sense that their rights over land are acknowledged. In addition, the land owners/holders are also authorized to exercise their rights such as to utilize, sell, rent, inherit or grant their plot of land. Nevertheless, in terms of procedural law, as was discussed in Section 6.2, the land owners/holders still suffer from legal uncertainty concerning the process of consultation. The uncertainty has emerged from two sources. Firstly, on the one hand the law and regulation require the establishment of a committee, if the consultation has failed. Yet on the other hand, the law and regulation state the team is unnecessary. Secondly, Law 2001 on Oil and Gas maintained the private nature of the consultation by stipulating that the participation of the regional government is only required when the consultation has failed. The decree of the Head of the Executive Agency of 2007, an implementing regulation of the Law of 2001 on Law and Gas, has changed the private nature of the consultation as it allowed contractors to invite village heads and subdistrict heads to the consultation as facilitators.

The private nature of the consultation decreased further, when Total was allowed to invite local police and military officers to the consultation meetings. As one of the nine national vital objects of East Kalimantan, Total's installations can be protected by local officers as a back up.[32] A national vital object is defined as an area/location, building/installation or enterprise which influences the livelihood of the majority of people in the area and the national interest, or functions as a strategic source of state revenue.[33] A middle-ranking employee of Total revealed that the presence of local and military officers has made the consultation meetings more effective.[34] Apart from the difference concerning the time when government officials should be invited and which forum the dispute should be brought to, if the consultation fails, all oil and gas regulations mention the state courts as the ultimate forum for land disputes.

The above descriptions of some of the problematic legal issues show the legal restrictions and vagueness that Total's employees and central government

32 Those provisions are stated in the Presidential Directive No. 63/2004 concerning the Security of a National Vital Object, and the decree of the Minister of Energy and Mineral Resources No. 1762/K/07/MEM/2007 concerning the Security of National Vital Objects within the Ministry of Energy and Mineral Resources.

33 See Article 1 (2) of Presediential Directive No. 63/2004.

34 Interview DH, a Head of Support Operation Department of Total E&P Indonesie, 14/9/2009.

officials may encounter whilst exercising use rights over the oil and gas resources. Whereas some regulations prioritize oil and gas extraction, there are also forestry, land and fishery regulations which (partly) restrict it. Equally, the forestry and land regulations provide the oil and gas resource users a degree of certainty by allowing the use of forest land and introducing an acquirement mechanism. Yet, at the same time, it is unclear which area of land can be acquired and how the consultation process should be conducted. Given these restrictions and vagueness, it is therefore interesting to know to which extent and how the oil and gas regulations have achieved their main goals. Reviewing the implementation of the oil and gas regulations may help to figure out an answer to this question.

6.4 Implementation of law by national and regional officials

Even though forestry law prescribes that any contractor should have a permit from the Forestry Minister in order to use the Forest Areas, 26 years after this provision was passed Total or Virginia Indonesia Company (Vico) Indonesia still do not hold a permit.[35] Officers of the Provincial Forestry Agency sent official letters to both Total and Vico Indonesia asking whether they held a permit or not. Total did not reply, while Vico Indonesia responded that they did not need a permit because they had been operational before the so-called Agreed Forest Use was declared in 1983.[36] In other words the company argued that they were not affected by the forest regulations concerning forest permit use. The argument goes actually against Government Regulation 1985 which had specific provisions about mining exploration and exploitation commencing before 1983.

As both companies resisted, the Provincial Forestry officials did not pursue the matter. A higher-ranking official of the Provincial Forestry Agency, when asked why the agency was not willing to conduct an inquiry, stated:

> There is a risk of losing our position if we conduct the inquiry. For us, Total and Vico are giant companies that have huge influential power.[37]

35 This information was provided by two higher-ranking officials at the Provincial Forestry Agency, and by an official at the Ministry of Forestry. When I visited the Ministry of Forestry in 2009 to confirm this information, two of Total's employees were also visiting the ministry to request terms and conditions for arranging the permit. It appears that Total may have started to arrange a license.

36 Interview SBT, 11/3/2009.

37 In Ind. '*Ada resiko bila pejabat akan mengurus masalah izin pinjam pakai ini karena bisa kehilangan jabatannya karena Vico dianggap sebagai perusahaan besar yang memiliki pengaruh*'. Interview SBT, 11/3/2009.

