Mining and environmental protection in Indonesia: regulatory pitfalls

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PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op woensdag 24 april 2024
klokke 11.15 uur

door

Feby Ivalerina Kartikasari

geboren te Bandung, Indonesië

in 1975

Promotoren:	prof. dr. A.W. Bedner
Co-promotor:	dr. B. Ribeiro de Almeida
Promotiecommissie:	prof. dr. W.J.M. Voermans prof. dr. W.J. Berenschot (Universiteit van Amsterdam en KITLV) prof. dr. M.R. Andri Gunawan Wibisana, S.H., LL.M. (Universitas Indonesia, Depok, Indonesië) dr.ir. C.I.M. Jacobs

Lay-out: AlphaZet prepress, Bodegraven
Printwerk: Ipskamp Printing

ISBN 978-94-6473-462-1

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Acknowledgments

This research would not have been possible without the help and support of many people and several institutions; therefore I would like to express my deepest gratitude to them.

I would like to thank my main academic supervisor, Adriaan Bedner, who never lost faith in me doing this research. You have been an inspiring academic advisor and mentor. There is no better supervisor for me than you. Without your patience, continuous support and encouragement, it would have been impossible for me to complete this dissertation.

I would also like to thank my co-supervisor, Bernardo Ribeiro de Almeida, who has always been so kind, from the moment I started my PhD journey. You are one of the first friends I made at VVI and you helped me from the start. I am very happy that you finally became my co-supervisor. You helped me structure my writing, provided helpful comments on my chapters, provided valuable materials, and listened to my worries and concerns about my dissertation. I also thank Jacqueline Vel for helping me shape my research, and for her insightful comments on proposals and dissertation drafts, especially during the early stages of my research.

I owe a debt of gratitude to all the interviewees who patiently took time to answer the many questions I had. You were very open and generous in sharing information, knowledge and insights. Without your help, this research would not exist.

To my friends at VVI, I am also very grateful. Discussions with PhD students and other researchers at VVI have broadened my academic horizons and shaped my research. Special thanks go to Hoko Horii and Laure D'Hondt, for discussing my dissertation with me. Also, Kari and Kora, you are always amazing at helping me whenever I contact you.

I also want to thank the Indonesian community in Leiden and its surroundings for being my 'substitute' family whilst I was in the Netherlands. Thank you for the friendship and nice atmosphere. Special thanks go to Fachrizal Afandi, Yance Arizona, and Bilal Dewansyah – thank you for helping me have a warm stay in Leiden.

Of course I would like to thank to my husband, Utu, and my daughters, Aza and Dede, who were amazing in supporting me through difficult and uncertain research times in a fun way. You guys know best how I got through

it all! Also to mamah and bapak, thank you for your continuous prayers and support for my intellectual pursuits from an early age. I am also lucky to have brothers and sisters who pray for and inspire one another, Kang Yus-yus, Kang Hen-hen, Kang Yan-yan, Vena, Mbak Ei, Ia and Virdi. Thanks also to my friends who feel like family – Abid, Josi and Pray – thank you for your inputs regarding my dissertation, and for finding your own ways to push me to complete my PhD.

Last but not least, I would like to thank the Indonesian Center for Environmental Law (ICEL) and its staff, who supported and helped me, as well as providing important material for my research. Also, thanks to Parahyangan Catholic University (UNPAR) and its staff, who supported me in following the PhD programme and helped me in various ways during my research, even though I had only recently joined UNPAR when I first registered for the PhD programme.

Abbreviations and acronyms

IGF	Intergovernmental Forum on Mining
UNDP	United Nations Development Programme
C&C	the Clean and Clear Policy
MOMI	Mineral One Map Indonesia
DPR	*Dewan Perwakilan Rakyat*, the House of Representatives
MPRS	*Majelis Permusyawaratan Rakyat Sementara*, the Temporary People's Consultative Assembly
DPRGR	*Dewan Perwakilan Rakyat Gotong Royong*, the Gotong Royong House of Representatives
MPR	*Majelis Permusyawaratan Rakyat*, the People's Consultative Assembly
LIPI	*Lembaga Ilmu pengetahuan Indonesia,* the Indonesian Institute of Sciences
SVLK	*Sistem Verifikasi Legalitas Kayu,* Timber Legality Verification System
ICEL	Indonesian Center for Environmental Law
KPK	*Komisi Pemberantasan Korupsi*, the Corruption Eradication Commission
Korsup KPK	*Kooordinator dan Supervisi* KPK, Coordination and Supervision Programme of KPK
PINUS	*Pilar Nusantara*
PWYP	Publish what You Pay
IUP	*Izin Usaha Pertambangan,* Mining Business Licence
IUPK	*Izin Usaha Pertambangan Khusus,* Special Mining Business Licence
CoW	Contract of Work
KKS *Batubara*	*Kontrak Kerja Sama Batubara,* Coal Cooperation Contract
PKP2B	*Perjanjian Karya Pengusahaan Pertambangan Batubara*, Coal Contracts of Work
CcoW	Coal Contracts of Work
DHPB	*Dana Bagi Hasil Penjualan Batubara*, Coal Sales Profit Sharing Funds
AMDAL	*Analisis Dampak Lingkungan,* Environmental Impact Assessment
IPPKH	*Izin Pinjam Pakai Kawasan Hutan,* lease-use forest area licence
TGHK	*Tata Guna Hutan Kesepakatan*, agreed forest land use
RTRW	*Rencana Tata Ruang Wilayah,* Regional Spatial Plan

IMF	International Monetary Fund
PAD	*Pendapatan Asli Daerah,* Regional Own-source Revenue
APBN	*Anggaran Pendapatan dan Belanja Negara,* State Revenue and Expenditure Budget
Pilkada	*Pemilihan kepala daerah*, election process for regional leaders
KP	*Kuasa pertambangan*, Mining Authorisation
Perda	*Peraturan Daerah,* Regional Regulation
WIUP	*Wilayah Izin Usaha Pertambangan,* mining business licence area
Tatib DPR	*Tata Tertib, DPR* DPR Rules
Prolegnas	*Program Legislasi Nasional*, National Legislation Programme
Baleg	*Badan Legislatif,* the DPR's Legislative Body
DPD	*Dewan Perwakilan Daerah*, the Regional Representative Council
DIM	*Daftar Isian Masalah*, a list of problems
Pokja PSDA	*Kelompok Kerja Pengelolaan Sumber Daya Alam,* Working Group on Agrarian Reform and Natural Resources Management
Pansus	*Panitia Khusus,* special committee of DPR
PETI	*Pertambangan Tanpa Izin,* Mining Without a Licence
PDIP	*Partai Demokrasi Indonesia Perjuangan,* the Indonesian Democratic Party of Struggle
ESDM	*Energi dan Sumber Daya Mineral,* Energy and Mineral Resources
SIE	*Surat Izin Ekspor,* Export Licence
SPE	*Surat Persetujuan Ekspor,* Export Approval Letter
GN-PSDA	*Gerakan Nasional Penyelamatan Sumber Daya Alam*, the National Movement to Save Natural Resources Programme
Korsup Minerba	*Koordinator dan Supervisi Mineral dan Batubara*, Mineral and Coal Coordination and Supervision
VPAs	Voluntary Partnership Agreements
FLEGT	Forest Law Enforcement, Governance and Trade
JATAM	*Jaringan Advokasi Tambang*
WP	*Wilayah Pertambangan*, Mining Area
Ditjen Minerba	*Direktorat Jenderal Mineral dan Batubara,* Directorate General of Mineral and Coal
BIG	*Badan Informasi Geospatia,l* Geospatial Information Agency
UKP4	*Unit Kerja Presiden Bidang Pengawasan dan Pengendalian Pembangunan,* Presidential Delivery Unit for Development Monitoring and Oversight
KLHK	*Kementerian Lingkungan Hidup dan Kehutanan*, the Ministry of Environment and Forestry

KSP	*Kantor Staf Kepresidenan*, Presidential Staff Office
ESRI	Environmental Systems Research Institute
GIS	Geographic Information System
WALHI	*Wahana Lingkungan Hidup*
PTUN	*Pengadilan Tata Usaha Negara*, Administrative Court
RTRW	*Rencana Tata Ruang Wilayah*, Regional Spatial Planning
PTSP	*Perizinan Terpadu Satu Pintu*, One Door Licensing Service
UKMK	*Usaha Mikro, Kecil dan Menengah*, micro, small, medium and cooperative enterprises
PPTSP	*Perangkat Daerah Penyelenggara Pelayanan Terpadu Satu Pintu*, Regional Agency of One Door Licensing Service
BKPM	*Badan Koordinasi Penanaman Modal*, Investment Coordinating Board
BPK	*Badan Pemeriksa Keuangan*, Financial Audit Agency
MK	*Mahkamah Konstitus,i* the Constitutional Court
Panja	*Panitia Kerja*, Working Committee
BKD	*Badan Keahlian DPR*, DPR Expertise Council
RDP	*Rapat Dengar Pendapat*, Public Opinion Meeting
Baleg	*Badan Legislasi*, legislative body
KMPM	*Koalisi Masyarakat Peduli Mineral dan Batubara*, Coalition of the Mineral and Coal Concerned Society
WPR	*Wilayah Pertambangan Rakyat*, people's mining areas
KLHS	*Kajian Lingkungan Hidup Strategis*, Strategic Environmental Study
WHP	*Wilayah Hukum Pertambangan*, legal mining area
ISNU	*Ikatan Sarjana Nahdglatul Ulama*, Nahdlatul Ulama Association of Scholars
FKHK	*Forum Kajian Hukum Konstitusi*, Legal and Constitutional Study Forum
DPRD	*Dewan Perwakilan Rakyat Daerah*, Regional People's Representative Council

I Introduction

1.1 Background

The impact of mining on the environment is undeniable. The typical environmental effects of mining projects include changes in the landscape, such as erosion, the formation of sinkholes, and air, soil and water pollution (Cameron & Stanley, 2017: 254). In fact, the environmental impacts are varied and sometimes unpredictable, involving various forms of environmental change or damage, from short-term to long-term effects and consequences (Matschullat & Gutzmer, 2012: 353). Furthermore, mining can cause adverse and unpredictable consequences for any of the environmental compartments (i.e. the atmosphere, hydrosphere, pedosphere, biosphere, cryosphere and/or lithosphere) (Matschullat & Gutzmer, 2012: 353).

Despite the environmental impact of mining, many developing countries rely on it as a significant source of export revenue. Furthermore, international financial institutions, such as the World Bank, support the encouragement of extractive industries as a development strategy (Kumah, 2006: 318; Campbell, 2008 in Bebbington *et.al.*, 2008: 889). As mining cannot be stopped and its environmental impact is enormous, environmental concern over mining activities has increased over the last three decades. International organisations have developed various mining-related forums, environment guidelines and frameworks. This began with the Berlin Guidelines for Mining and Sustainable Development in 1991, and was followed by guidelines from various international institutions, such as the Intergovernmental Forum on Mining (IGF) and the United Nations Development Programme (UNDP). All of these guidelines promote consideration of environmental protection throughout the mining life cycle.[1]

A crucial part of the mining life cycle is the licensing process. This is the process of the government granting mining rights to a company or other legal entity, in exchange for its commitment to exploring, developing or producing minerals (Cameron & Stanley, 2017: 84-85). The licensing process can be in the form of either a mining licence being issued or a mining contract being approved. A mining licence is a legal document that grants exploration or extraction rights according to a generally applicable set of

1 The mining life cycle encapsulates everything, from setting policy frameworks for natural resource extraction, to governing exploration, licensing, operations, and the closure and post-closure phases (UNDP, 2018: 8).

terms, with limited variation from one project to another (UNDP, 2018: 97). A mining contract is a negotiated agreement between the government and investors, for mining purposes in which most of the obligations of mining companies, such as taxes, environmental requirements and social contributions, are determined (UNDP & UN Environment 2018: 41). The licensing process refers to licensing policies that are made in accordance with the objectives of the mining sector in a particular country (Cameron & Stanley, 2017). Many studies and experiences show that the policy priority of mining-producing countries is usually to achieve resource-led development, but the public interest must also be protected (Cameron & Stanley, 2017: 57). Thus, the licence issuance process aims to find candidates best suited to mining sector policy, including environmental considerations – if they form part of the mining policy. In the process, the government has the authority to decide whether or not a mining company can start operations, based on environmental considerations, and to provide environmental requirements as a condition (UNDP, 2018: 81). Therefore, the licensing process is the key tool for the government to control mining activities, including ensuring that such activities will not harm the environment (IGF, 2013: 26).

This thesis studies the issuance of mining licences in Indonesia. Indonesia's production of coal, copper, gold, tin, bauxite and nickel is significant, and it is one of the world's largest exporters of thermal coal (PWC, 2019:12). Global mining companies consistently rank Indonesia highly, in terms of its coal and mineral prospects (PWC, 2019:12) and the mining industry plays an important role in the national economy. Data released by Indonesia's Central Bureau of Statistics (*Badan Pusat Statistik*, or BPS) in 2021 shows that mineral and coal mining contributes 7.39% to Indonesia's Gross Domestic Product (GDP). However, the environmental damage caused by mining in Indonesia is considerable. For example, large mining company operations are threatening many species and placing severe environmental stress on national parks, such as Lorenz National Park, a World Heritage site that surrounds the mining area of Freeport, in Papua (Resosudarmo *et.al.*, 2009: 42). Likewise, a mining operation conducted by Newmont, in Sulawesi, produced more than 48 million tonnes of waste rock during its 14 years of operation, resulting in a domestic NGO taking it to court over accusations of dumping hazardous tailings of mercury into nearby Buyat Bay (Resosudarmo *et.al.*, 2009: 42). Mining in Indonesia also contributes to deforestation and forest degradation, through the forest conversion required for activities other than forestry (Indrarto *et.al.*, 2012). Furthermore, in recent years mining pits have become a major environmental issue in Indonesia. Data from *Jaringan Advokasi Tambang* (JATAM), in 2019, shows that 3,092 coal mining pits that have not been restored, and have instead been filled with toxic water containing dangerous heavy metals.[2]

2 JATAM - Jaringan Advokasi Tambang (2020), *Terus Melegitimasi Lubang Kematian*, available at https://www.jatam.org/terus-melegitimasi-lubang-kematian/

These facts indicate that, from an environmental perspective, mining licensing in Indonesia has been a great challenge. In general, problems related to licensing processes for natural resource exploitation are directly connected with the destruction of the environment (see, Indrarto *et.al*, 2012; Kartodihardjo *et.al.*, 2015). In such situations, licences are not used as a legal tool to prevent environmental damage, but instead they serve to legalise the exploitation of natural resources (see, Gellert & Andiko, 2015). Licensing issues and their adverse environmental consequences in the mining sector became worse at the beginning of the reform period, after the decentralisation policy in 1999 gave the regional government authority to issue mining licences. Regional governments issued thousands of mining licences without considering environmental aspects, and some licences were even issued through processes not in accordance with laws and regulations (Indrarto, *et.al.*, 2012: 31; Hayati, *et.al.*, 2013: 36; Resosudarmo *et.al.*, 2012: 10; Devi & Prayogo, 2013: 42-44; Purnamasari *et.al.*, 2017: 24; Abdullah, 2017a: 1). The authority of local governments in issuing mining licences was reduced after the issuance of Mining Law 4/2009, and later Regional Government Law 23/2014, which gave greater authority to central government. Since then, the number of mining licences has decreased,[3] although the issuance of mining licence extensions and the upgrading of mining exploration licences to mining exploitation licences is still problematic. Several mining licence issuances have become the subject of lawsuits brought by communities for environmental reasons.[4]

In arguing that, until now, the problems of issuing mining licences and their impact on the environment have not been resolved, it is necessary to research the extent to which Indonesia's policies, laws and regulations have addressed its mining licence issuance problems, especially those concerning the environment and how the government bureaucracy plays a role in policies related to resolving mining license issuance problems. Such research can be carried out using various approaches. This research uses concepts, principles and theories relating to environmental law.

1.2 Law, policy, regulation, and government bureaucracy in resolving environmental problems

The environment is clearly at risk from various sources of damage and to overcome this problem it is important to develop strategies to divert human

3 https://modi.esdm.go.id/perizinan

4 See, for example, https://www.mongabay.co.id/2021/10/04/kala-bupati-beberkan-alasan-tegas-tolak-tambang-emas-trenggalek; https://www.mongabay.co.id/2018/03/09/daerah-bulat-tolak-tambang-batubara-mcm-walhi-gugat-menteri-karena-keluarkan-izin-produksi/; https://www.mongabay.co.id/2018/02/28/keluarkan-izin-operasi-tambang-emas-di-sulsel-sulteng-walhi-gugat-menteri-jonan/

behaviour towards environmentally friendly practices (Wilkinson, 2002: 10). Environmental law has developed to protect the environment in response to the increasing amount of pollution and environmental damage caused by human activity.

The environmental law literature shows many different approaches, strategies and mechanisms to regulate the behaviour of actors and address environmental problems (for example, Wilkinson, 2002; Lemos & Agrawal, 2006; Faure, 2012; Martin & Kennedy, 2015; Gunningham & Holley, 2016). Initially, environmental law was designed to prohibit or limit activities that damage the environment, by using command and control mechanisms referring to the nature of a rule and the elaboration of orders that are supported by the imposition of negative sanctions (Gunningham & Gabowsky, 1998: 4). The quality of the command and control model lies in: the strictness of state-level environmental regulations; the likelihood that violations will be detected (by officials or complainants); and, the severity of sanctions for non-compliance (Kagan *et.al.*: 41). However, the legal approach has been widely criticised for being inflexible and too expensive (Gunningham & Holley, 2016: 276; Bell *et.al.*, 2017: 245). Therefore, various alternative instruments have been developed, such as economic instruments including cap-and-trade schemes, taxes, subsidies, offsets, and payments for ecosystem services (Driesen, 2006: 283; Gunningham & Holley, 2016: 277). There are also recognised alternative instruments in the form of social control, including NGOs putting social pressure on companies via negative publicity, or other informal sanctions being imposed on polluting companies or businesses (Gunningham & Holley, 2016: 277; Gunningham & Sinclair, 2002: 191). Alternative mechanisms are argued to provide the industry with the flexibility and autonomy to make decisions at the lowest cost (Gunningham & Holley, 2016: 277), for example, with a tax mechanism, business actors can choose to either pay high taxes or reduce emissions. However, neither instrument is better than the other, because all environmental instruments have particular strengths and weaknesses (Faure & Partain, 2019). Therefore, most environmental law scholars argue that there is no single most appropriate instrument for protecting the environment; instead, the most suitable mechanism or instrument depends on the situation (for example, Faure, 2012: 14-15; Gunningham & Holley, 2016: 287; Bell *et.al.*, 2017: 262-267). In fact, a variety of environmental regulations have been developed for mining activities. In order to protect the environment from mining activities, common measures have included: setting limits on air and water pollution, waste disposal, and hazardous waste; comprehensive mining licences; and a number of economic instruments, such as trade-in pollution rights and taxes (Walde, 1992: 331-333). Most countries in Asia have long followed the global environmental regulatory trend towards managing mining activities (Otto *et.al.*, 1999: 323).

Independent of the approach taken, the laws, regulations, and policies issued by the government always play a role in the effectiveness of instruments in addressing environmental impacts. They are important, because they create a framework within which different strategies and instruments can operate. For example, they operate as a structure for positioning non-legal techniques, such as economic instruments (Wilkinson, 2002: 10). Laws, regulations and policies as command and control instruments provide a basis for regulating, prohibiting, and sanctioning, but they also play an important role in the use of other instruments (e.g. economic instruments), because they regulate the principles and standards necessary for their implementation. Hence no environmental instrument is truly separate from the laws, regulations, and policies issued by the state.

Since the role of laws, regulations, and policies as standards for the application of all environmental instruments is so important, their existence alone is not enough; they must be implemented and enforced (Bell et.al., 2017: 106). The laws, regulations and policies need to be qualified, otherwise it will be difficult to implement them. For example, they may be either too vague or too complex to be put into practice (Bell et.al., 2017: 106). Another example is that the laws, regulations and policies issued by various government sectors might be incoherent, making it difficult to achieve the harmonious environmental management required to guarantee a functional ecosystem (Platjouw, 2013). If the law is king, then the normative content of the law makes the difference between being subjected to a good or a bad ruler (Cullinan, 2013: 99). In the context of the environment, bad laws are a threat. Simply put, nature requires good laws which provide stronger protection for natural values (Bugge, 2013: 7).

Therefore, the study of quality of policy, law and regulation is pivotal to improve the quality of policy, law and regulation, especially in Indonesia. However, most legal research in developing countries focuses on law implementation and enforcement (Faure et.al., 2010: 100). In Indonesia, problems related to the environment and natural resources are considered more as issues of legal implementation, rather than issues regarding the quality of the law itself (e.g. Arnscheidt, 2009: 4). By contrast, legal implementation certainly cannot be separated from the quality of the law, as many implementation failures have their origin in the laws and regulations themselves (Seidman & Seidman, 2009: 437).

The quality of law is determined by the law-making process, and the process does not make it easy to create good quality laws. The law-making process related to the environment poses specific challenges, such as scientific uncertainty, dynamism, precautions, and controversy; moreover, like other law-making, environmental law-making is influenced by politics (Lazarus, 2004). Historically, the values of economic growth have consistently dominated national policy on environmental impact, and it is therefore challeng-

ing when law-making gives higher priority to environmental protection as a political goal, thereby limiting economic growth and consumption (Bugge, 2013: 5). This creates a need to change and restructure industrial societies, changing the aims of laws so that instead of facilitating and legitimising domination and exploitation, they promote ecological and social integrity and health (Cullinan, 2013: 108).

Obviously, tackling environmental problems requires more than good legal rules, as the effectiveness of law also depends on factors including: the quality, integrity, capacity and performance of political, legal, administrative and judicial bodies; and, the performance of complementary actors, such as experts, individual, government officers, politicians, and many others (Martin *et.al.*, 2016). Thus, the performance of government bureaucracy is also an important determining factor, because choices and decisions about how to implement laws, regulations and policies are made within that bureaucracy.

Taking the importance of laws, regulations, policies and bureaucracy in resolving problems related to the environment into account, and aiming to understand the extent to which Indonesia has addressed its mining licence issuance problems related to the environment, this thesis includes an assessment of the quality of laws, regulations and polices, an analysis of the process of law-making, and an examination of how government bureaucracy shapes the implementation of laws, regulations and policies. Although there are many laws, regulations and policies related to the issuance of mining licences, this research focusses on those which are most relevant, namely: Law 4/2009 on Mineral and Coal Mining (Mining Law 4/2009), the Clean and Clear Policy (C&C), the Mineral One Map Indonesia (MOMI) policy, and Law 3/2020 on Amendments to Law Number 4 of 2009 on Mineral and Coal Mining (Mining Law 3/2020) which amends Law 4/2009 on Mineral and Coal Mining.

1.3 Research questions

Based on the above discussion of the problem of mining licence issuance, which has been going on for a long time in Indonesia and has impacted the environment, this thesis analyses the relevant laws, regulations, polices and bureaucratic government responses to the problem, from the colonial period until 2020 (following the publication of the new Mining Law 3/2020). This study tries to answer the following questions:

Main questions:

1) To what extent have laws, regulations and policies related to mining licence issuance in Indonesia contributed to resolving environment-related mining licence issuance problems, and what factors have influenced this process?

2) What general lessons can be learned from this study of laws, regulations and policies dealing with mining and environmental issues in Indonesia?

Sub-questions:
1) To what extent has the quality of Indonesian laws, regulations and policies on mining licensing reinforced the state's capacity to address environment-related mining licence issuance problems?
2) To what extent does the Indonesian government use mining licensing regulation as a tool to address environmental problems and how has the Indonesian law-making process influenced the rules on mining licence issuance, especially with regard to the environment?
3) How has Indonesian bureaucracy developed and applied policies related to the issuance of mining licences, and to what extent have these policies contributed to addressing the mining licence issuance problems related to the environment?

1.4 Understanding policy, law and regulation

This thesis frequently uses the terms 'law', 'regulation' and 'policy'. This section clarifies what the terms mean in the context of this thesis.

To start with, policy and law are intertwined and sometimes difficult to distinguish. Policy is the result of how issues and problems are defined, constructed, placed on the political and policy agenda, and resolved (Parson, 1995: XV). This also applies to law, which is created to address certain problems and process them into rules (for example, Seidman and Seidman, 2009). Moreover, both law and policy are concerned with goals and how to achieve them (Arnscheidt, 2009: 29). Hence, both law and policy are meant to solve problems and achieve certain goals. However, the two are not identical. Policy is a government's statement of what it intends to do or not do, issued in various forms, such as laws, regulations, rulings, decisions, or orders, or a combination of these (Birkland, 2019: 242). After a policy has been decided on by the relevant government officials or policy-makers, the law-makers/-drafters design the law (Seidman and Seidman, 2009). As the law is made after the policy is established, and in accordance with the policy's aims and objectives, the law is a form of policy, and not every policy evolves into a law. However, true law is not just a part of government policy. As Bedner argues, law is intended not only to strive for policy goals but also to "curb arbitrary and unjust use of state power" (Bedner, 2004 in Arnscheidt, 2009: 30). Furthermore, after a policy becomes a law it is legally binding, enforced by the state, and controlled by the courts, and all actors (including the state powers) must comply with it (Arnscheidt, 2009: 30). The law-making process is therefore crucial, because it translates proposed policy into an implemented law, and in the process law-makers strive for

actors, individuals, the private sector and the government to implement the law (Seidman and Seidman, 2009: 445-447).

This section also makes a clear distinction between law and regulation. According to D'Hont, regulation refers to many different kinds of rules and actions designed to influence behaviour (D'Hont, 2019: 6), while law also includes rules to regulate behaviour. Baldwin *et.al.* define regulation as the promulgation of rules by government, accompanied by mechanisms for monitoring and enforcement that are usually assumed to be performed through a specialist public agency (Baldwin, *et.al.* 1998: 3). Law is also a set of rules made by the government, which usually includes an enforcement mechanism. Some scholars have defined the concept of regulation quite broadly, to cover more than the rules made by the government. Black, for example, argues that regulation is not simply an autonomous state activity, because regulation focusses on problem solving activities that may use a range of mechanisms, some of which are not connected with the state (Black, 2002). Therefore, regulation is increasingly being seen as 'decentred' from the state (Black, 2002: 2). This is in line with the view that regulation is a broad category which includes all kinds of flexible and innovative forms of social control (Gunningham & Holley, 2016: 274). This includes not only the rules issued by the government, but also a number of alternative approaches to regulating the behaviour of certain people or communities; for example, persuasion, self-regulation, and co-regulation, which involve not only the government but also commercial interests and non-governmental organisations (NGOs) (Gunningham & Holley, 2016: 274). Such mechanisms may only be partially or indirectly related to state law. Baldwin *et. al.* also promote a broader understanding of regulation by dividing it into two forms: first, regulation, which includes all state actions designed to influence people's behaviour using a command approach (Baldwin *et.al.*, 2012: 3); second, various other modes of influence that are based on the use of economic incentives (for example, taxes or subsidies), the power of contracts, the provision of information, or other techniques (Baldwin *et.al.*, 2012: 3). Thus, all mechanisms that influence behaviour, whether they are state-based or otherwise, are considered regulatory (Baldwin *et.al.*, 2012: 3). If regulation is defined this broadly, then (according to Black) the difference between law and regulation is that law contains internal unity and consistency, whilst regulation does not have to be united, coherent, or based on consistent values or principles (Black, 2002: 32). Accordingly, several legal characteristics are not needed in certain forms of regulation.

In this thesis I use the term 'policy' for various documents and statements issued by the government, whether these are in the form of a law, regulation, or otherwise. This is because I hold that all legal documents are also policy. I use the term 'a law' only for legal documents produced by the House of Representatives (*Dewan Perwakilan Rakyat*, or DPR) with the approval of the president. Although the current notion of regulation is more

expansive, I only use the term 'regulation' for rules issued by the government. In Indonesia, the term regulation is used to refer to the implementing rules of a law, such as a government, presidential, ministerial or regional regulation. Therefore, when I use the term regulation in this thesis, it means the implementing regulations of a law.

1.5 Indonesia's legal framework and government agencies concerned with the environment and natural resources

As this thesis focusses on discussing laws, regulations, policies and government bureaucracy in Indonesia, readers need to have an overview of Indonesia's legal framework and government institutions, especially those related to mining and the environment. It is hoped that the following description will be useful for the reader, as they follow the discussion of laws, regulations, policies and government bureaucracy in the following chapters.

The Indonesian legal framework regulating the environment and the exploitation of natural resources in Indonesia

There are various laws and regulations governing the environment and natural resources in Indonesia, ranging from those which apply nationally to those which only regulate certain provinces and districts. The types of laws and regulations and their hierarchy have changed several times, from the colonial period to the present. Chapter II explains the *Indische Mijnwet* (mining law) and several ordinances (*ordonantie*) that applied during the colonial period. *Wet* was formed by the Dutch government and parliament, whilst *ordonantie* were formed by the Governor General and People's Council (*Voksraad*) of the Dutch East Indies. This means, hierarchically, that *wet* was higher than *ordonantie*. In the early days of independence, after issuance of the 1945 Constitution, there were only three types of regulation, namely: a law, government regulation in lieu of a law, and government regulation. Based on Law 1/1950 on Types and Forms of Regulation Issued by the Central Government, the hierarchy of laws and regulations were: a law and government regulation in lieu of a law; government regulation; and ministerial regulation. This was later amended by the Resolution of the Temporary People's Consultative Assembly (*Majelis Permusyawaratan Rakyat Sementara*, or MPRS) XX/MPRS/1966 on the Memorandum of the Gotong Royong House of Representatives (*Dewan Perwakilan Rakyat Gotong Royong*, or DPRGR) concerning the Source of Law and Hierarchy of Laws and Regulations of the Republic of Indonesia, which stipulated the hierarchy of laws and regulations as follows: the 1945 Constitution; the resolution of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, or MPR); law and government regulation in lieu of a law; government regulation; presidential decree; and other implementing regulations, such as ministe-

rial regulation, ministerial instruction, and others. This was later amended again by Resolution of the People's Consultative Assembly III/MPR/2000 on Sources of Law and Hierarchy of Laws and Regulations, as follows: 1945 Constitution; resolution of the People's Consultative Assembly; law and government regulation in lieu of a law; government regulation; presidential decree; regional regulation. The types of law and regulations and their hierarchy were stipulated in a law specifically concerning law-making, Law 10/2004 on the Establishment of Laws and Regulations, which has since been replaced and amended by Law 12/2011. Based on this law, the hierarchy of laws and regulations in Indonesia consists of the 1945 Constitution; the resolution of the People's Consultative Assembly; law and government regulation in lieu of a law; government regulation; presidential regulation; provincial regulation; and district/city regulation. In addition, several other types of regulation are made by various state and government institutions, at both central and regional levels. Indonesia is also bound by several international agreements relating to natural resources and the environment, and when an international agreement is ratified it becomes law in Indonesia.

The environment and natural resources are regulated by all kinds of laws and regulations, including the 1945 Constitution and the Resolution of the People's Consultative Assembly, but they are mostly regulated by laws, implementing regulations, and regional regulations. Laws and regulations related to the environment and natural resources are classified as follows: general environmental laws and regulations; natural resources-related laws and regulations; regional regulations related to environment; ratified environment-related law. The general environmental laws and regulations consist of Law 32/2009 on Environmental Protection and Management and its implementing regulations, ranging from government regulations to regulations issued by government institutions in the field of environment. Natural resources-related laws and regulations consist of various natural resources-related laws and regulations – for example, laws governing mining, forestry, plantation, fishery and conservation – and their implementing regulations, ranging from government regulations to those issued by various government institutions. Regional regulations related to the environment consist of environment or natural resource regulations issued by provincial and district/city governments. Lastly, ratified environment-related law is an international agreement relating to the environment that Indonesia has ratified.

Indonesian government agencies related to mining

In Indonesia, various agencies implement laws and policies on the environment and natural resources. The agencies are part of either central or regional government. Throughout Indonesia's history the names of each of these government agencies has changed, as well as the main government agency responsible for mining. In 1966, mining was managed by the Min-

istry of Mining, Oil and Gas. In the same year its name was changed to the Department of Mining. In 1978, the Department of Mining changed its name to the Department of Mining and Energy. Then, in 2000, the name changed again to the Department of Mining and Mineral Resources. Finally, in 2009, in accordance with Presidential Regulation 47/2009 on Establishment and Organization of State Ministries, the name 'department' was changed to 'ministry'.

The main government institution responsible for mining from 2009 to the present has been the Ministry of Energy and Mineral Resources. The Ministry of Energy and Mineral Resources consists of several directorates general, which are in charge of energy and mineral resources; namely, the Directorate General of Oil and Gas, the Directorate General of Electricity, the Directorate General of Minerals and Coal, and the Directorate General of Renewable Energy and Energy Conservation.

Furthermore, there are other institutions related to mining, namely the State Ministry of Environment and Forestry, and other sector ministries related to natural resources, such as the Ministry of Marine Affairs and Fisheries, the Ministry of Agriculture, and the Ministry of Agrarian Affairs and Spatial Planning. These sector agencies are responsible for: making and implementing natural resource management policies in their respective sectors; issuing business licences; monitoring and supervising; and imposing administrative sanctions. In addition, some agencies related to the environment and natural resources are part of the provincial government or the district/city government.

The large number of agencies with responsibilities, duties and authority related to the environment and natural resources causes potential for overlapping functions, duties and authority. Even if there is no overlap, the impact of one agency's policies may have an impact on other agencies, because their fields are interrelated and interdependent.

1.6 Literature review: Indonesia's quality of law, its law-making dynamic, and government bureaucracy problems concerning the environment and natural resources

The quality of law, law-making and government bureaucracy related to environmental and natural resource management in Indonesia have all been studied by scholars and practitioners. The study in this thesis was built not only on theoretical insights related to the quality of law, law-making and bureaucracy, it also used research by other people to get a general picture of conditions in Indonesia and develop this research. This section discusses previous research undertaken regarding the quality of law, the law-making dynamic, and government bureaucratic issues in relation to environmental

and natural resource management in Indonesia. This section is also useful for the reader to get to know the general conditions of these aspects in Indonesia, before looking more deeply at their influence in the following chapters.

The quality of Indonesia's laws and regulations regarding the environment and natural resources

Even though literature that specifically examines the quality of laws and regulations regarding the environment or natural resources in Indonesia is scarce, there are several reviews of laws and regulations in Indonesia which form part of general research on environmental or natural resource management. The findings of this research are useful for describing the general situation on the quality of laws and regulations regarding the environment and natural resources in Indonesia.

Most scholars argue that the quality of laws and regulations regarding environment and natural resources in Indonesia is problematic, because of their incoherence, lack of clarity, and exploitation. For example, there are no rules governing the interaction between various participants in the natural resources sector, and every sector ignores the principles of integration regulated in the agrarian, environmental and spatial planning laws (KPK, 2018: 306). Other examples of inharmonious rules between sectors regarding licensing include the Forestry Law 41/1999, which stipulates that environmental service licences are limited to protected forests and production forests, although in Geothermal Law 21/2014 geothermal activities can be granted in conservation forests via an environmental service licence (KPK, 2018: 244-245). Moreover, the problem of disharmony between laws and regulations has been increasing, as thousands of regulations have been issued by regional governments, many of which conflict with other regional or national laws (Butt, 2010: 3- 4).

The issue of ambiguity also seems to be common in Indonesian laws and regulations. For example, Waddell argues that environmental laws and regulations on water quality management and pollution control in Indonesia are so vague that even basic environmental management ideas are not communicated (see, Waddell, 2004). As a result, the rules are not sufficiently able to convey meaning to those who are expected to apply or obey them (see, Waddell, 2004). Another example of unclear and inadequate rules was presented in research on plantation licensing (Khatarina, 2019). The Plantation Law 39/2014 does not clearly stipulate that plantation plans have to be taken into consideration when issuing plantation licences, even if such plantation plans can be powerful tools for ensuring sustainable plantation practices (Khatarina, 2019: 141). Due to unclear rules governing the relationship between plantation plans and licensing, the government has lost its opportunity to control licences through planning (Khatarina, 2019: 141).

Such bad legal drafting is even more of a problem in regional regulations. The lack of legal drafting skills within regional governments has resulted in many unclear and unenforceable regional regulations (Butt, 2010: 4).

In addition to the above problems, the natural resource laws and regulations in Indonesia are exploitative. Research conducted by the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, or KPK) in 2018 shows that laws on forestry, agriculture and plantations, mining and energy, and marine resources and fisheries tend to be oriented towards the exploitation of natural resources, and lack stipulations designed to protect the environment (KPK, 2018: 305). Since the New Order period, laws and regulations relating to natural resources have been prioritised for the sake of economic growth, turning legislation into a tool to exploit natural resources without any concern for the negative consequences (see, Gellert & Andiko, 2015). Likewise, many regional regulations are only concerned with profits for their own region. At the start of decentralisation especially, many district and provincial governments used the opportunity to issue regulations to exploit natural resources, which had been impossible to do during the New Order period (Barr *et.al.*, 2006: 11-12).

Thus, in general, the quality of laws and regulations in Indonesia, especially in the context of the environment and natural resources, is described negatively. However, the existing research (above) does not focus on studying the quality of laws and regulations, because they are just one part of research on environmental and natural resource management, and the basis for assessing the quality of laws and regulations has still not been explained in depth. While the research in this thesis pays in-depth attention to the criteria for assessing the quality of mining and environment-related laws and regulations so that the quality of laws and regulations is more measurable. Moreover, the assessment of laws and regulations in this thesis focusses on their quality in terms of addressing mining licence issuance problems related to the environment, which makes this study even more in-depth.

The dynamics of law-making related to the environment and natural resources in Indonesia

Literature on law-making, especially laws related to the environment and natural resources in Indonesia, exposes various dynamics within the law-making process. For example, Bedner discusses the process of making Environmental Management Law 23/1997 (Bedner, 2008); Arnscheidt explains the parliamentary debates on the Biodiversity Conservation Bill and drafting of the Natural Resources Management Law (Arnscheidt, 2009); Vel, *et. al.* discuss the dynamic of making Indonesia's Village Law (Vel, *et. al.*, 2017); Khatarina describes the legislative process for the 2014 Indonesian Plantation Law (Khatarina, 2019). The dynamics of the law-making process and a number of other factors affect the making of laws both positively and negatively.

The processes of making the Environmental Management Law 23/1997 (Bedner, 2008) and Indonesia's Village Law (Vel, *et. al.*, 2017) show support and even encouragement from various parties, such as academics and NGOs, to produce progressive laws. Bedner states that those involved in the making of Environmental Management Law 23/1997 had sufficient knowledge of environmental law and the ability to adapt their proposals to Indonesian conditions (Bedner, 2008). This prevented them from merely copying the environmental laws of other countries; instead, they amalgamated laws from other countries and adapted them to Indonesian conditions (Bedner, 2008). The proposal was also supported by a corps of environmental law experts, who possessed a high level of political skill and influence (Bedner, 2008). The law-making process resulted in a radical change to Environmental Management Law 23/1997 (amongst others) and the opening up of new legal avenues for victims of environmental pollution or destruction, including class actions and mechanisms for environmental mediation (Bedner, 2008: 194).

When making the Village Law, policy communities outside the government and parliament influenced both its development process and outcome (Vel *et.al.*, 2017). The impetus built by policy communities, through demonstrations, legal debates, campaign politics (during national elections), and active lobbying, could in fact influence the process of establishing the law (Vel *et. al.*, 2017). The policy communities succeeded in forcing the government to accept a completely different law to the government bill which had been proposed in the House of Representatives at the start of the debate (Vel *et.al.*, 2017: 466). The law translates the ideals of democratisation and human rights into a national law, which aims to improve the welfare of people living in nearly 75,000 villages in Indonesia (Vel *et. al.*, 2017: 467).

However, the support of various parties in a law-making process does not always lead to success, as evidenced by the process of drafting the natural resource management law (Arnscheidt, 2009). The law would radically change the pattern of natural resource management, which had previously paid more attention to the management of natural resources than to their exploitation, and all natural resource sector policies had to follow it. Therefore, the law would have a huge impact, in terms of the power various sectors had over natural resources. The main opponents of the bill were the Ministry of Forestry and the Ministry of Mines and Mineral Resources, who rejected the bill on the grounds that the natural resource management law would be like an umbrella law for other laws, and it therefore would be incompatible with Indonesia's legal system, which did not recognise umbrella laws (Arnscheidt, 2009: 285). Furthermore, only one party, *Partai Kebangkitan Bangsa* (PKB), considered supporting the idea of a natural resource management law (Arnscheidt, 2009: 286). Therefore, despite strong encouragement from a coalition of natural resource management NGOs and support from the Ministry of Environment, the bill did not pass.

Other law-making dynamics show closed processes which have happened without adequate discussion. Arnscheidt describes how the Nature Conservation Law in 1990 was made in a closed manner, ignoring important issues concerning conservation, because during the New Order the House of Representatives often simply received bills from the government without discussing them properly (Arnscheidt, 2009: 175). The result of the process was a law that does not solve various problems related to nature conservation in Indonesia; for example, it does not pay enough attention to effectively changing the problematic behaviour of certain actors, because debates in the House of Representatives did not address problem-solving extensively (Arnscheidt, 2009: 228). The law is therefore mainly symbolic, aiming to silence foreign critics rather than to be substantially effective (Arnscheidt, 2009: 229)

The closed law-making process and insufficient discussion was not limited to the New Order period. Khatarina explains how the 2014 Plantation Bill was discussed over a very short period of time, preventing opportunities for substantive debate in a meaningful legislative session or public consultation (Khatarina, 2019). Inappropriate processes and the absence of evidence-based policy-making meant that the 2014 Plantation Law did little to address the social and environmental problems of oil palm plantations in Indonesia, instead creating conditions that were more conducive to the plantation business (Khatarina, 2019: 206).

Although several law-making processes went through sufficient discussion and involved various parties, such as the law-making process of Environmental Management Law 23/1997 and Indonesia's Village Law, in general the lack of discussion and analysis in the House of Representatives, as well as the lack of public participation, have been enduring problems for law-making in Indonesia. Members of the House of Representatives spend less time debating on substantive matters and more time discussing technicalities that could instead simply be submitted to the drafters (Anggono, 2014: 247). In addition, the public participation provided by the House of Representatives is formal only, so direct public input has not been able to influence policy-making (Anggono, 2014: 242).

The various dynamics of law-making described above show that a good process, involving various parties and adequate analysis, makes it possible to produce good laws. Although, this is never certain, because there is always a possibility that other factors will have more influence on the law-making process, which is what happened when the Natural Resource Management Law was being drafted. What is certain, however, is that limited time, inadequate analysis, and a lack of public participation in the law-making process all result in problematic laws. This research shows that the quality of law is influenced by the law-making process. Therefore, an analysis of the law-making process should form part of this thesis, because

it helps to understand the reasons behind the quality of the mining law. The existing law-making research (above) is also a point of reference for analysing the process of law-making in this thesis. The law-making research in this thesis is distinguished from existing law-making research by the depth of its analysis regarding why some problems are not being addressed in law-making process. The focus of this research is on analysing how mining licence issuance problems related to the environment are addressed in the law-making process, including the most influential factors.

Problems concerning Indonesia's government bureaucracy

As explained in previous sections, the research in this thesis examines two policies related to the issuance of mining licences, namely C&C and MOMI, which focus on how the Indonesian government bureaucracy has built and implemented both. Therefore, it is necessary to understand the government bureaucracy situation in Indonesia.

Literature on government bureaucracy in relation to the environment and natural resource management in Indonesia shows that it presents several problems. One such problem is rampant corruption, which occurs at both central and regional levels, and in almost all government branches (legislative, executive, and judiciary) (Nugraha *et.al.,* 2006: XXV). The public services are full of different relationships, including friendship, ethnicity, religion, and political affiliation (Nugraha *et. al.,* 2006: xlvii). In this period of local autonomy corruption is endemic, due to an increase in regional government power and reasons to increase regional income; an easy way to obtain benefit under these conditions is by issuing licences (See, ICG, 2001; Indrarto *et. al*., 2012; Kartodihardjo *et. al.,* 2015). Some researchers found that abuse of the authority to issue licences mainly takes place during the election of regional leaders (*Pemilihan Kepala Daerah* or Pilkada). When companies provide campaign funds for regional head candidates to get elected, the regional heads make it easier for the companies, by helping them to obtain various regional facilities, including licences. Effectively, this creates a reciprocity system, between a successful team and a regional election winner (for example, Nugraha *et. al*., 2006: xxvi; Indrarto *et. al.,* 2012: 10).

Another issue is the fragmented government, or silos, known in Indonesia as *ego sektoral* (sectoral ego), which the literature shows to be one of the main problems for natural resource and environmental management in Indonesia (for example, Bedner & Niessen, 2003; McCarthy, 2004; Faure & Niessen, 2006; Arnscheidt, 2008; Butt & Lindsey, 2018). Each sector works only in accordance with its own objectives, without regard for the interests of others, even though management of the environment and natural resources cannot be realised partially. The high fragmentation of public bureaucracy is reflected in every agency in Indonesia (Pramusinto, 2016). All sectors have their own laws and regulations to regulate the

scope of their duty and authority, which gives rise to a feeling of *ego sektoral* (Nugraha *et. al*., 2006 xxxiii). Furthermore, each sector or ministry competes to obtain resources, consisting of financial resources, human resources, the implementation of rules, and other resources to strengthen their organisation (Pramusinto, 2016: 129). Further, the sectors are designed to compete with each other in terms of how they spend their allocated budgets, which promotes *ego sectoral* (Kartodihardjo, 2022). Therefore, civil servants in Indonesia have a 'silo mentality' when it comes to dealing with different institutions, trying to maintain their jurisdiction and functional duels whenever overlapping mandates arise (Turner *et. al*., 2019: 4). This condition is also exacerbated by poor communication and coordination between institutions. Communication between public institutions occurs conventionally, through regular meetings involving many ministries, but it seems that such a coordination model is symbolic only, since the officials attending these meetings are not authorised to make decisions for their ministries (Pramusinto, 2016: 132).

Problems with the relationships between government institutions have also occurred between central and regional governments since the early days of decentralisation, along with the issuance of Regional Government Law 22/1999 which gave broad authority to regional governments. After being given the power to manage their respective regions, local governments were reluctant to obey the regulations and guidance issued by central government, because they considered these to be interventions by the regional government, whilst regional initiatives were often considered by central government to be either insubordination or too excessive (Nugraha *et. al.*, 2006: xxvi).

In fact, most district governments in Indonesia were not ready to adopt the administrative and regulatory authority that had been transferred to them (Barr *et. al.*, 2006: 13). This was coupled with the regional government's lack of understanding of national laws and regulations, and its lack of capacity to implement them (see, ADB, 2005), meaning that natural resource management at the regional level was not in accordance with national policy. At the same time, central government had not provided any institutional guidance and support since the beginning of decentralisation (Barr *et. al.*, 2006: 14).

Following issuance of the Regional Government Law 23/2014, the authority of local governments (especially at district/city level) has been reduced, whilst the authority of central government is greater than before. Nevertheless, the relationship between central government and local government remains problematic. Zuhro, a senior researcher at the Indonesian Institute of Sciences (*Lembaga Ilmu pengetahuan Indonesia*, or LIPI) stated that the relationship between central and regional government is not harmonious, and that regional governments tend to be resistant to central government

policy.[5] This is because the regional government feels that its authority to carry out regional autonomy is increasingly limited, and it is suspicious that central policy will harm the regions.[6] At the same time, central government supervises regional government very weakly. For example, when researching the role of central government in the management of palm oil plantations, it can be seen that central government actually failed to carry out its supervisory role in managing the regional plantations (Khatarina, 2019).

Two chapters in this thesis analyse how C&C and MOMI were made and implemented under such government bureaucracy conditions. How could C&C, which aimed to verify the legality of the existing mining licences, be made and implemented in a situation where many government officials were carrying out illegal practices? How could MOMI, an integrated mining spatial database, be built within a fragmented government bureaucracy, when the collection of spatial data requires collaboration between government units and agencies?

1.7 Analysing the quality of laws and regulations, law-making, policy-making, and implementation in government bureaucracy, in the context of addressing mining licence issuance problems related to the environment

This thesis focuses on mining licence issuance problems related to the environment, which are identified and discussed in Chapter II. The following chapters discuss how these problems are addressed by laws, regulations, policy and bureaucracy in Indonesia. The chapters use theories from environmental law, quality of law, law-making, policy-making and government bureaucracy literature to analyse the extent to which environmental problems as a result of mining licence issuance are addressed by Indonesian laws, regulations, policy and bureaucracy. An overview of this analysis is given below.

Analysing the quality of Indonesian laws and regulations

In order to assess the quality of laws and regulations in Indonesia when addressing mining licence issuance problems related to the environment, this thesis develops quality of law criteria that refer to the literature on

5 Prof. Dr. R. Siti Zuhro, in a Focus Group Discussion which was held by *Pusat Studi Hukum Energi dan Pertambangan* (PUSHEP) and the *Direktorat Jenderal Bina Pembangunan Daerah* (BANGDA). The theme was *Membangun Konsepsi Pelibatan Daerah Provinsi dalamn Pengelolaan Mineral dan Batubara dalam rangka Kerangka Pelaksanaan Undang-Undang Pertambangan* 3/2020, Jakarta, October 13th 2020: https://pushep.or.id/sentralisasi-sektor-pertambangan-jadikan-daerah-tidak-merasa-memiliki-dan-peduli-terhadap-dampak-lingkungan/#

6 Ibid.

legisprudence. The literature examines laws from both theoretical and practical perspectives, to articulate criteria for good laws (Wintgens, 2002: 10-11).

Literature on legisprudence shows that scholars have different perspectives regarding the quality of legislation. There is no agreement about what good law is (see, Vanterpool, 2007; Florijn, 2008; Mousmouti, 2012; Aitken, 2013; Drinóczi, 2015). The quality of law standards are distributed by different regions or countries. Governments worry about the quality of their legislation, then issue standards and guidelines on the matter, so that criteria established in these documents vary significantly. For example, in the Netherlands, the Government White Paper Outlook on Legislation (*Zicht op wetgeving*) lists legality, conformity with the constitution and international treaties, and the effectuation of general legal principles; effectiveness and efficiency; subsidiarity and proportionality; practicability and enforceability; harmonisation; and simplicity, clarity, and accessibility (Florijn, 2008: 78). In Indonesia, Law 12/2011 on Establishment of Laws and Regulations sets the principles for establishing good legislation, which include: clear objectives; an appropriate institutional or forming authority; conformity between type, hierarchy, and material content; ease of implementation; usability; clarity; and openness (Article 16). Hence, there are different criteria regarding the quality of law. The determination of these criteria can be influenced by historical, political, and social contexts, as well as legal traditions, and the perspectives of various actors (Mousmouti, 2012: 192; Aitken, 2013: 1-2).

Chapter III discusses and determines the appropriate criteria for assessing the quality of laws and regulations in addressing mining licence issuance problems related to the environment. Based on these criteria, Chapter III assesses the quality of Mining Law 4/2009, and other relevant laws and regulations related to the issuance of mining licences and the environment. Chapter VII uses the same criteria to assess the quality of Mining Law 3/2020.

Analysing the law-making process in Indonesia

In general, law-making literature can be divided into two types. The first is law-making literature that concerns ideal forms of the law-making process and the second discusses the dynamics of law-making. The ideal law-making literature proposes various methods of law-making, in order to improve the quality of legislation. For example, Seidman, *et. al.* provide special techniques for drafters, especially in developing and transitional countries, so as to produce laws that can achieve social change (Seidman, *et. al.*, 2001). The technique they offer is rational-legal design through logical thinking, based on properly established facts. Mousmouti also suggests a law-making method aimed at achieving legal effectiveness, as it offers in-

depth analysis through strategy, design, and legal mechanisms, which help law-makers enter the thought process, understand the relevant issues, and identify and control any potentially critical problems with their design early on in the process (Mousmouti, 2018: 462).

Other legal experts can also be brought under this label, when they argue that law-making must be a rational process. Humans are rational beings, so they must be guided by rational laws (Popelier & Verlinden, 2009: 15) and the law must be justified in order to gain legitimacy (Popelier & Verlinden, 2009: 14; Wintgens, 2002:11; Oliver-Lalana, 2016a: 137). There must be a logical relationship between the problem to be addressed and the legislative solution chosen, which can be traced and justified (Mousmouti, 2018: 446). For this reason, legal scholars try to promote rational law-making criteria. The first criterion is that the method of law-making should be clear, structured, and measurable (Oliver-Lalana, 2016a: 136-137; Siehr, 2016: 218; Mousmouti, 2018: 8). A good method will direct the process of analysis and help the public to trace the reasons for making decisions. The second criterion is that the real problem should be understood (Seidman *et. al.*, 2001: 99; Oliver-Lalana, 2016a: 136-137; Mousmouti, 2018: 41-42). Therefore, comprehensive information is needed regarding the reality to be regulated, and the rational process must be open to information and criticism (Mader, 1985: 100-101 in Popelier & Verlinden, 2009: 18). The third criterion is a comprehensive analysis, in order to solve problems (Oliver-Lalana, 2016a: 136), for which scientific research is sometimes needed (Popelier & Verlinden, 2009: 18). Seidman & Seidman therefore suggest that parliamentarians ensure a proposed bill is accompanied by relevant research reports, which are logically structured so that the public can decide based on the facts and a high degree of logic (Seidman & Seidman, 2008: 104).

In addition, several institutions have issued criteria for making good laws, such as the European Union's Better Regulations[7] and Smart Regulations,[8] which aim to develop the quality of both European Union and national legislation (Xanthaki, 2014). Several tools to improve the quality of law-making have also been issued by the European Union, such as consultation, which improves relations between the government and stakeholders when making laws and regulations, and Regulatory Impact Assessment (RIA, or IA) which encourages law-making based on adequate analysis and evidence (Verschuuren & Gestel, 2009; Tala, 2010; Mousmouti, 2019)

7 *Better Regulation in the European Union* focusses on administrative burdens, legislative scrutiny, reducing the number of legislative instruments, and emphasising shared responsibility for the European Union and Member States (Xanthaki, 2014: 330).

8 *Smart Regulation* was introduced as the successor of *Better Regulation*, and it looks at the whole life cycle of legislative texts: design, implementation, enforcement, evaluation, and revision (Xanthaki, 2014: 330).

In practice, however, law-making is a complex process. Moreover, law-making is a political process, which involves various actors, with different interests (Florijn, 2008: 78; Tala, 2010: 209; Oliver-Lalana, 2016b: 240). Therefore, the basic characteristic of making laws is disagreement (Tala, 2010: 209); for example, disagreements between central and regional government, between government and parliament, or between industry and NGOs. The political component of law-making cannot be rationalised, as it depends on political views and choices. The dynamics of law-making are also influenced by various factors outside of political interest, such as limited time, skills, and resources (Mousmouti, 2018: 2), which can all make it difficult to apply methods that are considered rational. Law-making is even more complex in developing countries, and as Otto *et. al.* point out, heterogeneity and division of society, the weakness of the state, the fragmentation of laws, and the limitations of drafters all contribute to law-making problems (Otto *et. al.*, 2008: 55-56). As a result of this complexity, some scholars assume that the stages and rational processes are not fully practiced in reality (for example, Rooij, 2006: 30; Oliver-Lalana, 2016b: 240; Mousmouti, 2018: 8).

The second type of law-making literature focusses on the practical dynamic of law-making. In fact, not much literature discusses the dynamics of law-making theoretically and comprehensively (Rooij, 2006: 26; Mousmouti, 2018: 4; Almeida, 2020: 125). However, some literature discusses the dynamics of law-making; for example, Chambliss explains the complexity of law-making by explaining that it is a process which aims to resolve the contradictions, conflicts, and dilemmas inherent in the structure of certain historical periods (Chambliss, 1979). Furthermore Otto, *et. al.* describe the complexity of law-making in developing countries, which is influenced by several factors, such as: political elites often pursuing development by introducing ambitious plans for legal reform; legislators often lacking sufficient knowledge and interest in the main task of law-making; social heterogeneity; and the coexistence of contrasting socio-economic classes and ethnic communities, all of which contribute to making the task of legislators even more daunting (Otto *et. al.*, 2008: 53-74).

Chapters IV and VII are intended to explore the processes of making Mining Law 4/2009 and Mining Law 3/2020 and how the processes have affected the quality of those laws. For this reason, the law-making study in this thesis refers to literature which discusses the dynamics of law-making. Chapter IV combines the law-making literature with policy-making literature, to create a framework for reviewing the creation of the two mining laws. Literature related to the environment and natural resource law-making in Indonesia (explained above) is also used as a reference to analyse the two laws.

Analysing policy-making and policy implementation in Indonesian government bureaucracy

Research on bureaucracy may cover a wide area, as bureaucracy is related to both organisations and people (Wilson, 1989). Bureaucracy is about how government institutions function as organisations within the government system, which involves both the organisational structure and behaviour of administrative institutions (Meier & Krause, 2003: 1). To discuss the specifics of policy implementation, a comprehensive bureaucratic review is also required, as policy needs bureaucracy to develop formal rules and regulations, and sometimes even to create new organisations, departments, agencies, bureaus, etc., or to assign new responsibilities to existing organisations (Dye, 2017: 46). The number of theories related to bureaucracy continues to grow, including theories concerning the motives, values, and capacities of people within bureaucracy and practice (Rainey, 2014: 17), and the external factors that may affect bureaucracy, such as: technological and scientific capabilities; legal conditions; political conditions; economic conditions; demographic conditions; ecological conditions; and cultural conditions (Rainey, 2014: 88). Thus, there are many aspects that must be studied when assessing how bureaucracy works. However, this research focusses on particular aspects that are relevant to the specific character of a policy, and on specific problems within Indonesia's government bureaucracy.

This thesis discusses how the Indonesian bureaucracy worked to create and implement C&C and MOMI. The C&C policy is discussed in Chapter V, answering the question: To what extent does the policy resolve the problem of thousands of mining licences granted in violation of the legal rules and their impact on the environment? The chapter uses literature discussing illegality practices in Indonesia and literature related to the Timber Legality Verification System (*Sistem Verifikasi Legalitas Kayu* or SVLK) policy as a reference to assess C&C and its implementation. MOMI, discussed in Chapter VI, focusses on the fragmented character of the Indonesian bureaucracy when it needed to build a database system that required cooperation between different units and government institutions. Several theories regarding the relationship between units and institutions in government bureaucracy are discussed in Chapter VI, and are used as a reference in the discussion of MOMI development.

1.8 Methodology

Environmental law and its implementation in developing countries is complex; therefore, research concerning environmental law requires a multidisciplinary approach. A scientific approach to improving the implementation of environmental law must involve insights from other disciplines, different types of research questions, and methodologies that differ from those of

traditional legal scholarship (Martin & Craig, 2015: 29). The research for this thesis therefore uses a socio-legal approach. Wheeler and Thomas view socio-legal studies as an interdisciplinary alternative and challenge to the doctrinal study of law (Banakar & Travers eds., 2005: xii). In this study, the law interfaces with the context in which it exists (Banakar &Travers eds., 2005: xii). Banakar and Travers argue that, whilst socio-legal researchers use social theory for analytical purposes, they often tend not to address issues of sociology or other social sciences, but instead issues of law and legal studies (Banakar & Travers eds., 2005: xii). In this case, social theories are indeed only being used to understand a certain law. Research methods and techniques in the social sciences are studied and used to collect data (Irianto, 2012:5). By using the socio-legal method, data collection and analysis is directed at understanding various factors that influence law and policy, and their formulation and implementation regarding mining licences issuance and the environment.

I obtained data and information by collecting various documents and conducting interviews. I first collected laws, regulations, and policy documents related to mining licences and the environment. I also collected various documents to assist my understanding of the laws, regulations and policies, such as law-making minutes from DPR research results, government and NGO reports, meeting notes, and news. I obtained the laws, regulations and some other documents from the internet, whilst further documents were obtained from my NGO network and during my interviews.

I performed semi-structured interviews with 46 correspondents, consisting of policy-makers, government officials, mining consultants, NGOs, and academics. My more than 20 years of experience as a researcher at the Indonesian Center for Environmental Law (ICEL) enabled me to identify and interview the most suitable respondents for the present research. Those I did not know personally could be easily contacted through my network.

I started the interviews related to Mining Law 4/2009 with a lecturer from the Faculty of Law at the University of Indonesia, who was involved in drafting the mining law and also wrote a book about her experience of the process. She provided background information on how the mining law was created, how the process responded to mining and environmental problems (especially during the decentralisation period), and how various stakeholders had been involved in the process. She also provided the names of parliamentarians and government officials who were active in making the mining law.

I then contacted a former Minister of the Environment, who was a member of the DPR when the mining law was being drafted, and who was actively involved in the law-making process. My position as a researcher at ICEL made it easy for me to contact and interview him, especially since we had

worked together when drafting the Natural Resources Law, and ICEL had been in touch with him several times, regarding several different activities. He provided several numbers for former members of the DPR and former government officials involved in drafting the Mining Law 4/2009. I then contacted them, saying that he had recommended me.

My interviews with former members of the DPR and former government officials involved in drafting Law 4/2009 went quite well, and the interviewees explained the process with enthusiasm. Several said that the process of making Mining Law 4/2009 had been an intense three years, and that there had been a spirit of changing mining management for the better, in a way that would prioritise the national interest. From these interviews, I obtained background information about the making of Mining Law 4/2009, as well as details of the law-making process, such as the actors involved, how they were involved, and how they interacted with each other. I also received ideas about how mining had been managed in Indonesia, from the New Order period to the present, why the contract system had been abolished, and how the interviewees viewed the problems of mining licence issuance and the environment.

One of the former government officials I interviewed was a former Director General of Minerals and Coal. He gave me some of the names of government officials involved in C&C and MOMI and their contact numbers. He seemed to be well known and respected by the officials, so it was easier for me to communicate with and interview them. The officials also put me in contact with several government employees involved in both C&C and MOMI. From these interviews, I received quite detailed information, starting with the development of C&C and MOMI, right up to making and implementing the regulation. I also interviewed several staff from the Corruption Eradication Commission (*Komisi Pemeberantasan Korupsi* or KPK). Improving natural resource governance was one of KPK's targets, as it was acknowledged that activities related to natural resources were very vulnerable to corruption. KPK coordinated and supervised government institutions related to natural resources – one of which was the mining sector. This included encouraging government institutions to: make various changes; cooperate with other institutions; carry out various organisational changes; and issue a number of new rules and regulations to support the implementation of policy reforms, including supporting C&C and MOMI.

In conducting research on the implementation of C&C, I focussed on examining implementation of the policy in the province of South Sumatra. The reason I chose South Sumatra was that, in addition to many mining activities in operation there, my access to data in the area tended to be easier than in other areas. A friend from The Asia Foundation (TAF) is managing programmes there, and they helped me to 'get in' to the provincial bureaucracy. Another good friend also lives there, and he was close to various stakehold-

ers. In addition, South Sumatra is the focus area for the KPK Coordination and Supervision Programme (*Koordinator dan Supervisi* KPK or *Korsup KPK*), which prevents corruption within natural resource-related activities. I was linked with one of the NGOs, namely *Pilar Nusantara* (PINUS), which assists the provincial government in implementing programmes related to improving natural resource governance, one of which is C&C. PINUS gave me the contact details of several officials in the province, as well as several NGOs, so that I could interview them. PINUS also involved me in several meetings related to the implementation of C&C, which were organised by both central and regional government, as well as by NGOs in South Sumatra. The interviews provided me with data and information regarding the implementation of C&C in the province of South Sumatra, the result of its implementation, and C&C cases brought in the state administrative courts.

Furthermore, I interviewed several mining-related NGOs in Jakarta, such as JATAM, Publish what You Pay (PWYP), and Auriga. I also interviewed mining practitioners, experts, and academics involved with mining and the environment. I also received plenty of material from ICEL, as several of my colleagues there had monitored the drafting of Mining Law 4/2009 and Mining Law 3/2020. In addition, ICEL currently conducts research on mining licences in several provinces.

I was in the process of writing this thesis when the new Mining Law 3/2020 was issued. Fortunately, my list of questions for several of my interviewees included questions about the new mining law-making process. I used the results of these interviews for my research, plus several interviews with NGOs and academicians, and some research and news reports.

1.9 The scope of the research and its limitations

As explained above, this research focuses on the extent to which Indonesia's policies, laws and regulations have addressed mining license issuance problems, especially those related to the environment and how the government bureaucracy plays a role in making and implementing policies related to resolving these problems. Therefore, this research is about the quality of policies, laws and regulations and how this quality is influenced through the politics and characteristics of the drafting process. Research on policy making is not only concerned with dynamics in the legislative but also looks at the government bureaucracy, because many policies are made by the government. My research does not focus on the implementation of law and policies, even if I address this topic in some of the chapters. Examples include the history of mining license issuance policies in Indonesia (Chapter 2), the implementation of C&C policies in South Sumatra (Chapter 5) and the extent to which Mining Law 4/2009 resolves mining license issuance problems related to the environment (Chapter 7). The aim of these studies,

however, is to support the thesis in its assessment of the quality of policies, laws and regulations.

Furthermore, licensing covers (at least) the issuance of a license, the implementation of a license, monitoring, and law enforcement for license violations. This research highlights mining license issuance. As explained in the background section, this process is crucial because environmental damage can be prevented by screening mining companies that state they are committed to protecting the environment, whilst simultaneously forcing these companies to take certain measures before carrying out their mining activities.

There are various types of mining, namely mineral, coal, geothermal, oil and gas. In Indonesia, every type of mining has been regulated differently. There have also been several types of mining licence. For example, for Mining Law 4/2009 and the new Mining Law 3/2020, the mining business licence (*Izin Usaha Pertambangan* or IUP), special mining business licence (*Izin Usaha Pertambangan Khusus* or IUPK), and people's mining licence all apply. Each type of mining licence has different rules and procedures. Considering the impossibility of covering all types of mining licence in this thesis, I chose to focus on IUPs for metal minerals and coal mining, because IUPs for these types of mining licence have more complex licensing arrangements than for other types, and they are recognised as having a large environmental impact.

There are certainly more laws, regulations and policies associated with issuing mining licences than I have explored in this thesis. However, the research limits its focus to Mining Law 4/2009, New Mining Law 3/2020, C&C, and MOMI, which are the most closely related to mining licence issuance, and which I consider to be the most important in terms of demonstrating how law, regulation and policy in Indonesia respond to the environmental problems linked to mining licence issuance.

1.10 Structure of the thesis

After this introductory chapter, Chapter II discusses the laws, regulations and policies related to the issuance of mining and environmental licences in Indonesia, from the colonial period to the reform period, before the making of Mining Law 4/2009. This includes how the legal framework for issuing mining licences throughout history relates to environmental problems, and how subsequent laws, regulations and policies have responded to them, as well as what factors have influenced these conditions. Chapter II closes with a discussion of four problems related to the issuance of mining licences and the environment in the reform period, which were partly inherited from the previous period and became more complex in the early days of the reform

period, when decentralisation began. Subsequent chapters discuss how these problems have been addressed by laws, regulations and policies.

Chapter III provides an analysis of the legal framework for mining licence issuance and the environment after the reform period began. This chapter looks at the quality of the Mining Law 4/2009 and other relevant laws and regulations, in terms of addressing mining licence issuance problems related to the environment. To analyse these laws and regulations, Chapter III discusses and uses the quality of law criteria that are relevant to the legal capacity to address problems. After knowing the extent to which the legal framework addresses mining licence issuance problems related to the environment, it is necessary to look at the making of the Law on Mining 4/2009, as it is the main law governing issuance of mining licences.

Chapter IV analyses the making of Mining Law 4/2009, in order to understand how the environmental problems connected with mining licence issuance were addressed by the law-makers, and the factors which influenced them.

Chapter V examines C&C, the policy of verifying the legality of existing mineral and coal mining licences, which was implemented from 2011 to 2017. This chapter discusses the extent to which the policy can solve the problem of thousands of illegally issued mining licences, and especially their impact on the environment. Before reviewing the policy, the chapter discusses the literature on illegality practices in Indonesia and the Timber Legality Verification System (*Sistem Verifikasi dan Legalitas Kayu* or SVLK) policy, as references for assessing C&C.

Chapter VI discusses another policy related to the issuance of mining licences: MOMI. It is a single database that integrates spatial data on mining areas throughout Indonesia. The chapter discusses the dynamics behind the development of MOMI between 2011 and 2016, when the government agencies in Indonesia were generally fragmented. The chapter uses theories about the relationship between government units and institutions to understand how government bureaucracies could build MOMI.

Chapter VII discusses the quality of the new Mining Law 3/2020 and the dynamics of its creation, which focusses on responding to mining licence issuance problems related to the environment, based on the criteria and analytical framework used in chapters III and IV.

Finally, Chapter VIII is the conclusion of my thesis.

II Exploring the regulatory framework for mining licence issuance in Indonesia: A historical perspective

2.1 Introduction

This chapter shows how law, regulation, and policy related to mining licence issuance and environmental problems have influenced each other, from the colonial period until the enactment of Law 4/2009 on Mineral and Coal Mining (Mining Law 4/2009). The historical background will provide a certain understanding of how law, regulation and policy responds to the environmental problems connected with mining licence issuance, including in the present. The chapter also examines the regulatory framework for mining licence issuance, and the resulting environmental problems throughout its history. This includes how regulatory frameworks have contributed to an increase in environmental problems, and how subsequent law, regulation and policy have responded to these problems.

This chapter consists of the following six sections. After the current section, the second provides a description of the regulatory framework during the colonial period; a period when mining law was first issued, environmental impacts were not being considered, and regulations related to the environment did not regulate mining. The third section describes the situation during the early days of independence, when President Sukarno's nationalist policy influenced the mining industry. The fourth section discusses the economic policy during the New Order period, which stimulated the growth of the mining industry through mining contracts and licensing schemes, and the impact that this policy had on the environment. The fifth section discusses the reform period, when the policy of decentralisation affected the conditions for mining licence issuance and the environment. The final part of the fifth section discusses the environment-related mining licence issuance problems related to, which were inherited from the previous period and exacerbated at the beginning of decentralisation. The sixth section provides the conclusion.

2.2 The colonial period (1850-1945)

Indonesia has been a producer of mined metal (especially gold and silver) and precious stones (such as diamonds) for many centuries, but until the mid-19th century its mining activities had been modest (Eng, 2014: 4). Following the discovery of tin on Belitung Island in 1852, the Indonesian

mining industry began to develop in earnest (Eng, 2014: 5). At the time, mining was carried out by a firm named NV Billiton Maatschappij, assisted by a concession granted by the Dutch East Indies Government (Eng, 2014: 5; Hayati, 2015: 24). Furthermore, mineral reserve research and applications for mineral exploration licences were both increasing, alongside an increase in worldwide demand for minerals; therefore, mining could help meet the financial needs of the government in the Dutch East Indies (Setiawan, 2015: 302). In the end, this led the government to issue the Mining Law, *Indische Mijnwet* 1899 (IMW) (Setiawan, 2015: 302).

IMW regulated the authority and mechanisms for the management of mineral, oil and gas, including the regulation of land owners and licensing rights. The land owners could not control the minerals which were located within their land, because the colonial government had the authority to control the minerals (Article 1). The right to seek mining was granted by the colonial government, through a centralised concession system. Concession was granted in the form of a licence, which gave a mining company a number of rights to manage its mining and freely use any mines obtained during the exploitation solely for the benefit of the company (Article 16). The government collected a fixed annual fee from each concession: a net contribution of 0.25 guilders per hectare, and 4% of the gross income (Article 35).

IMW restricted the entry of foreign companies into the Indonesian mining industry through its complex requirements for obtaining concessions (Setiawan, 2015: 303-304). Only Dutch people, residents of the Netherlands or the Dutch East Indies, and companies established in the Netherlands or the Dutch East Indies could obtain concessions (Article 4). In fact, most foreign companies which operated in the Dutch East Indies at the time were registered in their home countries, as most of the company owners were not Dutch (Setiawan, 2015: 303-304). Based on the IMW rule, these foreign companies cannot be granted concessions. The policy restricting entry by foreign companies was made because, at that time, Dutch mining companies were still unable to compete with wealthier foreign companies, so if foreign companies had been free to invest their capital without restriction, they would have eventually dominated the Dutch East Indies mining area (Setiawan, 2015: 301).

IMW was amended in 1910. One of the amendments included the issuance of Article 5A, which allowed private companies to negotiate a mining contract directly with the Dutch Government, instead of going through the process of obtaining a concession (Hayati, 2015: 25). The policy was based on the idea that the government should maintain maximum control over mining businesses, but that the expertise of private companies was nevertheless required to manage and operate such businesses (Eng, 2014: 15). The contract system was also expected to provide better returns for the gov-

ernment than the concession system, because the government could make the terms in the contract quite stringent, in order to maximise government benefit from mining operations (Eng, 2014: 15).

Whereas economic considerations were a priority in policy-making, environmental impacts were ignored, even though environmental damage due to mining activities existed at the time. For example, in 1870 a medical officer stated that tin mining activities in Bangka had caused forest destruction and the neglect of large areas of land (Ross, 2014: 460). IMW did not regulate the environmental requirements for gaining concessions or contracts. Some restrictions on mining activities were intended only to ensure human safety and prevent the disturbance of communities. IMW prohibited certain areas for mining for public interest reasons only, such as the presence of military and government buildings or graves, public roads, canals, railroads, areas considered by indigenous peoples to be sacred, residential houses or standing factories, or because the land surrounded residential houses or factories, and mining needed to happen at a minimum distance determined by regulation (Article 8). Hence, in certain areas, there was no prohibition on mining for reasons of environmental protection. The supervision regulated in IMW also related only to human interest, such as: the safety of the soul and health of workers; the protection of topsoil to keep people and public traffic safe; and protection against the generally harmful effects of mining (Article 43). Companies were obliged to pay full compensation for any damage caused (Article 24).

There were some regulations regarding natural resources and the environment at the time, but nothing related to mining. One regulation, *Hinder Ordonnantie*, *Staatsblad* 1926, Number 226 (Nuisance Ordinance), regarding «*inrichting*", was closely related to environmental licensing. However, it was intended to regulate licences for industries that had the potential to disturb surrounding neighbours, and mining activities were always carried out in areas a long distance from residential dwellings. Other regulations, concerning the protection and preservation of nature, were not related to mining[1]. Therefore, for many years the remote location of the mines and the economic requirements of the colonial coffers allowed companies to operate with little regard for the damage they were inflicting (Ross, 2014: 466). Until the end of the Dutch colonial period, there were no regulations responding to the specific environmental impact of mining activities.

1 For example, 1931 *Dierenbeschermings Ordonnantie, Staatsblad* 1931, Number 134; 1941 *Natuurbeschermings Ordonnantie, Staatsblad* 1941, Number 167; 1932 *Natuurmonumenten en Wildreservaten Ordonnantie, Staatsblad* 1932, Number 17, which was replaced by 1941 *Natuurbeschermings Ordonnantie*; 1931 *Jacht Ordonnantie, Staatsblad* 1931, Number 133; and, 1940 *Jacht Ordonnantie Java en Madoera, Staatsblad* 1939, Number 733 (Hardjasoemantri, 1996; Rangkuti, 2005).

In 1942 the Dutch colonial period ended and was replaced by the Japanese occupation. During Japanese occupation no new laws regarding mining and the environment were made, but the mining industry was still running. Even though mining activities stopped during the early days of Japanese occupation, due to war damage, the Japanese government later realised the importance of mining to support their war costs, and it duly invested in mining (Isma, 2018: 66). The mining industry itself continued to develop and, even during the three years of Japanese occupation which ended in 1945, several new mining activities were developed by the Japanese government, including for copper, iron ore, cinnabar, manganese ore, and bauxite.[2] Meanwhile, no improvements in the attention given to the environment had been made since colonial times.

2.3 The Old Order period (1945-1965)

In the early days of independence, anti-colonialism and anti-western attitudes affected all aspects of policy in Indonesia. At the end of the 1950s, Sukarno refused foreign aid and nationalised key industries owned by the Dutch and other Western companies (Gellert, 2010: 39). The government issued Law 86/1958 on the Nationalisation of Dutch-Owned Companies in Indonesia, and its implementing regulations: Government Regulation 2/1959 on Implementation of the Law on Nationalisation the Dutch-Owned Companies, and Government Regulation 3/1959 on Establishment of the Nationalization Agency for Dutch Companies.

Specific to the mining sector, the government issued Law 10/1959 on Cancellation of Mining Rights and Government Regulation 50/1959 on the Determination of Dutch-owned Industrial/Mining Companies Subject to Nationalisation. Mining concessions and contracts issued under the IMW were rearranged. Law 10/1959 annulled all mining rights granted before 1949 which had not yet been worked on, or for which work was still at an early stage (Article 1). The nationalistic approach was therefore apparent in the contemporary policy. A cancellation of mining rights could only be made by the Minister of Industry for national interest reasons, if the concessions and contracts carried out exploration and exploitation of petroleum, in order to secure domestic consumption, or for foreign exchange needs (Article 3).

In 1960, a new mining law was issued: Government Regulation in Lieu of Law (*Perpu*) 37/1960 on Mining. An important element of this *perpu* was that it prevented foreign investors from entering the mining industry. The *perpu* replaced the concession regulated by IMW with a 'mining authority'

2 https://www.walhi.or.id/sejarah-dan-regulasi-pertambangan-di-indonesia-bagian-2.

(*Kuasa Pertambangan*, or KP). The company and/or individual mining rights that already existed under the IMW could remain valid for a certain period of time, and the holders of the rights had to conform to the provisions contained in the *perpu* (Article 30). The KP and the concession were the same form of mining licence, in which the government gave the right to mine to entities or individuals and collected a fixed fee from them. The only difference was that the concession was intended for Dutch people, residents of the Netherlands or the Netherlands East Indies, and companies established in the Netherlands or the Dutch East Indies, whilst the KP was intended for Indonesian state and regional companies, Indonesian private companies, and Indonesian citizens residing in Indonesia (Articles 4 and 5). Hence, the rules in *Perpu* 37/1960, stating that KP would not be given to foreign investors, seemed to follow the rules regarding restrictions on foreign investors obtaining concessions in IMW.

During the Sukarno administration, mining production and exports continued and the mining industry was dominated by state-owned enterprises (Eng, 2014: 8-10). Attention paid to the environment in this period was no better than during the previous period. Neither *Perpu* 37/1960, nor any other law or regulation created protection from mining activities for the environment. Similar to IMW, *Perpu* 37/1960 only prohibited certain areas for mining, because of potential interference with the interests of other parties, such as cemeteries, places that considered sacred, public works, mining business offices, residential houses, etc. (Article 12). Hence, during the Old Order period, law and regulation stayed focussed on mining exploitation, the only difference from the previous period being that the approach in this period was more nationalistic.

2.4 The New Order period (1966-1998)

The relationship between the mining licensing process and the environment during the 32 years of Suharto's presidency is complex. Several mining licensing policies were issued and, in addition to being different from the previous period, policies regarding the environment and natural resources also affected the issuance of mining licences. However, although the environmental and natural resources policies were interrelated, they were not actually coordinated. The implementation of the policies was even more complicated. Therefore, to explain the dynamics of the mining licence issuance policies in relation to the environment, this section is divided into several sub-sections, consisting of: mining-related laws that were issued to promote economic growth; mining contracts; the mining sector starting to give attention to the environment; restricted areas for mining; and the environmental impact of mining licence issuance policies and their implementation.

Mining-related laws and regulations to promote economic growth

After economic growth stagnated during the Sukarno administration, the policy of the Suharto government was to increase economic growth, mainly through the use of natural resources. To this end, President Suharto's New Order government created a completely new regime for mining (Spiegel, 2012: 190). The policy began with the issuance of the Resolution of the Temporary People's Consultative Assembly (MPRS) XXIII/1966 on Policy Reform on the Basis of Economy, Finance and Development, which contained a stipulation to increase the industry's attractiveness through foreign investment. Based on the resolution, Law 1/1967 on Foreign Investment, Law 1/1968 on Domestic Investment, and Law 11/1967 on Basic Mining Provisions (Mining Law 11/1967) were issued. The laws were intended to accelerate economic growth and resolve the economic problems inherited from the Old Order, by opening Indonesia up to foreign capital (Gandataruna & Haymon, 2011: 221). This was the beginning of massive development of the mining industry in Indonesia.

Mining licensing in Mining Law 11/1967 was carried out centrally, and the authority for doing so was held by the Minister of Mining, especially for the types of mines which were categorised as 'vital' and 'strategic' (class A and class B). The management of class C mining types, such as sand and gravel mines, was entrusted to provincial level governors. Mining Law 11/1967 provided mining rights to various parties via two schemes. The first was KP which, in general, was the same as KP regulated in *Perpu* 37/1960, as explained above: a form of licence granted to domestic mining companies or individuals with Indonesian citizenship. The second was the 'work agreement', which became known as *Kontrak Karya* or the Contract of Work (CoW). It was granted to foreign investors to carry out all phases of mining operations, including exploration, pre-production development, production, and mine closure. This was different from KP, which was granted for one stage of mining activity only.

In 1981 the rules regarding contracts for coal mining were differentiated from other types of mining. The coal mining contract was specifically regulated through Presidential Decree 49/1981 on Basic Provisions for the Coal Mining Exploitation Cooperation Agreement and subsequently regulated by the Presidential Decree 75/1996 on Main Provisions of the Coal Mining Exploitation Work Agreement. Initially, the coal mining contract was called the Coal Cooperation Contract (*Kontrak Kerja Sama Batubara* or KKS *Batubara*), but this was later changed to *Perjanjian Karya Pengusahaan Pertambangan Batubara* (PKP2B) or Coal Contracts of Work (CCoW). The main difference between the CCoW and the CoW was that for CCoW a fixed fee, royalties and Coal Sales Profit Sharing Funds (*Dana Bagi Hasil Penjualan Batubara*, or DHPB) had to be paid to the government, whilst the CoW only required a fixed fee and royalties to be paid to the government.

Mining development in Indonesia in 1967 was mostly focussed on supporting economic growth; there were basically no regulations to protect the environment (World Bank, 2001: 72). Hence, Mining Law 11/1967 almost did not regulate environmental protection, and the mining rights granted via KP and contracts were issued without environmental stipulations. The only provision related to the environment was stated in Article 30: that if mining was carried out in a workplace, the KP holder concerned would be obliged to return the land in such a way that it did not pose any danger of disease or other dangers to the surrounding community.

The Mining Contract of Work

Article 10 of Mining Law 11/1967 stipulated that if the government itself was not able to carry out certain mining activities, the government could appoint contractors to do so instead. This was supported by Law 1/1967 which stipulated that foreign investment in the mining sector was based on cooperation with the government, on the basis of either a work contract or another form of agreement in accordance with statutory regulations (Article 8, paragraph 1). These provisions became the basis for foreign investors to enter into mining agreements with the Indonesian government. The first foreign company to sign a CoW with the Indonesian government was an American mining company, Freeport McMoRan, which covered a large area of the Ertsberg gold deposit in the Jayawijaya Mountains in Irian Jaya (O'Callaghan, 2010: 220).

A CoW was very profitable for mining companies, because the contract scheme covered all phases of a mining operation. The other benefit for mining companies was that a CoW protected them from future government policies (also known as *lex specialis*), meaning that the contract was immune to legal changes (Wiriosudarmo, 2001: 20; IMI, 2018: 21). This was very advantageous, because exploitation of these mineral resources could last a long time. Based on Mining Law 11/1967, mining operations managed by foreign companies through a contract system were valid for 35 years and could be extended for up to 25 years, bringing the total longevity to 60 years. Therefore, if there were to be environmental policy in future, it would not affect a CoW. In the case of Freeport for instance, the very first CoW granted did not contain an environmental clause (O'Callaghan, 2010: 220). As explained above, at the time there was still no attention being paid to the environment. Furthermore, the government, which at that time was threatened by an economic recession, was in a bad bargaining position, resulting in contracts with very attractive terms for the company (Warburton, 2017: 293). However, subsequent contracts did not include environmental assessments (Robinson, 2016: 144). Indonesia did not even require foreign companies to provide mine closure plans in their CoW, which could force companies to think more carefully about the impact of their activities on the environment (Robinson, 2016: 146).

The mining sector starts to pay attention to the environment

Indonesia did not pay attention to the environment in any capacity, not only in the mining sector, until there was global pressure to pay attention to every activity that had the potential to have an impact on it. After the Stockholm Conference in 1972, the environment became a concern on a global scale (Hardjasoemantri 1996: 4; Niessen, 2003: 72). Indonesia issued several policies related to environmental protection, including in the mining sector. In 1977 the government issued Minister of Mining Decree 4/1977 on the Prevention and Handling of Disturbance and Pollution of the Environment Caused by General Mining. This decree was regulated in more detail by Director General of General Mining Decree 07/DU/1978 on the Prevention and Control of Disturbance and Pollution as a Result of Open Mining, and Director General of General Mining Decree 09/DU/1978 on the Prevention and Countermeasures Against Disturbance and Pollution as a Result of the Processing and Refining of Mineral Materials. These decrees were later replaced by Minister of Mines and Energy Decree 1211.K/008/M.PE/1995 on Prevention and Mitigation. The decree regulated mine reclamation and post-mining plans and guarantees, as requirements to be met before any mining activities were carried out. Later still, Director General of General Mining Decree 336.K/271/DDJP/1996 regulated reclamation guarantees in detail.