The officer instanced a recent case where a giant coal mining company illegally trespassed a concession area of a timber company. Having asked the coal company to temporarily halt the operations while the local police was carrying out an investigation, the chief of the Provincial Police Office was suddenly replaced.[38] The officer speculated that the coal company had been behind the replacement. Another high-ranking official suggested that Total and Vico were able to use the Delta's production forest without a permit because they possessed strong national backing. In the course of 1968-2002 the national backing was mostly provided by Pertamina who had been appointed the *kuasa pertambangan* by the central government (see Section 6.2). Having such a powerful authority Pertamina took the responsibility to build relations with government officers as well as with communities. Pertamina handled all matters concerning licences or permits that contractors needed, and land acquisition. Therefore, at the time, contractors could fully concentrate on extraction activities whilst Pertamina dealt with all administrative and social matters. As Khong (1986, p.163) points out, in that time Pertamina was a powerful institution as it was not only a company, but also a regulatory body.

Given that the Executive Agency, as the replacement of Pertamina, does not enjoy the same authority as Pertamina and lacks human resources, since 2002 Total has had to arrange its own permits or licenses.[39] This can be illustrated by a case when Total's employees tried to arrange a forest permit use at the Ministry of Forestry and suggested that the ministry should take action against the shrimp farmers who had been illegally occupying the production forest, the official of the ministry asked Total to solve it by providing compensation to the shrimp farmers. Even more surprising for the Total employees was that the ministry officials advised Total's employees to 'forget' (*memutihkan*) about all prior plots of forest land that had been used by Total without a permit.[40] Here the term 'forget' meant to pretend that Total had never used any plots of Forest Land in the Delta's production forest. This

38 The coal company is Kaltim Prima Coal, which operates internationally. The timber company is PT Porodisa which obtained a timber concession license in 1968. PT Porodisa had reportedly accused Kaltim Prima Coal of illegally occupying its concession of 37,000 hectares, which is located in East Kutai District. Kaltim Prima Coal occupied the area without a permit from the Minister of Forestry or approval from PT Porodisa. See several reports of *Kaltim Post*, 'Porodisa Siap Beber Penyerobotan KPC', 14/4/2008; 'KPC Bantah Rambah Lahan Porodisa', 11/4/2008; and KPC Hentikan Kegiatannya', 7/8/2008.

39 Total and Vico Indonesia are under the supervision of the Executive Agency of Kalimantan and Sulawesi region. At the time of field work, this regional office only had six officials including several part-time employees. These officials are responsible for supervising around 40 contractors. Interview YH, a Head of Division for Administration Matters and License of the Executive Agency for Upstream Oil and Gas Activities of the Regions of Kalimantan and Sulawesi, 15/12/2009.

40 Interview DH, 14/12/2009.

pretension enabled Total to apply for a permit without being bothered by the fact that they had already used parts of the production forest illegally.[41]

Even though the forestry regulations qualify most shrimp farmers of the Mahakam Delta as illegal forest occupants, Total was still able to acquire the land they needed. This diverts from their first principle which is 'to respect the law and regulations'. Total did not strictly comply with the forestry regulations. According to those regulations, they should have rejected the land rights of the shrimp farmers by arguing that the ponds were located within production forest. Total's stance to this matter is properly summarized by a middle-level employee of Total, who said:

> Even though the pond owners are illegal in accordance with forestry regulations, yet we cannot be blatantly legal-minded by expelling them. Besides, the pond owners are legal for they are members of registered villages and furthermore they have land letters issued by sub-district heads.

Saleng (2004, p. 201) found the rise of a dual or ambiguous legal culture amongst mining companies. The mining companies practice strict enforcement when they are dealing with security procedures, work safety as well as traffic lights. However, they often disobey formal rules and even the provisions of contracts, when they encounter claims from community members. They behave in this way since their priority is that their operations are kept running.

However, even though Total's employees acknowledged the land rights of the shrimp farmers, they still argued that the compensation they paid to the land holders should not include the land price. This implies they only acknowledged farmers' rights to get compensation for their expenses, but not for their land rights. They added that the land belonged to the state, and they could not buy state land from a private party by using state money. Thus the compensation only included the expenditures of the shrimp farmers for the construction and cultivation of the ponds, namely for dikes, huts, and breeding. This list of expenditures actually refers to a Decree of Kutai District Head No. 180.188/HK-630/2008 concerning the Basic Amount of Compensation.[42]

The above description looks contradictory, as the decree of the head of the Executive Agency of 2007 states that land acquisition should constitute a transfer of land rights from the original land owner/holder to the state.