However, it seems that the decrees were not strict enough to ensure that mine reclamation and post-mining were carried out. Obligations related to mine reclamation and post-mining in Director General of General Mining Decree 336.K/271/DDJP/1996 did not form part of the mining licence issuance requirements compelling the applicant to comply with these environmental requirements. This made it possible for a mining company to still be granted a licence, even if it did not provide mining reclamation and post-mining plans and guarantees. Furthermore, there were some weaknesses in the decree, including unclear guidelines and procedures for identifying post-mining land use for each mining area, unclear provisions for the renegotiation of future reclamation plans to accommodate changes in regional conditions, and a lack of measurable performance indicators against which compliance with a reclamation plan could be determined (McMahon *et. al*., 2000: 21). Contemporary news reports regularly featured stories about extensive ex-mining land in Indonesia being abandoned, resulting in environmental damage. There were even some reports of local children having accidents in the abandoned mine pits.[3]

3 For example:
https://www.jatam.org/tag/lubang-tambang/;
https://www.mongabay.co.id/2021/11/05/sejak-2011-sudah-40-nyawa-melayang-di-lubang-tambang-batubara-kaltim/amp/;
https://www.bbc.com/indonesia/indonesia-50184425.amp; https://amp.kompas.com/regional/read/2022/03/11/165456078/genangan-air-lubang-tambang-batu-bara-di-kukar-ancam-permukiman-warga; and,
https://www.cnbcindonesia.com/news/20210129141759-4-219673/ribuan-lubang-tambang-tak-direklamasi-begini-data-esdm

Indonesia's participation in the Stockholm Conference encouraged the passing of the 1982 Law on Basic Provisions for Environmental Management (or, the 1982 Environmental Law) (Rahmadi, 2006: 128). Prior to the 1982 Environmental Law, laws and regulations related to the environment in Indonesia, such as the Ordinance on the Protection of Wildlife (*Dinenbeschermings Ordonnantie*) and the Nuisance Ordinance (*Hinder Ordonnantie*), both from the colonial government period, were inconsistent (Bedner, 2003: 2). The 1982 Environmental Law also stipulated that any plans that were expected to have significant impacts on the environment must be accompanied by an environmental impact assessment (*Analisis Dampak Lingkungan,* or AMDAL) (Article 16). This was the first regulation to stipulate an environmental requirement before a mine could become operational in Indonesia. As explained above, before the enactment of the 1982 Environmental Law, no other environmental or natural resources law regulated mining activities in terms of environmental protection, and there was certainly no environmental requirement that had to be met before mining activities began. All mining projects executed before 1982 were designed and approved without any environmental consideration (Wiriosudarmo, 2001: 39).

In time, Government Regulation 29/1986 on AMDAL was issued. The regulation played an important role in sectoral agencies making decisions related to AMDAL, including the mining sector agencies. In Government Regulation 29/1986, the decision about whether or not an activity required AMDAL was determined by the Sectoral Minister (Article 10, paragraph 1). Furthermore, the regulation stipulated that AMDAL be submitted by companies to the sectoral minister or governor (depending on the place where the activity was carried out), after which it would be assessed by the AMDAL Commission formed by the sectoral minister or governor. The Minister of Environment produced only general guidelines regarding AMDAL preparation, whilst technical guidelines would be prepared by the sectoral minister. Based on the regulation, the Minister of Mining and Energy would make the ultimate decision regarding AMDAL for mining activities. This regulation was later amended by Government Regulation 51/1993, which gives authority to the Minister of Environment to determine the types of business or activities that are subject to AMDAL, after hearing and taking into account the suggestions and opinions of sectoral agencies (Article 2, paragraph 2).

The 1982 Environmental Law was later amended by Law 23/1997 on Environmental Management (the 1997 Environmental Law), which made it clear that every business and/or activity that had a large and significant impact on the environment was required to have AMDAL, in order to obtain a licence to conduct such business and/or activity (Article 18, paragraph 1). Therefore, based on the 1997 Environmental Law, a mining licence could only be obtained by a company after it had obtained AMDAL. Subsequently, the Government Regulation on AMDAL was replaced by

Government Regulation 27/1999. In contrast with previous government regulations, Government Regulation 27/1999 stipulated that the AMDAL Commission would no longer be within sectoral agencies, but within an environmental impact control agency that would be based at the central government or regional government offices[4], depending on where the activity was being carried out (Article 18, paragraph 1).

Both the 1982 Environmental Law and the 1997 Environmental Law were made so that all law and regulation related to natural resources and the environment had to refer to them. The 1997 Environmental Law also recommended that other laws be reformed and harmonised according to the basic ideas or principles of the Environmental Law (Rahmadi 2006: 129). However, no steps towards integration, harmonisation or even coordination were taken, so that most environmental decisions were only determined by sectoral regulation (Bedner, 2003: 4). One reason for this is that the structure/hierarchy of law and regulation in Indonesia does not recognise an umbrella act: a law which is used as a reference for other laws. Ergo, laws related to natural resources are not required to comply with environmental laws. Moreover, the Ministry of Environment was not very influential, having authority only over coordinating the activities of sectoral departments and other government agencies in environmental management, and publishing environmental quality standards and guidelines (Rahmadi, 2006: 130-131). On the other hand, based on sectoral laws and regulations, sectoral departments have environmental regulatory authority over their respective sectors (Rahmadi, 2006: 130-131). Unfortunately, although most of the sectoral departments had environmental bureaus, which should have served to encourage coherence with environmental policies and norms, they were predominantly weak (Otto, 2003: 17). As a result, many environmental regulations were difficult to implement, including AMDAL. Although Indonesian rules regarding AMDAL were consistent with international standards, AMDAL did not work as it was intended to work (Ballard, 2001: 14). There were numerous problems with its implementation; for example, many activities subject to an AMDAL procedure were carried out without AMDAL approval provided by the AMDAL Commission (Rahmadi, 2006: 131). In other cases, AMDAL was simply copied from previous submissions for other projects (Lindsey & Butt, 2018: 166; Indrarto *et. al*, 2012: 94).

4 The Environmental Impact Control Agency was called *Badan Pengendalian Dampak Lingkungan* or BAPEDAL. This agency was tasked with monitoring and controlling development activities that have a significant impact on the environment. BAPEDAL was formed based on Presidential Decree 23/1990 on the Environmental Impact Control Agency. Consequently, the government formed BAPEDAL in several regions, based on the Decree of the Head of BAPEDAL 136/1995 on the Organization and Work Procedure of the Regional Environmental Impact Control Agency. In 2002, in response to Presidential Decree 4/2002 on Amendment to Presidential Decree Number 108 of 2001 on Organizational Units And Duties of Echelon I Minister of State, BAPEDAL merged with the Ministry of Environment.

The implementation of AMDAL in the mining sector encountered specific problems. AMDAL for mining activities were often not detailed enough to cover the environmental impacts caused by mining (Marr, 1993; McMahon *et. al*., 2000; Ballard & Burke, 2006). Moreover, AMDAL was designed to address environmental impacts at the mining level only, omitting the impacts at landscape level, such as those related to the overall scale of mining activity in an area and the level of expansion (McMahon *et. al*., 2000: 21). Meanwhile, most AMDAL contained large amounts of irrelevant information and failed to focus on the main aspects of the affected environment in sufficient detail, so that the key and unique mining issues were not adequately addressed (McMahon *et. al.*,2000: 20). This problem was probably caused by the fact that most of the environmental consultants in Indonesia were not familiar with, or experienced in, the mining industry and its particular aspects (Wiriosudarmo, 2001: 36). Moreover, AMDAL approval was given by the Environmental Impact Management Committee, the members of which were only representatives of various stakeholders and therefore not always experts in fields related to AMDAL. Consequently, they were not sufficiently competent to gauge the seriousness of environmental problems caused by mining activities (Wiriosudarmo, 2001: 36). The time allotted to conducting AMDAL was also very short, because mining companies usually wanted to complete their AMDAL as soon as possible, so that they could start their construction phase. This meant that there was rarely enough time to collect and analyse data, or to communicate effectively with potentially affected communities (Wiriosudarmo, 2001: 37). Although AMDAL is supposed to be communicated to the community, mining companies often either did not present AMDAL to local residents at all, or they did so, but the meetings were conducted using technical language that was difficult for many to understand (Fünfgeld, 2016: 152). Worst of all, often the results of environmental impact assessments were not adequately taken into account in decisions to approve licensing applications (McMahon *et. al.,* 2000: 21).

Restricted areas for mining activities

The problems associated with issuing mining licences also related to where mining activities were being carried out. Initially, mining activity was permitted in almost all areas, because the government placed a high priority on mining activity as an important source of foreign currency and foreign investment (Otto, *et. al.,* 1999: 327; Wiriosudarmo, 2001: 8-9). Forestry was the sector most affected by mining, as most mining activities were being carried out in forest areas and the old Forestry Law 5/1967 did not prohibit mining in forest areas. As explained above, all sectors were expected to support economic growth, therefore the forestry law also supported the exploitation of natural resources in forest areas. Hence, there was no barrier to the government issuing mining licences for mining in forest areas.

In the 1990s several laws were adopted that limited the area of mining activity, such as Biodiversity Law 5/1990, Spatial Planning Law 24/1992, and Forestry Law 41/1999. After the new Forestry Law 41/1999 was passed, at the end of the New Order period, a lease-use forest area licence (*Izin Pinjam Pakai Kawasan Hutan* or IPPKH) was required for every mining activity in a forest area and open mining was prohibited in protected forests. However, the process of assigning a status to forest areas had its own problems. The status of forest area at that time was based on an agreed forest land use map (*Tata Guna Hutan Kesepakatan* or TGHK) originally drawn up in 1982, which classified approximately 141 million hectares of Indonesia's total land area of 187 million hectares (about 74% of the total) as forest land (Resosudarmo, *et. al*., 2014: 264). However, TGHK was mostly indicative and often did not reflect actual conditions on the ground, causing land use conflict (Resosudarmo, *et. al.*, 2014: 264). At the same time, the Department of Mining and Energy had its own map, which was different to that of the forestry sector. Conflict between the forestry sector and the mining sector in Indonesia became endemic (World Bank, 2001: vi). This was exacerbated by the lack of coordination within and between institutions, which in turn hampered the balance between environmental and development issues (World Bank, 2001: vii).

The determination of forest areas continued to be a problem, because more and more actors were developing an interest in forest areas. The passing of Spatial Planning Law 24/1992 also did not help to resolve the land conflict problem. At implementation level, the ministers in power, especially the forestry and mining ministers, refused to treat Law 24/1992 as a reference point (Moeliono, 2011: 93). If all sectors had to refer to Law 24/1992, then it would be necessary either to renegotiate the terms and conditions of existing production sharing agreements and contracts of work, or to cancel existing forest concessions, which would damage the existing public-private business networks. Therefore, the Suharto government also needed to maintain a sectoral approach to natural resource management (Moeliono, 2011: 94). Even the Minister of Forestry claimed that forest land was not subject to comprehensive government spatial planning, giving him the ultimate authority to determine which areas were under its exclusive jurisdiction and to include areas as forest land (Moeliono, 2011: 94-95). The issuance of Spatial Planning Law 24/1992 complicated matters even further, as it gave local governments the authority to make a regional spatial plan (*Rencana Tata Ruang Wilayah*, or RTRW) for their area. As the status of the forest had been determined in the TGHK, as explained above, there was a need for conformity between the TGHK and RTRW maps, and the process of making this happen was known as *Paduserasi*. Considering that this process determined power over land, the implementation of *Paduserasi* was obviously not easy, and in some provinces it dragged on for years, especially in the provinces of Riau and Central Kalimantan, which both had large forest areas (Resosudarmo, *et. al*., 2014: 264). This problem continued, especially

during the decentralisation period, when the regional government (in addition to having the authority to issue spatial planning) had the authority to grant land use licences for plantation and mining, meaning that they had even more interest in the forest.

The environmental impact of mining licence issuance policies and their implementation

During the New Order period Indonesia focussed on economic growth, as described above. As the country is blessed with abundant natural resources, various commodities have been extracted and exported, on a large scale, since the beginning of the New Order period (Gellert, 2010). Technocrats and bureaucrats formulated the necessary economic policies to attract foreign investment and support from the governments of Western countries and Japan (Crouch, 2010: 16). Therefore, Indonesia's mining policy strongly encouraged the exploitation of minerals and coal, especially with regard to the licensing process described above. The flexible approach to issuing licences and overall mining governance in the New Order period made Indonesia one of the largest producers of tin nickel and copper in the late 20th century (Devi & Prayogo, 2013: 9). The CoW scheme succeeded in attracting foreign investors to explore and develop mineral resources in Indonesia, and income from the mining sector has therefore improved since the early 1970s (Suryantoro & Manaf, 2002: 4). Indeed, Indonesia's economic growth was partly financed by the exploitation of extensive natural resources, found mainly in its outer islands (Crouch, 2010: 90). Therefore, throughout the 1980s and 1990s, Indonesia's New Order was respected as a model of successful national development based on prudent economic policy-making (Gellert, 2010: 37).

On the other hand, the mining industry was full of corruption and cronyism. State authority over various policies, including mining licences, was used as an important source of funding for the military and other state agencies, as well as for individual officials and their families (especially the president's family) via a patronage system (Hadiz & Robison, 2013: 47). Revenue from the mining sector – especially from foreign companies – flowed towards the centre, in accordance with government policies and mining contract provisions, whilst the welfare of local communities was neglected (World Bank, 2001: 62; Robinson, 2016: 145). Domestic critics began to frequently raise the issue of corruption which was carried out by President Suharto's regime in the 1990s, when the beneficiaries of patronage were usually Suharto's children (Gellert, 2010: 42).

Due to the corrupt implementation of pro-growth mining policy, the granting of mining rights was not based on environmental interests. The environmental damage caused by mining activity during the New Order period was enormous. Damage included extensive land disturbance, the

loss of forest cover and habitat, the contamination of rivers used for drinking water and food supplies, and increasing social conflict over access to mineral resources (World Bank, 2001). The environmental impacts were widely reported; for instance, the tailing dumped by Freeport's Grasberg mine into the Aikwa River, then into the Arafura Sea, south of New Guinea. The disposal of tailings caused changes to the forest ecosystem, a reversed river flow, and the presence of copper deposits along the river (Marr, 1993; Bachriadi, 1998). Freeport's mining operations threatened most species, as well as putting heavy environmental stress on Lorenz National Park, a World Heritage site that surrounds the area (Resosudarmo *et. al*, 2009, 42). Environmental problems due to tailing disposal also occurred in Minahasa, North Sulawesi. Newmont Minahasa Raya, established in 1986, was widely reported to have dumped tailings into the bottom of Buyat Bay, causing pollution there.

Mining has also contributed significantly to forest degradation and deforestation. Tailings and waste rock are disposed of off-site, including in forest areas (Wiriosudarmo, 2001: 33). Moreover, most mining requires forest conversion. Mining for coal and other minerals mostly uses open-pit mining techniques, which create significant environmental damage because the felling of trees, animals, and soil from a large coverage area disrupts the ecosystem and, after mining is complete, the land is often left neglected (Resosudarmo *et. al*, 2009: 42). On the other hand, mine reclamation is usually only carried out over a small area and is not taken seriously; for example, by only planting non-native botanical species (Resosudarmo *et. al*, 2009, 42).

To summarise, the New Order focussed on economic growth and one method for achieving this was mining industry development, meaning that environmental protection policies were not a priority. The policy of issuing mining licences and mining contracts was intended to attract investors, rather than to prevent the adverse effects of mining. Environmental problems due to mining, which were becoming increasingly real and widespread, were not responded to by the mining legal framework. Mining policies in laws and regulations did not change much during this period. Even though several regulations were issued regarding environmental protection for mining activities, this was more in service of following the global trend at the time, in which the environment was starting to be considered, and less in service of solving mining-related environmental problems. Further, the environmental laws and implementing regulations that were subsequently issued could not regulate mining licensing or contract processes for mining, because these fell under the authority of the mining sector. Hence, environmental problems were getting worse and the legal framework was not working towards solving them.

2.5 The reform period (1999-2008)

The economic crisis in 1997 created social, economic and political turbulence in Indonesia. This was exacerbated by increasing environmental damage in the mid-1990s, when forest fires of unprecedented magnitude and geographic scope caused the loss of high forest cover on two natural resource-rich islands, Kalimantan and Sumatra (World Bank, 2001: i). This crisis forced President Suharto to resign and hand over to the vice president, Bacharuddin Jusuf Habibie. Furthermore, in order to restore the economy, the Indonesian government was forced to agree to the demands of the International Monetary Fund (IMF) and other global organisations for broad reforms of many aspects of state administration (Hadiz & Robison, 2013: 35). The fall of Suharto was expected to open the door to a dramatically different kind of politics, in which individuals and social organisations could demand responsible governance and the rule of law (Hadiz & Robison, 2013: 35). This situation also prompted many demands to change the pattern of natural resources governance. This was because such governance was considered to be exploitative, as it mainly benefitted people who were close to central government.

During the economic crisis, the relationship between central and regional government was also disrupted. Regional elites no longer received economic benefit from the centre, because central domination was no longer a source of profit for regional elites, but instead an unnecessary burden (Crouch, 2010: 90). Therefore, regional elites tended to favour their own areas earning a living, especially in areas rich in natural resources (Crouch, 2010: 90). Furthermore, people's hatred for what was seen as central domination and unfair treatment was also widespread (Crouch, 2010: 90). Indeed, for a while before Suharto stepped down, many provinces had been complaining of excessive control by the economic, military, and central bureaucracies, and that Indonesia's natural resources, mostly located in the outermost regions, were being almost entirely channelled to the centre (Butt, 2010: 1-2). Moreover, the regions were dissatisfied about their local natural resources being appropriated by central government, along with encountering stifling bureaucratic control, military-led surveillance, and human rights violations (Butt & Parsons, 2012: 92).

President Habibie initiated several policies, such as freedom of the press, freedom to form political parties, and free elections. He also granted a referendum in East Timor, as well as bringing in administrative decentralisation (Schulte Nordholt & Klinken, 2007: 12). Decentralisation promised local democracy, because with the removal of the New Order's authoritarian political control, regional 'civil society' and a free press would emerge to monitor regional government performance and ensure transparency, openness to criticism, and sensitivity to local needs, as well as holding politicians accountable to voters (Crouch, 2010: 110). In addition, regional government

would be closer to the community and more responsive to its needs and expectations, so that service delivery in the region would improve (Crouch, 2010: 110; Buehler, 2010: 269).

Within one year, the decentralisation programme was built and Regional Government Law 22/1999 was enacted. This law was made in a hurry by a group of bureaucrats, without any feedback from the regions (Schulte Nordholt & Klinken, 2007: 12). One of the main reasons why the government wanted to accelerate the process was to accommodate anti-Jakarta sentiment in many areas outside of Java (Schulte Nordholt & Klinken, 2007: 12). Meanwhile, a lack of public attention was being given to the process of making the autonomy law, due to other pressing political activities at the time, including student demonstrations demanding Suharto's trial, commotion in the military, and massive financial scandals (Crouch, 2010: 95).

Regional Government Law 22/1999 gave regional governments the authority to manage natural resources in their own territories. The determination in the law of authority over natural resource management being based on area gave the district government wider authority to issue mining licences than the provincial and central governments, because most natural resources were located in district areas. This was reinforced by Government Regulation 25/2000 on the Authority of Central Government and the Authority of Provinces as Autonomous Regions, which stated that provincial government authority to grant mining licences was only for mining activities located in cross-regency/municipal areas (Article 3). Meanwhile, central government's authority was over the establishment of guidelines to control natural resources and preserve environmental functions (Article 2).

The law regulated the distribution of authority at all levels of government (central, provincial, district/municipality), but it did not provide clear rules regarding the process of transferring power and the relationship between central and regional government. Decentralisation did not amount to a simple transfer of power, because the legal changes omitted any definition and regulation of the respective legal and administrative roles, and areas of responsibility, at various levels of government (McCarthy, 2004: 1208). As the law was adopted hastily and the government failed to issue important implementing regulations, the speed of the transformation caused a lot of disturbance and confusion, as well as a lot of conflict over which level of government had authority over which areas (Crouch, 2010:116). At the same time, district governments were rapidly using their new powers to increase regional revenues (Crouch, 2010: 116). Actors at every level sought to support their interests by advancing their own interpretations of decentralisation policies (McCarthy, 2004: 1200). Regional governments considered that they had full power over natural resources, without being controlled by central government (Indrarto *et. al.*, 2012; Devi & Prayogo, 2013; Abdullah, 2017a). This ambiguity allowed state actors in the regions to have greater

discretion when it came to allocating access rights, enabling them to use various laws to assert the legitimacy of their positions (McCarthy, 2004: 1208). Decentralisation allowed such actors to have freedom over natural resources, including through the granting of licences.

Utilisation of natural resources by regional governments was primarily designed to pursue regional own-source revenue (*Pendapatan Asli Daerah*, or PAD). Broadly speaking, regional revenue consisted of central government transfers, PAD, and other forms of legitimate income. Transfers from the centre to the regions were in the form of funds sourced from the State Revenue and Expenditure Budget (*Anggaran Pendapatan dan Belanja Negara*, or APBN) and allocated to the region in the context of implementing decentralisation. Meanwhile, PAD created greater incentives, because it went directly to the regional government treasury, to be used as it saw fit. The issuance of licences was an important way to increase PAD (Resosudarmo *et. al.,* 2014: 268). Therefore, district elites extracted resources and expanded their businesses under the umbrella of district legality by issuing regional regulations (McCarthy, 2004:1216), including creating rules regarding licensing. As regional regulations were intended to get PAD, it was therefore not surprising that many regional regulations were misguided or unclear, violating the rights of citizens, imposing excessive taxes, and even violating Indonesia's international obligations (Butt, 2010: 10-11).

Another problem was the capacity of regional governments. At the time, little was known about the capacity of regional forestry and mining services in the various districts and provinces. Clearly, until the end of the Suharto period these agencies did not have the authority or funds to exercise regional control (World Bank, 2001: 91). However, there were no rules regarding the transition of authority from central to regional government, and transition time was not sufficient for adaptation to the new authority. The proposed two-year transition and implementation period was even shortened to six months, which was too short a time for anything to be done properly (Schulte Nordholt & Klinken, 2007: 13). With little time and no guidelines, it was difficult for regional governments to be ready to manage natural resources. Given the district governments' relative lack of technical and managerial capacity (even in Java), it was unlikely that the district governments outside Java had the requisite resources, such as trained officials, university faculties, accredited laboratories, and political leaders of adequate status (World Bank, 2001: 91).

In some cases, implementation of decentralisation progressed in the opposite direction to that expected, resulting in increased exploitation of natural resources (de Jong *et. al.,* 2017). Exploitation of natural resources was certainly not carried out merely for the welfare of the community. Decentralisation did not produce democracy, good governance and strong civil society at the regional level (Jong *et. al*., 2017: 335). Under certain conditions,

decentralisation was even followed by forms of authoritarian rule (Schulte Nordholt & Klinken, 2007: 1). The New Order still inherited an authoritarian government model during its implementation of decentralisation, but it operated at a different level, so the situation remained far from the goal of good governance (McCarthy, 2004: 1200). The decentralisation of corruption, collusion, and political violence that used to belong to the centralised New Order regime were remoulded into a patrimonial pattern that existed at regional level during the decentralisation period (Schulte Nordholt & Klinken, 2007: 18). Decentralisation had certainly benefited the regional elite (McCarthy, 2004: 1200). In contrast to the centralist clientelism of the past, Indonesia was now characterised by decentralised clientelism (Aspinall, 2013: 36). Therefore, with great authority over natural resources, but without sufficient capacity and integrity, regional governments exploited natural resources by issuing many licences whilst giving very little attention to environmental protection (McCarthy, 2004; Barr., *et. al.*, 2006; Schulte Nordholt & Klinken, 2007; Lindsey & Butt, 2018). In this context, licensing did not function to prevent negative impacts from mining activities; instead, it functioned as a legal tool to exploit mines.

Mining licence issuance problems related to the environment at the beginning of the reform period

As discussed in the previous sections, throughout Indonesia's history its mining policy was mostly intended to satisfy economic interests, so that mining licence issuance policies tended to maximise mining exploitation. Although environmental policies regarding mining were developed, they did not solve any of the environment problems related to mining. The subsections below concern four mining licence issuance problems related to the environment which were notable during the early reform period. The problems were inherited from previous periods, and were exacerbated during the decentralisation period.

1) *The rampant issuance of mining licences by regional governments, which are not in accordance with legal procedures and which ignore the environment*

As explained above, after the issuance of Regional Government Law 22/1999 each sector had to adapt its policies by devolving certain powers to regional governments. The Department of Mining and Mineral Resources adjusted its regulations, in line with the decentralisation policy. This included Government Regulation 75/2001 on the Second Amendment to Government Regulation 32/1969 on the Implementation of Mining Law 11/1967. Based on Government Regulation 75/2001, the authority to issue mining licences henceforth depended on the location of the mining activity (Article 1). This meant that, in almost all cases, the district government for where the mining was located had the authority to issue mining licences for

all types of mining, except for mining operations crossing district borders, for which the province had authority.

The government regulation then became the basis for regional government issuing thousands of mining licences. District governments were quick to jump on the mining bandwagon, seeing mining licences as an easy way to make revenue (Robinson, 2016: 147). There was euphoria about taking advantage of the rich mineral resources in the regions. Several studies detail the increase in mining licence issuance, with around 600 mining licences issued before decentralisation, and around 10,000 licences issued in 2010 (Indrarto, *et. al*., 2012: 31; Hayati, *et. al*., 2013: 36; Resosudarmo *et. al*., 2012: 10; Devi & Prayogo, 2013: 42; Purnamasari *et. al*., 2017: 24; Abdullah, 2017a: 3). Many mining licences were granted without adequate studies being undertaken, and without compliance with laws and regulations being reviewed (Abdullah, 2017a: 1). Licences were even being issued without an AMDAL (Hayati, 2013: 36).

Whilst district governments had a desire to obtain financial benefit from issuing licences, they did not in fact have the capacity to do so properly. They were not ready to deal with the complex and highly technical issues and legal requirements of mining management, including processing licence applications (Gandataruna & Haymon, 2011: 224; Devi & Prayogo, 2013: 43; Venugopal, 2014: 11). District governments also did not have clear data on the condition of their natural resources, as they lacked adequate mining databases, especially those pertaining to the area and mapping coordinates (Venugopal, 2014: 10). The delegation of mining management authority to regional governments was not accompanied by the infrastructure required for mining management, such as a regional administration system and a body of mining inspectors (Bambang Gatot Hariyono in Hayati, 2015: xii). This meant that district governments issued licences without adequate knowledge, data, and instruments. Furthermore, given the district's limited technical capacity and resources, and the possible absence of environmental constituencies, they paid little or no attention to the environmental and social impacts of mining operations (World Bank, 2001: 98).

Regional governments issued mining licences without regard to central government regulations and procedures, which they were still supposed to take into account (Resosudarmo, 2014: 276). Mining licences were granted to unqualified investors who lacked technological, technical and financial competence, and this further accelerated environmental damage (Gandataruna & Haymon, 2011: 226). Overlapping, where mining licences overlapped with licences issued by other sectors, was a classic phenomenon, but mining licences even overlapped with other mining licences and some were granted for sites located in conservation areas (Indrarto, *et.al.*, 2012: 31; Kartikasari *et.al.*, 2012: 3; Devi & Prayogo, 2013: 42-43; Resosudarmo, 2014:

276; Abdullah, 2017b: 14). This became a key cause of increased deforestation (Resosudarmo *et al.*, 2009: 8).

Regional mining licensing problems occurred in the absence of central government control. Since decentralisation began, there had been miscommunication and miscoordination between the central and regional governments, resulting in inconsistencies between central government mining policies and those of regional governments (Venugopal, 2014: 9; Fünfgeld, 2016: 150). Although the Department of Mining and Mineral Resources had the authority to oversee mining, its weak vertical relationship with regional governments led it to regularly ignore the mining licences they issued (Resosudarmo, 2014: 277). Furthermore, the weak coordination of data between the central government and regional governments made it difficult for central government to supervise licensing in the regions (Venugopal, 2014: 10)

2) *Complex and non-transparent licensing procedures for mining have an impact on the environment*

Several studies have shown that licences related to natural resources in Indonesia are complex. For example: several different licences obtained from different government agencies are required for one activity, and the procedures for these are governed by different regulations; licensing takes a long time; and, the cost of the process is uncertain (e.g. Kartikasari *et. al.*, 2012; Kartodihardjo *et. al.*, 2015). Government officials wishing to issue licences for illegal purposes will find it easier to avoid the licensing hassle. Illegal practices in issuing licences are even more difficult to detect, if the procedures are not transparent, and the complex and non-transparent mechanisms for issuing mining licences make it easier to deviate from regulations related to the environment.

As explained above, based on Mining Law 11/67, an individual or company must apply for KP or enter into CoW with the Indonesian government, in order to carry out mining activities. Furthermore, Environmental Law 23/1997 and Government Regulation 27/1999 stipulated that, prior to obtaining a business licence, it was necessary to have an AMDAL that had been approved by the AMDAL Commission in the district where the mining activity was going to be carried out. In addition, if a mining activity was carried out in forest areas, an a lease-use forest area licence (*Izin Pinjam Pakai Kawasan Hutan* or IPPKH) was required, in accordance with Forestry Law 41/1999. The entire procedure prior to mining was governed by different laws and regulations, and by different agencies. The procedure that must be followed to carry out mining activities was therefore not a simple process. Whilst different from a mining licence, a mining contract had its own procedure that was not tied to the complexities of Indonesian law.

During the reform period, when the authority for mining licence issuance was delegated to regional government, licensing procedures became even more complex. Power over natural resources was used by regional governments to generate regional revenue, by issuing various burdensome licence issuance regulations, including an uncertain timeframe for the licensing process, and the imposition of illegal taxes and levies (O'Callaghan, 2010: 222; Kartohadiprodjo *et. al.*, 2015: 185; Purnamasari *et. al.*, 2017: 24). Regulatory problems in the area added to the confusion and legal uncertainty over mining licensing (Resosudarmo *et. al.*, 2009: 36). Furthermore, some officials increased their income from licensing and took advantage of the complex systems (Lindsey & Butt, 2018: 162). Public services had always had a reputation for being corrupt, and this had worsened since decentralisation began (O'Callaghan, 2010: 222).

The situation was exacerbated by non-transparent and minimal public participation in decision-making for the licensing process, which hindered monitoring by the community (Indrarto, *et. al*., 2012:23-26; Venugopal, 2014: 8), making it easier for corrupt practices to occur. Many of the irregularities in licence granting were associated with the election process for regional leaders (*Pemilihan kepala daerah or* Pilkada). Companies provided campaign funds to prospective regional leaders, with certain reward expectations when the candidate won the election (Aspinall, 2013: 38; Indrarto *et. al*, 2012: 10; Devi & Prayogo, 2013: 44; Abdullah, 2017a: 1; Robinson, 2016: 147). Transparency in the licence issuing process could reduce corrupt practices, because everyone had the opportunity to monitor the process. However, throughout the history of Indonesian mining management there had never been any rules regarding transparency, and this weakness was maintained during the decentralisation period.

3) Lack of environmental safeguards for the issuance of mining licences

The issuance of licences should aim to prevent activities that can be harmful, including endangering the environment. However, as explained in the previous section, laws, regulations and policies that have historically been applied in Indonesia were not sufficient to filter out mining that damaged the environment.

The previous section shows that, although regulations governing mine reclamation and post-mining had existed since the New Order period, companies were not required to fulfil all the obligations in the regulations before a licence could be issued. This meant that there was no compulsion for companies to carry out their obligations, because there was no risk of not getting a licence. Hence, in practice, Mine Closure and Reclamation plans were hardly ever prepared and approved before the commencement of production (IMI, 2018: 48). Even at the time, many mining companies did

not carry out their obligations regarding mine reclamation and post-mining (Abdullah, 2017a: 12; Abdullah, 2017b: 33).

As discussed in the previous section, the implementation of AMDAL during the New Order period was problematic, making it a difficult tool to use to prevent environmental damage. However, in the reform period transferring the authority to assess AMDAL to district/city governments, as a consequence of the decentralisation policy, was also difficult. Before the decentralisation policy, AMDAL was assessed by the AMDAL Central Commission and either approved by the Head of the Environmental Impact Control Agency, or assessed by the regional AMDAL Commission and approved by the governor. However, under Regional Government Law 22/1999 one of the matters which had to be carried out by the regional government was environmental management (Article 11). This meant that the district government had authority to conduct an AMDAL assessment and decision. Based on Government Regulation 25/2000, the provincial government only had the authority to assess AMDAL when the location of activities covered more than one regency/city. The central government only had authority to assess AMDAL when the location of the activities covered more than one province, were in one area, shared a sea area with other countries within less than twelve miles, or were located adjacent to a state border.

The transfer of authority for AMDAL assessments from the provincial to district/city levels was not without its problems. Research conducted by Bedner, regarding the consequences of decentralisation for AMDAL, shows that at first this transfer of authority caused problems because there was no legal rule regarding AMDAL assessment committees at the district level, so that in practice the province continued evaluating AMDAL to fill that gap (Bedner, 2010: 45). In addition, the decentralisation of AMDAL assessments to district level allowed districts to adjust the rules for the size and scope of projects requiring AMDAL, resulting in fewer projects than before being subject to AMDAL procedures (Bedner, 2010: 45). There was also a huge capacity problem for regional governments.

The quality of AMDAL implementation during the decentralisation period, including for mining activities, did not appear to be better than during the previous period. With regard to the issuance of mining licences, the possibility of implementing AMDAL in the district was even lower than before. This was due to the likelihood that regional governments were not prepared to provide a sound AMDAL assessment system, coupled with regional governments' strong desire to issue mining licences. Therefore AMDAL, as one of the tools which could be used by the government to filter mining activities that did not damage the environment, was entirely neglected at regional government level.

4) Issuance of mining licences in environmentally vulnerable areas

As described in the previous section, mining in conservation and protected areas had been a problem before the reform period. During the New Order period there were several reasons why mining was always prioritised whilst the attention given to the environment was very slight. Regional governments were relatively powerless and they let mining companies manage their own affairs, so that the companies were involved in their own spatial planning, sometimes even encroaching on territories outside their concessions (Robinson, 2015, 145). This situation did not improve much after the beginning of the reform period, partly because several laws and regulations related to land protection issued during the New Order period remained in place, i.e. Biodiversity Law 5/1990, Spatial Planning Law 24/1992, and Forestry Law 41/1999.

Government policy during the reform period also did not show willingness to protect vulnerable areas from mining activities. Forestry Law 41/1999, which was issued at the end of the New Order period (as described in previous sections), prohibits open-pit mining activities in 'protected forests'. Conservation advocates appreciated the efforts of the Ministry of Forestry to maintain the function of protected and conservation forests, amid strong pressure from the mining sector. However, the new policy was seen as a major setback in the government's efforts to lure investors to the mining sector (Resosudarmo *et. al*., 2009: 35). Tough lobbying by the mining sector resulted in the issuance of Government Regulation in Lieu of Law (*Perpu*) 1/2004 on Amendments to Law Number 41/1999 on Forestry, which was later officially confirmed as Law 19/2004 on Stipulation of Government Regulation in Lieu of Law Number 1/2004 on Amendment to Law Number 41/1999 on Forestry to Become Law (Resosudarmo *et. al.,* 2009: 35). The regulation allowed 13 mining companies that had obtained contracts on protected or conservation areas prior to the enactment of the forestry law to continue their activities.

The implementation of the forestry law also failed to maintain the protection and conservation of forests. Even though Article 38 of Forestry Law 41/1999 requires IPPKH ownership for mining activities in forest areas, many licences were issued in forest areas without IPPKH. Whilst IPPKH can be used to assess mining activities that will be carried out in forest areas, it can also serve to prevent mining activities in conservation and protected forest. On the other hand, some mining activities were carried out in conservation or protected areas, which was actually prohibited by Forestry Law 41/1999 (Abdullah, 2017a: 1).

In fact, obtaining IPPKH was difficult and time consuming (IMI, 2018: 33). There were general issues connected with obtaining licences in the forestry sector (including IPPKH), such as: a broad discretion to issue licences; a

non-transparent licence issuance implementation mechanism; an unclear time limit for licences to be granted; space being made for the agent (applicant) to influence the decision-making process; and, a lack of public accountability making corruption even more systemic (Kartodihardjo *et. al*, 2015). The difficulty in obtaining IPPKH could result in mining companies being reluctant to apply for a licence to carry out their activities in forest areas.

Mining in forest areas was also connected to determining the status of forest areas. The Ministry of Forestry was responsible for determining forest areas, consisting of protected areas, conservation areas, and production areas, before deciding whether various activities would be allowed in those areas. However, the process of determining forest areas also encountered various problems. As explained in the previous section, forest area used to be determined based on TGHK, but after regional governments gained the authority to issue RTRW based on Spatial Planning Law 24/1992, there had to be harmonisation between TGHK and RTRW, which was achieved via a process called *Paduserasi*. After the decentralisation policy had been implemented, regional governments had more interest in determining land use via RTRW. This was because regional governments now had the authority to issue land-based licences, e.g. for plantation and mining. Therefore, the wider the forest area, the more limited the area of land for which these licences could be granted. The conflict of interest between regional governments and the forestry sector caused difficulties in harmonising the TGHK and RTRW. For example, Central Kalimantan Province issued a regional regulation on RTRW in 2003, which reduced the designated forest area to 10.3 million hectares and increased the non-forest land area to 5.1 million hectares (Resosudarmo, *et. al*., 2014: 265-266). The Central Kalimantan government then issued agricultural and mining licences based on their 2003 RTRW, which caused an overlap with forest areas based on TGHK as stipulated by the Ministry of Forestry (Resosudarmo, *et. al*., 2014: 266)

Land use overlaps caused by differences in the TGHK and RTRW maps were also exacerbated by conflicts between sectors whose activities were land-based. This is because each sector had a land management plan of their own. The Ministry of Forestry, the Ministry of Home Affairs, the Ministry of Energy and Mineral Resources, and the National Land Agency (*Badan Pertanahan Nasional*, or BPN) all made their own maps (Resosudarmo *et. al.*, 2014: 267). At the time there was no comprehensive spatial map applicable to all sectors, and each sector referred to different regulations and maps. Meanwhile, coordination, which had not been going well since the previous period, was getting worse with the presence of a new actor: the regional government, which was also in charge of land management. The absence of integrated data and coordination of land planning between sectors resulted in the unclear definition of areas categorised as environmentally vulnerable to mining.

2.6 Conclusion

This chapter discussed how laws, regulations, and policies related to mining licence issuance and environmental problems have influenced each other throughout Indonesia's history, from the colonial period to the beginning of the reform period. It also discussed how the legal framework for mining licence issuance and its implementation have contributed to environmental problems, and how the subsequent legal framework has responded to these problems, as well as the factors which have influenced the conditions.

During the colonial period, mining policy issued through the IMW, which was the first mining law in the Dutch East Indies, aimed to use mining materials to increasingly benefit the economy. Therefore, all mining management rules, including the mechanism for granting mining rights through concessions, were based on the economic interests of the Dutch government. Likewise, when the form of mining contracts was later regulated by the IMW amendment, this was based on the Dutch government's (economic) consideration that foreign resources were needed for mining utilisation, whilst ensuring that the government would benefit from an agreement with a company. Therefore, even though environmental impact from mining activities had already occurred, environmental interests were still not really being considered in mining policy at that time. Moreover, there were no environmentally-focussed laws or regulations which regulated mining, and the global situation had not yet led to concern for the environment in every aspect of life. This lack of concern for the environment did not change during the post-independence period. The only important change at the time was the nationalistic approach of policy, which limited the involvement of foreign investors in every sector, including mining. Nevertheless, mining activities continued and the resulting environmental impacts remained neglected.

Environmental problems were certainly not the main concern of the next period: the New Order period. The New Order government aimed to restore the economy, which had become stagnant during the Old Order period. Rich natural resources, including those derived from mining, were used as the main capital for development. Policies to facilitate the exploitation of mining materials were issued, especially licensing policy using the Mining Contract of Work and Mining Authorization scheme. In the process of issuing licences and contractual agreements, prior to the commencement of mining activities, Mining Law 11/1967 and its implementing regulations, and the format of the mining contract of work, did not regulate the environment, let alone ensure commitment to protection of life.

From the 1970s, when environmental concerns began to be considered at global level, Indonesian laws and regulations began regulating environmental issues, and some such regulations related to mining. Even so, envi-

ronmental regulation in the mining sector at the time was very limited, and it did not strictly regulate mining. Environmental laws and regulations were also not strict enough to regulate mining activities, and the environmental sector was notably inferior to the mining sector. Meanwhile, other laws and regulations related to natural resources were not effective in limiting mining areas. Land use sectors did not coordinate with each other, and the sectors had their own problems in managing their own territory; for example, the forestry sector still encountered problems with determining forest areas. Meanwhile, due to the flexible issuance of mining licences and contracts without an adequate environmental policy, the environmental damage during the New Order period was worsening. The problems were not responded to by issuing laws and regulations that would be more protective of the environment; instead, they were simply ignored. Meanwhile natural resources were increasingly being exploited, because they were becoming even more profitable for the authorities and other parties associated with them. The use of natural resources was no longer merely a source of national economic growth, but also a way fill coffers, so that policies related to the public interest, including the environment, were viewed as obstructive to personal interests.

The reform period, which was expected to produce a more democratic government in which natural resources would be allocated to benefit the people, not just the few at the centre, was in fact no better than the previous period. During the reform period, mining licence issuance problems related to the environment were even worse, because the abuse of power that used to be carried out by the centre was now being carried out by the regions. Regional governments had the authority to issue mining licences and to manage the environment. The attraction of obtaining regional revenue and other benefits meant that the interest of regional governments in issuing mining licences as often as possible was greater than their wish to protect the environment. This was exacerbated by the fact that regional governments did not have the capacity to manage natural resources, including by issuing mining licences, which in turn made the issuance of mining licences rampant, but without sufficient knowledge and attention being given to the environment.

In summary, all the political periods had similar regulatory frameworks: rules regarding procedures for obtaining mining rights were lenient, and rules regarding environmental protection were weak. This was because mining licences were intended as a method for developing both the mining industry and the interests of several powerful parties, and were therefore only used as a legal tool to exploit mines. Therefore, even though from time to time this licensing policy caused environmental problems, subsequent laws and regulations did not respond to those problems. As a result, the problems were never resolved by laws, regulations and policies. The fol-

lowing chapters explain whether the same pattern applies in the following period, up until the issuance of Mining Law 3/2020.

The previous section ends with a discussion of the environmental problems related to mining licence issuance during the reform period. The problems had actually existed since previous periods and had exacerbated since the decentralisation policy was implemented. The key problems were: the rampant issuance of mining licences by regional governments, which were not in accordance with legal procedures and which ignored the environment; complex and non-transparent licence issuance procedures; the lack of environmental safeguards when issuing mining licences; and the issuance of mining licences in environmentally vulnerable areas. Chapters III and IV discuss the extent to which these problems were addressed by Mining Law 4/2009.

III Assessing the quality of the mining licence issuance framework in response to mining licence issuance problems related to the environment: Mining Law 4/2009, and other relevant laws and regulations

3.1 Introduction

As explained in Chapter I, this thesis analyses mining-related laws and regulations, in order to understand how Indonesia responds to environmental problems regarding mining license issuance. This chapter discusses the quality of laws and regulations regarding the issuance of mining licences and concerning environmental protection after the start of *Reformasi* (or, the reform period). As discussed in Chapter II, the various laws and regulations on mining licensing that have been issued in Indonesia since the colonial period have had a major impact on the development of the mining industry, as well as on the environment. However, throughout this history, the mining licence issuance problems related to the environment have hardly been considered and addressed by subsequent laws and regulations. At the beginning of the reform period, such problems became more complex, after the implementation of a decentralisation policy in which the regional government obtained authority to issue mining licences.

This chapter will look into the quality of Mining Law 4/2009, and other laws and regulations related to the issuance of mining licences and the environment. The study will explore the extent to which the Indonesian legal framework has addressed the environmental problems regarding mining licence issuance, which have occurred from the start of the reform period up until the issuance of Mining Law 3/2020. For this purpose, the chapter identifies the quality of law and regulation criteria that are relevant to the ability of law to solve problems, then uses them as a benchmark to look at the legal framework concerned.

This chapter consists of four sections. The next section (Section 2) discusses the quality of criteria for laws and regulations that are relevant to assessing the legal framework. Section 3 is an analysis of the rules for issuing mining licences in relation to the environment. This section is divided into four sub-sections, corresponding to the four problems that were presented in Chapter II: 1) rampant issuance of mining licences by regional governments, which were not in accordance with legal procedures, and which ignored the environment; 2) complex and non-transparent mining licensing procedures; 3) a lack of environmental safeguards when issuing mining licences; and 4) issuance of mining licences in environmentally vulnerable areas. Section 4 concludes the extent to which the legal framework meets the criteria set out in this chapter and potentially solves the environmental problems regarding mining licence issuance.

3.2 The quality of laws and regulations

As explained in Chapter I, the quality of laws and regulations is difficult to define. This section discusses both formal and substantive criteria for law-making, as proposed by several scholars (for example, Mader, 2001; Karpen 2013; and Mousmouti, 2012). The formal criteria are related to the quality of legislative drafting (Mader, 2001: 120), textual quality (Karpen, 2013: 151), or technical quality (Voermans *et.al.*, 2000: 6). Fluckiger uses the term 'formal quality' for drafting-related criteria, which include clarity, simplicity, consistency, concision, and precision (Fluckiger, 2010: 215). Other scholars also provide formal criteria as basic principles that may make legislation better, including clarity, accuracy, and unambiguity (Vanterpool, 2007: 171; Xanthaki, 2011: 80). The formal criteria are in line with the legal theory presented by Fuller, who argues that formal legality means that a law meets certain criteria, being: clear, consistent, known to every citizen, general, and non-retroactive (Fuller, 1976: 41)[1].

The substantive quality of law is related to the content of the law, and it is widely accepted as a key element of legal quality. Most scholars relate the quality of the contents of laws to social reality, such as Mader, who argues that the substantive quality of law is associated with its impact on social reality (Mader, 2001: 121). This relationship is also mentioned by Fluckiger, who considers it part of 'factual criteria' (Fluckiger, 2010: 213-214). Mousmouti also argues that an important element of quality of law is effectiveness, i.e. how the effectiveness of the quality of law is expressed in terms of its real life results (Mousmouti, 2012: 205). Rooij focusses on the 'implementability quality', which assesses whether or not legislation has a positive effect on compliance and enforcement (Rooij, 2006). Seidman and Seidman also issue guidelines to help the substance of a law change human behaviour, based on the understanding that the law must achieve the desired social change (Seidman *et. al.*, 2001)

The formal quality of law and the substantive quality of law cannot be separated, as they are complementary. Furthermore, the substantive quality of law cannot exist without the formal quality of law. For example, although a law might be made based on comprehensive research into changing a certain problematic behaviour, it will not achieve quality of law if certain criteria for the formal quality of law (such as clarity) are not met. The law will be difficult to implement, because its norms are unclear or ambiguous and therefore its intended subjects may not understand them. Likewise, if a law has met the formal quality of law, it will not achieve its goal if the substance of the law is (for example) not in accordance with social reality.

1 Bedner also states that, in the context of formal legality, the law must be clear and certain in its content, accessible and predictable for the subject, and general in its application, so that citizens can predict how the state will respond to their behaviour (Bedner, 2010: 60).

To examine the extent to which norms in the Indonesian regulatory framework can potentially solve problems, this chapter defines and uses several criteria, including the formal quality of law criteria – namely, clarity and coherence – and the substantive quality of law criteria – namely, adequacy, feasibility, and conformity with environmental principles and standards relevant to mining licence issuance. The criteria used in this chapter are interrelated and complementary. So the conclusion, regarding the extent to which the regulatory framework can potentially solve the problems explored in this chapter, is measured based on the fulfillment of *all* the criteria. More information about each of these criteria is given below, including why each criterion is relevant to assessing the quality of the legal framework for regulating the issuance of mining licences in relation to the environment.

Clarity

Clarity means the quality of being easy to understand. A simple understanding of clarity in terms of the quality of law is a set of unambiguous and understandable legal norms. A clear law makes people confident in their understanding of norms and is related to certainty (Re, 2019: 1509). One of the requirements generated by the principle of legal certainty is that a law can be read and understood by its recipients (Voermans, 2009: 66). In general, the legal system must provide clear norms in order to guarantee certainty, so that citizens can understand legal directions (Bertea, 2008: 29). After the law is understood by the public, and implemented by public officials uniformly and repeatedly, legal certainty is formed (Bertea, 2008: 30). People know what behaviour the legislation expects of them, and the consequences for not meeting those expectations. Clarity also protects people from the arbitrariness of authorities or other 'powers'. Certainty gives maximum legal predictability, so it is closely related to legality and the rule of law doctrine (Fuller, 1976; Bedner, 2010). Therefore, clarity is a standard criterion of most studies on legislative quality, and it is used as a standard for law-making (for example, Vanterpool, 2007: 187-188; Flückiger, 2008: 12). Thus, I refer to clarity in this thesis because it is a basic standard that must be met by law. Furthermore, to be able to resolve problems, the law must be implemented in accordance with the intent of the law-maker, whose purpose must be stated clearly in the norms.

How can one measure whether or not a law meets the clarity criterion? it is difficult to measure clarity in general, and even harder to provide quantitative measurements for it (Fuller, 1976: 43). Even the notion of clarity itself is considered by some scholars to be unclear and debatable (Kurzon, 1985: 269; Vanterpool, 2007: 167: Re, 2019: 1507). In general, clarity requires that a piece of legislation must be readable (for example, Kurzon, 1985: 269; Flückiger, 2008: 15). Text that is easy to read generally uses simple and concise sentences, without expressions that are too specialised (Flückiger, 2008:

15). Simplicity also means not using long sentences, because even if long sentences are accurate and grammatically correct, the short-term memory of many readers will not allow the correct understanding of very broad material (Vanterpool, 2007: 188). To ensure that legislation is easy to understand, the use of plain language is widely recommended, both by scholars and in guidelines for making legislation (Vanterpool, 2007: 188; Xanthaki, 2008: 17; Majambere 2011:418; Gashabizi, 2013: 419-420). Plain language is simple language which avoids the use of complicated and technical terms, for the sake of understanding by the intended audience (Vanterpool, 2007: 191). This can be done simply by using everyday language (Vanterpool, 2007: 191; Gashabizi, 2013: 420). However, simple language cannot always be used, as certain cases require a longer, more technical, or more complicated explanation (Flückiger, 2008: 23). In this case, simple language can actually create confusion. Therefore, if simplicity conflicts with clarity, then clarity prevails (Xanthaki, 2008: 18). The idea is to adapt the complexity of the situation being regulated and not use complex legal jargon just for the sake of it, but only when necessary. Another clarity criterion that is also widely discussed is precision. Written legislation must avoid ambiguity and ensure that each rule is accurately stated (Vanterpool, 2007: 195). Ambiguity can create different interpretations of a text. Seidman *et. al*., state that precise legislation is important, so that meanings cannot be twisted (Seidman *et. al,* 2001: 261). However, sometimes texts cannot be explained by using light and simple language; to achieve precise norms, some texts require ponderous, complicated language (Flückiger, 2008: 23). In other cases, precision may be absent in order to cover political disagreement; for example, when a problem cannot be resolved by law-makers, so that resolution is delegated to lower implementing regulations (Xanthaki, 2008: 16).

In this chapter, clarity means that norms respond to real problems in legislation, and that regulations must be easy to understand and unambiguous. Regulations must be written in simple and precise sentences. However, to regulate certain conditions that require more technical and complex explanation, the language used does not have to be simple. Moreover, sentences providing rules which can be explained in more detail in implementing regulations also do not have to be too precise. In essence, texts should neither generate ambiguity nor lead to multiple interpretations.

Coherence

Coherence is often defined as the equivalent of hanging together, making sense as a whole, cohesion, consonance, speaking with one voice, or being tightly knit (Peczenik, 1989: 159 in Bertea, 2005: 372). To achieve coherence, there must be reasonable interconnection between mutually reinforcing elements, in order to form supportive rationality (Bertea, 2005: 372). Each of these elements supports or justifies each other, so that they integrate and produce harmony (Kress, 1993: 640-641). The degree of coherence therefore

depends on weighing all the elements and balancing them against each other (Alexy & Peczenik, 1990: 132).

The term 'coherence' is common in discussions about legal reasoning and legal justification, where coherence is needed to justify legal propositions or judicial decisions (Raz, 1992). A coherent decision means that each argument put forward supports the others, and is in accordance with the basic principles of a legal system (Bertea, 2005: 372). A decision can be justified if it is supported by arguments that are rationally coherent, i.e. the decision does not contain any illogical arguments, in terms of its structure (Hage, 2004: 87). The decision can also be justified if it is coherent in terms of existing cases and laws (Levenbook, 1984, 355; Siems, 2008: 149).

Coherence is not only used to justify arguments or decisions. It is essential that any legal system (Grantham & Jensen, 2016: 363) has a unity of principles, or a set of legal norms that share the same values or principles (MacCormick, 1984). For Weinrib, every legal doctrine, institution, or action (and its justification) forms an integrated unit, every sub-part (or aspect) of which reflects the whole (Kress, 1993: 640). In a broader understanding of coherence, law is not only a coherent collection of norms; it must also be coherent with social reality, because it law a social phenomenon (Hage, 2004: 90). Unity in the legal system, or being free from contradiction, makes the system clear (Grantham & Jensen, 2016: 363). What is coherent can be understood, it makes sense and is well expressed (Raz, 1992: 276 in McGarry, 2013: 18). Legal subjects will better understand the law, if the rules in their legal system do not contradict each other, making it more likely that they will understand how the rules apply to them. Therefore, coherence supports both legal certainty and the rule of law (Grantham & Jensen, 2016: 363; McGarry, 2013: 18).

In the context of environmental law in Indonesia, Otto discusses the incoherence in decisions, laws and regulations related to the environment and natural resources. Terms like 'coordination', 'harmonisation' and 'integration' have become part of Indonesian legal discourse to address incoherence, but it is not always clear what they mean (Otto, 2003: 13). Otto defines coordination as a particular adjustment between separate parts, but the parts still maintain their own identity and purpose (Otto, 2003: 15-16). The word harmonisation applies when the separate parts are adjusted to one another, giving rise to "agreeable effects" (Otto, 2003: 15-16), whereas integration means the joining of two or more parts into one unit (Otto, 2003: 15-16). By Otto's definition, coherence most closely relates to the term harmonisation, where harmonising different parts will lead to coherence. Otto goes on to explain coherence from the perspective of environmental management, as harmony between institutions, norms, and procedures (Otto, 2003: 16).

I use coherence as one of my criterion, because (as Otto says) in Indonesia there are various laws and regulations related to the issuance of mining licences by different agencies, and there is therefore ample opportunity for contradiction. To be able to solve real problems, the laws and regulations must support each other in creating clear rules. Contradictory rules can be confusing, making them difficult to enforce and easy to divert, because the legal subject is given a choice of several different rules. Conversely, a coherent law has more legitimacy, resulting in a greater obligation on legal subjects to obey the law (McGarry, 2013: 26)

In this chapter I am discussing coherence at two levels, within a law or a regulation, and within the legal system as a whole. Provisions in a piece of law or regulation are said to be coherent, not only because they are not contradictory, but also because they support each other and have the same purpose. Likewise, different laws and regulations must not only be uncontradictory but also harmonious. The relationship between mining law and other laws and regulations, in terms of environmental protection (as Otto explains above), is like separate parts that must be directed towards conformity. For example, rule A stipulates that everyone must have a licence to carry out X activity. Rule B in the same law, or rule C in another law, is said to be coherent, if it is not only not in conflict regarding the licence obligations governed by rule A, but also in support of rule A (e.g. by not allowing activity X to be carried out without a licence).

Adequacy

Adequacy basically means being enough or satisfactory for a particular purpose. The criterion of adequacy is inspired by the quality of law in terms of its implementability, as defined by van Rooij. He states that the rules in a law must be adequate so that, when they are fully complied with, the desired social change can be achieved as much as possible (Rooij, 2006: 34). In this way, the norms of a law have the capability to control behaviour as expected by the law-makers.

As discussed by several scholars, discussion on a law achieving its purpose may also be linked to the law's effectiveness (such as Karpen 2002; Mousmouti, 2012). Effectiveness is the extent to which the law succeeds in producing the desired regulatory effect (Mousmouti, 2012: 201). Moreover, Mader defines effectiveness as the conformity between observable attitudes and behaviour in the target population (individuals, companies, and public officials responsible for implementing or enforcing laws) with attitudes and behaviours as determined by law-makers (Mader, 2001: 126). Effectiveness is achieved when the implementation of legislation has changed behaviour in accordance with the objectives of the law. Therefore, effectiveness is influenced by both the quality of a law and how the law is implemented (Mader, 2001: 126; Xanthaki, 2008: 14; Mousmouti, 2012: 201-202). Thus,

the effectiveness of laws and regulations can be better known if they have already been implemented and evaluated.

However, before a law is implemented, the extent of its potential to resolve the issues being addressed can be estimated via an adequacy assessment of the norms in the law. The adequacy of the norms provided by the law is one element contributing to the law's effectiveness. Adequate norms in law must *first* assume that, because law is aimed at solving real problems, the rules in laws must relate to the real problems being addressed. Making norms in accordance with social realities is a quality statutory requirement for achieving effectiveness (Mousmouti, 2012: 201-202). Therefore, the law must be based on careful research on the problems to be handled, which will provide the norms needed to solve the problems. *Second*, the norms must be capable of solving the problems. For this reason, Rooij provides criteria for norms to achieve the desired social change; that is, the norms need to be quite strict and the scope of application quite wide (Rooij, 2006: 35). Quite strict means that the individual or company has no alternative but to comply with the established norms. For example, the norms impose appropriate sanctions, or other consequences, if legal subjects commit an act that is prohibited. These sanctions or consequences are strict enough to force legal subjects to prefer following the norms to ignoring them. Sanctions that are too light will allow legal subjects alternatives to obeying the norms. Norms must also have a broad scope, meaning that legislative norms must cover every aspect of the problem to be handled. For example, to solve the problem of illegal licence issuance, the norms in the law must be sufficient not only to regulate sanctions for illegal licence holders, but also to govern the entire licensing process. If the law only regulates sanctions, the root of the problem regarding the granting of illegal licences will not be resolved, because there is a possibility that the problem will exist throughout the licensing process. Therefore, the licensing system as a whole should be regulated.

The adequacy of law therefore deserves to be one of the criteria determining the extent to which laws and regulations in Indonesia have the potential to resolve mining licence issuance problems related to the environment, because adequate norms can support the effectiveness of implementation. Assessment of the adequacy of laws and regulations in this chapter firstly includes the relationship between real problems and the norms of laws and regulations. The chapter assesses the extent to which norms in the regulatory framework respond to, or are related to, the problems that have been described in Chapter II. Secondly, assessment of adequacy includes the stringency and scope of the norms concerning issues that must be handled, meaning that the norms related to solving these problems will be assessed on: whether the scope of the regulation is broad enough to cover the problems; and, whether the norms are strong enough to change the problematic behaviour.

Feasibility

Feasibility means the possibility that something is reasonable, or that it can be made, done, or achieved. Based on this definition, norms are feasible if they can reasonably be implemented by every subject of the law that they address, such as individuals, companies, state institutions, and law enforcers. The feasibility criteria used in this chapter are also influenced by the implementable law criteria discussed by van Rooij. According to him, the norms in a law are feasible when they can be carried out financially, physically, and technically by legal subjects (Rooij, 2006; 36). Therefore, feasible laws and regulations are made based on a sufficient understanding of the ability of legal subjects to obey the rules, economically, culturally, and in other relevant contexts. Feasible rules are also made by considering the state's ability to enforce the law, which includes applicable costs, the capacity of law enforcement officers, and the capacity of other facilities that may support law enforcement.

In fact, many laws are not feasible, and some even demand things that are impossible for legal subjects to implement (Fuller, 1976: 70-78). In developing countries, the phenomenon of a law that is not feasible existing often occurs, because the political elites of developing countries issue ambitious laws that tend to require radical social change, in order to pursue development (Otto *et. al.,* 2008: 55). Such laws are difficult to enforce, because people are prepared to accept neither rules that are very different from their usual practice, nor the possibility that the state does not have sufficient time to prepare its law enforcement instruments. For example, legislation may require that all licensing processes be carried out online, with the intention of preventing corruption, despite that fact that certain technology is required to carry out this policy. Such legislation cannot be implemented immediately, if the government does not provide sufficient budget and the skilled staff required to operate the new technology.

Based on the explanation above, it appears that sometimes there is a trade-off between adequacy and feasibility. Adequacy focusses on the aspirations of legislators, whilst feasibility focusses on the possibility and willingness of norm recipients and law enforcement officials to either comply with the law or enforce it (Rooij, 2006: 36). Therefore, an adequate norm may not always be feasible.

This chapter assesses the extent to which norms in the form of solutions to problems related to mining licence issuance and the environment are feasible for implementation. The laws and regulations analysed in this chapter were issued during the reform period, after the initiation of the problematic decentralisation policies described in Chapter II. I will assess the extent to which these norms can be implemented, by assessing the capacity of legal subjects, from both economic and technical points of view. Moreover, the

assessment focusses on the timeframe required for legal subjects to adjust to and apply these norms. Another important element that is assessed is the extent to which the law conforms to the culture or practices that have previously been used, so that the rules do not meet with too much resistance from legal subjects.

Conformity with principles of environmental law and international standards regulating mining and the environment

As the quality of laws and regulations mentioned in this chapter is assessed from an environmental perspective, I will analyse the extent to which norms related to the issuance of mining licences promote environmental interests, by applying the internationally recognised principles of environmental law, in addition to the general criteria discussed above. I will focus on the principles of environmental law that are relevant to mining and the environment; namely, the preventive principle, the polluter pays principle, and the public participation principle. Since a principle is a guide for action it has no detailed definition; therefore, there is debate about its meaning, and its application may vary by jurisdiction or situation (Martin *et. al*., 2016: 7). In this sub-section, I will explain each of these principles in the context of the regulatory framework for mining and the environment.

The explanation of these principles is linked to the guidelines for regulating mining, which are issued by international environmental agencies or forums that focus on mining and sustainable development, such as: the Berlin II Guidelines for Mining and Sustainable Development[2]; Extracting Good Practices, A Guide for Governments and Partners to Integrate the Environment and Human Rights into Governance of the Mining Sector[3];

2 These guidelines were issued by the United Nations in 2002. They are intended to provide general guidance for sound and sustainable management of mining. These guidelines highlight what can be done in terms of regulation, administrative control and mine management, in order to achieve an acceptable level of environmental performance (UN, 2002).

3 This joint guide, from 2018, written by *Naturvårdsverket* (the Swedish Environmental Protection Agency) and the United Nations Development Programme (UNDP), is aimed at supporting the government and other stakeholders in better managing the environmental and social aspects of mining. One of the guidelines provides an overview of the tools and approaches that the mining sector can use to manage the environment in a more integrated and holistic manner (*Naturvårdsverket* & UNDP, 2018).

Managing Mining for Sustainable Development, A Sourcebook[4]; Mining Policy Framework, Mining and Sustainable Development, 2013[5].

1) The preventive principle

This principle derives from *The Trail Smelter Arbitration [1941]* (Wilkinson, 2002: 104; Kiss & Shelton, 2007: 90). The case arose from crop damage to property in the United States that had been caused by emissions from Canadian smelters. The court concluded that, under the principles of international law, as well as United States law, no state had the right to use or permit the use of its territory in such a way that would cause injury by smoke in or to the territory of another country or property, or persons in it (Wilkinson, 2002: 104). Case law precedent and the adaptation of general international law rules have both resulted in the basic norms of international environmental law prohibiting transboundary pollution (Kiss & Shelton, 2007: 90). Furthermore, the preventive principle became more widely known after the 1971 Stockholm Declaration on the Human Environment featured it as Principle 21. The principle stipulates that States have, in accordance with the United Nations Charter and the principles of international law, a sovereign right to exploit their own resources in accordance with their own environmental policies, as well as responsibility for ensuring that activities within their own jurisdiction or control do not cause environmental damage to other States or territories outside the boundaries of national jurisprudence. Principle 21 was reaffirmed in the 1992 Rio Declaration on the Environment and Development.

The preventive principle is can therefore be interpreted as states, companies, or individuals, under certain circumstances, being obliged to take steps to avoid causing certain types of environmental damage, including to the environment outside of their territory or ownership (Wilkinson, 2002: 105). The principle not only prevents activities that are known to cause extra-territorial environmental damage, it also seeks to avoid harm, regardless of whether or not there are transboundary impacts due to the inter-depen-

4 This sourcebook is a joint effort by the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UN Environment). It extracts the most relevant knowledge for policy-makers, such as policy tools and practices, and regulations to manage the mining sector in order to achieve sustainable development. The focus of this book is on the practical issues that need to be addressed by policy-makers, administrators and regulators, as well as by community leaders and members, including environmental regulation (UNDP & UN Environment, 2018).

5 These guidelines were issued by the Intergovernmental Forum on Mining, Minerals, Metal, and Sustainable Development (IGF). The forum is a voluntary initiative of more than 75 countries committed to exploiting mining for sustainable development, in order to ensure limited negative impacts and the sharing of financial benefit. The framework contains identification of best practice for implementing good governance in the mining sector, which will in turn contribute to sustainable development (IGF, 2013).

dence of all parts of the environment and the fact that it is often impossible to repair environmental damage (Kiss & Shelton, 2007: 91). Various legal instruments can be used to prevent environmental damage, such as licensing procedures, operating standards, emission limits, product standards, and use of the best available techniques (or, BAT) (Kiss & Shelton, 2007: 91).

Most of the regulatory guidelines for mining propose environmental impact assessment (EIA) as a tool to prevent the environmental impacts of mining activities (such as *Naturvårdsverket* & UNDP, 2018; UNDP & UN Environment, 2018; IGF, 2013). EIA helps to protect the environment by looking at the possible impacts of a project and providing information that enables developers to minimise those effects during the construction, operation, and decommissioning phases (UN, 2002: 36). A mining company will identify the potential impacts on the environment, explain how it plans to manage those effects, and provide information to the community, government and other decision-makers, so that it can be decided whether or not the project should proceed and, if so, what conditions should be attached to it (UN, 2002: 36). However, in accordance with the purpose of the preventive principle, this does not mean that only EIA instruments can be used to prevent damage being caused by mining activities; a variety of different instruments can be used, as long as they are intended to prevent environmental damage.

2) The polluter pays principle

The polluter pays principle was first introduced by the Organization for Economic Cooperation and Development (OECD 1975) (Wilkinson, 2002: 120; Kiss & Shelton, 2007: 95; Bell & McGillivray, 2006: 265). The OECD definition[6] was that the polluter should bear the "costs of pollution prevention and control measures", the latter being "measures decided by public authorities to ensure that the environment is in an acceptable state". In other words, the polluter must bear the cost of the steps that he is legally bound to take to protect the environment, such as measures to reduce pollutant emissions at their source and measures to avoid pollution by treating effluent from polluting installations, as well as any other sources of pollution (OECD, 1992: 5). Later, this principle was recognised as part of the 1992 Rio Declaration on Environment and Development, in Principle 16. The principle stated that national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

6 OCDE/GD(92)81, The Polluter-Pays Principle, OECD Analyses and Recommendations Environment Directorate Organisation for Economic Co-Operation and Development Paris 1992, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En

The basis of the polluter pays principle is that those responsible for pollution meet the costs of its consequences (Bell & McGillivray, 2006: 61). This means that producers of goods must be responsible for the cost of preventing and treating any pollution caused by the manufacturing process (Bell & McGillivray, 2006: 266). This includes costs incurred to avoid pollution, in line with the idea that protecting life by prevention is better than protecting it by cure (Bell & McGillivray, 2006: 266). It should be emphasised that this principle does not justify the view that whoever pays is allowed to pollute (Wilkinson, 2002: 131-132), but it does ensure that environmental costs are included in the overall cost of the production process. For example, European Union legislation provides that, for the necessary environmental quality objectives to be achieved, polluters must pay costs for pollution control measures, such as the construction and operation of anti-pollution installations, and investment in anti-pollution equipment and new processes (Kiss & Shelton, 2007: 97). Another mechanism is the use of mandatory insurance, to anticipate any polluters who might be unable to pay, for example (Wilkinson, 2002: 131).

In relation to mining, the polluter pays principle is most relevant to the company's obligation to carry out mining and post-mining reclamation; that is, activities to restore and improve the quality of the environment and ecosystem following part of (or all) mining business activities, and to restore the environmental and social functions around the mining area. Therefore, most guidelines related to mining and the environment suggest that mining and post-mining reclamation are included in mining arrangements (*Naturvårdsverket* & UNDP, 2018; UNDP & UN Environment, 2018; IGF, 2013). Mining and post-mining reclamation are important stages in mining, but there is always the possibility that a company will not carry it out due to financial problems, given the high costs of environmental and social improvements. In such instances, a mechanism is needed to guarantee that the company will fully rehabilitate the mining area[7]. Most guidelines suggest financial guarantees to rehabilitate the mining areas granted during the licensing process (*Naturvårdsverket* & UNDP, 2018; UNDP & UN Environment, 2018; IGF, 2013) Financial guarantees ensure that the costs of reclamation and restoration of ex-mining land are ultimately the responsibility of the mine owner or operator[8]. In determining the level of financial

7 United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environmental Programme Industry and Development (UNEP), "Environmental Guidelines for Mining Operations." http://commdev.org/files/814_file_UNEP_UNDESA_EnvGuidelines.pdf, p. 12.

8 United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environmental Programme Industry and Development (UNEP), "Environmental Guidelines for Mining Operations." http://commdev.org/files/814_file_UNEP_UNDESA_EnvGuidelines.pdf, p. 12.

assurance, the licensing process plays an important role for three reasons[9]. First, the licence can be used to identify the standards required for reclamation and environmental performance in the mine. Second, the mine plan is used as the basis for calculating the amount of the financial guarantee, taking into account factors such as the existing level of pollution prevention, closure planning, and reclamation design. Third, licences are often the only way to successfully enforce environmental performance and reclamation standards; therefore, a license application should be considered completed, only if it includes an acceptable plan for eventual mine closure and the provision of adequate financial guarantees to cover the costs of closure and ongoing monitoring (IGF, 2013: 26). Indonesia also regulates a reclamation guarantee fund (*dana jaminan reklamasi*) for mining activities (Article 30-35 Government Regulation 78/2010 on Reclamation and Post-Mining). The guarantee fund is a refundable deposit system. A certain amount of money is deposited in a joint account controlled by both the government and the mining company. This amount can only be drawn if the government considers the company's reclamation satisfactory. Placing such a reclamation bond does not relieve the company of its obligation to carry out mine reclamation, but it provides a guarantee for the government that funds are available if the company fails to carry out the reclamation.

3) The public participation principle

The public participation principle developed internationally after being recognised in the 1992 Rio Declaration. Principle 10 of the declaration states that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment, which is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10 recognises 3 pillars of public participation, namely access to information, public participation, and justice. The Aarhus Convention lays the principle out in more detail, stating that access to information includes the active, unsolicited dissemination of information, and the provision of reactive information. The latter is where public authorities provide certain

9 United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environmen- tal Programme Industry and Development (UNEP), "Environmental Guidelines for Mining Operations." http://commdev.org/files/814_file_UNEP_UNDESA_EnvGuidelines.pdf, p. 13.

information upon request and within a certain time limit (Bell & McGillivray, 2006: 317). In terms of public participation, the convention promotes increased public participation in environmental decision-making, where the public participates in the preparation of plans and programmes related to the environment (Bell & McGillivray, 2006: 317). The convention also promotes access to justice in environmental issues by giving the public the right to challenge decisions through independent review via the courts or other independent bodies (Bell & McGillivray, 2006: 317).

Forms of public participation are varied, and participation may occur through elections, grassroots action, lobbying, public speaking, hearings, and other forms of government where various interests and communities actively shape the considerations and decisions that affect them, including licensing procedures (Kiss & Shelton, 2007: 103). It should be understood that a community does not automatically have the capacity to access and understand all the information relevant to its interests. Application of the principle of public participation therefore needs to be accompanied by community empowerment, so that powerlessness can be moderated and equalised by several disparities, thus supporting fairer participation (Martin *et. al*., 2016: 20). This is especially true in the mining sector, in which data and information are complex and difficult for the public to understand.

Most of the guidelines related to mining and the environment require public participation for every stage of mining. Actively engaging the affected public to participate in rule-making, licensing and monitoring the sector acknowledges the value of community and civil society participation in both improving governance of the mining sector and strengthening enforcement (*Naturvårdsverket* & UNDP, 2018: 12). Public consultation and engagement helps to balance economic development considerations with social and environmental considerations, leading to decisions that are more sustainable, and more viable politically and socially (UNDP & UN Environment, 2018: 15). Therefore, there should be a legal and institutional framework that ensures transparent and available information provides opportunities for an informed public to participate in decision-making, as well as providing mechanisms to hold decision-makers and mining companies accountable to an informed public (*Naturvårdsverket* & UNDP, 2018: 23). In turn, the licensing process should require mining entities, in preparing their applications for mining licences, to consult with communities and other stakeholders at all stages of the assessment and planning process, and to document the nature and results of their engagement programme in the license application (IGF, 2013: 7).

Transparency is recognised as an important element in mining licensing instruments (NGRI Reader, 2015: 4; Cameron & Stanley, 2017: 221). This is an important step in ensuring that the public (particularly people affected by a specific project) has access to the terms and conditions governing access

to the country's mineral resources (*Naturvårdsverket* & UNDP, 2018: 97). At the very least, the following must be available to the public: data and reports on licences, geological surveys, and reserves; the national mining cadastre and a national data bank; national and regional level mining contracts or concessions (*Naturvårdsverket* & UNDP, 2018: 45). Even the mining licence/investment contracts, or at least their key terms, are available to the public, as there is a growing body of international guidance calling for the disclosure of contract terms, with only limited exceptions. Availability includes: access to the terms and conditions being granted for access to the country's mineral resources; giving the public tools to assess and discuss whether or not the government has negotiated a good deal for the country; helping to reduce corruption and making it more likely that rights are allocated on the basis of merit; providing a basis for holding mining companies accountable, as it makes the commitments that a company has made more transparent (*Naturvårdsverket* & UNDP, 2018: 97).

3.3 The quality of Indonesia's laws and regulations in terms of addressing mining licence issuance problems related to the environment

This section uses the criteria for assessing the quality of laws and regulations (described above) to analyse the effectiveness of Mining Law 4/2009, and other relevant laws and regulations, in addressing the environmental problems associated with mining licence issuance at the beginning of the reform period, as identified in Chapter II. At the time, key problems were: 1) the rampant issuance, by regional governments, of mining licences that were not in accordance with legal procedures, and which ignored the environment; 2) the complex and non-transparent mining licensing procedures; 3) the lack of environmental safeguards for issuing mining licenses; and 4) the issuance of mining licences in environmentally vulnerable areas. The sub-sections below are based on the four problems. Each sub-section discusses the extent to which the regulatory framework responded to the problem and met the relevant quality of laws and regulations criteria.

The rampant issuance, by regional governments, of mining licences that were not in accordance with legal procedures, and which ignored the environment

Chapter II explains how, in the early days of decentralisation, the authority to issue mining licences (known at the time as Mining Authorisation or *Kuasa pertambangan* or KP) was delegated to regional governments, which resulted in the widespread issuance of KP. In turn, this boosted opportunities to obtain own-source regional revenue (*Pendapatan Asli Daerah*, or PAD) and illegal profit by issuing mining licences via regional powers. Many of the licence issuance processes did not go through legal procedures and ignored environmental requirements. Therefore, the process eliminated

the opportunity to filter out companies that were committed, and had the ability to protect the environment and prevent mining licences being issued for environmentally vulnerable areas. As a result, there were thousands of problematic KPs, some of which did not have an accompanying Environmental Impact Assessment (EIA or *Analisis Mengenai Dampak Lingkungan*, or AMDAL) and were located in conservation areas, posing a risk to the environment. Therefore, with regard to the issue of problematic licence issuance by regional governments, Mining Law 4/2009 had to deal with two main problems: (1) problematic behaviour on behalf of regional governments when issuing mining licenses; and (2) the existence of thousands of mining licences which had been issued via unlawful processes.

The Mining Law and its implementing regulations responded to the problem of regional governments' behaviour by giving authority to central government to determine mining areas and supervise the regional governments. Moreover, the mining law provided criminal sanctions for governments committing violations by issuing mining licences. Mining Law 4/2009 stipulated that the authority to determine mining areas rested with central government. The Mining Law stated that mining areas would be determined by central government, after coordinating with the regional government and consulting with the House of Representatives (*Dewan Perwakilan Rakyat* or DPR) (Article 6). The regional governments were no longer authorised to decide on mining areas, and a mining licence, which the Mining law referred to as a Mining Business Licence (*Izin Usaha Pertambangan*, or IUP), could only be issued by a regional government after the mining area had been determined by central government. Further, Government Regulation 22/2010 on the Regulation of Mining Areas stipulated in more detail how a mining area should be determined.

The Mining Law also regulated the central government's supervision of mining operations carried out by regional governments (Article 139-141). This included the obligation for regional governments to provide reports on their mining management to central government (Article 142). Government Regulation 55/2010 on Guidance and Supervision of Mineral and Coal Mining Business Management regulated central government's supervision of regional governments, in more detail. Furthermore, the Mining Law established a criminal sanction for government officials who abused their licensing authority: a maximum of two years in prison, and a maximum fine of of 200,000,000 rupiah (Article 165). However, the mining law did not regulate the thousands of problematic KPs which were issued in the early days of decentralisation.

Below, I discuss the extent to which the quality of the Mining Law responded to the two problems described above.

1) The clarity and coherency of rules in regulating the behaviour of regional governments

Chapter II discusses how one of the problems in issuing mining licences in the regions is caused by the unclear distribution of power between central government and regional governments. Indeed, the clarity of norms regarding the division of authority was very important. Central government and regional government should both understand what authority they have, the accompanying limitations and obligations, and the consequences if they were to abuse their authority. Mining Law 4/2009 clearly stipulated the division of authority for issuing mining licences, as follows: regents/mayors had the authority to issue IUP for mining within districts/cities; the governor had the authority to issue IUP for mining across districts/cities; and the Minister of Government Affairs in the Field of Mineral and Coal Mining was authorised to grant IUP for mining across provincial areas (Article 37). These rules were clear norms; so it could be understood, without multiple interpretations, that each level of government had the authority to issue mining licences in their areas. The rules regarding the authority of central government to determine mining areas and supervise mining operations by regional governments were also clear. Furthermore, Mining Law 4/2009 clearly stipulated the sanctions for officials who abused their authority when issuing mining licences.

Clarity on the division of authority between central government and regional governments in issuing IUP was also supported by the alignment between Mining Law 4/2009 and the regional autonomy policy, as regulated by Law 32/2004 on Regional Government. At the time, as with all policies related to natural resources, the Mining Law was required to be in line with the decentralisation policy, which meant giving the authority to issue mining licences to regional governments. Also, because the rules in Mining Law 4/2009, regarding the authority of central government and regional governments, were coherent with the decentralisation policy, as regulated by Law 32/2004, they were even easier to understand.

2) The adequacy and feasibility of rules regarding the authority of central government to determine mining areas and supervise the implementation of mining licence issuance by regional governments

Several rules to control the authority of regional governments seem to be adequate, because they respond to the problematic behaviour of regional governments, when issuing mining licences, by limiting and controlling their authority. Prior to the enactment of Mining Law 4/2009, regional government could determine the areas defined in mining licences and issue the licences without supervision, so that many mining activities were carried out in conservation or protected areas. The enactment of Mining Law 4/2009 formally eliminated the possibility for regional governments to

determine their own mining areas when issuing mining licences. In addition, there were new rules for the supervision of mining management, and a sanction imposed on government officials who abused their authority when issuing mining licences.

However, the rules regarding the determination of mining areas by central government were difficult to implement, due to the central government's lack of readiness to provide data on mining potential throughout Indonesia (see, TII, 2017: 27-29). The rules concerning central government supervising regional governments were also difficult to apply, as central government first needed to improve its capacity to carry out the supervision. This included matters of finance, human resources, and other facilities. Hence, the solutions adopted by the mining law and its implementing regulations to regulate the behaviour of regional governments seemed adequate, but were likely not feasible for implementation. As explained in the previous section, fulfilment of adequacy criteria is sometimes an issue due to difficulty in fulfilling feasibility criteria.

3) The adequacy of rules to regulate the existing problematic KPs

The thousands of problematic KPs that had been issued by regional governments were not addressed by Mining Law 4/2009. In fact, the law did not mention KP at all, so immediately after the passage of Mining Law 4/2009 the status of KP was not clear. The Mining Law only regulated how the IUP process was issued, it did not pay attention to the thousands of existing KPs. Government Regulation 23/2010 on the Implementation of Mineral and Coal Mining Business Activities clarified the status of KPs by stipulating that KPs granted prior to the enactment of the regulation would remain in effect until the KP expired and must be adjusted to the IUP form no later than three months from enactment of the regulation.

The rules regarding KP in the government regulation were not adequate to address the problem of the existence of the thousands of problematic KPs that had been created through the unlawful procedures described in Chapter II. Government Regulation 23/2010 required only that the KP holder must change the administrative form of licence from KP to IUP. There was no detailed mechanism for the transfer and requirements for KPs to become IUPs, in accordance with the requirements for issuing IUPs in Mining Law 4/2009. This meant that the problematic KPs remained valid for as long as the form was converted into an IUP. Therefore, no adequate rules were provided to solve the problem of the thousands of existing KPs unlawfully issued in the early days of decentralisation, even though many of them had resulted in environmental problems.

Complex and non-transparent mining licensing procedures

As explained in Chapter II, the licensing process did not identify companies that were committed and had the capacity to protect the environment. One of the reasons for this was that procedures for issuing mining licences were complex and not transparent. In order to obtain KP, a company needed licences, and other documents obtained through various complex procedures from different government agencies which were governed by several different regulations. It was increasingly complex after the start of the decentralisation policy, because the regional government had the authority to issue regional regulations (*Peraturan Daerah*, or Perda) to manage natural resources, which means they were allowed to regulate various procedures and requirements for obtaining KP. The complexity of the mining licence issuance system could be used by government officials to ignore the legal procedures for issuing licences, including those related to environmental protection – for example, the obligations related to AMDAL. This was also exacerbated by the absence of rules regarding transparency in the licence issuance process, making it difficult for various parties to fully see the process. Therefore, Mining Law 4/2009 and its implementing regulations did not seem to respond to the issue of the complexity and opacity of the licensing process, in the absence of any rules leading to a transparent and simpler form of licence issuance process regulation, as well as to certainty regarding time and costs.

However, Mining Law 4/2009 did issue new policies related to the licensing system, the most significant of which were abolition of the contract scheme and use of an auction system to obtain a metal and coal mining licence. The Mining Law abolished the contract scheme, so that mining rights were only granted through the licensing system. The existing contracts were still in effect until the termination of the contract was over (Article 169 (1)), and they should be adjusted according to the rules in the Mining Law, not later than one year after promulgation of the law (Article 169 (2)). As for the auction system, Mining Law 4/2009 and Government Regulation 23/2010 stipulated that companies must first obtain a mining business licence area (*Wilayah Izin Usaha Pertambangan* or WIUP) which, for metal, mineral and coal mining, was obtained through an auction process organised by the minister, governor, or regent/mayor, depending on the WIUP area defined (Article 10-11, Government Regulation 23/2010). After winning the auction, a company would be granted a WIUP by the Minister, governor or regent/mayor (Article 17, Government Regulation 23/2010) and the process of applying for IUP could begin.

1) The adequacy of rules to solve the problem of mining license issuance complexity and transparency

As explained above, Mining Law 4/2009 and its implementing regulations contained no rules aimed at simplifying the complexity of licensing procedures. Furthermore, transparency in the issuance of mining licences was also not stipulated in the Mining Law and its implementing regulations. Hence, the Mining Law and its implementing regulations were not adequate to resolve the problems of mining license issuance complexity and transparency, because there were no rules specifically designed to respond to that problem.

The auction system in Mining law 4/2009 and Government Regulation 23/2010 were regulated as part of the mining licence issuance process, and did not aim to address the problem of mining licensing complexity and non-transparency, but instead aimed to screen all mining companies with the capability to carry out mining activities in Indonesia. In fact, the auction system even had the potential to exacerbate the complexity. The new system required new rules and procedures, and if they were not appropriate, they would create new complexities. Furthermore, Mining Law 4/2009 and Government Regulation 23/2010 did not adequately regulate transparency in the auction process. Only one article in Government Regulation 23/2010 stated that, prior to an auction for a WIUP, the minister, governors or regents/mayors, in accordance with their respective powers, shall publicly notify business entities, cooperatives, and individuals of area to be auctioned off, at least 3 three months prior to the auction (Article 10). This would simply be an announcement to parties potentially interested in participating in the auction. In addition, there was no rule that guaranteed transparency in the auction process, in order to support the fair treatment of all bidders.

2) The feasibility of implementing the auction system in Indonesia

Competitive bidding processes involve defining and selecting the areas to be tendered, establishing technical and financial qualification criteria for bidders, determining bid evaluation criteria, establishing bid evaluation procedures, and appointing a bid evaluation committee (IMI, 2018). Therefore, the auction system requires procedures and skills for regulating a competitive bidding process (Venugopal, 2014: 4), as well as the readiness of the state to provide data on potential mines to be offered, and state capacity to hold auctions.

However, based on the old mining law, Indonesia had implemented a mechanism whereby the state did not require the availability of accurate geological data, as companies conducted their own research and applied for licences or contracts once they had discovered mining potential in a

particular area. With the auction system in effect, the state needed to immediately provide geological data and prices. This was difficult for Indonesia, especially at the beginning of the enactment of auction provisions, because it was not easy to carry out research to determine mining areas and the price to be offered. There were several weaknesses in the auction process in Indonesia, including: the detailed geological information used to justify basic value was unclear, while the time required by registrants to survey the mining business licence area being auctioned was insufficient to assess the base value; there was a lack of institutional capacity and resources to verify the information stated in the documents submitted; there was no due diligence mechanism to prevent bid-rig or fraudulent bid participation (TII, 2017: 27). Therefore, the auction system was difficult to implement in Indonesia and it needed some careful preparation, especially when it came to the availability of proper data regarding potential mining and various resources to support the implementation of auctions. The Indonesian government was not yet ready for this system.