---

41 Interview R and R, employees of Total E&P Indonesie who were in charge for service claim and land acquisition, 17/12/2009 and 21/1/2010. Interview DH, 14/12/2009.

42 Yet, there are different views with regards to the status of land holders with land letters. Total's officials regarded the occupants of the Delta production forest as legal on account of the land letter. Yet, a company like Mahakam Sumber Jaya, a coal mining company which has a mining concession area in Samarinda and Kutai District, viewed those who occupied forest areas as illegal despite having a land letter. See 'MSJ Siap Berikan Kompensasi Soal Tuntutan 300 Petani Pelita Makmur 3', *Kaltim Post*, 6/5/2010, and 'Bupati Kukar Resmikan Tambang Batu Bara PT Mahakam Sumber Jaya', http://www.kutaikartanegara.com/news.php?id=710, downloaded on 10/6/2011.

Accordingly, there cannot be a transfer of land rights if the land is already perceived as state land, even if the price of the land is not included in the compensation. Moreover, in practice, Total marked the land for which compensation had been paid, to indicate which areas now belonged to the Executive Agency/Total (see Picture 6.1). The marks seem to be meant to distinguish between the compensated land and the surrounding land which was still privately owned.

Picture 6.1: A land boundary mark owned by the Executive Agency/Total E&P

As mentioned before, the involvement of Kutai agency officials, local police and military officers in the Mahakam Delta has led to consultations being run more effectively. Through the active involvement of the officials and officers the consultation has moved from the private into the public sphere. Total needed the Kutai agency officials because the villagers perceived them as neutral and, most importantly, as people with authority.[43] In this process the land owners/holders usually accepted the amount of compensation that Total offered them.

The fact that Total offered a fairly high sum in terms of compensation is another reason why Total could easily acquire land. Total paid around US$

43 Across Indonesia many oil companies have employed professional security personnel due to the tense relation with the local people in the work area of the company (Saleng 2004, p. 100-101).

950 (IDR 10 million) per hectare and the price would go up to US$ 1,800 (20 million IDR) per hectare, when Total needed the land urgently.[44] The amount of compensation is about the same as what Vico paid for land holders in inland Muara Badak, while the Kutai District government could only offer around US$ 177 (IDR 1,500,000) per hectare. At such a high price, it is not surprising that many shrimp farmers sold their land to Total, particularly after pond productivity decreased sharply in 2003 (Rachmawati 2003, p. 61; Hidayati et al. 2004, p. 61; Noryadi et al. 2006).

Making a profit from land acquirement is also an important reason for local officials and officers[45] to be willing to engage in consultations. For every time they were present at the consultation meetings they received a lump sum from Total. They preferred the meetings to take place in Samarinda, where they received a larger payment.[46] For, according to the regulations, the more remote the meeting place from the offices of the officials, the higher the payment. For sub-district officials and officers, attending the meetings was even more attractive, because they received a fixed share of the compensation.[47] The fixed share constitutes of 2.5 % of the total amount of compensation for each land transaction. Of this share, 1.5% goes to the sub-district head (*camat*) in his formal role of authorized local notary (Ind. *Pejabat Pembuat Akta Tanah*). The remaining 1% goes to the sub-district office. Yet, in practice, the full 2.5% was usually given to the sub-district head in the hope that he/she would share it with the members of the Sub-District Leaders Consultation Forum (*Musyawarah Pimpinan Kecamatan,* abbrev. Muspika*)* as well as with the village heads.[48] In some cases village heads demanded a larger share of up to US$ 9,500 (10 millions IDR) for each land transaction.[49]

Based on the provisions mentioned in Section 6.2 it could be concludeded that Total does not have a strong legal backing to forbid fishermen to fish in the areas in close proximity of the oil and gas installations. This is not only

44 The amount of compensation offered by the two oil and gas companies is higher than the amount that coal and oil palm companies offered to land holders who lived inland. The coal companies offered an amount ranging from US$ 1,000 to US$ 1,300 (11 to 14 million IDR) while the oil palm companies could only offer US$ 110 (2.5 million IDR). Interview Hrs, a village head of Saliki, 9/2/2010, and EM, a Head of a technical section of Sepatin village, 10/2/2010.