3) The coherency of rules for issuing mining licences between laws and regulations related to the environment and natural resources

As mentioned above, mining activities not only required a mining licence but also other documents, such as AMDAL, an environmental licence, and a lease-use licence (*Izin Pinjam Pakai Kawasan Hutan*, or IPPKH), if the mining was to be carried out in forest areas. If the rules related to these documents were not in line, this added to the complexity of licensing.

Unlike other laws related to natural resources, which only focussed on regulating the sector, Mining Law 4/2009 and its implementing regulation, Government Regulation 23/2010, linked the issuance of mining licences to rules in other laws and regulations. The Mining Law stipulated that AMDAL was one of the requirements for a mining licence (Article 36). Government Regulation 23/2010 stipulated that the requirement to obtain an exploration IUP is a statement to comply with the provisions of laws and regulations in the environmental sector, and to obtain production operation, IUP also require the approval of environmental documents in accordance with the provisions of laws and regulations (Article 26). The documents were AMDAL and an environmental licence, which were regulated by Law 32/2009 on Environmental Protection and Management, and Government Regulation 27/2012 on Environmental Licensing. Law 32/2009 stated that an environmental licence was a requirement for obtaining a business and/or activity licence (Article 40 paragraph (1)). Therefore, the rules supported each other, because both required the fulfillment of environmental documents before issuance of a mining licence. This coherence reduced the complexity of the licensing system.

Mining Law 4/2009 also linked mining activities with other requirements stipulated by laws and regulations in other sectors. Mining Law 4/2009 banned mining activities in prohibited areas, unless a licence was obtained from a government agency in accordance with the provisions of the law (Article 134). This was related to the provisions in Mining Law 41/1999 on Forestry, which stated that the use of forest areas for mining purposes was to be carried out after granting IPPKH (Article 38). Therefore, the obligation to have an IPPKH for mining activities in forest areas regulated by the forestry law was supported by Mining Law 4/2009, which required a licence from the authorised agency for mining in certain areas. This coherence would make the procedures for carrying out mining activities clearer, and might reduce the complexity of licensing.

4) Conformity between mining licence issuance rules regarding transparency and the principles of environmental law and international mining, as well as environmental guidelines

As explained in the previous section, transparency is part of the public participation principle. Transparency is an important element in international guidelines for mining and the environment, and with regard to the process of issuing mining licences. However, as explained above, the Mining Law and its implementing regulations did not adequately regulate transparency and public participation. Although Mining Law 4/2009 stated that mining was managed on the basis of the principles of participation, transparency and accountability, the law and its implementing regulation, Government Regulation 23/2010, did not in fact regulate it adequately. The law only stipulated that the central and regional governments were required to make mining business licences available for the public to see (Article 64). No specific provision was made for openness and public participation in the licence issuing process. Therefore, in terms of the process for issuing mining licences, the Indonesian regulatory framework was not in line with the transparency and public participation standards promoted by international mining and environmental guidelines.

Lack of environmental safeguards when issuing mining licences

As explained in Chapter II, one of the main environmental problems regarding the issuance of mining licences has been the lack of attention given to environmental interests throughout the process. The previous Mining Law and its implementing regulations did not regulate environmental requirements for issuing mining licences. Hence, mining licences were being issued without environmental consideration. Subsequently, environmental law and government regulations issued during the New Order period regulated the requirements for making an environmental impact assessment or AMDAL before mining activities were carried out; however, as described in Chapter II, these were not properly implemented.

Unlike the previous mining law, Mining Law 4/2009 regulated AMDAL within the mining licence issuance process. Moreover, the Mining Law also stipulated obligations related to mining reclamation and mine closure for IUP holders. The extent to which the quality of laws and regulations related to AMDAL, mine reclamation, and post-mining helps to resolve the problems with issuing mining licences is discussed below.

1) The coherency and adequacy of AMDAL rules for mining activities

Mining Law 4/2009 clearly stipulated that AMDAL was one of the documents required to obtain a mining licence (Article 39). This rule was followed up in detail by Government Regulation 23/2010, which stipulated that, in order to obtain a Production Operation IUP, a company must have a letter of commitment to comply with laws and regulations regarding the environment and environmental documents, in accordance with laws and regulations (Article 26). This referred to AMDAL, which was regulated by the Environmental Law and its implementing regulations.

Environmental Law 32/2009 and its implementing regulation, Government Regulation 27/2012 on Environmental Licensing, regulated AMDAL adequately, because the rules were comprehensive and strict. This included the requirements for assessing AMDAL and making it the main basis for issuing an environmental licence. The Environmental Law also stipulated that, without an environmental licence, a business licence could not be issued (Article 40), and IUP could not be issued without AMDAL. Moreover, Government Regulation 23/2010 linked IUP obtaining procedures to AMDAL and the environmental licensing rules stipulated by the Environmental Law and its regulations. Government Regulation 23/2010 stipulated the submission of these environmental documents as one of the conditions for applying for an IUP (Article 26). Therefore, the regulation supported the rules regarding AMDAL in the Environmental Law and its implementing regulations, thereby establishing coherent rules.

2) The adequacy of rules regarding mine reclamation and post-mining as safeguards for the issuance of mining licences

Unlike the previous mining law, Mining Law 4/2009 regulated both mine reclamation and post-mining (Article 39 and Article 99-100). Mine reclamation and post-mining were regulated in more detail, as part of mining licensing, in Government Regulation 23/2010 which stipulated the technical requirements for exploration IUP holders to apply for a Production Operation IUP. One of the requirements was to provide planning documents for mine reclamation and post-mining (Article 25). Regulations regarding mine reclamation and post-mining were specifically regulated in Government Regulation 78/2010 on Reclamation and Post-Mining. Mining companies are required to submit mine reclamation and post-mining plans, provide

a contribution to the guarantee fund as well as eventually carry out reclamation and post-mining. As explained on 3.2 above, the guarantee fund is a form of a refundable deposit system from which a company can only retrieve its deposit once its reclamation has been judged satisfactory by the government.

However, the Mining Law and government regulations did not make mine reclamation and post-mining plans and their guarantee funds part of the consideration for deciding to grant IUP. The Mining Law and Government Regulations 23/2010 did not specify that mine reclamation and post-mining plans would be assessed before granting or rejecting an IUP application. They only stipulated that in order to apply for a production operation IUP, a company must submit mine reclamation and post-mining planning documentation. Therefore, the requirement to apply for an IUP was only the submission of a plan, and not its approval by the competent authority. This rule was strengthened by Government Regulation 78/2010, which stated that exploration IUP holders were required to prepare and submit a mine reclamation and post-mining plan, along with an application for a production operation IUP (Article 6). Approval of the reclamation plan would occur no later than 30 days after the production operation IUP had been granted and the post-mining plan would be approved no later than 60 days after the production operation IUP had been granted (Articles 13 and 16). This means that approval for mine reclamation and post-mining plans could be submitted *after* the IUP had been issued, and did not form part of the assessment for issuing an IUP. Based on Government Regulation 78/2010, the provision of mine reclamation and post-mining guarantee funds was also not part of the requirement for issuing an IUP. Consistent with Mining Law 4/2009, the government regulation stipulated that IUP holders were required to provide reclamation and post-mining guarantee funds, meaning that these obligations would be carried out after the IUP had been granted.

Since the Mining Law and its implementing regulations did not explicitly stipulate that mining reclamation and post-mining plans and guarantee funds would inform the decision to issue an IUP, the government could not force companies to fulfil their obligations before obtaining an IUP. These rules were not adequate to compel companies to carry out their obligations.

However, obviously the problem of implementing mine and post-mining reclamation is not only caused by the process of issuing mining licences. In fact, the regulations regarding mine and post-mining reclamation are overall inadequate. Apart from the unclear rules regarding the timing of the placement of the deposit into the guarantee fund, the mining law and its implementing regulations do not provide clear and specific guidelines on how each of the cost factors for the guarantee fund are to be accounted for (Hayati, et.al., 2020: 23). They also do not provide specific written guide-

lines for evaluating the quality of the reclamation conducted by mining companies as the basis for the retrieval of the deposit (Hayati, et.al., 2020: 23). However, the most problematic issue regarding the failure of mining and post-mining reclamation is law enforcement. as mining companies have gone unpunished even when they blatantly failed to fulfill their obligations (Hayati, et.al., 2020: 23). A number of researchers have suggested that this is caused by corruption in government institutions, which leads to poor enforcement (Hayati, et.al., 2020: 23).

3) The conformity of AMDAL and reclamation and post-mining rules with the preventive principle and international guidelines on mining and the environment

As explained in the previous section, one of the applications of the preventive principle, especially in mining, was the availability of an EIA. All international guidelines on mining and the environment also required the existence of an EIA prior to the implementation of mining activities. Indonesia regulated AMDAL as an EIA for mining activities in both Mining Law 4/2009 and its implementing regulations, and AMDAL was also regulated comprehensively and in detail in the Environmental Law and its implementing regulations. Therefore, in relation to AMDAL for mining activities, the regulatory framework met the standard preventive principle and international guidelines for mining and the environment.

However, the rules regarding mine reclamation and post-mining did not meet the polluter pays principle or the international guidelines. In the international guidelines and framework regarding mining and the environment, it had actually been a trend that mine reclamation and post-mining should be part of mining licence requirements. The IGF Framework stated that licensing applications should only be considered complete if the mine closure plan and adequate financial assurance to cover the costs of closure had been approved and accepted (IGF, 2013: 26). The UNDP also encouraged a closure plan and adequate financial assurance to be in place before granting a licence for a new mine, so that adequate funds (or guarantee of funds) could be put aside from the beginning of the mining operation (UNDP & UN Environment, 2018: 71). Mining and post-mining reclamation plans and mining and post-mining reclamation guarantees were very important, because they ensured that a company had the plans and funds in place to restore the environment after its mining activities had been concluded, meaning that they would not impose on the government. It was therefore important to ensure it was applicable *during* the licensing process, rather than afterwards. This also ensured that the cost of environmental impact would be passed on to the polluter. By contrast, as described above, Mining Law 4/2009 and its implementing regulations were not explicitly placed in plans and guarantees for mine reclamation and post-mining as part of the requirements and assessments for obtaining an IUP. Therefore, there was

no assurance that companies would submit plans and guarantees for mine reclamation and post-mining prior to the process of mining licence issuance.

Issuance of mining licences in environmentally vulnerable areas

Based on the explanation in Chapter II, many mining activities were carried out in environmentally vulnerable areas, such as conservation and protection areas. One of the reasons for this was that the issuance of mining licences, especially those granted by regional governments, was not based on adequate consideration of area conditions. Mining Law 4/2009 did not prohibit carrying out mining activities in areas that are environmentally vulnerable, but it did prohibit such activity in places where statutory regulations had already prohibited mining activities, unless a licence was obtained from a government agency according to the laws and regulations (Article 134). Therefore, the rules regarding the protection of certain areas depended on other laws and regulations. Determination of mining areas could also affect the protection of environmentally vulnerable areas. Mining Law 4/2009 regulated the determination of mining areas (*Wilayah Pertambangan* or WP). One part of WP was the mining business licence area or WIUP: an area that could be granted an IUP. A company had to obtain WIUP via an auction process, before applying for an IUP. Therefore, mining licences should only be granted in WIUP areas.

Based on the above explanation, areas that could be granted an IUP were based on WIUP, and other laws and regulations that limited mining activities in certain areas. The following discusses the extent to which the regulatory framework regarding the determination of WP, WIUP, and laws and regulations related to the protection of environmentally vulnerable areas from mining activities, met the quality of laws and regulations criteria.

1) The clarity and adequacy of rules regarding the determination of mining areas to prevent mining activities in environmentally vulnerable areas

Mining Law 4/2009 authorised the central government to determine WP prior to issuing mining licences. The determination of WP stipulated by Mining Law 4/2009 was based on national spatial planning, in a transparent manner, taking into account the opinions of agencies, ecological aspects, environmental insight, and regional interests (Articles 9 and 10). The government determined WIUP which, as described above, was an area that could be granted an IUP. The Mining Law regulated that the determination of WIUP should be based on the following criteria: geographic location; conservation principles; environmental carrying capacity; optimisation of mineral/coal resources; and population density (Article 18). Therefore, based on the Mining Law, the environment was one of the main considerations for determining WP and WIUP. However, no detailed explanation of the criteria was provided in either the Mining Law, or Government Regu-

lation 22/2010, the implementing regulation for mining areas. Therefore, there was no explanation for what was meant by determination of WP which was transparent, which honoured the conservation principles, and which took into account the opinions of the other agencies stipulated in Article 18. The lack of clarity regarding these criteria could lead to different interpretations of each. For example, the conservation principle could hold different meaning for different parties.

The lack of clarity regarding environmental criteria made the environmental standards that were the basis for determining mining areas rather vague, and it could not be ascertained if the designated WP and WIUP were located in environmentally vulnerable areas or not. Hence, the rules regarding the determination of mining areas were not adequate to prevent mining activities in environmentally vulnerable areas.

2) The coherency and adequacy of rules regarding mining areas to prevent mining in environmentally vulnerable areas

The determination of mining areas was related to other land user sectors, such as plantations and forestry, both of which have their own land planning systems. This was potentially not in line with mining areas, so harmonious laws and regulations needed to be created. Potential conflicts were found in the forestry sector especially. Forest area planning was regulated by Forestry Law 41/1999 and its implementing regulations, notably Government Regulation 44/2004 on Forest Planning.

One purpose of forest planning was to determine the function of forest areas, which consisted mainly of conservation forest, protection forest, and production forest. Based on the designation of forest area functions, the use of forest areas for development purposes outside of forestry activities, including mining activities, could only be carried out in production forest areas and protected forest areas; in the latter, open mining was prohibited. Thus, in determining the mining area, coordination with the forestry sector was essential to ensuring that mining areas would not fall within conservation forest areas. However, the Mining Law did not regulate the designation of mining areas in coordination with other sector policies. In the process of determining mining areas regulated by Mining Law 4/2009 and Government Regulation 22/2010, there were almost no rules pertaining to coordination with other sectors. Even though Mining law 4/2009 stated that the determination of WP would be based on consultation with the DPR, as well as on regional interests, ecology, the environment, and consultation with other sectors (Articles 9 and 10), no further explanation was given in either the article or the implementing regulation. Also, Government Regulation 22/2010 did not contain stipulations regarding coordination with other agencies to determine mining areas. If the determination of mining areas and forestry areas was not coordinated, it had the potential to harm the

environment; for example, the mining sector determined one mining area within an area which was already designated as conservation forest area by the forest sector.

Moreover, laws and regulations regarding spatial planning, such as Law 26/2007 on Spatial Planning and its implementing regulations, did not help resolve the land conflicts between sectors. The laws and regulations only regulated spatial usage by various sectors in general, then passed technical criteria on to sectoral ministers. There were no rules in the spatial planning laws and regulations regarding coordination with other sectors or ministries. The only implementing regulation that stipulated coordination between agencies was Government Regulation 15/2010 on the Implementation of Spatial Planning, and the spatial planning coordination referred to in this regulation only concerned coordination between regional governments and between different levels of government (i.e. the central, provincial, and district/city governments).

The natural resource laws and regulations regarding land use (as described above) did not seem to contradict each other, although they were disconnected. Several sectors had the authority to determine and plan their respective areas based on different laws and regulations. There were no rules to define the relationship between the area determination process for one sector and another, which resulted in inharmonious land use planning in Indonesia. Therefore, the regulatory framework related to the determination of mining areas could be described as incoherent, because the rules did not lead to a division of Indonesia's territory which was unified and could clearly define areas prohibiting mining activity. The disharmony of these rules, coupled with the absence of any rules regarding coordination, made rules related to land use inadequate for protecting environmentally vulnerable areas from mining activity.

3) The coherency and adequacy of natural resource laws and regulations to prevent mining in environmentally vulnerable areas

As explained above, Mining Law 4/2009 did not regulate areas that are environmentally vulnerable to mining activity, but instead left their regulation to other laws and regulations. One of the laws limiting mining areas was Law 5/1990 on the Conservation of Living Natural Resources and their ecosystems. This law prohibited activities that could result in changes to conditions in certain areas, such as nature reserves and national parks (Articles 19, 31, and 33). However, the rules in this law were very general, and there was no strict prohibition of activities that could disturb these protected areas.

Another law that prohibited mining activities in certain areas was the Forestry Law 41/1999. This law prohibited mining in conservation areas and

open-pit mining in protected areas (Article 38). The law and its implementing regulation, Government Regulation 24/2010 on Use of Forest Areas, required a lease-use forest area licence or IPPKH for mining activities in non-conservation forest areas. Such a licence might be able to filter out mining activities in prohibited forest areas. However, the Forestry Law and its implementing regulation did not stipulate any sanctions for violating the rule. Eventually, Law 18/2013 on the Prevention and Eradication of Forest Destruction set sanctions for mining in forest areas without a licence (Article 89).

Spatial laws and regulations also restricted mining activity in certain areas. However, Spatial Planning Law 26/2007 and its implementing regulations only provided general boundaries for mining activities. The law regulated the basis of spatial planning, dividing it into two functions: the cultivation function, and the protection function (Article 5 (2)). Mining activities could only be carried out in areas deemed to have a cultivation function. Furthermore, Government Regulation 26/2008 on National Spatial Planning only outlined general criteria for mining areas, passing technical criteria to the minister with a duty towards and responsibility for the mining sector.

Coastal areas and small islands were also environmentally vulnerable, and they had seen significant environmental damage due to mining (Dahuri, 2001: 147, 166). The areas were regulated by Law 27/2007 on the Management of Coastal Areas and Small Islands, and Law 1/2014 on Amendment to Law Number 27/2007 on the Management of Coastal Areas and Small Islands. Law 27/2007 did not prohibit mining activity on small islands, but it did prohibit mineral mining in areas where it would cause technical, ecological, social, cultural and/or environmental damage, and/or environmental pollution, and/or harm to the surrounding community (Article 35 k.). No explanation was given for this rule, but it meant that mining was still allowed on small islands, as long as it did not cause damage, environmental pollution, or loss for the community. There would be a criminal sanction if the rule were violated (Article 73). Eventually, Law 1/2014 on Amendments to Law Number 27 of 2007 on Management of Coastal Zone and Small Islands stipulated the obligation to have a location licence for the use of coastal and small island areas (Article 16). This meant that a location licence was also required to carry out mining. A location licence would be granted based on a zoning plan for coastal areas and small islands, it would consider the sustainability of coastal and small island ecosystems, and it could not be granted in core zones within conservation areas (Article 17).

Hence the laws and regulations only regulated the protection of certain areas. Law 5/1990 and Law 26/2007, as well as Government Regulation 26/2008, were not adequate to prevent mining in environmentally vulnerable areas, because they did not specify the areas where mining activities were prohibited. Furthermore, the Law 27/2007 rules relating to mining in

coastal areas and small islands were not adequate, because they did not explicitly prohibit mining in certain areas that were part of small islands. The rules still allowed mining, as long as it did not technically, ecologically, socially, or culturally cause environmental damage and/or environmental pollution, but no further explanation was provided.

However, Law 1/2014 required companies to have a location licence for the use of coastal and small island areas, which were granted based on environmental considerations and could not be granted within core zones of conservation areas. This meant that mining licences were limited in certain areas, based on environmental protection alone. The rules regarding mining in forest areas were also quite strict, because apart from explicitly prohibiting certain areas for mining, there was also an obligation to have IPPKH for mining activities in forest areas, which could filter out mining activities in those areas. In addition, there were criminal sanctions for any violation of the rules. These rules could therefore be described as adequate, because if they were implemented they would reduce the possibility of mining activity occurring in environmentally vulnerable areas.

3.4 Conclusion

This chapter examines the extent to which mining licence issuance problems related to the environment (as identified in Chapter II) were addressed and solved by Mining Law 4/2009, and other relevant laws and regulations related to the issuance of mining and environmental licences. The problems identified in Chapter II were: 1) the rampant illegal issuance of mining licences, by regional governments, which are not in accordance with legal procedures and which ignore the environment; 2) complex and non-transparent mining licensing procedures; 3) the lack of environmental safeguards when issuing mining licences; and 4) issuance of mining licences in environmentally vulnerable areas. This assessment uses relevant quality of law criteria to assess whether various laws and regulations have had the ability to solve the problems. The criteria are: clarity, coherence, adequacy, feasibility, and conformity with environmental principles and standards from international guidelines regarding mining and the environment.

In terms of the problem of rampant illegal issuance of mining licences by regional governments, there were two issues to resolve, namely: (1) the problematic behaviour of regional governments when issuing mining licences; and (2) the existence of thousands of mining licences issued via unlawful processes. Mining Law 4/2009 responded to this issue by creating clear rules, stating that every level of government had the authority to issue mining licences. The division of authority to issue licences, between central government and the regional governments, was also in line with the regional autonomy policy regulated by Law 32/2004 on Regional Gover-

nance, and the coherence between these regulations made the distribution of powers even easier to understand. Clear rules were important, because one of the problems with issuing mining licences in the regions was the unclear distribution of power between central government and the regional governments.

In response to the problem of the behaviour of regional governments in issuing mining licences, even though regional governments had been given authority to issue mining licences, Mining Law 4/2009 limited their powers by giving central government the authority both to determine mining areas and to oversee regional governments. The Mining law also regulated sanctions if the regional governments abused their authority when issuing mining licences. The rules were adequate to control the behaviour of regional governments, because they were no longer authorised to decide mining areas as before, reducing the possibility that there would not be the capacity or bad intention for granting mining licences in conservation or protected areas. Furthermore, central government also supervised the mining management carried out by regional governments, and there were sanctions if government officials abused their authority when issuing mining licences.

However, sometimes adequate rules are not feasible for implementation. The rules stipulating that central government should supervise regional governments seemed to be difficult to implement, due to the lack of central government capacity to carry out the powers assigned to it; therefore, the rules may not have been feasible. It would take time to adjust, and sufficient funds were required, along with a very strong willingness to implement them.

Meanwhile, Mining Law 4/2009 did not respond to the thousands of problematic KPs, for which licences had been issued unlawfully. Government Regulation 23/2010 only required that the KP document be converted into an IUP document, so there was actually no substantive change. Therefore, there was no adequate rule to combat the problem of the existence of the unlawful KPs, even though many of them had already caused environmental problems.

The Mining Law and its implementing regulations did not seem to respond to the problem of complex and non-transparent mining licensing procedures. The Mining law regulated neither a transparent, simpler regulation of the licence issuance process, nor certainty regarding time and costs; therefore, the rules were not adequate to resolve the issue. The Mining Law did issue a new licensing mechanism – an auction procedure to obtain mining licences in some areas – but this was no simpler than the previous mechanism. The auction system may not even be feasible to fully implement in Indonesia, due to the lack of state capacity; for example, in terms of providing mining data and other required resources.

The complexity of issuing licences was exacerbated by the absence of rules regarding transparency and public participation. As during the previous regime, the Mining Law and its implementing regulations did not regulate transparency and public participation in the mining licence issuance process, even though transparency and public participation in mining was standard in almost all international guidelines related to mining and the environment. Hence, Mining Law 4/2009 and its implementing regulations did not apply the public participation principle of environmental law. On the other hand, Mining Law 4/2009 and Government Regulation 23/2010 linked the requirements of mining licence issuance with other laws and regulations governing mining activities, such as environmental and forestry laws and regulations. Since mining activities required several documents that were regulated by different laws and regulations, coherence between those rules had the potential to reduce the complexity of licensing.

Regarding the problem of the lack of environmental safeguards when issuing mining licences, Mining Law 4/2009 and Government Regulation 23/2010, unlike the previous mining law and mining regulations, regulated more clearly regarding AMDAL. They made AMDAL a requirement for applying for IUP, and the AMDAL rules were regulated in more detail by Environmental Law 32/2009 and its implementing regulations. These rules were adequate to force mining companies to procure an AMDAL, because AMDAL was now part of the consideration for issuing an IUP. The use of the AMDAL instrument in the mining licensing process was in accordance with the preventive principle of environmental law, because it was an effort to prevent the environmental impact of mining activities. This rule is also in line with international guidelines as most of the international guidelines regarding mining and the environment require the use of an EIA in the process of issuing mining licences.

Mining Law 4/2009 and government regulations did not make mine reclamation and post-mining plans, and their guarantee funds, part of their considerations in making decisions to grant IUP. International guidelines recommend that mine reclamation and post-mining plans be submitted as part of a mining license application, and that they become part of the assessment of whether or not an application should be accepted. This was a way of implementing the polluter pays principle, which ensures that polluters are financially burdened for damaging the environment. Hence, Mining Law 4/2009 and the government regulations did not use licensing as a tool to force companies to fulfill their environmental obligations.

The problem of mining in environmentally vulnerable areas also seemed difficult to resolve via the legal framework, due to several weaknesses in the rules regarding determination of mining areas and protection of certain areas from mining activity. Mining Law 4/2009 regulated the determination of mining areas by central government. However, the rules regarding the

determination of mining areas were not adequate, because although some criteria for determining mining areas related to the environment, there was no clarity regarding those criteria, and they were not explained by the mining law or its implementing regulations. Therefore, there was no guarantee that environmental interests would be considered in the determination of mining areas. In addition, the rules regarding the process of determining mining areas were not coherent with other laws and regulations governing the determination of areas for other sectors. In addition, there were no rules regarding coordination with other land use sectors when determining mining areas. Therefore, the rules regarding the determination of mining areas were not adequate for dealing with mining in environmentally vulnerable areas.

Although the problem of mining activities in environmentally vulnerable areas was not addressed directly by Mining Law 4/2009, protection was given to such areas via other laws and regulations. The laws and regulations related to forestry and small islands contain regulations concerning the protection of specific areas from mining activities, but the Spatial Planning Law and its implementing regulations, as well as the Law on the Protection and Conservation of Natural Resources and their Ecosystems, do not firmly and clearly regulate the protection of certain areas from mining activity.

In summary, even though there are several provisions in Mining Law 4/2009 which aim to resolve problems regarding the regional issuance of mining licences and protection of the environment, based on the quality of laws and regulations assessment criteria, the regulatory framework has not yet been able to solve the mining licence issuance problems related to the environment. Several problems were adequately addressed by Mining Law 4/2009 and its implementing regulations, such as the behaviour of regional governments in issuing mining licences through restrictions and the supervision of regional government authorities, but the regulations were either difficult to implement or not feasible. The problem of lack of environmental safeguards when issuing mining licences was also addressed by inserting AMDAL into the licence issuance process. However, Mining Law 4/2009 and its implementing regulations did not make mine reclamation and post-mining plans, and their guarantee funds, part of the decision-making process for mining licences, even though international guidelines recommended it. Meanwhile, the Mining Law and its implementing regulations did not seem to respond to other problems, such as the complexity and non-transparency of mining and mining licences in environmentally vulnerable areas. The laws and regulations related to other natural resources were also insufficient for solving these problems. From the perspective of environmental law, the regulatory framework was not really in accordance with environmental law principles, and problems related to the environment were neither considered nor resolved.

The law-making process can explain the mixed nature of Mining Law 4/2009. Therefore, it is necessary to look at the process for making Mining Law 4/2009. The dynamic of this law-making process is discussed in Chapter IV.

IV The dynamic for developing Mining Law 4/2009 during the reform period

4.1 Introduction

This chapter focusses on the law-making process for Law 4/2009 on Mineral and Coal Mining (or, Mining Law 4/2009). The previous chapter examined the quality of the Mining Law and other related laws and regulations, and showed the very limited extent to which the regulatory framework addresses mining licence issuance problems related to the environment, as identified in Chapter II. Based on the quality of the assessment criteria for laws and regulations, namely: clarity, coherency, adequacy, feasibility, and conformity with environmental law principles and international standards for regulating mining and the environment, some of the rules meet some of these criteria, but most do not. Some of the mining licence issuance problems related to the environment were not addressed by the regulatory framework. Therefore, it would be difficult to use the regulatory framework to resolve mining licence issuance problems related to the environment.

Therefore, it is necessary to analyse the genesis of Mining Law 2009 as the main law governing the issuance of mining licences, in order to understand how mining licence issuance problems related to the environment were discussed, and what factors influenced such discussion. This chapter takes a step back, to provide an analysis of the law-making process for Mining Law 4/2009, mainly in terms of the process of problem finding, problem analysis and problem solving.

The second section of this chapter discusses the literature related to the dynamics of law-making and how certain theories can be used to analyse the process for making Mining Law 4/2009. The third section explains the rules regarding law-making that were in effect in Indonesia during the process of making Mining Law 4/2009. The fourth section is about the making of Mining Law 4/2009, beginning with an explanation of the law-making chronology, then discussing how problems were found, analysed and resolved, including the extent to which mining licence issuance problems related to the environment were addressed. The last section concludes the discussion of the dynamics of making Mining Law 4/2009 by answering the question of how those dynamics have affected the quality of Mining Law 4/2009.

4.2 Literature review on the dynamics of lawmaking

As explained in Chapter I, literature related to law-making can be divided into two types: literature that discusses the ideal conditions for the law-making process, and literature that discusses the dynamics of law-making. This section discusses the literature regarding the dynamics of the law-making process. This type of literature does not discuss how to provide an ideal process for law-making, instead describing and analysing the complexity of law-making in practice, where various factors may be influencing the dynamics of the process. Whilst (as explained in Chapter I) it is difficult to find literature that discusses the dynamics of law-making theoretically and comprehensively, literature related to environmental law-making and policy-making does provide an overview of the complexity of law-making, and can therefore be used as a reference for analysing Mining Law 4/2009.

The complexity of law-making and policy-making

Chapter III concludes that some mining licence issuance problems related to the environment were not addressed by Mining Law 4/2009. This means that determining problems to put on the agenda for analysis and resolution is an issue. However, it is difficult to find law-making literature that discusses the dynamics of problem finding and determination. Most of the literature examines the process of law-making *after* problems have been determined only. However, some public policy literature highlights problem-finding, including that of Carol Bacchi and John W. Kingdon.

According to Bacchi, problems are often considered to be both real and taken for granted (Bacchi, 200: xv). The dominant view in most policy approaches is that the government's job is (only) to deal with and try to solve the "problem at hand" (Bacchi & Goodwin, 2016: 16). This may explain why analysis of how a condition becomes a problem is often absent in research that precedes law-making. In fact, the problems handled by law-making are the result of a production process which creates problems (Bacchi, 2009: 1). Therefore, Bacchi suggests that it is necessary to shift our focus from how to solve the 'problem' to considering how a particular proposal implies a certain understanding of the problem (Bacchi, 2009: 1). This is known as 'problematization' and it either signifies a form of critical analysis by questioning something, or refers to the product of government practice, i.e. how a problem is addressed (Bacchi & Goodwin, 2016: 16). Bacchi provides seven questions for analysing the problem that underlies a proposal or policy document, otherwise known as the "What's the 'problem' represented? (or, WPR) method" (Bacchi, 2009: 2). The seven questions are: 1) What is the 'problem' represented as in a specific policy? 2) What presuppositions or assumptions underlie this representation of the 'problem'? 3) How has this representation of the 'problem' come about? 4)

What remains unproblematic in this representation of the problem? Where are the silences? Can the 'problem' be thought about differently? 5) What effects are produced by this representation of the 'problem'? 6) How/where has this representation of the 'problem' been produced, disseminated and defended? How could it be questioned, disrupted, and replaced? (Bacchi, 2009: 2)

In other words, Bacchi does not discuss the dynamics of problem-finding in the policy-making process; instead, she investigates the 'problem' represented in a document or policy proposal (Bacchi, 2009). Bacchi's view is important to this chapter, because it stimulates critical interrogation of the problem-finding process. Bacchi also shows that one consequence of creating problems in the policy-making process is that there will be issues left out and considered unproblematic (Bacchi, 2009: 12-13). Therefore this process, which creates dismissal of certain issues from the agenda for law-making, needs to be analysed.

Bacchi's perspective on "creating problems in the policy-making process" is in line with Kingdon, who argues that there is a process whereby issues are noticed and become problems that must be resolved in policy-making (Kingdon, 2014). Kingdon observes that, in reality, several issues have been discarded in policy-making and law-making, because they are not categorised as 'problems' (Kingdon, 2014). Only a few subjects or issues are of concern to the government and enter the agenda (Kingdon, 2014: 3). After the agenda has been determined, the government determines the alternatives. Of all the possible alternatives, officials actually only consider some seriously, thereby narrowing the set of conceivable alternatives (Kingdon, 2014: 4). Two things can affect the determination of the agenda and alternatives. The first is the participants, and the second is the process by which the agenda items and alternatives become prominent. Participants include the President, congress, bureaucrats in the executive, and various forces outside the government (including the media, interest groups, political parties, and the general public), all of which are potential sources of agendas and alternatives (Kingdon, 2014: 15). According to Kingdon, several things are important for research on participants, namely: (1) the importance of each participant; (2) the way in which each participant is important (e.g. whether or not they affect the agenda, alternatives, or both); and, (3) the participant's resources (Kingdon, 2014: 21). Based on his research, Kingdon argues that those who receive a lot of press and public attention – including the president and his/her high-ranking officials, prominent members of congress, the media, and election-related actors such as political parties and campaigners – have an influence over agenda-setting but little control over the creation of alternatives (Kingdon, 2014: 199). Conversely, relatively hidden parties – including academic specialists, career bureaucrats, and congressional staff – are less influential in terms of agenda-setting, but they do have greater impact on the creation of alternatives (Kingdon, 2014: 199).

Besides the participants, the process itself may influence setting the agenda and alternatives. To explain this process, Kingdon developed a theory known as the 'multiple streams framework' (or, MSF) (Kingdon, 2014). MSF theory describes three streams in the policy-making process – problems, policies, and politics – and their interactions before entering the policy agenda.

The problem streams are an issue of concern, because (as described above) only *some* of the issues are considered to be problems. A condition may become a problem driven by, firstly, indicators that show a problem exists (Kingdon, 2014: 90). Such indicators abound in politics, as governmental and non-governmental agencies routinely monitor activities and events such as road fatalities and disease rates, as well as carrying out routine monitoring and research (Kingdon, 2014: 90-91). Secondly, focussed events such as crises come as a threat to a nation as a whole (Kingdon, 2014: 96). Thirdly, feedback arises from various parties regarding the operation of government programmes. This feedback often brings problems to the government's attention, e.g. programmes which are not going according to plan, or implementation that does not match the government's interpretation of statutory mandates, etc. (Kingdon, 2014: 100-101). The key question is why some problems do not receive attention. Kingdon gives a number of reasons for this. First, the government may either address the problem or fail to address it and be frustrated by its failure. Second, the conditions that highlight the problem may change, e.g. there are no more indicators to show that a problematic condition or crisis is gone. Third, people may become accustomed to a condition or relabel a problem. Lastly, another item arises to push the high-priority item aside (Kingdon, 2014: 78).

The policy stream is the process by which problems are debated and proposals generated. This process generally occurs in specialist communities of (for example) government officials, academics, lawyers, etc. Each of these specialist communities put out policy ideas, but the communities are fragmented and thus lack a common orientation (Kingdon, 2014: 143). Only after years of effort do proposals get to the point where they can be considered seriously (Kingdon, 2014: 143). Proposals that are being considered seriously include more than just good ideas, the proposers also anticipate the obstacles that their proposals will face (Kingdon, 2014: 143). They adapt their proposals to anticipated budget constraints, consider whether their proposals will win approval from the general and specific public, and modify their proposals to gain approval from elected officials (Kingdon, 2014: 143). Ultimately, the policy stream generates a shortlist of proposals (Kingdon, 2014: 144).

Finally, there is the political stream. Regardless of problem recognition or proposed policies, political events flow according to their own dynamics and rules (Kingdon, 2014: 198). This stream refers to the development of

national politics, in which the combination of national atmosphere, elections, and organised political power is a strong agenda setter (Kingdon, 2014: 199). Consensus is needed both to identify and to solve problems (Kingdon, 2014: 199). In political streams, consensus is built by bargaining over persuasion (Kingdon, 2014: 199). Participants build consensus by bargaining/trading provisions for support, adding elected officials to coalitions by giving them the concessions they are demanding, or compromising on ideal positions that would gain wider acceptance (Kingdon, 2014: 199).

The three streams run independently, meeting at certain times, usually critical moments when there is a chance for an agenda change (Kingdon, 2014). The policy-making process is therefore not an orderly or gradual process, but rather loose and (seemingly) somewhat unintentional (Kingdon, 2014: 78).

Besides Kingdon's MSF, there are several theories that show complex policy-making and may also be used as references when analysing the making of Mining Law 4/2009, including the Incrementalist model and the Garbage Can model. Incrementalism, in Lindblom's 1959 model, shows that limited intellectual capacity, and the availability of information, time and resources, make it difficult to fulfil the requirements of rational policy-making. Policy-makers hence simplify the decision-making process, employing small steps, trial and error, and limited consideration of the consequences (Pal, 2011). Comprehensive alternatives are usually ignored, because they are either impractical in their political terms or the consequences are unpredictable (Atkinson, 2011: 10). Policy-makers therefore do not need to investigate a large number of long-term changes, which would take a lot of time, and they only make small and necessary adjustments, meaning that policies change very gradually, in small steps (Kingdon, 2014: 79).

Finally, the garbage can model, developed by Cohen *et.al* in 1972, argues that the policy-making process is irrational, disorganised (in terms of a chronological cycle), and contains no clear relationship between the problem and the solution. This is referred to as 'organised anarchy', in which people cannot define their preferences or develop a clear idea of their goals, they do not understand organisational processes well, and they enter into and out of the decision-making process fluidly (Kingdon, 2014: 84). In the decision-making process there are four separate variables which are not tied to one another: problems, solutions, participants, and choice opportunities. Problems and solutions can seem like they are 'dumped in a garbage can', leaving decisions to be made by chance. This is because policy is not being made by an organisation with a coherent structure; moreover, members do not have a comprehensive understanding of the problem; there are no permanent members in the organisation, and participants move in and out of the decision-making process (Kingdon, 2014: 84).

Characteristics of law-making related to the environment

Law-making can be even more complex when it comes to the environment. There are several distinctive environmental and human characteristics associated with environmental law-making, and this can make it difficult to manage. Lazarus argues that there are five characteristics that must be faced in order to regulate the environment, namely: complexity, scientific uncertainty, dynamism, prudence, and controversy (Lazarus, 2004: 14). Complexity consists of the complexity of the ecosystem itself, and the complexity of economic activities which are the main objects of environmental regulation (Lazarus, 2004: 14). Human behaviour, ecosystems, and their respective effects are indeed very complex (Martin, *et.al.*, 2016: 4). The environment also contains scientific uncertainty, due to its complexity. Therefore, it is difficult to determine the limitations of environmental protection, as the scientific information that underlies environmental law is tentative and uncertain. As a result, the implications for laws related to the environment continue to change. Controversy also arises regarding different values, such as the wealth of natural resources and human health (Lazarus, 2004, 14). In environmental law and policy these values can be extended further, to include the interests of non-humans and of future generations (Bell and McGillivray, 2006: 9). There may also be conflict regarding the rules for the distribution of costs caused by environmental legislation (Lazarus, 2004: 14). Meanwhile, due to this complexity it is difficult to conduct policy evaluations, both because of the uncertainty of the causal relationship between law and social and environmental outcomes, and because of the time lag between legal intervention and its results make those results difficult to measure (Martin, *et.al.*, 2016: 4).

Therefore, in making laws and regulations there are big differences between political parties regarding the right policies to implement, especially regarding the methods for carrying out environmental protection and the costs to be incurred. This is a political balancing process that depends on what is considered acceptable and involves economic, political, social and cultural criteria, as well as scientific and environmental criteria (Bell and McGillivray, 2006, 13-14). Chambliss adds to the explanation of the complexity of law-making, by explaining that creation is a process that aims to resolve contradictions, conflicts, and dilemmas inherent in the structure of certain historical periods, and by providing the example of Neil Gunningham's research on the drafting of the Pollution Act, which illustrated the dilemma of negotiating between environmental and economic interests (Chambliss, 1979: 157-158)

From the two types of literature on this subject it can be concluded that first, a condition, although problematic, is not necessarily defined as a problem that enters the agenda of policy-making or law-making. There are various factors which encourage a condition being considered a problem. Second,

participants and the policy-making or law-making process both influence the setting of the agenda and its solutions. Third, the process of making policy or law is complex and sometimes irrational, and it works through unclear stages. Fourth, the process of making policies or laws is even more complex when it comes to the environment, because of the complexity of the environment itself and the various conflicting interests, such as the conflict between environmental protection and economic interests. Based on these insights, I will examine how the participants in and process of making Mining Law 4/2009 affected the finding, analysis and resolution of problems, as well as whether or not there were other influential factors at play.

4.3 The rules regarding law-making

The authority to make law is regulated by the 1945 Constitution. In the New Order period, based on the constitution (before the amendment), the president held the power to make laws, with the approval of the House of Representatives (*Dewan Perwakilan Rakyat* or DPR). After the president made a law, the DPR would either approve or dismiss it. The 1945 Constitution also gave the DPR the right to submit a bill, but it hardly ever used this power. During the New Order period, various exploitative natural resource (including mining, forestry, and irrigation) laws and regulations were enacted, in order to achieve the government's goals of economic growth.

After the New Order period ended, Indonesia made four amendments to the 1945 Constitution. In the second amendment, the authority to make laws changed, and the DPR now held the power to make laws, whilst the president had the right to submit draft laws to the DPR. The amendment also stipulated that each bill would be discussed by the DPR and the president together, in order to obtain mutual agreement. The bill would become law after the president signed the bill. If, within 30 days of being mutually approved by the DPR and the president, the bill was still not signed by the president, it would automatically become law and must be promulgated. The second amendment also stipulates that the law-making procedure is further regulated by a law (Article 22).

In 2004 Indonesia issued Law 10/2004 on the Establishment of Law and Regulation, which was further regulated (in more detail) by Presidential Regulation 68/2005 on Governance Mechanisms to Prepare Drafts of Laws (PR 68/2005), Drafts of Government Regulations in Lieu of Laws, Drafts of Government Regulations, and Drafts of Presidential Regulations. Prior to the enactment of Law 10/2004, the mechanism for making a law was regulated by: Presidential Decree 188/1998 on Procedures for Preparing Draft Laws; Presidential Decree 44/1999 on Techniques for Drafting Law and Forms of Draft Law; Presidential Instruction 15/1970 on Procedures for Preparing Draft Laws and Draft Government Regulations for the Republic

of Indonesia; and Regulations on Procedures for the Indonesian House of Representatives (Hariningsih, 2004: 11; Farida et.al., 2008: 7). Law 10/2004 was replaced by Law 12/2011 on Establishment of Laws and Regulations, which was regulated in more detail by Presidential Regulation 87/2014 on Implementation Regulations for Law Number 12 of 2011 on Establishment of Laws and Regulations. Later, several articles of the law were amended through Law 15/2019 on Amendments to Law Number 12 of 2011 on Establishment of Laws and Regulations. Law-making is also regulated in the DPR Regulations on DPR Rules (*Tata Tertib DPR*, or Tatib DPR), which were issued for each term of the DPR administration. In general, the laws and regulations regulate the procedures for law-making, including who is involved and their roles, academic papers, decision-making stages of discussion, and public participation.

The dynamics of making Mining Law 4/2009, which lasted from 2005 to the end of 2008, certainly cannot be separated from the rules contained in Law 10/2004, Presidential Regulation 68/2005, and DPR Regulation 08/DPRRI/2005-2006 on Rules of the House of Representatives of the Republic of Indonesia. This section discusses how laws and regulations have regulated the mechanisms of law-making, especially those related to the processes of problem-finding, problem analysis, and problem solving. In the next section, this explanation will also be used to analyse the extent to which these rules have affected the law-making process.

Stages of law-making[1]

The stages of law-making regulated in Law 10/2004 were planning, preparation, drafting techniques, formulation, discussion, ratification, promulgation, and dissemination (Article 1 paragraph 1). Planning referred to the National Legislation Programme (*Program Legislasi Nasional* or Prolegnas) (Article 15). Prolegnas set the priorities for bills to be discussed each year and it contained a list of bills to be discussed within a certain period of time (Hikam, 2005: 24).

Based on Article 4 paragraph 2 of Presidential Regulation 61/2005 on Procedures for the Preparation and Management of the National Legislation Programme, each bill registered in the Prolegnas contained: the background and purpose of preparation; targets to be realised; the main ideas, scope or object to be regulated; and the range and direction of the setting. Bills that would be included in the list could come from either the government or the DPR. Before the government submitted a bill to be included in the list, the minister whose duties and responsibilities were in the field of law asked

1 I use the past tense to discuss these rules, because the law and regulations concerned are no longer valid.

other ministers and the heads of Non-Departmental Government Institutions to provide a plan for development of the bill within their respective agencies, in accordance with their scope of duties and responsibilities (Article 11). Meanwhile, for bills that would be included in the list by the DPR, the DPR's Legislative Body (*Badan Legislatif*, or Baleg) could request or obtain input from the public (Article 8). The DPR and the government jointly discussed the preparation of the National Legislation Programme (Article 20).

After Prolegnas was established – meaning that there had been decisions on the prioritised bill list for discussion in a specific year, based on Article 17 paragraph (1) of Law 10/2004 and Article 121 paragraph 3, DPR Regulation 08/DPRRI/2005-2006 – the DPR, the president, or the Regional Representative Council (*Dewan Perwakilan Daerah*, or DPD) could develop the bill. Article 17 paragraph 3 of Law 10/2004 stated only bills that were included in Prolegnas could be discussed. Only in exceptional circumstances were the DPR or the president allowed to submit a bill outside of Prolegnas.

A bill originating from the president was prepared by the minister or the head of a non-departmental institution most relevant to the material stipulated in the bill (Article 18 paragraph 1 of Law 10/2004). Preparation included the harmonization and coordination of bill materials (Article 18 (2) of Law 10/2004). Either the minister or the head of the non-department formed an inter-departmental committee, consisting of legal experts, drafters of laws and regulations from various departments, and institutions related to the bill (Article 6 (1-3) of PR 68/2005), to harmonize draft laws (Article 8 of PR 68/2005). The inter-departmental committee focussed on discussions on principal problems, regarding the object to be regulated, the scope, and the direction of regulation (Article 10 (1) of PR 68/2005). Experts from universities, or other social, political, professional and community organisations could be invited to discuss the bill at the inter-departmental committee level, according to the requirements for preparing the bill (Article 10 (5) PR 68/2005). The bill had to be approved by the relevant ministers, and if there was disagreement, the president would make the decision (Article 17 of PR 68/2005). If the bill was approved, it was then submitted to the DPR and discussed within a period of no later than 60 days from receipt of the president's letter (Article 20 (1 & 3) of Law 10/2004).

A bill originating from the DPR could be submitted by a commission, joint commission, or legislative DPR body to the DPR leadership (Article 130 (2-3), DPR Regulation 08/DPRRI/2005-2006). The Plenary Meeting would then decide whether or not the proposed bill could be accepted (Article 130 (5), DPR Regulation 08/DPRRI/2005-2006). If the proposed bill was approved, the head of the DPR would submit it to the president, asking them to appoint a representative minister to discuss the bill (Article 130 (10), DPR Regulation 08/DPRRI/2005-2006).The bill was then submitted to the

president, who would assign a minister to discuss the bill with the DPR within a period of no more than 60 (sixty) days from receipt of the bill by the president (Article 21 (1-2) of Law 10/2004; Article 130 (11), DPR Regulation 08/DPRRI/2005-2006). The assigned minister would prepare the views and opinions of the government and make suggestions for any improvements needed, in the form of a list of problems (*Daftar Isian Masalah*, or DIM), in coordination with other relevant ministers and heads of non-departmental government institutions (Article 32 (1) PR 68/2005).

The government or the DPR could prepare an 'academic paper' at the beginning of the bill development process. The paper would contain the background and purpose of the preparation, the targets to be realised, and the scope, objective, or direction of the regulation of the bill (Article 1 (point 7) of PR 68/2005). Academic papers were not required, but could be made and submitted together with the bill for the next stage of law-making. The initiator of the bill could compile an academic paper on the material it regulated, which at least contained a philosophical, sociological, and juridical basis, as well as the subject matter and scope of the material being regulated (Article 5 (1-3) PR 68/2005). Preparation of the academic paper was carried out jointly, with the department whose duties and responsibilities lay in the fields of law and regulation, and with universities or other parties who had the requisite expertise (Article 5 (1-2) of PR 68/2005). DPR Regulation 08/DPRRI/2005-2006 stipulated that a bill, along with explanations, statements and/or academic papers would be submitted to the head of the DPR (Article 125 (1) and Article 130 (3) of DPR Regulation 08/DPRRI/2005-2006).

The next phase was for the bill to be discussed by the president or minister and the DPR, during several DPR meetings, for mutual approval (Article 32 (1-7) of Law 10/2004; Article 121 (2), DPR Regulation 08/DPRRI/2005-2006). The discussion of the bill consisted of two stages. The first stage was commission meetings, joint commission meetings, legislative body meetings, budget committee meetings, special committee meetings, and the second stage of plenary meetings (Article 32 (5-6) of Law 10/2004, Article 136 (1) of DPR Regulation 08/DPRRI/2005-2006).

The first stage discussions began with either the general views of the factions and the DPD (if the bill came from the president), or the general view of the president (if the bill came from the DPR), and responses after the meetings were held to discuss the bill by the DPR and president, based on DIM (Article 137 (1) of DPR Regulation 08/DPRRI/2005-2006). At this stage, opinion meetings and public hearings could be held (Article 137 (2) of DPR Regulation 08/DPRRI/2005-2006). Furthermore, in the law-making process, external parties such as the public or experts could provide input, orally or in writing, regarding the bill's material (Article 53 of Law 10/2004; Article 141 and Article 142 of DPR Regulation 08/DPRRI/2005-2006; Article 13 (2) of PR 68/2005). Therefore, the bill originating from the DPR was dis-

seminated to the public by the Secretariat General of the DPR, and if the bill came from the president, dissemination was carried out by the government institution that formulated the bill (Article 22 (1-2) of Law 10/2004).

The second stage was actual decision-making in a plenary meeting. It consisted of reporting the results of the discussion, the final opinion of the factions, and the final opinion of the president (Article 138, DPR Regulation 08/DPRRI/2005-2006). The bill, which had been jointly approved by the DPR and president, was then submitted by the head of the DPR to the president, to be ratified as law (Article 37 (1) of Law 10/2004).

Focussing on rules related to problem-finding, problem-analysing and problem-solving

Referring to the rules above, problems were mostly formulated in the department if the bill was the president's proposal, and in the commission, joint commission or legislative body if the bill was a DPR proposal. The reason for this was that, before it was entered into the Prolegnas, the bill already needed to have been developed by the proposer of the bill. Based on these rules, the initiator of the bill played a major role in identifying and determining problems. However, in the process, other parties could also contribute by suggesting what issues needed to be discussed, and the DPR could request or obtain materials and/or input from the public.

After a bill was included in the Prolegnas list, it would be formulated by either the DPR or the government. Problem-finding, analysing, solving, and legal drafting, would be carried out by both proposers. If a bill was proposed by the government, the president would appoint a relevant department to formulate the bill. Hence, the department played a big role in determining both the agenda and alternative solutions. However, it was also possible for other parties to propose issues that needed to be discussed and any alternative solutions, because the department held inter-departmental meetings involving officials authorised to make decisions, as well as legal experts and drafters who were technically competent to review the material of the bill. They would discuss the main issues regarding the object to be regulated, the scope, and the direction of the regulation.

As described above, the DPR process for formulating a bill was carried out by a commission, joint commission, or the legislative body of the DPR, so one of these bodies would play a main role in determining the agenda and alternative solutions. However, problems could also be influenced by other parties during the process, and the legislative body of the DPR could hold working visits to obtain public aspirations which could then be used as material for preparing bills (Article 42 of DPR Regulation 08/DPRRI/2005-2006).

There were two stages for discussion of the bill by the DPR and the government. Problems and alternatives were discussed mainly in the first stage, as the second stage was a plenary session limited to deciding on whether or not a bill would be passed. The first stage of discussion was carried out over several meetings and focussed on the so-called 'DIM': a list of problems that need to be addressed, along with solutions related to the articles in the bill. During discussion of the bill by the DPR and the government new problems were seldom identified, because Article 137 paragraph 1 of DPR Regulation 08/DPRRI/2005-2006 stipulated that the meetings would be limited to discussing the DIM. Theoretically, it was not impossible to use this process to find and determine new problems that needed to be addressed because, based on existing regulations, discussions outside the DIM were not prohibited, and in the first phase of meetings, opinion meetings and public hearings could also be held.

In summary, the rules regarding law-making in Indonesia seemed to reflect a gradual law-making process, starting with the identification of legislative needs in Prolegnas. The bill would be developed by the President or the DPR, followed by discussion and decision-making on the bill by the DPR and the government, in the DPR. Based on these rules, most problems were found and determined during discussion of the bill before it entered the Prolegnas. If the bill was a presidential proposal, this took place in the department. If the bill was a proposal from the DPR, this took place in the commission, joint commission, or legislative body of the DPR. Discussion of the bill by the DPR and the president, in the DPR, was mostly about alternative solutions to these problems, as, based on DPR Regulation 08/DPRRI/2005-2006, the meeting should only focus on discussing the DIM.

4.4 The dynamics behind the making of Mining Law 4/2009

This section discusses the dynamics behind the process of making Mining Law 4/2009, especially with regard to problem-finding, problem-analysing and problem-solving, by looking at the participants, the process and other influential factors. To better understand the flow of law-making, the section opens with a description of the Mining law's chronology.

The chronology of Mining Law 4/2009

The making of Mining Law 4/2009 was driven by the need to make a new mining law that would be adapted to the autonomy policy regulated by Law 22/1999 on Regional Government (see, Gandataruna & Haymon, 2011: 224; Devi & Prayogo, 2013: 26; Hayati, 2015: 3; Purnamasari *et. al*, 2017: 22). This happened at the beginning of the reform period, when (as described in Chapter II) various parties were demanding changes to the exploitative pattern of natural resource management prevalent during the New Order

period, which only served to benefit powerful groups and ignored public interest. One source of pressure to change the pattern of natural resource management was the civil society movement, which later established the Working Group on Agrarian Reform and Natural Resources Management (*Kelompok Kerja Pengelolaan Sumber Daya Alam*, or Pokja PSDA) and pushed for a Resolution of the People's Consultative to become the basis for improving agrarian reform and resource management (Peluso *et. al.*, 2008: 393-394). The result of their efforts was the Resolution of the People's Consultative Assembly IX/2001 on Agrarian Reform and Natural the Resources Management. One of its provisions states that natural resource management policy should review the laws and regulations relating to natural resource management, based on the principles of agrarian and natural resource management reform, as regulated in the Resolution of the People's Consultative Assembly IX/2001. Law 22/1999 and the Resolution of the People's Consultative Assembly IX/2001 thereby became the legal bases for changes to the mining law.[2]

In 2001, the Department of Energy and Mineral Resources began to formulate a mining bill. The bill aimed not only to change mining governance in accordance with the decentralisation policy, but also to change mining governance and prioritise national interests.[3] Formulation of the bill within the government required a serious effort, because at that point the government intended to completely change the management of mining.[4]

The government claimed that drafting of the mining law was carried out via a discussion process with experts, academics, NGOs, professional organisations, as well as through a series of inter-departmental meetings.[5] The Department of Energy and Mineral Resources appointed several experts on these issues, to formulate the mining bill. In addition to involving mining law expert, Tri Hayati, the department involved international law expert, Hikmahanto Juwana, as the new mining law was expected to prioritise national interests without causing any conflict with foreign holders of

2 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 3.

3 Interview with Tri Hayati, an academic and mining law expert who was involved in making Mining Law 4/2009, at the Department of Energy and Mineral Resources, September 18th 2019; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

4 Interview with Tri Hayati, an academic and mining law expert who was involved in making Mining Law 4/2009, at the Department of Energy and Mineral Resources, September 18th 2019; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

5 Letter from the President of the Republic of Indonesia to the Head of the House of Representatives, Number: R. 29/Pres/5/2005, concerning the Draft Law on Mineral and Coal Mining, May 20th 2005.

mining contracts.[6] The ministry also involved an expert in government administration and regional autonomy, Bhenyamin Husein, in order to find a balance between decentralisation on the one hand, and effective mining policy on the other.[7] However, the NGOs complained that they had not been involved in the formulation of the bill.[8] The government claimed that there had been meetings with the NGOs, but that disagreements had occurred in which the NGOs demanded a moratorium on the issuance of mining licences, which the government rejected.[9] From that point onwards, the government continued the process without involving the NGOs.

In May 2005 the mining bill was submitted to the DPR by the Minister of Energy and Mineral Resources through letter Number R.29/Pres/5/2005 on the Bill on Mineral and Coal, signed by President Yudhoyono. The Minister of Energy and Mineral Resources' statement to the DPR when submitting the bill was that the old Mining Law needed to be changed, because there had been changes in national, regional and global conditions over the past 38 years, since the previous Mining Law 11/1967 had been enacted; for example, changes related to free trade, the environment, human rights, democratisation, decentralisation and the spirit of reform.[10] In addition, with the enactment of Law 22/1999 on Regional Government (replaced by Law 32/2004 on Regional Government), the regional governments were authorised to manage natural resources, and the mining law therefore needed to be adjusted to the regional autonomy policy.[11] The proposal to change the old mining law was agreed by the DPR without difficulty.[12] The

6 Interview with Tri Hayati, an academic and mining law expert who was involved in making Mining Law 4/2009, at the Department of Energy and Mineral Resources, September 18th 2019.

7 Ibid.

8 Minutes of a public hearing meeting between the Special Committee for Mineral and Coal Mining and experts, September 21st 2005, the House of Representatives, Republic of Indonesia, pp. 18-19; position paper of civil society groups (JATAM, ICEL, HUMA, WALHI, KAU, SPI, and KIARA), 'Mineral and Coal Law: An Empty Message for the Nation', written by Henri Subagiyo and Irvan Pulungan.

9 Interview with Tri Hayati, an academic and mining law expert who was involved in making Mining Law 4/2009, at the Department of Energy and Mineral Resources, September 18th 2019; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

10 Minutes of working meeting of the Special Committee for the Mineral and Coal Mining Bill with the Minister for Energy and Mineral Resources, July 4th 2005, the House of Representatives, Republic of Indonesia, p. 4.

11 Ibid, p. 5.

12 Minutes from a working meeting of the Special Committee for the Mineral and Coal Mining Bill with the Minister of Energy and Mineral Resources, July 4th 2005, the House of Representatives, Republic of Indonesia; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; interview with Sonny Keraf, a former DPR member from PDIP, who was involved in drafting Mining Law 4/2009, September 19th 2019; interview with Alvin Lie, a former DPR member from PAN, who was involved in making Mining Law 4/2009, September 25th 2019.

DPR then formed a special committee (*Panitia Khusus or* Pansus), which consisted of 50 members of the DPR, and the President assigned the Minister of Energy and Mineral Resources to discuss the bill.

Discussion of the Mining Law bill started on July 4th 2005, beginning with the Minister of Energy and Mineral Resources describing the main issues regulated by the bill.[13] Each faction of the DPR then responded to the statement from the government.[14] Furthermore, the DPR held seven days of meetings, inviting various stakeholders to provide input for the bill.[15] Stakeholders consisted of five groups – universities, NGOs, regional governments, business groups, and professional groups – and seven experts.[16] The next meetings involved discussion of the bill by the DPR and a team from the Department of Energy and Mineral Resources,[17] and they were generally a discussion of the articles in the bill and DIM, which had been prepared by the government.[18] This was in line with Article 137 (1) of DPR Regulation 08/DPRRI/2005-2006, which stipulated that DIM should be discussed in meetings between the government and the DPR.

Problem-finding whilst making Mining Law 4/2009

As the department appointed by the president to formulate the mining bill from the very beginning, the Department of Energy and Mineral Resources determined the problems on the agenda for resolution when making the new mining law. The two main problems it identified were foreign domination of the Indonesian mining industry, and how decentralisation policies

13 Minutes from a working meeting of the Special Committee for the Mineral and Coal Mining Bill with the Minister of Energy and Mineral Resources, July 4th 2005, the House of Representatives, Republic of Indonesia.

14 Ibid.

15 Minutes from a general hearing of the Special Committee for Mineral and Coal Mining with Experts, August 24th 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, August 29th 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, August 31st 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, September 5th 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, September 7th 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, September 12th 2005, the House of Representatives, Republic of Indonesia; minutes from a general hearing of the Special Committee for Mineral and Coal Mining with experts, September 14th 2005, the House of Representatives, Republic of Indonesia.

16 Ibid.

17 Minutes from a working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister for Energy and Mineral Resources, December 7th 2005, the House of Representatives, Republic of Indonesia.

18 Ibid.

were being implemented in mining management.[19] Mining policies had not favoured national private mining companies and the contract scheme was dominated by foreign investors, resulting in the under-development of the capabilities of private Indonesian mining companies.[20] After decades of mining being dominated by foreign investors, it was time for Indonesia to change its mining governance, following in the steps of several countries in Africa that had changed their mining policies to prioritise national interests.[21] The problem with decentralisation was that mining management had to be in line with decentralisation policy, which caused mining licences to be issued in an uncontrolled manner, with unfounded levies and no attention paid to environmental regulations.[22] Raden Sukhyar, former Director General of Minerals and Coal stated that "regional governments were issuing mining licences arbitrarily, therefore the process needed to be limited."

In addition to the above problems, an academic paper on the mining bill, produced by the Department of Energy and Mineral Resources, described several other problems concerning mining management in Indonesia. Firstly, the conflicts between communities surrounding mining areas and the mining companies themselves.[23] Communities often protest against mining businesses, because they generally gain little from the presence of mining, and such conflict could result in an insecure mining business.[24] Secondly, rampant incidences of mining without a licence (*Pertambangan Tanpa Izin*, or PETI). The PETI conducted by a local community would often

19 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 20-22; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

20 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 20; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

21 Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009; September 26th 2019; interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

22 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 22-23; interview with Tri Hayati, academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019.

23 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 29.

24 Ibid, p. 27-28.

be funded by a group of people known as the 'cukong', and sometimes government officers also supported these activities. Thirdly, the inconsistencies between policy for mining, forestry, the environment, and autonomy.[25] Mining sector licensing was often not in line with forestry, environmental and autonomy policies.[26] This was especially the case with forestry policy prohibiting open-pit mining in protected forests, which interfered with mining companies' activities.[27] Furthermore, there was overlapping land use, especially with forestry, because the forestry sector's maps were different from the mining area reserve system.[28] In addition, changes in forest boundaries issued by the Department of Forestry and any new discoveries of mineral resources would cause overlapping land use.[29] Fourthly, there was no added value from mineral and coal products.[30] In addition, 90% of the materials for the Indonesian mining industry came from abroad.[31]

Lastly, there were problems related to the environment. Environmental problems occurred in unlicensed and small-scale mining which damaged and polluted the environment via (amongst other things) deforestation, erosion, and river water pollution.[32] In practice, small-scale miners were also very weak in maintaining work safety and they did not do any environmental planning.[33] The competition between regional governments to obtain revenue resulted in many licences being issued without any attached environmental protection rules or measures to control the use of natural resources.[34] Another problem related to environmental management was the improper practice of reclamation, being carried out not in accordance with environmental impact assessments (EIA or *Analisis Mengenai Dampak Lingkungan*, or AMDAL) that had been prepared and approved.[35] The wasteful use of mining materials (or weak levels of conservation) was another environmental issue.[36] The existence of PETI caused the remaining resources and reserves to be exploited in an uncontrolled and unplanned manner.[37] Moreover, mining companies were generally only concerned with the economy, and did not take the conservation aspect into account.[38]

25 Ibid, p. 21.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid, p. 22.
30 Ibid, p. 29.
31 Ibid.
32 Ibid, p. 28.
33 Ibid.
34 Ibid, p. 23.
35 Ibid, p.26.
36 Ibid, p.30.
37 Ibid, p.31
38 Ibid.

Hence, although environmental issues were seen as problems that must be solved, this was not based on in-depth studies. The academic paper showed that the mining sector was concerned about the environment, but it had failed to present any comprehensive research demonstrating real environmental problems that should be placed on the agenda for the mining law discussion.[39] This can be seen in the academic paper which did not explain the research methods used, so that it was not known how the research reached the conclusion that these problems existed and needed to be addressed.[40] Furthermore, the academic paper did not adequately explain the references, such as the data or literature, used in the research.[41]

After discussion of the mining bill by the government was complete, the next stage in the process was for the government to submit the academic paper and bill to the DPR. The DPR then held meetings with five groups, consisting of regional governments, NGOs, employers' associations, and professional associations, and seven experts, over seven days. However, as meetings for four of the stakeholders were carried out in only two hours, the meetings were too few and too short to discuss the problems in depth.[42] Some stakeholders said that they had received documents from the parliament only one day earlier, and some even claimed that they had not received any documents.[43] In the limited time available the meeting contained a brief presentation from stakeholders, then continued with questions or comments from members of the DPR, but these only provided

39 See the academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004.

40 Ibid.

41 Ibid.

42 See the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 24th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 29th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 31st 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 5th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 7th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 12th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 14th 2005, the House of Representatives, Republic of Indonesia.

43 The minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 24th 2005, the House of Representatives, Republic of Indonesia; the minutes of the public hearing meeting of the Special Committee for Mineral and Coal Mining with experts, September 21st 2005, the House of Representatives, Republic of Indonesia.

general opinions.[44] Therefore, no new problems originated from these meetings for further discussion.

In fact, there were several opportunities to explore problems in addition to these meetings. For example, every party in parliament could hold discussions with various stakeholders, although this did depend on the will and interests of each faction.[45] Sonny Keraf, from the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia Perjuangan*, or PDIP) acknowledged that he had received input from several stakeholders at such meetings. Furthermore, the DPR made field visits to several places in East Kalimantan, Bangka-Belitung, and East Nusa Tenggara, although the research report for these visits was only submitted and explained during the meetings,[46] and there was no sufficient analysis of the data obtained. Therefore, in the end, hardly any new problems were mentioned during discussion of the bill by the government and the DPR.

In the discussion of the mining bill in the DPR, environmental problems were in fact included as a priority for discussion. The members of parliament involved in the law-making process at the time seemed concerned

44 See the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 24th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 29th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, August 31st 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 5th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 7th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 12th 2005, the House of Representatives, Republic of Indonesia; the minutes of the general hearing of the Special Committee for Mineral and Coal Mining with experts, September 14th 2005, the House of Representatives, Republic of Indonesia.

45 Interview with Sonny Keraf, former DPR member from PDIP, who was involved in drafting Mining Law 4/2009, September 19th 2019; interview Alvin Lie, former DPR member from PAN, who was involved in making Mining Law 4/2009, September 25th 2019.

46 The minutes of the working meeting between the Special Committee for the Draft Mineral and Coal Mining Law with the Minister of Energy and Mineral Resources, March 15th 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, May 4th 2006, the House of Representatives, Republic of Indonesia.

about the impact of mining on the environment.[47] However, during the DPR process there was no in-depth discussion of which environmental problems must be resolved. Sonny Keraf, a former Minister of the Environment, seemed to be very influential in formulating the environmental content of the bill, but his input was based on personal knowledge and experience, rather than on comprehensive research.[48]

In summary, whilst several important issues were categorised as problems that must be resolved by the mining law, most of the problems mentioned in chapters II and III (above) were left out. These included: 1) the rampant issuance of mining licences by regional governments, which are not in accordance with legal procedures and which ignore the environment; 2) complex and non-transparent mining licensing procedures; 3) the lack of environmental safeguards when issuing mining licences; and 4) issuance of mining licences in environmentally vulnerable areas. The problem of regional governments issuing mining licences not in accordance with legal procedures and ignoring the environment was the only problem raised. The existence of thousands of problematic mining licences being issued by regional governments through unlawful procedures was not acknowledged. The overall problem of the mining licensing system was not questioned, so the issue of complex and non-transparent licensing did not arise. This included problems with AMDAL, reclamation, and post-mining in relation to the issuance of mining licences, as well as the problem of issuing mining licences for development in environmentally vulnerable areas.

There are at least three reasons why these problems were not included in the formulation of the mining bill in government. First, when formulating the mining bill the government focussed on two issues, improving mining governance that prioritises national interests, and implementing regional government decentralisation, and the agenda for discussing the bill was based on those issues.

Second, there were very few studies available on problems related to mining and the environment. As explained above, the quality of the academic paper produced in the process of making this mining law was inadequate and, in the end, it was not even used as a reference for making the mining

47 The minutes of the working meeting between the Special Committee on Mineral and Coal Mining Bills and the Minister of Energy and Mineral Resources, January 19th 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee on Mineral and Coal Mining Bills and the Minister of Energy and Mineral Resources, February 1st 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, February 2nd 2006, the House of Representatives, Republic of Indonesia.

48 Ibid.

law. In the discussion of the mining bill in the DPR several members of the DPR even stated that the bill did not reflect the content of the academic paper.[49]

The third reason was the lack of stakeholder involvement in the process of problem finding. Although the government hired several experts, these were not involved in problem finding. They only provided alternative solutions to problems determined by the government, such as decentralisation and mining contract problems. In fact, the government selected them for this particular purpose. Furthermore, even though the government stated that it had involved various stakeholders, NGOs claimed that they had not been involved in the formulation of the draft law .[50] Indeed, the public and NGOs were not much involved in the process compared to the government, DPR and several experts. Understanding of public participation in law-making is often interpreted differently by the government than by NGOs. The government considers that disseminating a bill and presenting it to certain groups via a number of meetings (known as 'socialisation', in Indonesia) is sufficient as a form of public involvement. Meanwhile, NGOs consider this to be insufficient, because law-making requires the participation of various interested parties who work to influence the content of a bill. Moreover, there was a very big difference between implementation of public participation for the mining bill and implementation of public participation for the bill on natural resource management which was being carried out around the same time. The bill on natural resource management was formulated via a lengthy public consultation process, in addition to the fact that the members of the drafting team consisted of various stakeholders (Arnscheidt, 2009). As Sonny Keraf said, "Most of the law-making in the DPR was not participatory. I too dreamed of a participatory law-making process like that which occurred for the bill on natural resource management, but not all the parties wanted the same thing."

Indeed, the law-making rules in Law 4/2010 and Presidential Regulation 68/2005 only required the dissemination of a bill to the public. The public had the right to provide input on a bill, but there was no detailed mechanism for public participation, meaning that in the case of the mining bill the public participation process carried out by the government did not actually violate any existing rules. As explained above, communication with NGOs did not run smoothly. The NGOs argued that mineral resources should be

49 The minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, December 7th 2005, the House of Representatives, Republic of Indonesia.

50 Interview with Tri Hayati, academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019; interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

managed before they were used and that a moratorium on mining licences was needed, whilst the government believed that mining activities must continue regardless. As a result, the government only communicated and cooperated with a limited number of groups, and much of the input that could have been useful for the bill was lost.

The process of analysing problems and determining solutions whilst making Mining Law 4/2009

The process of analysing problems and determining solutions started with the formulation of the bill in the government and continued in meetings between the DPR and the government in the DPR. The discussion between the government and the DPR (as described above) focussed more on DIM and articles that had been prepared by the government. Therefore, as the problems and their solutions had both been prepared by the government, the meetings in the DPR were limited to discussing alternative solutions to those problems only.

Regarding the problems with licensing, the matter discussed most often was related to domination of foreign investors and regional government. In the early 2000s, commodity prices continued to rise, so the government and the DPR became increasingly sensitive to the fact that foreign miners were making large profits whilst the relative contribution of foreign investors to the mining industry as a whole had declined over time (Warburton, 2017: 293). The majority of foreign investment in the mining sector was in the extraction of valuable minerals. The companies that invested, produced and earned the most in this sub-sector were foreign-owned, and they had been slow to facilitate domestic shareholding (Warburton, 2017: 297). The government and the DPR considered that the contract system was the cause of inequality between domestic companies and foreign companies. In the contract system the government and the authorities were placed in equal positions, so that state control over mining resources was limited, and this contradicted state sovereignty over natural resources as regulated in the 1945 Constitution.[51] Furthermore the government had a problem with the behaviour of companies in the contract system.[52] As government official

51 Interview with Tri Hayati, academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources September 18th 2019; Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; Interview with Sonny Keraf, former DPR member from PDIP, who was involved in drafting Mining Law 4/2009, September 19th 2019.

52 Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; Interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

Raden Sukhyar stated, "we were very fed up with contract holders, but even changing contracts was difficult".[53] During the implementation of the contract system, foreign investors benefitted because, after a contract was signed it was difficult to make any changes, even if the government issued a new policy.[54] Therefore, both the government and the DPR seemed to agree that the contract system created problems, rather than benefits, for the state. By contrast, a licensing system was expected to be more able to control mineral resources as regulated by the constitution, because the government was more flexible in its regulation of mining resource utilization within the licensing system. For this reason, the government and the DPR agreed to abolish the contract scheme and replace it with a licensing scheme.

Licensing problems were also seen as mining management problems caused by regional governments.[55] The phenomenon of abuse of authority in the region had been known from the start by the government. Therefore, it was thought that clearer policies to regulate mining management in the regions were needed.[56] Members of the DPR were also well aware of the problems of mining licensing in the regions. Several of the problems regarding regional mining management that had emerged in the discussion at the DPR concerned unlawful levies to obtain licences and overlapping mining licences.[57] The implementation of mining policies by regional governments was an ongoing dilemma in the process of drafting the mining law. On the one hand, the government had to implement an autonomy policy, and on the other there were the regional problems with mining management.[58]

53 Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

54 Ibid.

55 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 20-21; the minutes of a hearing to discuss the Draft Mining Law between the Working Committee, Special Committee and the Directorate General of Minerals and Coal, June 21st 2006, the House of Representatives, Republic of Indonesia.

56 Interview with Tri Hayati, an academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019.

57 The minutes of the working meeting between the Special Committee on Mineral and Coal Mining Bills and the Minister of Energy and Mineral Resources, February 15th 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, February 16th 2006, the House of Representatives, Republic of Indonesia.

58 Interview with Tri Hayati, an academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019; Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

Therefore, the government sought clarity regarding the limits of regional government authority when it came to mining management.[59] The DPR discussed how mining management in the regions could be supervised by the central government. In the end, it decided to make rules regarding central government supervision of regional governments' mining management, creating sanctions for the governments if the licences they issued were not in accordance with statutory regulations.

In summary, licensing problems were not analysed broadly. The discussion focused on how to get the contract scheme abolished and replaced with a licensing system, as well as on licensing issues created by regional governments' approach to mining licensing. This was quite problematic, since after the abolition of the contract scheme, the responsible use of mineral resources was dependent on licensing. The licensing system must be adequate in order to achieve the country's mining development goals as well as protect public interests. Therefore, the analysis regarding licensing should be in-depth, and this did not happen in the process of making the mining law. In order to improve the licensing system the government proposed an auction system to create mining business licence areas (*Wilayah Izin Usaha Pertambangan*, or WIUP). This also required an in-depth analysis into why the auction system was needed and how it could be implemented in the Indonesian context, but no such analysis appeared in either the academic paper or the discussions in the DPR.

Regarding environmental problems, the government and the DPR discussed general issues regarding the environmental impacts of mining activities, but did not go into detail. The government and the DPR mostly considered environmental problems to be caused by: a) decentralisation, which gave regional governments the authority to issue mining licences without following environmental rules; and b) the failure of regional governments to optimise natural resources, because they were trying to increase their regional revenues.[60] Therefore, an alternative solution to solving mining management problems in the regions was to give authority to the central government to oversee regional government.

59 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 21.

60 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 22-23.

Another environmental problem discussed was the impact of mining activities and implementation of mine reclamation and post-mining on the environment.[61] However, not many alternatives for resolving these problems were proposed. The discussion did not explore in-depth why companies did not carry out mining and post-mining properly, nor did they present any ways to encourage mining companies to comply with their environmental obligations. They thus ignored (as explained in Chapter III) international guidelines related to mining and the environment which recommend that AMDAL, reclamation and post-mining plans, and guarantee funds form part of the decision-making for issuing mining licences, although these could be effective tools to force mining companies to fulfil their obligations.

Environmental problems regarding the impact of land use for mining activities on the environment were also not analysed broadly. The phenomenon of issuing mining licences in areas that were environmentally vulnerable was not discussed during the making of the mining law. The government and the DPR again connected this land use problem to poor mining management by regional governments, discussing their unpreparedness in managing mining areas and the absence of relevant data.[62] In addition, there was a discussion about conflicts between mining and other sectors, particularly forestry.[63] However, this did not become an environmental problem, as it was more of a discussion on how to create legal certainty for

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61 The minutes of the working meeting between the Special Committee on Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, February 2nd 2006, the House of Representatives, Republic of Indonesia; the minutes of hearings between the working committee, special committee, and Director General of Minerals and Coal, June 22nd 2006, the House of Representatives, Republic of Indonesia; the minutes of hearings between the working committee, special committee, and Director General of Minerals and Coal, July 12th 2006, the House of Representatives, Republic of Indonesia; the minutes of the hearing on the Discussion of the Draft Mining Law between the working committee, special committee, and Directorate General of Minerals and Coal, June 21st 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee on Mineral and Coal Mining Bills and the Minister of Energy and Mineral Resources, January 25th 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, July 12th 2006, the House of Representatives, Republic of Indonesia.

62 The minutes of the working meeting between the Special Committee on the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, February 8th 2006, the House of Representatives, Republic of Indonesia; the minutes of the working meeting between the Special Committee for the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, February 15th 2006, the House of Representatives, Republic of Indonesia.

63 The minutes of the working meeting between the Special Committee on the Mineral and Coal Mining Bill and the Minister of Energy and Mineral Resources, January 18th 2006, the House of Representatives, Republic of Indonesia; the minutes from a hearing on the Discussion of the Draft Mining Law between the working committee, special committee, and Directorate General of Minerals and Coal, June 22nd 2006, the House of Representatives, Republic of Indonesia.

mining areas, rather than the creation of an intention to protect environmentally vulnerable areas.[64]

Proposals regarding alternative solutions were based more on individual thoughts than on academic studies. The academic paper was not referred to during discussion of the draft mining law at the DPR.[65] Moreover, discussion of alternative solutions in the DPR was also not carried out in depth. This was firstly because the deliberation system in the DPR did not allow for in-depth discussions, and the meetings in the DPR only progressed article by article and only discussed the DIM. Secondly, not all the DPR members understood mining issues. Alvin Lie, a DPR member who was involved in drafting the mining law, said that "the members of the DPR were politicians with varying skills, and not all of them were sufficiently familiar with mining management; moreover, there were several laws that needed to be discussed at the same time".[66] Alvin Lie added, "therefore, if there was no strong reference, members made decisions based on political considerations only."

This is not to say that the legislative project was not taken seriously. Mining Law 4/2009 was developed through intensive and serious discussion over a period of three years. At certain points in time the mining bill was discussed almost every day,[67] a rare occurrence in the making of laws in Indonesia. Over the course of several interviews, parties involved in drafting the law stated that law-makers from both the government and the DPR had the requisite knowledge and integrity to improve the mining law.[68] The law-

64 The minutes of the hearing on Discussion of the Draft Mining Law between the working committee, special committee, and the Directorate General of Minerals and Coal, June 22nd 2006, the House of Representatives, Republic of Indonesia.

65 Interview with Alvin Lie, former DPR member from PAN, who was involved in making Mining Law 4/2009, September 25th 2019.

66 Ibid.

67 This can be seen in the minutes from the Mining Law 4/2009 process, issued by the House of Representatives; Interview with Rani Febrianti, a former staff member at the Department of Energy and Mineral Resources, who was involved in drafting Mining Law 4/2009, October 10th 2019; Interview with Tri Hayati, academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019.

68 Interview with Tri Hayati, academic and mining law expert, who was involved in making Mining Law 4/2009 at the Department of Energy and Mineral Resources, September 18th 2019; Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 16th 2019; Interview with Sonny Keraf, former DPR member from the PDIP, who was involved in drafting Mining Law 4/2009, September 19th 2019; Interview with Alvin Lie, former DPR member from PAN, who was involved in making Mining Law 4/2009, September 25th 2019; Interview with Ahmad Redi, academic and former staff at the Ministry of State Secretariat, October 29th 2019; Interview with Rani Febrianti, a former staff member at the Department of Energy and Mineral Resources, who was involved in drafting Mining Law 4/2009, October 10th 2019.

makers at the time remained idealistic, as claimed by one of the drafters of the Mining Law.[69] In addition, as claimed by a former Director General of Minerals and Coal, young employees at the Ministry of Energy and Mineral Resources had much enthusiasm and were very progressive.[70]

This relatively high level of involvement and professionalism certainly had to do with the 'spirit of the day'. The government began creating the bill at the beginning of the reform period and it was discussed by members of parliament appointed for the period 2005-2009, so the reform spirit was lingering at this point in time. However, such conditions were not enough to encourage adequate analysis to support the making of the mining law. It seemed that the government and the DPR were more focussed on discussing future mining management, after more than 30 years of continuity, instead of analysing the real problems of mining. They made a commitment to improving mining management, to maintaining state sovereignty, to prioritising national companies, and to enhancing people's welfare.[71] However, the process of making the mining law still ignored various issues regarding the issuance of mining licences.

After more than three years of debate, the bill was approved on December 16th 2008 in the Plenary Meeting of the DPR, and it passed into law. The National Mandate Party (*Partai Amanat Nasional*, or PAN) faction rejected the enactment, and one of the reasons for this was that potential mining areas had been allotted to hundreds of mining contract holders.[72] Thus, according to PAN, the concept of a mining licence was nothing more than a discourse, because in fact there was no land left.[73] The Mining Law also received negative reactions from NGOs, which stated that it had not accommodated various input from the public.[74] It was considered that the Mining

69 Interview with Alvin Lie, a former DPR member from PAN, who was involved in making Mining Law 4/2009, September 25th 2019.

70 Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019.

71 Academic paper, Draft Law on Mineral and Coal Mining, Directorate General of Geology and Mineral Resources, Department of Energy and Mineral Resources, 2004, p. 4; Government Statement on the Submission of the Draft Law on Mineral and Coal Mining; Interview with Raden Sukhyar, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, September 26th 2019; Interview with Sonny Keraf, a former DPR member, who was involved in drafting Mining Law 4/2009, September 19th 2019; Interview with Simon Sembiring, former Director General of Mineral and Coal, who was involved in drafting Mining Law 4/2009, October 3rd 2019.

72 The minutes from the Final Opinion of the National Mandate Fraction, Indonesian House of Representatives, on the Draft Law on Mineral and Coal Mining, December 16th 2008, p. 6.

73 Ibid.

74 Position paper of civil society groups (JATAM, ICEL, HUMA, WALHI, KAU, SPI, and KIARA), "Mineral and Coal Law: An Empty Message for the Nation", written by Henri Subagiyo and Irvan Pulungan.

Law did not change the exploitative paradigm in mineral resource management, because it also focussed on the use of mineral resources.[75]

4.5 Conclusion

The law-making research for this chapter was conducted to find out why the Mining Law 4/2009 did not respond to several environment-related mining licence issuance problems and did not meet the quality of law criteria, as discussed in Chapter III. Using insights from law and policy-making theories, such as Bacchi's What's the 'problem' represented? Kingdon's multiple streams Framework, Lindblom's Incrementalist, and Cohen's Garbage Can Model as theoretical guides, this chapter focussed on how problems were found, analysed and resolved.

One interesting observation is that although the above theories argue that law-making is a complex process and it is difficult to achieve a structured and rational law-making process, the process for making Mining Law 4/2009 cannot be said to have been an unstructured process. The process of making the mining law was carried out over three years via intensive discussions carried out by the government, the DPR, and several experts. The process of making this mining law was in accordance with the rules governing law-making in Indonesia. It began gradually, with the formulation of the mining bill by the government, followed by discussion of the bill between the government and the DPR, and then the passing of the bill into law.

However, Mining Law 4/2009 does not address mining licence issuance problems related to the environment. Referring to Kingdon, two factors determine the inclusion of problems on an agenda, namely: the participants, and the process (Kingdon, 2014). The role of the Department of Energy and Mineral Resources in finding problems dominated the roles of other participants involved in the law-making process. Based on Indonesian law-making rules, presidential initiative law should be formulated by the relevant department; hence, from the beginning, the Department of Energy and Mineral Resources determined the problems and solutions regulated the mining law. Even though this department involved other parties in the formulation of the law, especially academics and experts, their role was limited to finding alternative solutions to the problems that had been previously determined by the government. Meanwhile, the public, including the NGOs, do not seem to have been involved from the start, as there were principal differences in insight regarding mining management. Whilst NGOs argued that the government should by placing a moratorium on mining

75 Ibid.

licence issuance, the government wanted to continue its mining business. Because of this dispute, various problems that the NGOs care about did not feature on the agenda, which was instead exclusively based on the knowledge and perspectives of the Department of Energy and Mineral Resources.

Likewise, in the discussion of the bill in the DPR, no new problems were raised by the DPR. The discussion between the government and the DPR focussed on the list of problems, and took an article by article approach to the bill that had been prepared by the government. This process was in line with DPR Regulation 08/DPRRI/2005-2006, which stated that the purpose of the discussion between the government and the DPR was to discuss DIM. Therefore, the DPR hardly engaged in the definition of problems, instead limiting itself to providing alternative solutions to the problems defined by the government. The role of the participants and the mechanism for making the Mining Law 4/2009 therefore became the main factors causing environmental problems with mining licence issuance not to be addressed, as discussed in Chapter III. The dominant role of the Department of Energy and Mineral Resources in problem-finding was not balanced by an adequate role being played by other stakeholders. As problems only arose from the knowledge and perspective of this department, broader problems were not found, let alone responded to. Therefore, several mining licence issuance problems related to the environment that needed to be solved by the mining law were not included on the agenda for its discussion.