45 I use the term 'local officers' to refer to local police and local military officers. For more see Chapter 8.

46 Interview Hdt, an employee of Total E&P Indonesie, 16/12/2009.

47 A lump sum for participating in consultation meetings or a fixed share of land transactions are only two examples of financial benefit that the local offials and officers could receive from the oil and gas companies. It also happened that periodical payments to a number of high-ranking officials of the Kutai District government were made by Total for serving the company with administrative matters. Interview AR, an employee of Total E&P Indonesie, 15/12/2011.

48 The members of Muspika consist of the sub-district head, and chief of sub-district-based military and police officers.

49 Interview RNP, Rd and Rn, officers of Local Police Office of Aggana sub-district, 1/7/2008.

because the circular letters are legally weak, but also because the letters are not harmonized with the fishery regulations which allow the fishermen to fish in the traditional zone (see Section 1.3.2 on harmonization). In the tidal trap net case Total's employees did not accuse the tidal trap owners of illegally entering mining zones, because they did not claim them as exclusive territories. Total's middle-level employee whom was mentioned earlier, said that Total could not forbid fishermen to fish in the vicinity of their installations given that there is open access to the sea. On Total's notification boards that were installed nearby the installations, was only written, 'Sub-marine pipeline, do not anchor, do not dredge!', or 'Sailing at full speed is prohibited to avoid beating of the waves!'. It is clear that these notices did not refer to any notion of possession of the surrounding areas by Total or even the Executive Agency. Taking that into consideration, the Executive Agency of the Kalimantan-Sulawesi Region suggested that Total would not prioritize legal enforcement on the fishermen as it could generate unexpected resistance.

In fact, the main concern of Total when asking fishermen to stay away from their installations is security. Security, as said, contributes to ensuring that their operations are kept running. For example, security officers of the oil and gas companies – who could be local officials hired by the companies on a part time basis – made sure that there were no unstatic gears installed in Zone II of the Fishing Ground Division (see Section 7.2), before the companies carried out seismic explorations.[50] When an official of the Port Administration Office of the Ministry of Public Transportation questioned whether Total had obtained a permit to install their installations, there was an emotional response from the Executive Agency officials saying Total's operations had to continue because of compliance with an agreement with international buyers. In addition, they said, 'Total was not criminal and, more importantly, that the Kutai District government would loose revenue if the extraction activities faced any further delay'.[51] Given that the Kutai District government partly depends on the revenue made on petroleum, most officials agreed that oil and gas extraction should be prioritized.[52]

6.5 Concluding remarks

If the volume of oil and gas production in the Delta would be the only indicator with which to assess the effectiveness of oil and gas regulations, one could say that the regulations were effectively implemented. To give a concrete example: at the time of writing, Total undertakes 30% of all Indonesian gas

50 Interview Agg, a staff of Muara Badak office of Kutai Fishery Agency, 3/12/2011.
51 Interview YH, 15/12/2009.
52 Interview RBS, a former Head of Kutai Environmental Agency, 24/4 and 7/5/2008. See also Simarmata (2010, p. 191).

production and 9% of all oil production. Together with Vico Indonesia, which mostly operates onshore, Total provides 45% of Indonesian gas production. These figures are interesting, given the legal ambiguity which the oil and gas resource users have faced in the Mahakam Delta, both in terms of overlap as well as restrictions. At this point it is important to realize that some oil and gas, fishery and forestry regulations actually facilitate oil and gas resource users in exercising their exploitation rights. Even if those regulations are legally weak and contain internal contradictions, favouritism of oil and gas resource use in the implementation of the law has successfully removed some of the weaknesses and contradictions.

Favouritism of oil and gas resource use originally comes from a common awareness that it contributes significantly to state revenue. The importance of this income has often led government officials at different administrative levels as well as legal officers to prioritize the interest of oil and gas companies, despite the lack of a strong legal argument. The decisions are sometimes ultimately made to ensure that oil and gas extraction are kept running.

Yet, oil and gas resource use has also been favoured because the oil and gas companies benefited the officials and officers themselves in real terms. The willingness of the local officials and officers to engage in the consultation meetings as well as in dispute settlement might have been more due to the direct financial benefits than to the more distant knowledge that oil and gas resource use provide a substantial contribution to state revenue. This argument is confirmed by the increasing levels of jealousy among officials and officers, about the question of who should be invited to which meeting. They even chose distant places to meet and fixed the amounts of their shares to earn more money. To them as well as to land owners/holders who expected to receive large amounts of compensation, the oil and gas resources have constantly looked like treasures with a constant supply of cash money.