The second factor which, according to Kingdon, affects problems being put on the agenda is the process (Kingdon, 2014). As stated by Kingdon, "ideas can come from anywhere" (Kingdon, 2014: 71). Issues such as the domination of foreign companies and the management of mining by regional governments seem to have attracted the government's attention. The domination of the mining industry by foreign companies, leading to the weakening of domestic companies, had been felt by the mining sector in Indonesia for years, and more recently there had been examples of nationalist policy trends within the African mining industry. Problematic mining management by regional governments, however, had been recognised by the public, as the problem could be found on a daily basis in the media, various seminars, and other meetings. Furthermore, the uncontrolled management of mining by regional governments had disrupted the mining industry as a whole. In spite of this, the government still did not address the mining licence issuance problems related to the environment. The process of determining the problems to be included in the agenda was rather haphazard. The academic paper prepared by the government did not contain adequate studies on mining in Indonesia, there were no rules requiring the existence of academic paper in making laws, let alone rules regarding research standards for academic papers. Moreover, meetings between the government and the DPR only focussed on discussing the list of problems and articles in the mining bill that had been prepared by the government.

Furthermore, hearings with various stakeholders in the DPR only presented general opinions on mining issues in Indonesia, in spite of field visits (organised by the DPR) having been made to several regions, which were not discussed further during the making of the Mining Law.

In addition to the process of determining the problem, which Kingdon calls the 'problem stream', there are two other streams that influence policy-making, namely the policy stream and the political stream (Kingdon, 2014). In the policy stream, ideas can be proposed by various communities. In the process of making the Mining Law, most of the policy ideas came from the government, especially the Department of Energy and Mineral Resources, whilst several experts nominated by the government, and several members of the DPR, and other policy communities did not really get the opportunity to propose their policy ideas.

Meanwhile, the political stream when making the mining law showed that the atmosphere of reform was still influential. The national mood at the time was moving towards change in the management of natural resources, including mining, which during the New Order period had been managed centrally and had been dominated by foreign companies. These issues therefore received major attention when the Mining Law was being drafted. The atmosphere of reform also influenced the enthusiasm of law-makers for producing mining laws that were better than those issued during the New Order period. In fact, the political atmosphere supported the making of a good Mining Law, but unfortunately this was not supported by adequate research on either mining or environmental problems.

An important underlying factor, which meant the environmental problems linked to mining licence issuance were hardly addressed during the process of making Mining Law 4/2009, was that making laws related to environmental issues brings with it its own special problems, one of which is the conflict between environmental interests and economic interests (Chambliss, 1979: 159). As this was a mining law, it focussed on the interests of developing the mining industry and was limited in its ability to address the impact of mining activities on the environment in general. Neither the basic causes nor the solutions were studied more deeply, in either the academic paper prepared by the government or in discussions between the government and the DPR. Therefore, the analysis did not link issuance of mining licences and the environment. Although licensing problems caused by regional governments were being seen as exclusively related to mining management, they were actually broader. As for the norms intended for environmental protection, some were proposed in the discussion between the government and the DPR, but this was only because Sonny Keraf, a legislator who was a former Minister of the Environment, played an active role in the discussion process in the DPR. However, this resulted in individual ideas in on-the-spot discussions at the DPR, and not in well considered

ideas based on comprehensive research on environmental issues related to mining in Indonesia.

However, because Mining Law 4/2009 was made via a structured process of long discussions and commitment from both the government and the DPR, its final result was not too bad. There was enthusiasm for it from law-makers, from the government and from the DPR, because after decades of the same pattern, mining management in Indonesia could finally be changed during the reformation period. Unfortunately, the positive spirit of the law-makers to change mining governance for the better, and the sufficient time allocated for discussion were not supported by methods to obtain information on real problems, and proper analysis. This included a failure to involve all stakeholders, especially at the stage of formulating the mining bill in the government, where problem-finding and analysis of the bill were mostly carried out, as the bill was the government's initiative. In fact, because of the spirit of the reform, the making of the new mining law was driven more by mining management ideas for the future, whilst existing problems that should have been addressed first were ignored.

One of the problems related to the issuance of mining licences and the environment that was ignored in the making of the Mining Law 4/2009 was the existence of thousands of mining licences that had been issued through unlawful procedures, as a result of implementing the decentralisation policy. The next chapter discusses how government bureaucracy in Indonesia made and implemented a mining licence legality verification policy known as the 'Clean and Clear Policy' (or C&C), in order to detect the thousands of problematic mining licences and measure their impact on the environment.

V Measuring the effectiveness of the 'Clean and Clear' policy for dealing with unlawful mining licences and their environmental impact

5.1 Introduction

As explained in Chapter II, thousands of mining licences were issued through unlawful procedures, from when the decentralisation policy was first implemented in Indonesia in 2000, up until 2009. Many of these mining licences were issued by regional governments, without regard for laws and regulations, resulting in negative environmental impacts. Unfortunately, as discussed in Chapter III, Law 4/2009 on Mineral and Coal (Mining Law 4/2009) did not respond to the existence of the problematic mining licences, leaving a lack of clarity around how to solve the problems they had caused.

In 2011 the Ministry of Energy and Mineral Resources instigated the 'Clean and Clear' policy (or C&C) with the objective of verifying the legality of the existing mineral and coal mining licences. Through C&C, the mining licences were assessed based on criteria set by the central government. Licences that met the criteria were given C&C status and companies that held C&C licenses could be registered and continue their mining activities. Companies which did not meet the criteria were subject to certain actions (depending on the criteria not met), starting with provision of the required documents up until the date of revocation of the licence. This policy, which lasted until 2017, received both positive and negative responses. On one hand, the policy was considered helpful for managing the existing mining licences, because it allowed data on mining licences throughout Indonesia to be collected, thereby eliminating any overlaps between the mining licences. However, some argued that the policy only legalised mining licences, whilst the process of issuing the licences had in fact violated the laws and regulations.

This chapter discusses C&C and its implementation, in order to examine the extent to which C&C resolved the problem of thousands of unlawfully issued mining licences and their impact on the environment. To discuss the policy and the dynamics of its implementation, this chapter is divided into six sections. The next section explains the background to C&C and its objectives. The third section discusses the literature on illegality practices in Indonesia and the Timber Legality Verification System (*Sistem Verifikasi dan Legalitas Kayu*, or SVLK) policy as a reference for assessing C&C and its implementation. The fourth section analyses the regulation which was the basis for implementing C&C: Minister of Energy and Mineral Resources

(*Energi dan Sumber Daya Mineral* or ESDM) Regulation 43/2015 on Evaluation Procedures for the Issuance of Mineral and Coal Mining Business Licences. The fifth section explains the dynamics of implementing C&C in general, then focusses on the implementation of C&C in South Sumatra Province. The last section is the conclusion.

5.2 Understanding the Clean and Clear policy

As explained in the previous chapters, after the decentralisation policy was implemented, the regional government issued thousands of mining licences. The central government could not control the rampant issuance of these mining licenses, and it did not even have access to complete mining concession data for the regions. After Mining Law 4/2009 required the government to manage mining areas in line with the mining policies stipulated in the mining law, the government needed data on mining licences throughout Indonesia, in order to find out which areas had been licenced for mining (Abdullah, 2017a: 4). It was very important for the government to have data on mining licences, especially for metal minerals and coal, because unlike the previous mining law, where mining companies examined the potential for mining materials in an area, Mining Law 4/2009 required the government to determine mining areas by itself, which could then be auctioned off for use before any mining licences were issued.

In 2011, the Ministry of Energy and Mineral Resources organised a programme called 'Reconciliation', which was intended for the collection of data on mineral and coal mining licences that had been issued by regional governments (Abdullah, 2017a: 4). Reconciliation set out to collect documents relating to Mining Business Licences (*Izin Usaha Pertambangan*, or IUP) and to confirm the IUP data, together with regional governments (Abdullah, 2017a: 4). In addition, reconciliation aimed to ensure that mining licences that were in effect prior to the Mining Law 4/2009, namely the Mining Authorisation (*Kuasa Pertambangan*, or KP) had been converted into IUP (Abdullah, 2017a: 4). As explained in Chapter III, based on Government Regulation 23/2010 each KP must be converted to the IUP form, no later than three months from the enactment of Government Regulation 23/2010. To this end, the ministry invited all the regional government leaders to Jakarta so that they could submit all their IUP documents, such as decisions on the issuance of mining licences, along with map attachments, documents related to financial obligations, and Environmental Impact Analysis (*Analisis Mengenai Dampak Lingkungan*, or AMDAL) approvals (Abdullah, 2017a: 4).

This did not work out well, because regional governments were not cooperative about providing data on mining licences in their areas. One reason for this was that regional governments considered that there was no legal basis for central government to determine C&C or non-C&C (Abdullah,

2017a: 4). As the reconciliation process did not go smoothly, data on mining licences could not be fully collected (Abdullah, 2017a: vii).[1]

After the failure of reconciliation, the Minister of Energy and Mineral Resources and the House of Representatives (*Dewan Perwakilan Rakyat* or DPR) met to discuss the problems concerning issuance of mining licences in the region and they agreed that it was necessary to re-manage IUP in the region and that only IUP meeting the legal requirements should be registered in the Ministry of Energy and Mineral Resources mining area database.[2] Therefore, the ministry began to assess all the IUP data provided by the regional governments, categorising them as either C&C IUP or non-C&C IUP[3]. The Director General of Mineral and Coal issued Decree 1406/30/DJB/2012 on Standard Operating Procedures (SOP) for Processing Clean and Clear certificates. 'Clean' meant that there was no overlap with the same type of IUP, while 'Clear' meant that administrative requirements were being obeyed[4]. The C&C criteria in the decree included: no overlap with other mining concessions; having an exploration report, feasibility study report, and the necessary environmental documentation; and paying financial obligations in the form of fixed fees and royalties.[5] Mining companies needed C&C certificates for their IUP because a number of regulations (for example, the Minister of Energy and Mineral Resources Regulation 1/2014) also required a C&C certificate for providing licensing services, including transportation and sales licences, export licences (*Surat Izin Ekspor* or SIE), export approval letters (*Surat Persetujuan Ekspor* or SPE), and investment changes (Abdullah, 2017a: 5). The consequence for mining companies without a C&C certificate was that they would not be provided with a number of services from the government.

In 2014 the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK) started to get involved in C&C. This involvement was

1 Also, interview with Surya Herjuna, the Head of the Sub-Directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019.

2 Interview with Surya Herjuna, the Head of the Sub-Directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019.

3 Interview with Surya Herjuna, the Head of the Sub-Directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019.

4 Interview with Surya Herjuna, the Head of the Sub-Directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019; Dedi Supriyanto, the Head of the Mineral and Coal Utilisation Section, Directorate of Mineral and Coal Programme Development, Directorate General of Minerals and Coal, 30th October 2019.

5 Directorate General of Minerals and Coal, 'Indonesia Mining Outlook 2015, Mineral and Coal Policy', Directorate General of Minerals and Coals, Ministry of Energy and Mineral Resources, Jakarta, January 28th 2014.

part of the National Movement to Save Natural Resources Programme (*Gerakan Nasional Penyelamatan Sumber Daya Alam*, or GN-PSDA), based on the charter of the 'Protecting Natural Resources' declaration, which was signed by the Chairperson of the Corruption Eradication Commission, the Armed Forces Commander, National Police Chief, and Attorney General on June 9th 2014 (Abdullah, 2017b: 13). The declaration included a statement supporting the management of Indonesian natural resources free from corruption, collusion and nepotism (Abdullah, 2017b: 13). Therefore, the KPK carried out mining governance reforms via what it called Mineral and Coal Coordination and Supervision (*Koordinator dan Supervisi Mineral dan Batubara*, or Korsup Minerba). Korsup Minerba involved academics and non-government organisations at both national and regional levels, all of which supported the KPK in carrying out supervision, research, and monitoring (Abdullah, 2017b: 13). The KPK supported C&C, because it could be used to access mining company data, as well as to filter the legality of existing IUPs (Abdullah, 2017a: 1-2). The KPK also expected that C&C might contribute to overcoming various negative impacts from the issuance of unlawful mining licences, which had caused the state financial losses (Abdullah, 2017b: 1-2).

Korsup Minerba urged having a legal basis for IUP assessment (Abdullah, 2017a:vii) because, as explained above, without legal basis for the implementation of reconciliation, regional governments would refuse to cooperate. Then, the Ministry of Energy and Mineral Resources issued Minister Regulation of Energy and Mineral Resources 43/2015 on Evaluation Procedures for the Issuance of Mineral and Coal Mining Business Licences, which applied to metal, mineral and coal mining IUPs throughout Indonesia.[6] The ministerial regulation concerned the C&C implementation mechanism, which will be discussed in one of the sub-sections of this chapter.

5.3 Illegality and legality verification policy in Indonesia

Indonesia used laws and regulations to control access to natural resources, but the government failed to implement and enforce them. Therefore, illegal practices were common in Indonesia, especially in the context of natural resource management (McCarthy, 2011: 89-90). This issue was further complicated by the fact that many state officials were involved in the illegal practice (Aspinall & Klinken, 2011: 2-3). Politicians and government employees accepted bribes, inducements, favors, commissions, etc., in exchange for ignoring the regulations and providing routine government services, including licensing (Cribb, 2011: 32). The process of issuing

6 https://programsetapak.org/pemantauan-bersama-untuk-meningkatkan-tata-kelola-sektor-pertambangan/

licences related to natural resources (i.e the use of timber, plantations, and mining licences) in forest areas was a form of government service that was widely abused by state officials, and the impact this had on deforestation which ultimately caused systematic damage and the conversion of natural forests (Kartodihardjo *et.al,* 2015: 184). One illegal practice often carried out by government officials when issuing licences violated the procedure for issuing licences, by speeding up the issuance process; for example, by accelerating the submission of documents or document processing (Meehan & Tacconi, 2017: 118). Another common illegal practice was to give preferential treatment to companies who obtained licences, even if those licences had been obtained against laws and regulations; for example, by granting licences to areas that were either not in accordance with forest classification or had been granted licences previously (so that they overlapped with existing licences) (Meehan & Tacconi, 2017: 118-119).

Corruption and other forms of illegality in Indonesia were already 'rooted', having become a routine practice that did not go away (Aspinall & Klinken, 2011: 5; Cribb, 2011: 43). Even when the New Order period ended, giving way to the Reform period, corruption and other illegal practices by state officials proved to be more resistant to reform than people had expected (Aspinall & Klinken, 2011: 4). This also happened with the issuance of mining licences. After regional governments had been given authority to issue mining licences (as explained in Chapter II), they carried out an unlawful procedure to issue as many licences as possible.

Therefore, as explained above, C&C was issued in order to assess the legality of the mining licence issuance process for existing mining licences, so that only mining licences that were confirmed to have the required legal documents were granted C&C status. In fact, policies ensuring the legality of documents or products are not new in Indonesia. For example, there was already a legality verification scheme for combating unlawful timber trading, known as the Timber Legality Verification System (*Sistem Verifikasi Legalitas Kayu*, or SVLK). The scheme was developed by Indonesia, based on Voluntary Partnership Agreements (VPAs) with the 2003 European Union (EU) Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan (European Commission [EC] 2003).[7] The system ensures that all timber is produced in accordance with national laws, and that legality certificates, produced via legal procedures, are always provided for timber (Maryudi, 2016).

SVLK, which have been discussed in various forums and papers, concern: what is categorised as legal; how a scheme is implemented; effect(s) on the eradication of illegal logging; how the small-scale forestry sector is

7 https://silk.menlhk.go.id/index.php/article/vnews/23

impacted, etc. (for example, Obidzinski, *et.al.*, 2014; Nurrochmat, *et.al.*, 2016; Setyowati & McDermott, 2017). Some discussions criticise the SVLK scheme and its implementation, stating that the legality scheme has mainly served to simplify the resolution of Indonesian forest governance issues into an auditable list of regulatory requirements (Setyowati & McDermott, 2017: 755-756). Legality in SVLK policy is only narrowed by the availability of formal documents, and not by the evaluation of deviations to obtain these documents (Setyowati & McDermott, 2017: 755-756). The scheme is therefore only an administrative procedure, which fulfils administrative requirements and is therefore considered to have complied with the law. This is the case, even though the process of fulfilling administrative requirements can be misused, risking conflict with the goal of eradicating illegal logging, because the root of the problem is not being solved (Obidzinski & Kusters, 2015). It is even possible that the scheme actually legitimises exploitative (but legal) practices and makes it possible to legalise previously illegal or legally ambiguous practices (Bartley, 2014: 105).

Referring to the situation of rampant illegal practices in Indonesia and in SVLK, and in order to understand the extent to which C&C resolved the problem of thousands of illegally issued mining licences and their impact on the environment, this chapter assesses: the legality criteria, or criteria for granting a C&C certificate; the C&C mechanism; and the implementation of C&C itself.

In assessing the legality criteria used by C&C to assess mining licences, I refer to the general understanding of legality that is simply conformity with laws and regulations, and not to the deeper understanding of legality as discussed by legal scholars – for example, Fuller, who states that the ideal legality is that all rules are clear, consistent with each other, known to every citizen, never retroactive, and carefully followed by the courts, the police, and all those responsible for their administration (Fuller, 1964: 41), or the understanding of legality stated by Shapiro: that it is broad to the point of questioning the identity of the law, such as whether an unfair rule can still be said to be a law (Shapiro, 2011: 24). Legality, in the opinion of such scholars, is not only behaviour in accordance with the existing rules, but also that the rules themselves must be of a certain quality.

In contrast, I focus on assessing whether the legality criteria for assessing mining licences in C&C were in accordance with Indonesian laws and regulations. After assessing the criteria used in the C&C, the study analyses the mechanism used to determine whether or not a mining licence has met the legality criteria, and to determine the sanctions for mining licences that did not meet the criteria. Finally, the study analyses the implementation of C&C, focussing on how the mechanism for assessing mining licences was carried out, the role of government authorities in assessing mining licences, and the behaviour of companies and other parties involved. C&C may be

difficult to implement in Indonesia because, as explained above, rampant illegal practices and even unlawful activities are so deep-rooted and difficult to eradicate, making the mechanism easy to carry out through unlawful practices.

5.4 Minister of Energy and Mineral Resources Regulation 43/2015

As explained in Section 2, C&C was initially implemented without a legal basis. The Ministry of Energy and Mineral Resources asked the regional governments to provide documents related to metal and coal mining licences, then assessed whether or not the licences fell into the clean and clear category. However, the implementation was not effective, and after the KPK became involved in C&C, it pushed for a legal basis for its implementation. Eventually, the Minister of Energy and Mineral Resources issued Minister Regulation 43/2015, which was used (from 2015 to 2017) as a guide for assessing metal and coal mining licences.

In the hierarchy of laws and regulations in Indonesia (Articles 7 and 8 of Law 12/2011 on the Establishment of Laws and Regulations), as described in Chapter I, the ministerial regulation sits within several types of laws and regulations, namely: the 1945 Constitution; the Decree of the People's Consultative Assembly; Laws/Government Regulations in Lieu of Laws; Government Regulations; and Presidential decrees and other regulations established by the People's Consultative Assembly, House of Representatives, Regional Representative Council, Supreme Court, Constitutional Court, Financial Audit Agency, Judicial Commission, Bank Indonesia, Ministers, particular agencies, or government commissions. The rules in the ministerial regulation must therefore be in line with, and must not conflict with, the higher laws and regulations. In general, ministerial regulations regulate the rules contained in the laws and regulations above in more detail.

Ministerial Regulation 43/2015 was issued when 32/2004 on Regional Government was replaced by Law 23/2014 which changed the rules regarding authority for mining management. The law regulates that the regent/mayor is no longer authorised to issue or revoke metal minerals and coal mining licences, the authority for which would now only be held by the Minister of Energy and Mineral Resources and the governor. The Ministerial Regulation also stipulated that only the Minister of Energy and Mineral Resources and the governor had the authority to assess mining licences. All regents/mayors must submitted mining licence documents to the governor if the mining licence owner was a company with domestic investments, or to the Minister of Energy and Mineral Resources if the mining licence owner was a company with foreign investments (Article 2).

On behalf of the Ministry of Energy and Mineral Resources, the Director General of Mining and Coal and the governor would assess mining licence documents (Article 4). The type of metal and coal mining licences to be assessed were IUPs, originating from the adjustment of KP and KP that had neither expired nor been adjusted to become an IUP (Article 5 (1)). Therefore, IUPs that were not included in these two criteria did not need to be assessed; for example, IUPs that were not from KP and that had been issued after Mining Law 4/2009 entered into force.

Mining licence assessment was based on administrative, spatial, technical, environmental and financial criteria (Article 5 paragraph (2)). The administrative criteria concerned the availability of documents related to mining licences, such as the licence application, licence extension, status upgrade licence, and licence reduction. The spatial criteria required documents showing that the mining area did not overlap with other mining licence areas. The technical criteria comprised an exploration report document for exploration IUP holders, and feasibility study documents for IUP holders entering the production operation stage. The environmental criteria referred to the completeness of the environmental documents submitted. Finally, the financial criteria included documents showing fulfilment of the obligation to pay fixed fees, for exploration IUP holders, and documents showing payment of fixed fees and royalties, for production operation IUP holders.

In the assessment process, the Director General of Mineral and Coal (on behalf of the Minister of Energy and Mineral Resources) and the governor would ensure and adjust licensing documents collected to satisfy the rules of Mining Law 4/2009 and its implementing regulations. For example, this could happen by adjusting the term of a mining licence in a licence document, if it exceeded the period stipulated by Mining Law 4/2009 (Articles 10 and 11), in order to shrink the area if there were overlapping mining business areas, or to give the area to the first applicant if a licence was found that evidenced overlap with another mining licence area for the same type of mining (Article 12). Another way in which this could happen was if changes were made to the coordinates of mining licences, so that they would lie partly outside of mining area reserves (Articles 14 and 15).

The Director General of Mineral and Coal (on behalf of the Minister of Energy and Mineral Resources) and the governor imposed administrative sanctions on exploration IUP holders if they did not meet the technical criteria – namely: not having exploration reports, feasibility study reports, environmental documents, or any proof of payment of fixed financial fees (Article 17 (1)) – and on exploitation IUP holders if they did not have proof of payment of fixed fees and production fees (royalties) (Article 17 (2)). The administrative sanction came in the form of a written warning, the temporary cessation of business activities, or the revocation of IUP (Article 17 (3)).

The Director General of Mineral and Coal (on behalf of the Minister of Energy and Mineral Resources) and the governor would revoke a mining licence: if the application for an IUP extension was made after the IUP or KP validity period had expired; if the KP reserve or application was made after Mining Law 4/2009 had come into effect; if the application for a reserve area had been filed in the areas of Contract of Work (COW), Coal Contract of Work (CCoW), KP and IUP that were still active and already contained the same type of mining; and if, from the results of the administrative assessment, it was found that the Exploitation KP was not preceded by the Exploration KP (Article 7 and Article 8). Licence revocation was also imposed if all the coordinates fell outside of the mining area reserve (articles 14 and 15) and the exploitation did not meet the environmental criteria (Article 18). If the governor did not revoke an exploitation of mining licence that did not meet the environmental documentation criteria, the Director General of Mineral and Coal (on behalf of the Minister of Energy and Mineral Resources) would revoke it instead (Article 19).

After the governor had assessed a mining licence, the results had to be submitted to the Minister of Energy and Mineral Resources, no later than 90 calendar days from signing the official handover of licensing documents from the regent/major (Article 21 (1)). The Director General of Mineral and Coal (on behalf of the Minister of Energy and Mineral Resources) would provide a Clean and Clear IUP certificate, based on the results of the evaluation conducted by the Director General of Mineral and Coal and the governor (Article 24).

Based on the explanation above, there were several weaknesses in Ministerial Regulation 43/2015 that could make C&C ineffective for dealing with thousands of unlawfully issued mining licences, let alone for improving environmental conditions. First, the contents of the ministerial regulation should only be technical rules that explain the rules of higher legislation. Therefore, there should be a higher regulation stipulating that an assessment of existing mining licences must be carried out. As C&C was only regulated at the level of ministerial regulation, its legal force was weak. Second, the C&C criteria stipulated in the ministerial regulation did not include the obligation to hold a forest use licence (*Izin Pinjam Pakai Kawasan Hutan*, or IPPKH) for mining to be carried out in a forest area, even though one of the problems in issuing mining licences was their issuance in environmentally vulnerable areas, such as conservation forest or protected forest areas. The criteria set out in the ministerial regulation also neglected to include documents related to reclamation and post-mining, even though the laws and regulations required these documents for the process of issuing mining licences. Third, the assessment of mining licences was based on document checking only, and according to experiences of illegal practices common in Indonesia, providing such documents could easily be carried out through unlawful procedures. This mechanism was almost the same as

the SVLK mechanism described above, for which timber was considered legal based only on the completeness of documents. This mechanism had been criticised because of its inability to demonstrate legal compliance, as it could not ensure that the required documents had actually been issued legally.

5.5 Implementation of the Clean and Clear (C&C) policy

This section discusses the implementation of C&C after the enactment of Ministerial Regulation 43/2015, especially in South Sumatra. Based on the explanation in Section 2, C&C was divided into two stages, the first being C&C before the issuance of Ministerial Regulation 43/2015 and the second being after issuance of the ministerial regulation. The first phase of C&C began with the so-called 'reconciliation', where the Ministry of Energy and Mineral Resources asked the head of regional governments to submit all mining licence documents that had been issued. This activity continued, by analysing the completeness of the documents and giving them either C&C or non-C&C status. As explained above, the first stage of collecting mining licence documents faced difficulties, mainly because of the challenges of working with regional governments, so not all of the mining licence data could be collected by the Ministry of Energy and Mineral Resources. However, from the data successfully collected, it appeared that there were problems with the issuance of mining licences in the regions, in 2014 the Directorate General of Mineral and Coal stated that 2,476 (or 77% of the) mining licences for Indonesia's mining operations involved administrative issues, such as incomplete identification or business registration documents.[8] After the first phase of C&C indicated that there were major problems, the second phase of C&C began. In the second phase, assessment of mining licences was carried out not only by the Ministry of Energy and Mineral Resources but also by the governor, in accordance with Ministerial Regulation 43/2015, and the KPK was also involved in the implementation of this policy.

The process proved difficult. First (as mentioned above), although the ministerial regulation stipulated that the district/municipal government was required to submit their IUP documents to both the provincial government and central government, for verification, many district governments did not submit mining licence data, because they objected to handing over their

8 https://programsetapak.org/wp-content/uploads/2016/10/Indonesias-mining-sector-leaking-revenues-and-clearing-forests.pdf

authority to the provincial government, as was regulated by Law 23/2014.[9] Second (as explained above), the assessment of the legality of mining licence issuance was based only on the completeness of documents submitted. There was no field checking, therefore the actual conditions could not be known.[10] For example, based on one document there was no overlap between licences in the area under consideration, but in reality there *was* overlap in the field. Third, there were law enforcement problems, as Minister Regulation 43/2015 stipulated that mining licences which did not meet certain C&C criteria should be revoked. However, several regional governments neither revoked such mining licences nor negotiated with troubled mining companies that were looking for loopholes to avoid punishment, as in the case of East Kalimantan Province.[11] The Director General of Mineral and Coal at the time, Sukhyar, said that regional governments were reluctant to revoke the mining licences, because they cared about the mining companies, and if the mining licences were revoked the mining companies would need to go through the process of issuing mining licences again, which was an expensive burden on them.[12] Fourth (as explained above), the ministerial regulation did not state any requirements for the completeness of IPPKH documents for mining in forest areas, or for completeness of mining reclamation and post-mining documents as criteria for the legality of mining licences. Therefore, there were still many mining licences in forest areas without IPPKH, and which did not implement the obligations related to mine reclamation and post-mining. For example, data from *Jaringan Advokasi Tambang* (JATAM) shows that in West Kalimantan 95% of IUPs with C&C status overlapped with forest areas, but did not have an IPPKH.[13] Meanwhile, in Central Sulawesi, of the 14 IUPs with C&C status, four did not make reclamation guarantees, whilst the remaining ten did make reclamation guarantees, but did not carry out any reclamation.[14] Indeed, when C&C was implemented, 75% of mining licence holders throughout

9 Interview with Muhammad Wafid, the Director of Directorate of Mineral and Coal Programme Development, Directorate General of Minerals and Coal, October 22nd 2019; Dedi Supriyanto, the Head of Mineral and Coal Utilization Section, Directorate of Mineral and Coal Programme Development, Directorate General of Minerals and Coal, October 30th 2019; Asep Warlan Yusuf, Administrative Law Professor at Parahyangan Catholic University, April 5th 2018; Achmad Fadillah, Head of Mining Division Energy and Mineral Resources Agency, West Java Provincial Government, April 9th 2018.

10 The opinion of Abrar Saleng, Mining Law Professor from Hasanuddin University: https://www.dunia-energi.com/tanpa-pengecekan-lapangan-clear-and-clean-iup-tidak-menyelesaikan-masalah/

11 https://www.mongabay.co.id/2017/11/06/406-izin-pertambangan-di-kaltim-dicabut-tanggapan-pegiat-lingkungan/

12 https://www.hukumonline.com/berita/a/pemerintah-akui-belum-bisa-tegas-cabut-iup-bermasalah-lt54b134f714100

13 https://programsetapak.org/wp-content/uploads/2017/01/saatnya-kerja-nyata-selamatkan-SDA.pdf

14 https://programsetapak.org/wp-content/uploads/2017/01/saatnya-kerja-nyata-selamatkan-SDA.pdf

Indonesia had not fulfilled their obligations related to reclamation and post-mining guarantees.[15]

The Ministry of Energy and Mineral Resources continued to push implementation of C&C, the that only mining companies that had C&C certificates could operate. The ministry encouraged IUP holders to check the validity of their licences and obtain C&C certificates. Furthermore, the ministry blocked non-C&C IUPs by sending letters to a number of agencies, such as the Ministry of Law and Human Rights, customs agencies, and sea transportation agencies, so that non-C&C IUPs would not be given administrative services.[16]

The role of the KPK in implementing the Clean and Clear policy

As explained above, since 2014 the KPK had been involved in supporting implementation of C&C through *Korsup Minerba*. It helped to overcome some of the weaknesses in the implementation of the policy. It supervised government agencies in carrying out their responsibilities for implementing C&C. For example, *Korsup Minerba* ensured that central government formulated rules and standards for implementing the policy, by conducting monitoring and evaluation. It also pushed regional governments to prepare any IUP documents issued by regents/mayors (Abdullah, 2017b: 44).[17] *Korsup Minerba* also bridged barriers to data flow and coordination between institutions within the central and regional governments.[18] *Korsup Minerba's* role also included preliminary baseline studies, coordination meetings, and the preparation of action plans with relevant agencies, as well as monitoring, coordinating, and supervision of action plans that had been prepared by the various relevant agencies (Abdullah, 2017b: 43).

The involvement of the KPK greatly accelerated the implementation of C&C. As a government institution, it had the power to enforce the criminal law of corruption and, in fact, the KPK had arrested government officials involved in corruption related to the use of natural resources. Hence government officials generally followed the instructions of *Minerba Korsup*, because they felt that they needed to be careful when dealing with the KPK.[19] As a result, the role of *Korsup Minerba* in ensuring that every govern-

15 https://programsetapak.org/wp-content/uploads/2017/01/saatnya-kerja-nyata-selamatkan-SDA.pdf

16 https://www.mongabay.co.id/2017/12/09/pemerintah-akan-blokir-ribuan-izin-tambang-bermasalah/

17 See also, KPK Presentation, 'Coordination and Supervision of Mineral and Coal Mining Management 19 Province in Indonesia', Bali Province, December 3rd to 4th 2014.

18 Interview with Dian Patria, the head of *Korsup Minerba*, May 3rd 2018.

19 Interview with Dian Patria, the head of *Korsup Minerba*, May 3rd 2018.

ment institution carried out its obligations was significant.[20] In addition to overcoming the coordination problems between institutions, *Korsup Minerba* also accelerated the process of implementing C&C by increasing government capacity; for example, by ensuring the availability of data and information technology for institutions involved in the implementation of C&C.[21]

Moreover, *Korsup Minerba* took the initiative to ensure that implementation of C&C could improve forest protection. As explained above, the criteria for mining licence legality in Minister Regulation 43/2015 did not include IPPKH for mining licences located in forest areas, meaning it was possible that even mining licences with C&C status could be located in conservation forest or protected forest areas. *Korsup Minerba* established a mechanism for evaluating these mining licences too (Abdullah, 2017a: 26; Abdullah, 2017b: 60-61). *Korsup Minerba* cooperated with The Ministry of Environment and Forestry (*Kementerian Lingkungan Hidup dan Kehutanan*, or KLHK), The Ministry of Energy and Mineral Resources and the regional governments to agree on action plans. In the plans, the governor/regent/mayor was asked to send a notification letter to reduce concessions located in conservation forest and protected forest areas, creating a temporary cessation of activities and, for IUPs that did not yet have an IPPKH, asking companies to process licences at the KLHK (Abdullah, 2017a: 26; Abdullah, 2017b: 60-61).

Korsup Minerba also cooperated with communities, NGOs and academics in monitoring the implementation of C&C at both central and regional levels. It often received reports from the public regarding violations that had occurred in the field.[22] The report on field conditions was useful for overcoming the mining licence assessment weakness specific to C&C, i.e. that it was based on the completeness of documents only.

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20 Interviews with Asgan R. Nasrullah, an employee of the Directorate of Mineral and Coal Program Development, Directorate General of Minerals and Coal, December 10th 2019; Surya Herjuna, the Head of Sub-directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019; Dedi Supriyanto, the Head of Mineral and Coal Utilization Section, Directorate of Mineral and Coal Program Development, Directorate General of Minerals and Coal, October 30th 2019; Rabin Ibnu Zainal, Director of PINUS, August 28th 2018;Dian Patria, the head of *Korsup Minerba*, May 3rd 2018.

21 Interviews with Asgan R. Nasrullah, an employee of the Directorate of Mineral and Coal Program Development, Directorate General of Minerals and Coal, December 10th 2019; Surya Herjuna, the Head of Sub-directorate of Coal Business Services, Directorate of Coal Business Development, Directorate General of Minerals and Coal, December 16th 2019; Dedi Supriyanto, the Head of Mineral and Coal Utilization Section, Directorate of Mineral and Coal Program Development, Directorate General of Minerals and Coal, October 30th 2019; Rabin Ibnu Zainal, Director of PINUS, August 28th 2018;Dian Patria, the head of *Korsup Minerba*, May 3rd 2018.

22 Interview with Dian Patria, the head of *Korsup Minerba*, December 9th 2019.

Clean and Clear policy implementation in South Sumatra Province

The dynamics of C&C implementation in each region of Indonesia varied, because of varying regional characteristics. The problems that commonly occurred when implementing the policy above have already been described (above), but to examine the implementation of C&C more deeply I undertook research in the Province of South Sumatra. I chose this province because, based on information from the KPK, it is considered to be the area in which implementation of C&C was most successful.[23] The South Sumatra Provincial Government supported the implementation of this policy. It was also cooperative towards *Korsup Minerba* and had a good relationship with the regional NGOs.[24] This may also have had something to do with the fact that (based on data owned by NGOs in South Sumatra at the time) South Sumatra Province leaders were not associated with the mining companies operating in that region. My research in South Sumatra aims to understand the extent to which the C&C policy was implemented effectively, and whether its impact on the environment in the province can be considered a successful implementation of the policy.

South Sumatra produces metallic minerals consisting of gold, silver, iron ore, iron rock, lead, and coal. Coal reserves in South Sumatra make up 22.24 billion tons (or 39%) of the national coal reserves.[25] Mineral and coal resources are exploited on the basis of hundreds of mining licences issued by the South Sumatra provincial government, 15 district governments, and one city government.[26] Most of these mining licences were issued for locations in forest areas.[27] Data from the Directorate General of Mineral and Coal at the Ministry of Energy and Mineral Resources on April 28th 2014 shows that 794.28 hectares covered by mining licences in Musi Rawas Regency and 85.96 hectares covered by mining licences in Musi Banyuasin Regency were situated within conservation forest.[28] Meanwhile, 1,200.13

23 Explanation of *Korsup Minerba* in a press conference organised by NGOs in South Sumatra and *Korsup Minerba*, Palembang, April 3rd 2018.

24 Interview with NGOs in South Sumatra, such as WALHI, PINUS and HAKI, April 3rd 2018; Dian Patria, the head of *Korsup Minerba*, December 9th 2019.

25 Presentation by Robert Heri, the Head of the Energy and Mineral Resources Agency, South Sumatra Provincial Government, 'Process of Arranging Mineral and Coal Mining Business Licenses in South Sumatra Province', Seminar and Workshop on Early Year Notes of Mineral and Coal Mining in South Sumatra, Palembang, January 10th 2017.

26 Presentation of the KPK Natural Resources Corruption Prevention Team, 'Coordination and Supervision of Mineral and Coal Mining Management in South Sumatra Province', Directorate of Research and Development of the KPK, April 28th-30th 2014.

27 Presentation of the Governor of South Sumatra Province, 'Prospects for Mining of Metal Minerals in South Sumatra', during the discussion on the Minister of Energy and Mineral Resources Regulation Number 7 of 2012, Jakarta April 10th-11th 2012.

28 Presentation of the KPK Natural Resources Corruption Prevention Team, 'Coordination and Supervision of Mineral and Coal Mining Management in South Sumatra Province', Directorate of Research and Development of the KPK, April 28th-30th 2014.

mining licences in Banyuasin Regency and 8,116.49 mining licences in Empat Lawang Regency were situated in protected forests.[29]

As described above, the Ministry of Energy and Mineral Resources carried out the first phase of C&C in 2011. The result was that, of the 359 mining licences in South Sumatra, 83 (or 23.12%) were categorised as non-C&C.[30] Furthermore, reclamation guarantee funds had only been submitted for 29 mining licences and post-mining guarantee funds had only been sent for 4 mining licences.[31] As explained above, no sanctions were imposed during the implementation of the first phase of C&C, but non-C&C mining licence holders were not provided with any government services related to their business.

Since the issuance of Ministerial Regulation 43/2015, C&C had been implemented in South Sumatra in collaboration with the Provincial Government, *Korsup Minerba* and several NGOs in South Sumatra, such as *Pilar Nusantara* (PINUS), *Wahana Lingkungan Hidup Indonesia* (WALHI) and *Hutan Kita Institute* (HAKI). *Korsup Minerba* and NGOs were involved, because they were positive that C&C would overcome the existing problems with mining licences.[32]

Based on Ministerial Regulation 43/2015, all district/city governments in South Sumatra had to submit IUP documents to the South Sumatra Provincial Government for evaluation. The transfer of authority was responded to negatively by the district/city government and it was not cooperative regarding the implementation of C&C.[33] Therefore, the process of submitting the licence documents did not run smoothly, and some district/city governments did not respond to the request letter for documents that was sent by the provincial government.[34] The provincial government therefore immediately sent out letters to companies holding an IUP, requesting that

29 Presentation of the KPK Natural Resources Corruption Prevention Team, 'Coordination and Supervision of Mineral and Coal Mining Management in South Sumatra Province', Directorate of Research and Development of the KPK, April 28th-30th 2014.

30 Presentation of the KPK Natural Resources Corruption Prevention Team, 'Coordination and Supervision of Mineral and Coal Mining Management in South Sumatra Province', Directorate of Research and Development of the KPK, April 28th-30th 2014.

31 Presentation of the KPK Natural Resources Corruption Prevention Team, 'Coordination and Supervision of Mineral and Coal Mining Management in South Sumatra Province', Directorate of Research and Development of the KPK, April 28th-30th 2014.

32 Discussion between NGOs at a press conference organised by NGOs in South Sumatra and *Korsup Minerba*, Palembang, April 3rd 2018.

33 Interview with Aries Syafrizal, the Head of the Mineral and Coal Engineering and Reception Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

34 Interview with Rabin Ibnu Zainal, Director of PINUS August 28th 2018; Aries Syafrizal, the Head of the Mineral and Coal Engineering and Reception Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

they submit all mining licence documents. The letters contained the threat that, if the documents were not submitted, the company's negligence would be reported in regional newspapers. This threat proved to be a successful method for collecting mining licence documents.[35] Furthermore, *Korsup Minerba* and the Provincial Government of South Sumatra invited district/city governments to cooperate regarding C&C, and organised several meetings between *Korsup Minerba*, the provincial government, and district/city governments, to discuss development of the policy and action plans.[36]

Mining licence documents for operations in South Sumatra could finally be collected, but there was no guarantee that the process of issuing these documents would be carried out legally. The illegal issuance of such documents was indeed an issue in C&C (as described above). An NGO provided photos of several IUP documents, stating that illegal practices in the issuance of mining licence documents had been found in a company where the IUP had been signed by the regent in 2009, although at that time the regent was deceased.[37] It seemed that the IUP document had only been prepared to meet the requirements of the Clean and Clear policy.[38] However, two officials from the Provincial Government of South Sumatra claimed that they could recognise fake documents, so they claimed that all the verified documents were legal.[39]

Furthermore, because the C&C mechanism only checked documents, real mining problems in the field were not covered by C&C. An official in the South Sumatra provincial government admitted that even if an IUP did not overlap with another one in the relevant document there could very well be overlaps in the field.[40] As the monitoring system for mining activities in the field remained limited, it was difficult to see the implementation of C&C in the field.[41]

35 Interview with Aries Syafrizal, the Head of the Mineral and Coal Engineering and Reception Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

36 Interview with Dian Patria, the head of *Korsup Minerba*, May 3rd 2018; Interview with Hendriansyah, the Head of the Mineral and Coal Business Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

37 Interview with Rabin Ibnu Zainal, Director of PINUS, August 28th 2018.

38 Interview with Rabin Ibnu Zainal, Director of PINUS, August 28th 2018.

39 Interview with Aries Syafrizal the Head of the Mineral and Coal Engineering and Reception Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018; Hendriansyah, the Head of the Mineral and Coal Business Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

40 Interview with Aries Syafrizal, the Head of the Mineral and Coal Engineering and Reception Division, the Energy and Mineral Resources Agency, South Sumatra Provincial Government, August 28th 2018.

41 Interview with Rabin Ibnu Zainal, Director of PINUS, August 28th 2018; Dian Patria, the head of *Korsup Minerba*, December 9th 2019.

Regarding mining licences in forest areas, although C&C criteria in Ministerial Regulation 43/2015 did not cover forestry requirements (as described above), in its involvement in implementing the C&C policy throughout Indonesia, *Korsup Minerba* had taken several actions regarding mining licences for sites located within forest areas. As a result of these efforts, hundreds of hectares of mining licences for activities located in conservation forest in Musi Rawas Regency and Musi Banyuasin Regency were removed from the area, and mining licences for activities sited in protected forest in Banyuasin Regency also no longer exist.[42]

As a result of the implementation of the first phase of C&C in South Sumatra (as described above), out of 356 mining licences, 276 met the Clean and Clear criteria. In 2015, after *Korsup Minerba* got involved in implementing the policy, the result was only 175 mining licences being considered C&C.[43] After the issuance of Ministerial Decree 43/2015, an IUP evaluation was carried out based on the Ministerial Regulation, starting in 2016, and the result was that only 141 IUPs were deemed to meet the C&C criteria.[44]

The revocation of several mining licences and company lawsuits in South Sumatra Province

Based on Ministerial Regulation 43/2015, the Director General of Mineral and Coal or the governor could impose sanctions on a company if its mining licence did not meet regulation requirements in terms of administration, technical matters, or environmental concerns. For certain violations (as described above), the sanction would be revocation of the mining licence. Unlike the general phenomenon that occurred in other regions in Indonesia (as described above), where regional governments were reluctant to revoke problematic mining licences after assessing them, the Provincial Government of South Sumatera revoked 34 non-C&C mining business licences. As a result of the revocation, nine companies filed a lawsuit with the administrative court.

In fact, the provincial government of South Sumatera was aware that one consequence of revoking the licence could be mining companies filing lawsuits, and it was prepared for the possibility. *Korsup Minerba*, NGOs

42 Presentation by Robert Heri, the Head of the Energy and Mineral Resources Agency, South Sumatra Provincial Government, 'Process of Arranging Mineral and Coal Mining Business Licenses in South Sumatra Province', Seminar and Workshop on Early Year Notes on Mineral and Coal Mining in South Sumatra, Palembang, January 10th 2017.

43 PINUS' presentation Highlights on Mineral and Coal Mining in South Sumatra, at a press conference organised by NGOs in South Sumatra and *Korsup Minerba*, Palembang, April 3rd 2018.

44 PINUS' presentation Highlights on Mineral and Coal Mining in South Sumatra, at a press conference organised by NGOs in South Sumatra and *Korsup Minerba*, Palembang, April 3rd 2018.

and academics helped the South Sumatera Provincial Government in dealing with such cases because, as explained above, they supported the implementation of the second phase of C&C. Furthermore, they thought that if the provincial government was defeated in court, the situation would be unfavourable for the natural resources protection movement, because it would form a bad precedent in the fight for revocation of mining licences in other areas of Indonesia.[45] To win these cases they developed a strategy together with the provincial government,[46] and they were also involved in providing data; case analysis; discussions; and observation of the trials[47].

The judgments in these lawsuits were fairly positive for the government. Of the nine mining company lawsuit cases, five were won by the Provincial Government of South Sumatera, whilst four were won by mining companies. Two of the latter demonstrated the weakness of C&C policy and will be discussed below: the case of *PT Trans Power Indonesia v. Governor of South Sumatera* and *PT Duta Energi Mineratama v. Governor of South Sumatera*.

The South Sumatera Governor revoked both companies' mining licences, because they could not show certain documents stipulated in the laws and regulations, namely: a government decision on the mining reserve area; reclamation and post-mining plan documents; and proof of payment of fixed contributions and production fees (royalties). However, both companies claimed that their mining licences were not one of the objects of evaluation, as referred to in Article 5 of Ministerial Regulation 43/2015. The objects of evaluation were: a mining licence (IUP) that had been adjusted via Mining Authorisation (KP) and/or a KP which had not expired but had not been adjusted to become an IUP. Their IUP was a new IUP, not an adjustment from a KP. The companies' other argument was that the sanctions should be given in stages, namely: a) a written warning; b) the temporary suspension of some or all exploration activities or production operations; and c) revocation of the IUP. The governor's action of revoking the company's IUP immediately, without written warning or temporary suspension of business activities, revealed its arbitrary nature.

The court granted the companies' claims with several considerations, including: in line with the Circular of the Director General of Mineral, Coal and Geothermal 1053/30/DJB/2009, an application for a KP which had been received before the enactment of Law No 4/ 2009 could be further processed, without having to go through an auction process using the IUP format. Thus, the company's IUP was not an object of evaluation based on Ministerial Regulation 43/2015. Furthermore, in line with Article 17

45 NGO discussion in a press conference organised by NGOs in South Sumatera and *Korsup Minerba*, Palembang, April 3rd 2018.
46 Ibid.
47 Ibid.

of Ministerial Regulation 43/2015, if a company did not have complete documents, the government should provide administrative sanctions in stages, the first being a written warning, then second being the temporary suspension of business activities, and the last being revocation of the IUP by the government – in contrast with a governor immediately actioning the sanction to revoke a mining licence. The decision of the courts was upheld by both the high court and the supreme court.

Based on these cases there were several weaknesses in Ministerial Regulation 43/2015 that hindered efforts to overcome the problem of unlawful mining licences. Based on the regulation, not all mining licences were suitable for assessment. As explained above, Article 5 of the Ministerial Regulation stated only a KP or an IUP adjusted from a KP must be evaluated. However, in the transition period (especially in early 2009 when Mining Law 4/2009 had just been passed) many applicants were granted IUP directly, without going through KP. Moreover (as explained above) one of the reasons for revoking a mining licence was because a company did not have mine reclamation and post-mining plan documents, although C&C criteria in the ministerial regulation did not include completeness of the reclamation and post-mining plan documents. Therefore, even though the two companies did not have these documents, they were not considered to have committed a violation.

The judges' opinions that the IUPs of the two companies were not part of the object of evaluation for a mining licence were correct, because their IUPs did not fall into the categories regulated by Ministerial Regulation 43/2015. However, the judges were not right in their interpretation of Article 17 (3) of the Ministerial Regulation. The judges argued that, according to Article 17 (3), the Governor of South Sumatera should provide administrative sanctions in stages. Whereas there was no provision in the regulation that the imposition of sanctions must be gradual. Article 17 (3) only stated provisions regarding types of administrative sanction, namely: a written warning; the temporary cessation of business activities; or revocation of the IUP. This means that the governor had the authority to choose the appropriate sanctions for violations committed by the two companies.

5.6 Conclusion

C&C was a policy designed to assess the legality of the issuance of metal mineral and coal mining licences in Indonesia. It was a reaction to the widespread issuance of mining licences in the regions through unlawful procedures, outside of central government control. This is not actually a new type of policy in Indonesia. Previously, the SVLK (for example) was intended to verify the legality of timber circulating in the market. The SVLK has been criticised because assessment of the legality of timber is based only

on an assessment of the existence of certain documents, but it does not go beyond that to trace how the document was obtained, which is odd, given that illegal documentation practices are rampant in Indonesia and government officials are also involved.

Reflecting on the literature related to illegal practices in government bureaucracy in Indonesia and the SVLK, this chapter has discussed to what extent the C&C could solve the problem of the existence of thousands of mining licences issued through unlawful procedures, and to what extent the policy has impacted on environmental improvements. In the end it was found that, despite some successes, C&C could not solve the problem of thousands of problematic mining licences existing, and it therefore did not promote environmental conditions.

There are several reasons why the policy failed in this respect. The first is a legal-technical one. The policy was regulated in Ministerial Regulation 43/2015, which was insufficient as a legal basis for C&C. Ministerial regulations should only regulate technical rules for implementing higher regulations. Therefore, the rules in the Ministerial Regulation were not comprehensive and did not have enough force to be implemented.

Secondly, several legal requirements for the issuance of mining licences, regulated by various laws and regulations, were not included in the C&C criteria. Among them were the placement of guarantee funds for mine reclamation and post-mining, and IPPKH for mining activities in the forest, even though both were serious issues from an environmental perspective. This means that, even if a mining company did not have these documents, its mining licence could still be categorised as a C&C mining licence.

Thirdly, the mining licence assessment mechanism only assessed the completeness of the documents, and this mechanism was easy to misuse. This is like the SVLK mechanism, where the measure of legality is based only on the existence of certain documents. It is always possible that the documents have been obtained illegally, a practice that occurs often in Indonesia, but also that the situation on the ground differs from that found in the licence.

While the implementation of C&C in various regions in Indonesia varied, it was generally problematic. Many district/city governments were not cooperative and refused to submit mining licence documents to the provincial government for the assessment. This was in addition to the fact that, since the beginning of the decentralisation period, there had been no adequate coordinating relationship between the central and regional governments. Even though Ministerial Regulation 43/2015 stipulated that district/city governments must submit the documents, (as explained above) the governments refused because of the reason mentioned above that a ministerial regulation was insufficient for imposing this obligation The problem

of coordination between provincial and district/city governments also occurred in areas that were considered to be the most successful in implementing C&C policies; for example, in the province of South Sumatera, where the provincial government had difficulty obtaining mining licence documents from the district/city government. Furthermore, because the assessment of mining licence legality was only based on the completeness of the documents, in the implementation, the legality of obtaining the documents was not being traced and explored.

The revocation of mining licences resulting from the assessment of mining licences was a problem in various regions. Many regional governments did not want to revoke mining licences even though they should, based on the C&C assessment stipulated in Ministerial Regulation 43/2015. Cases in which licences were actually revoked were not always successful either. As this chapter found, in South Sumatera the governor revoked mining licences, but several mining companies whose licences had been revoked filed lawsuits at the state administrative court. Of the nine cases that went to trial, five were won by the South Sumatera provincial government. The governor lost two cases, in both of which the judge decided to cancel revocation of the mining licences, and it can be concluded that there were weaknesses in Ministerial Regulation 43/2015, which made it difficult to catch all the problematic mining licences.

However, in part, C&C was a success. This was largely due to the support of *Korsup Minerba*, KPK and several other parties, such as NGOs and universities. The KPK used its position as a respected law enforcement agency to encourage every institution in the central and regional governments to carry out their obligations and cooperate with each other. In addition, although the IPPKH and mine reclamation and post-mining documents were not included in the C&C criteria regulated by Ministerial Regulation 43/2015, *Korsup Minerba* made an effort to ensure that mining companies were complying with forestry and mine reclamation and post-mining regulations. Although these efforts could not guarantee compliance by all mining companies, in some places there were positive results. One example was in South Sumatera, where no further mining activities were licensed in conservation areas, and the number of mining licences issued within protected areas decreased. However, the involvement of the KPK and other parties was certainly limited, and it was impossible for them to supervise the implementation of all mining licences in the field and throughout Indonesia.

Hence, C&C was especially useful for collecting data on mining licences that had previously been difficult to obtain, and for ensuring that there was no overlap between the same types of mining licence – based on documents, at least. However, this policy could not be relied upon to overcome the problem of thousands of mining licences being obtained via unlawful

procedures, because it only assessed the completeness of mining licence documentation whilst ignoring conditions on the ground. Furthermore, this policy was not enough to affect environmental improvements, because the criteria related to the environment, such as the IPPKH, mine reclamation, and post-mining, were not included in the C&C criteria. It was still possible to obtain a mining licence with a C&C without carrying out any obligations related to mine reclamation and post-mining, and without an IPPKH, even though the area being licensed was in a forest or even conservation area.

VI A breakthrough amidst regulatory complexity: analysing the development of the Mineral and Coal One Map Indonesia (MOMI)

6.1 Introduction

The widespread issuance of mining licences by regional governments, after the implementation of decentralisation (as described in Chapter II), made mining uncontrollable. This was also a spatial problem, because regional governments issued mining licences without any clear spatial data, resulting in overlapping licences and mining activities in environmentally vulnerable areas, including in conservation and protected areas. As a result of decentralisation, the central government could not supervise mining management in the region and did not even have access to all the data available on mining licences. After Law 4/2009 on Mineral and Coal (Mining Law 4/2009) was enacted, the central government was required to delimit mining areas (*Wilayah Pertambangan*, or WP), meaning that they must collect data on both the potential and the actual use of areas designated for mining. Therefore (as explained in Chapter V), in 2011 the Ministry of Energy and Mineral Resources started collecting mining licence (*izin usaha pertambangan*, or IUP) data from regional governments. This programme was extended into an integrated data programme, known as the Mineral and Coal One Map Indonesia (MOMI), which aimed to integrate all the spatial data for mining areas throughout Indonesia into a single database. MOMI was expected to be very useful, because in addition to being a source of information on mining licences and areas, it is also a single spatial data reference for making decisions related to mining.

Amongst various general issues in the effort to manage data in Indonesia, e.g. financing, technology and human resources, perhaps the most important issue has been collecting the data in the first place. Data related to natural resources in Indonesia are scattered across various ministries, institutions, and technical units, or they are kept by individuals, and there is also much variation within data sets (WAVES, 2016: 3). Moreover, government organisations in Indonesia (as described in Chapter I) are fragmented, making cooperation between agencies (or even between units within one agency) difficult. This also happens in data management, for which there is no good coordination, even between units within one institution (UKP-PPP, 2014). If differences in data are found between agencies, there is no mechanism for data harmonisation, making it difficult to build consensus regarding data to be used as a common reference (UKP-PPP, 2014). This is particularly problematic, because integrated data development requires the

sharing of data through communication and/or coordination between the parties that own the data. Therefore, the authorised agency(ies) might have to make a number of changes or adjustments in its/their bureaucracy(ies) for developing MOMI, or at least it/they may need to develop new communication and coordination approaches within its/their own units, or with agencies from other sectors.

This chapter discusses the dynamic of MOMI development between 2011 to 2016, and the difficulties involved. The chapter is divided into six sections. After the introduction, the second section forms an explanation of the MOMI Programme. The third section discusses theories regarding the relationship between government units and agencies, and this is used as a reference for both the fourth section, which discusses the dynamics of MOMI development, and the fifth section, which concerns factors influencing the achievement of MOMI. The last section forms the conclusion.

6.2 Understanding MOMI

The making of MOMI was driven by Mining Law 4/2009, which authorised the central government to delimit mining areas. Therefore, the central government needed accurate data related to mining areas, including data regarding mining concessions throughout Indonesia. Furthermore, the making of MOMI was based on an implementing regulation of Mining Law 4/2009, Government Regulation 22/2010 on Mining Areas, which regulated how the Minister of Energy and Mineral Resources should manage mining business activity data, as well as the uniformity of the coordinate system and base map (articles 36 and 38). In more detail, the Minister of Energy and Mineral Resources Regulation 12/2011 on Procedures for Determining Mining Business Areas and an Information System for Mineral and Coal Mining Areas regulates the development of a mining area information system, which was built integrally to process regional data into useful information for solving problems and making decisions regarding territoriality. A mining area information system includes: a standardised coordinate system; a base map issued by the government agency for government affairs in the field of national surveys and mapping; and, mining area maps (Article 15 (1)).

In 2011 work began on building MOMI: a mining area information system or database of mining areas throughout Indonesia. The data used to prepare MOMI were spatial data from the Geospatial Information Agency (*Badan Informasi Geospatial*, or BIG), obtained from ministries and institutions that publish thematic maps and base maps, as well as general data from regional government and company reports (Herjuna *et. al.*, 2015: 297). The development of MOMI became the task of a sub-unit of the Ministry of Energy and Mineral Resources, namely the Sub-Directorate for Mineral and Coal Area Management, which is part of a directorate within the Directorate General

of Mineral and Coal (*Direktorat Jenderal Mineral dan Batubara*, or Ditjen Minerba).

The Directorate General of Mineral and Coal can use MOMI to perform an analysis of overlapping mining licence area data, to monitor data related to mining areas, to collaborate with various agencies that provide spatial data, and to analyse the spatial data (Herjuna *et. al.*, 2015: 300). MOMI can also be used by other institutions; for example, to report on mining management carried out by regional governments, as a form of data and information equalisation between various agencies, or to monitor mining activities (Herjuna *et. al*., 2015: 301). Basically, MOMI can be used by anyone who needs it, because the site is open to the public.

An important element in creating MOMI is data collection. As explained in Chapter V, the central government did not used to have complete data on mining licence areas, especially for areas where licences had been issued by regional governments. Therefore, the Ministry of Energy and Mineral Resources organised a reconciliation programme by inviting regional governments to submit data on mining licences. The data was then managed and entered into the MOMI system. Furthermore, since MOMI is a database of all mining areas in Indonesia, the system must integrate various spatial information related to mining areas, such as forest areas, administrative boundaries, etc., and this requires access to data from various other sectors. Therefore, MOMI required not only data on mining licences from regional governments, but also data from other sectors.

At the time there was no standard map which applied to every sector, neither was there a nationally integrated basic and thematic map. Each ministry and sectoral agency at the national and regional levels had different forest maps, which varied in scale and accuracy, and in many cases did not reflect the situation on the ground (Santosa *et. al,* 2013: 7). Therefore, in 2011 President Susilo Bambang Yudhoyono instructed each government agency to use the One Map as a national reference point. He also put the Presidential Delivery Unit for Development Monitoring and Oversight (*Unit Kerja Presiden Bidang Pengawasan dan Pengendalian Pembangunan*, or UKP4) in charge of initiating policy and cooperating with the only institution authorised to issue basic geospatial information, the BIG (Shahab, 2016). The One Map Policy which emerged from this process aimed to develop one reference for basic geospatial information and one standard for thematic mapping-sector(s), which together would work as a single reference for all sectors (Santosa *et. al*, 2013: 7). This policy required the cooperation and coordination of various ministries and government agencies, to provide thematic maps in accordance with the standards specified by BIG.

In relation to the One Map, the Ministry of Energy and Mineral Resources was in fact one of the government agencies required to provide thematic

maps in accordance with the standards set by Geospatial Law 4/2011. Therefore, in making MOMI there was coordination between The Ministry of Energy and Mineral Resources officials and the parties involved in One Map (as explained in Section 4, below).

Considerable data needed to be collected from central and regional government agencies during the development of MOMI, which required good relationships between government units and agencies. Section 3 (below) discusses some theories regarding the relationships and coordination between fragmented governments. The discussion is intended for use as a reference when analysing the dynamics of data collection to develop MOMI (in Sections 4 and 5).

6.3 Relationships and coordination between fragmented government units, divisions or agencies

As explained in Chapter I, Indonesian government bureaucracy is fragmented. In fact, Indonesia is not the only place where this occurs, as public administration always consists of various divisions and specialisations, with their own detailed tasks and specific goals (see, Jinshan and Tuo, 2012; Cejudo & Michel, 2017). Specialisation provides several benefits, and it may create single-purpose organisations and specialised units that can promote working efficiency, responsiveness, and accountability (Cejudo & Michel, 2017: 747). Specialisation is politically important for government, because it provides a clear place for the identification and activities of client groups in society (Bouckaert *et. al.* 2010: 14). Furthermore, this indirectly fosters positive competition between public administration units, because their performance is easier to measure (Grossman *et. al.*, 2017).

Problems may arise if units, divisions, or government institutions need to be interconnected. In fact, such a relationship between units, divisions or government institutions is unavoidable. Downs argues that most of the dynamic activity of almost every agency involves its relationship with other bureaus (Downs, 1967: 211). Complex government policy implementations generally require several institutions or certain programmes to play a role. However, this relationship is not easy, because the institutions and programmes tend to focus on their own interests and goals. Often, organisation within the public sector does not seem to have the most basic information about what others are doing, and the individuals involved do not seem to care much about the actions of their colleagues elsewhere (Bouckaert *et. al.*, 2010: 14). Therefore, since government structures have begun to differentiate and specialise, complaints have arisen that one organisation often does not know what another is doing and that their programmes are either contradictory or redundant, or both (Peters, 1998: 295).

Coordination is used to connect between divisions, units or institutions, in addition to communication, collaboration, integration, and so on. According to Otto, the word 'coordination', applies when certain adjustments are achieved between separate parts that maintain their own identity and goals, bringing these parts into a proper, harmonious and correct relationship (Otto, 2003:15). Therefore, units, divisions, and institutions in government that have different tasks, functions and goals adjust to each other in order to achieve certain goals. Bouckaert *et. al.* distinguishes between horizontal coordination and vertical coordination. Horizontal coordination includes forms of coordination between organisations or units that run parallel, for example between ministries, departments, or agencies (Bouckaert *et. al*., 2010: 24). Vertical coordination is the coordination of lower-level actors by higher-level organisations or units of action, e.g. coordination between levels of government, such as central government and regional governments (Bouckaert *et. al*., 2010: 24). The implementation of horizontal and vertical coordination is different, because in horizontal coordination no actor can impose decisions on other actors by using hierarchical authority, whilst in vertical coordination actors higher up in the government hierarchy can use their position to impose decisions on other actors (Bouckaert *et. al.*, 2010: 24).

Coordination has the appearance of a simple, mutually supportive policy, as opposed to conflict (Pressman & Wildavsky, 1973: 133), but in reality it is difficult to implement. Horizontal communication faces difficulties because of conflict, competition, or other differences between units or groups, whereas vertical communication faces difficulties as a result of superior-subordinate relationships, including rejection, inattention, misunderstanding, and reluctance, or the withholding of information by lower level actors (Rainey, 2009: 367). Moreover, other factors may cause conflict, such as the organisational culture or sub-units, the values, goals, structure, tasks and functions, or leadership and environmental pressures (Rainey, 2009: 371). Since each organisation has its own goals, administrative routines, and legal mandates, they do not cooperate and tend to maintain their own patterns for fear of reducing their chances of achieving these goals (Bouckaert *et. al.* 2010:25).

Another cause of difficulty in coordination is that the autonomy of an organisation makes it difficult to coordinate the work of different agencies, because government agencies tend to view any inter-agency agreement as a threat to their own autonomy (Wilson, 1989: 192). Downs calls this feeling of being threatened by other organisations "territorial sensitivity" (Downs, 1967: 216). He argues that relationships between organisations cause uncertainty about the safety of each organisation, as "the bureau" usually cannot forecast all the possible ramifications (Downs, 1967: 215). When other social agents propose actions that affect the bureau's interior, the bureau is usually unable to predict all the possible consequences, and it worries that what

seems trivial today may prove to be a major threat tomorrow (Downs, 1967: 215). Therefore, bureaucratic organisations try to: maximise self-sufficiency; minimise dependence on outsiders; defend, and when possible, expand their organisational and substantive boundaries; concentrate on their distinctive programmatic tasks; and, cooperate with outsiders only on terms which they find suitable (Esman 1991: 74). In this case, when establishing inter-agency relations, each agency is careful to ensure its own institution is protected.

How coordination might work continues to be discussed in the public administration literature. Several actions may assist the implementation of coordination – for example, coordinating the design of policies from above and ensuring that policies are coherent, because if policies are fundamentally compatible, administration can run along normal functional lines and still produce coherent results (Bouckaert *et. al* 2010:21). This reduces conflict between coordinating parties, because the results are based on coherently organised policies. The success of coordination can also be supported by skill in forming agreements between parties, that is to get what you do not have without forcing other actors to comply (Pressman & Wildavsky, 1973: 134). Negotiations must be carried out to reconcile differences so that policies can be changed, even at the expense of their original goals (Pressman & Wildavsky, 1973: 134). Therefore, the ability to form agreements also plays an important role in the implementation of coordination. Another action that can assist the implementation of coordination is the presence of a facilitator, who is assigned to carry out various elements of coordination, such as the exchange of information, negotiations, coordinated resource contributions, inter-agency monitoring, and an appropriate operating schedule (Esman 1991: 74). This means that there are other parties supporting the coordination activities, who become points of liaison between the parties.

The development of MOMI required a relationship between the Ministry of Energy and Mineral Resources and regional governments regarding the exchange of data on mining licences that had been issued. Moreover, relationships between the units and other agencies were also needed, for example the coordination between the Ministry of Environment and Forestry (*Kementerian Lingkungan Hidup dan Kehutanan*, or KLHK) regarding data on forest areas. However, developing an appropriate relationship to collect data for MOMI was a challenge amongst the fragmented Indonesian government bureaucracies. This condition was exacerbated by the communication problems between organisations and because data sharing is rarely carried out in Indonesia due to both limited technology and the selfish behaviour of government officials (Pramusinto, 2016: 132). Therefore, theories regarding relationships and coordination in bureaucracy (above) help us to understand how the relationship dynamics between the units and agencies of Indonesian government bureaucracies came about during the development of MOMI (as discussed in Section 4, below).

6.4 Dynamics during the development of MOMI

As explained in Chapter V, in 2011, prior to the collection of IUP data for the reconciliation programme, central government had very little data available on mining licences, especially licences which had been granted by regional governments, as most of the IUP data were not reported to the central government. Meanwhile, as many IUPs had been issued without regard for legal procedures and proper maps, there were also many overlaps between licensed mining areas. There was no alignment between the map used as a basis for granting IUPs and the actual conditions of the area. At that time, there was even a map that showed a district with a total IUP area wider than the district area as a whole.[1]

Thus, before reconciliation was carried out, only a small amount of data on IUP was held by the central government, and it was scattered across several units within the Directorate General of Mineral and Coal. For example, if a unit required data on a coal IUP, it had to ask the Directorate of Coal, but if data on a mineral IUP was required, it had to ask the Directorate of Minerals.[2] The data were owned by several officials, and they usually obtained them by chance, e.g. when the officials happened to carry out supervision or other activities in regional areas.[3] Therefore, individuals usually had control over the data for an area; for example, the Sumatran region was controlled by one official, while the Papua region was controlled by another.[4] The data was stored in either soft copy or hard copy format.[5] Clearly, there was no centralised or integrated data on IUPs, so if data was needed the unit had to contact the official holding the data, and this was always a problematic approach if the official was not in office.[6] Furthermore, sharing data between two units was often based on good relationships between individuals within the units.[7] Therefore, it was a problem if one official did not have a good relationship with another official who was in possession of the necessary data.

Although Government Regulation 22/2010 on Mining Areas requires the provincial government and district/city governments to submit data and/or information on IUPs to the central government (Article 36 (3)), this

1 Interview with Surya Herjuna, the Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Minerals and Coal, December 16th 2019.
2 Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.

never happened. Therefore (as explained in Chapter V), the reconciliation programme to collect IUP data from regional governments had to be carried out. The reconciliation results showed that the number of mining concessions was much higher than previously recorded by the Directorate General of Mineral and Coal. Based on data from the Directorate General of Mineral and Coal, before reconciliation there were only around 200 concessions for Contracts of Work and Coal Agreements, and 300 for 'mining authority' or *Kuasa Pertambangan* or KP (now called IUP) were registered, but after reconciliation the total number of mining concessions at the Directorate General of Mining turned out to be around 11,000.[8]

In fact, the reconciliation found that many of the thousands of IUPs did not have complete licensing documents, and that some of them even overlapped with one another. All mining licences, including those that did not have complete documents, were entered into a database at the Directorate General of Mineral and Coal. However, at a meeting with Commission VII of the House of Representatives (DPR), DPR members stated that the government should not register the problematic IUPs as WPs,[9] and that only legitimate mining concessions were to be registered. Therefore, the Ministry of Energy and Mineral Resources started to verify the legality of all IUPs through the Clean and Clear policy (or C&C), as explained in Chapter V. Along with C&C, MOMI was built where all the IUP data which was recognised as legal was stored, in a single database that presented spatial information and could be accessed through either the intranet or the internet. In this way, MOMI development and C&C implementation were carried out simultaneously and in support of each other.

Similar to C&C, the development of MOMI was later assisted by the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK), as part of the National Movement to Save Natural Resources (*Gerakan Nasional Penyelamatan Sumber Daya Alam*, or GN-PSDA). As part of the GN-PSDA, the KPK not only conducted law enforcement for corruption cases, it also made efforts to prevent possible corruption in natural resource businesses, including in the mining sector, through what was known as the Coordinator and Supervision of Mineral and Coal (*Koordinasi dan Supervisi Mineral dan Batubara*, or Korsup Minerba). In 2011, *Korsup Minerba* began researching mining governance, and this resulted in several recommendations, including the need to build a mining database (Abdullah, 2017b: 23). *Korsup Minerba* considered MOMI to be an important programme for overseeing

8 Interview with Surya Herjuna, the Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Minerals and Coal, December 16th 2019.

9 Ibid.

mining licences, but also because MOMI could also be used by other interested parties, including the public.[10]

KPK played a significant role in the development of MOMI, as it accelerated the filtering of IUPs falling into the C&C category, which could then be entered into MOMI.[11] As a corruption eradication institution, the existence of KPK was respected by government agencies, meaning that *Korsup Minerba* could force regional governments to submit all their documents related to IUPs for evaluation.[12] Based on interviews with several Directorate General of Mineral and Coal officials, after KPK got involved in 2013, the development of MOMI accelerated.[13]

MOMI not only covered IUP data, but also data related to other sectoral areas, such as forestry and plantations. Initially, there was almost no data sharing between the Ministry of Energy and Mineral Resources and the Ministry of Environment and Forestry, but in 2011 a Memorandum of Understanding (MoU) regarding data exchange between the Ministry of Energy and Mineral Resources and other government agencies – such as the Ministry of Environment and Forestry – was produced.[14] Data exchange between agencies was also carried out via communication between individuals who happened to be on good terms.[15] Based on my interviews, each of the agencies requires data from other sectors, so information exchange between sectors is beneficial for each party. For example, the Ministry of Environment and Forestry needed data on IUPs that were likely to encroach on forest areas, and each mining activity needed a lease-use forest area licences (*Izin Pinjam Pakai Kawasan Hutan*, or IPPKH) from the Ministry of Environment and Forestry.[16]

10 Interview with Dian Patria, the Head of *Korsup Minerba*, December 9th 2019.

11 Interview with Dian Patria, the Head of *Korsup Minerba*, December 9th 2019; Interview with Surya Herjuna, the Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Minerals and Coal, December 16th 2019.

12 Interview with Dian Patria, the Head of *Korsup Minerba*, December 9th 2019.

13 Interview with Surya Herjuna, the Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Mineral and Coal, December 16th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, December 10th 2019.

14 Interview with I Made Edy Suryana, the Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019.

15 Ibid.

16 Ibid.

The One Map policy also influenced the development of MOMI, especially those related to data collection from other sectors. From 2016 onwards, after President Widodo issued a presidential regulation to accelerate the implementation of the One Map policy, spatial data from all sectors were submitted to BIG and made available at the Presidential Staff Office (*Kantor Staf Kepresidenan*, or KSP). Therefore, after 2016, if data related to other sectors such as forestry were required, MOMI coordinated with the KSP involved in managing the One Map policy, because data from other sectors had been collected there. Once every year, ministries and other government agencies were asked to update the data to the KSP, and every 3 months they also coordinated with the KSP.[17] Thus, it seemed that spatial data coordination with other sectors was no longer an obstacle from this point onwards, because of the connections coordinated and organised by the KSP.

Since the beginning of its development, MOMI did not seem to have faced many obstacles. In several interviews with government officials involved in MOMI, it was claimed that there was not much resistance within the Directorate General to the development of MOMI, at the beginning of the process.[18] There may have been a few people who preferred to control their own data, because closed data would be more valuable to them, but there were only a few such people and ultimately this had no impact on the development of MOMI.[19] Moreover, there was no significant adjustment in agency organisation, as the development of MOMI did not require a high level of technology, but only a number of skilled human resources who could be trained.[20] Another factor that might have affected the development of MOMI was that government officials who were responsible for the development of MOMI at the time shared an enthusiasm for building a new

17 Ibid.

18 Interview with Surya Herjuna, the Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Minerals and Coal, December 16th 2019; Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019; Interview with I Made Edy Suryana, the Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019.

19 Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019.

20 Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019; Interview with I Made Edy Suryana, the Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019.

system which would later facilitate the effectiveness of the unit.[21] MOMI indeed helped the unit to provide WP, as the lack of a good database would have made it very difficult for the unit to carry out its work.

So far, MOMI can be considered a successful spatial database programme. MOMI received a special achievement award in the GIS Awards of the Environmental Systems Research Institute (ESRI), an international supplier of geographic information system (GIS) software, web GIS, and geo database management applications, at the ESRI International User Conference in San Diego, California, in July 2013.[22] It shows spatial data on mining concession areas and other related areas. It integrates the spatial data of ministries/agencies in one interface simultaneously, so that in one monitor view the location of mining activities that overlap with other maps, such as maps of forest areas, maps of administrative boundaries, maps of geological formations, special maps, etc., can be seen.[23] In addition, MOMI includes information about mining companies and their IUPs, such as the company name, president/director, company address, telephone number, the official who issued the licence, the mining licence number, etc.[24] Previously, mining company data were very difficult to access; it was even difficult just to get the name of the company.

MOMI can be used primarily to analyse overlaps between mining concessions and other sectoral land uses. If a mining concession area that is inputted into MOMI and it overlaps with another mining concession of the same type, the system will automatically either request authorisation or refuse

21 Interview with Surya Herjuna, Head of the Sub-directorate of Coal Business Services, the Directorate of Coal Business Development, and the Directorate General of Mineral and Coal, December 16th 2019; Interview with Dian Patria, the Head of *Korsup Minerba*, December 9th 2019; Interview with I Made Edy Suryana, Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019.

22 Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019.

23 https://www.esdm.go.id/id/media-center/arsip-berita/mengenal-minerba-one-map-indonesia-momi-aplikasi-andalan-kesdm

24 Presentation of the Directorate General of Mineral and Coal, *Momi & MODI*, at the Focus Group Discussion on Potential Mining Sector Taxpayers, October 2nd 2019.

to save.[25] In addition, the position of mining concessions in other sectoral areas, such as forestry, can be seen. MOMI can be accessed by the public here: https://momi.minerba.esdm.go.id/gisportal/home/

6.5 Analysis of the factors that influenced data collection during the development of MOMI

As explained in the previous section, prior to the development of MOMI, data related to mining concessions were scattered between various parties, and some data were even stored by individuals. Within agencies each unit worked separately, according to their respective goals. Moreover, there were no rules or standards for data sharing between units and agencies, so data exchange and data sharing did not occur automatically. Moreover, the relationship between central government and the regional governments (as described in chapters I and II) had already been problematic for a long time. The relationships between sectoral agencies had also been problematic for a long time (as described in Chapter I); they were fragmented, and concerned only with the interests of their own sector. In particular, government agencies – especially those for the mining and forestry sectors – with authority over land and natural resources tended to be focussed only on their own agency's interests, sometimes even competing for control over areas of land. Each of the agencies controlled and protected their own data, so data exchange did not automatically flow, even though all of the natural resources sectors were interrelated.

At the time of making MOMI, this bureaucratic culture had not changed. Furthermore, data management was still considered to be fairly unimportant. One official at the Ministry of Energy and Mineral Resources stated that most employees still only thought about their daily tasks and there was no data management plan, because there were other more important tasks to do.[26] However, the development of MOMI did work. Several of the factors below supported the development of MOMI, despite the fragmented condition of Indonesian government organisations.

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25 Interview with I Made Edy Suryana, Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019; Interview with Dimar, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019.

26 Interview with Dwinugroho, the Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019.

One factor influencing the development of MOMI was the issuance of Mining Law 4/2009, which requires the government to provide mining areas, especially as the basis for arranging mining area auctions before granting mining licences. Under the previous mining law, to obtain a mining concession a mining company was required to submit a mining concession proposal, based on its own research carried out in certain areas. Thus, instead of the mining land being provided by the government and offered to the company, the company itself would carry out the exploration. Information about the mining area was considered to be the private property of the company. By contrast, and different from the previous mining law, Mining Law 4/2009 requires the government to provide areas that can be mined. Therefore, in its preparation of the law, the government had no choice but to collect data related to mining areas. Furthermore, Mining Law 4/2009 and its implementation regulations, such as Government Regulation 22/2010 on Mining Areas and Minister of Energy and Mineral Resources Regulation 12/2011 on Procedures for Establishing Mining Business Areas and Information Systems for Mineral and Coal Mining Areas, require the Ministry of Energy and Mineral Resources to have open and complete data on mining licences throughout Indonesia, and to manage them for the benefit of providing mining areas that can be auctioned.

Another factor that meant MOMI worked well was that it was carried out by a mining agency unit that prepares mining areas: the Sub-Directorate for Mineral and Coal Area Management. One of the officials in the unit stated that its main task was to manage existing mining concessions and prepare mining areas for upcoming mining licences, so it needed to ensure that there were no overlaps between mining licenses.[27] Hence, MOMI was an important programme for the sub-directorate, in terms of enabling the preparation of mining areas, and it meant that data management, especially regarding mining concession areas, was not a side job (as it was for other units) but a major task. An integrated database, such as MOMI, made it easy for officials to carry out their duties, by enabling the monitoring of mining areas in real time.[28]

Moreover, in various interviews, employees of the Ministry of Environment and Forestry, and *Korsup Minerba*, conveyed that officials involved in the formation of MOMI, the Director General, the Head of the Sub-directorate,

27 Interview with I Made Edy Suryana, Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019.

28 Ibid.

and several of its employees, were all enthusiastic about building MOMI.[29] Therefore, although the data was geographically scattered and a silo culture existed, the development of MOMI had to continue. The next challenge was to open up communication with other units or other agencies. In addition to reconciliation with regional governments, they created several Momerandums of Understanding (MoUs) with other agencies regarding data sharing and direct communication with other officials.[30]

Another factor supporting MOMI was the fact that there were certain interests from other agencies in submitting data to the unit that ran MOMI. Several agencies had an interest in obtaining data from other agencies, so they cooperated on data exchanges, for example via an MoU.[31] Each agency needed information from other agencies, for example the Ministry of Environment and Forestry needed mining concession data to find out which mining concessions encroached on the forestry area, so that they could find out if the concessions were complying with forestry regulations, and determine the amount of tax that must be paid. In other words, there was mutual benefit for institutions supporting the collection of data needed for MOMI. Regional governments, on the other hand, submitted their data to the central government, because if the IUPs data did not enter MOMI, their existence would not be recognised.[32] This would have an impact on regional income from the mining sector, because IUPs that were not registered with MOMI were not given facilities by the Ministry of Energy and Mineral Resources, such as export recommendations.

The recent trend that the government should provide accurate and open data to the public seems also to encourage the operation of MOMI. Not long after MOMI was built, a One Map policy to integrate all the spatial data in Indonesia was adopted. Due to this policy, since 2016 the sub-directorate that had been handling MOMI has not even needed to request data from other sectors, because the data was provided by the KSP that also managed the One Map policy.

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29 Interview with Dwinugroho, Head of the Geology, Mineral and Coal Human Resources Development Center, who was involved in the early development of MOMI, December 30th 2019; Interview with Dian Patria, the Head of *Korsup Minerba*, December 9th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019.

30 Interview with I Made Edy Suryana, Head of the Mineral and Coal Regional Development Sub-directorate, the Directorate General of Mineral and Coal Programme Development, and the Directorate General of Mineral and Coal, October 29th 2019; Interview with Asgan R. Nasrullah, staff member at the Sub-directorate of Mineral and Coal Regional Development, the Directorate of Mineral and Coal Programme Development, and the Directorate General of Minerals and Coal, December 10th 2019.

31 Ibid.

32 Ibid.

Finally, KPK's support for MOMI has also been significant. *Korsup Minerba* coordinated and supervised relevant agencies, so they could connect agencies if there was any coordination obstacle between them.[33] Moreover (as explained in the previous section), *Korsup Minerba* also accelerated the process of legally verifying mining concessions, so that the data could immediately be entered into the MOMI system. In addition, the fact that *Korsup Minerba* cooperated with various parties, such as NGOs, influenced government agencies, because they felt that they were being watched.

6.6 Conclusion

From 2011 to 2016, the Ministry of Energy and Mineral Resources built MOMI, a single database that integrates all of the spatial data related to mining areas throughout Indonesia, so that decisions related to mining could be made. MOMI was also expected to be a source of information on mining licences and areas for stakeholders. This chapter found that MOMI was built successfully, even though spatial data was spread across various units and institutions, and despite the fragmented nature of Indonesia's bureaucracy. This study found that there were several conditions supporting the success of MOMI's development.

Data collection was an important issue in the development of MOMI, because with fragmented bureaucracy, data related to mining licences were not centralised but spread across various government units and agencies. Some of the data was even held by individual government employees. Furthermore, since MOMI is a database covering all the mining areas in Indonesia, it needed to integrate other sectoral spatial information, such as forest areas, administrative boundaries, and other geospatial information. Therefore, coordination was needed to collect data, not only between mining agencies, but also between mining agencies and those from other sectors. However, until MOMI was developed there was no coordination mechanism, and data sharing between government employees, or between units and agencies, was based more on good relationships between individuals.

Nevertheless, even in a fragmented governance situation, data collection for MOMI development appeared to be possible. Several factors influenced the success of collecting spatial data for MOMI: first, there was a legal basis encouraging the formation of MOMI, formed by Mining Law 4/2009, Government Regulation 22/2010 on Mining Areas, and Minister of Energy and Mineral Resources Regulation 12/2011 on Procedures for Establishing Mining Business Areas and Information Systems for Mineral and Coal Min-

33 Interview with Dian Patria, the head of Korsup Minerba, 9 December 2019.

ing Areas. Secondly, the construction of MOMI was assigned to a suitable agency, the Sub-Directorate for Mineral and Coal Area Management of the Ministry of Energy and Mineral Resources, because it supported its function as a unit preparing mining areas. Moreover, because MOMI was part of the job desk sub-directorate, the officials concerned collected data through communication and negotiation with other units or agencies, and concluded an MoU with other agencies regarding data sharing. Thirdly, rather than 'ordering' compliance, there were certain interests from other agencies in submitting data to the unit that runs MOMI; for example, because they themselves needed spatial data from other agencies. In addition, sharing the data basically did not interfere with the administration of each institution, as administration could run along normal, functional lines (Bouckaert *et. al*., 2010: 21). Fourthly, the development of MOMI was supported by the data integration trend in Indonesia, especially the One Map Policy, which integrated all spatial data. Various agencies had already stored their spatial data in One Map. Therefore, coordination worked because the related sectors actually had policies that were fundamentally compatible (cf. Bouckaert *et. al.*, 2010: 21). Fifth, MOMI development was supported by KPK through *Korsup Minerba*, which also assisted in collecting mining data, by forcing regional governments to submit licensing documents to the Ministry of Energy and Mineral Resources. In this case, *Korsup Minerba* acted as a facilitator (cf. Esman 1991: 74).

The success of developing MOMI was hence not caused by improvements or even changes in the government bureaucracy, but by the several supporting conditions described above. When compared to C&C (as discussed in Chapter V) the presence of MOMI was urgently needed by the mining sector, to record mining areas which would then be used to manage mining, whereas C&C was originally intended to record mining licences throughout Indonesia, after which the DPR would push for legal verification of those licences. The mining sector itself did not have an urgent interest in establishing the legality of these licences, because the sector only needed mining licence data to ensure that mining licences did not overlap. Moreover, even though both MOMI and C&C involved various stakeholders working together (as explained above), submitting data to MOMI did not interfere with the interests of these stakeholders, whereas the implementation of C&C disrupted the interests of stakeholders such as mining companies and district/city governments.

This indicates that government policies and programmes can be successfully implemented within the government bureaucracy in Indonesia, if there are: laws, as a basis for regulating the policy or programme; an agency responsible for implementing the policy or programme; an agency that is of strong benefit to the programme; human resources with enthusiasm and expertise; and, a favorable national political situation. By contrast, government policies or programmes are difficult to implement if many of

the interests of the various parties involved are disrupted. In a situation of rampant illegality in Indonesia, parties who feel their interests are being disrupted will protect themselves by taking illegal action.

The use of MOMI should help resolve some problems with issuing mining licences, especially regarding the problem of unclear data on mining areas. In addition to MOMI being able to prevent overlapping mining licences, it can prevent the granting of mining licences in environmentally vulnerable areas, because spatial data on protected and conservation areas is also included in MOMI.

VII The making of Mining Law 3/2020: panacea or problem?

7.1 Introduction

In May 2020, when the research process for this dissertation was nearing completion, a new mining law was issued: Law 3/2020 on Mineral and Coal (Mining Law 3/2020). The new law did not come as a surprise, even if I did not expect it to be issued this quickly. The process of changing this mining law had actually been underway since 2015, but discussion of the bill seemed to be happening slowly and no significant changes appeared in the drafts being circulated publicly. The contents of the drafts were also strongly rejected by certain stakeholders, especially the NGOs, who thought that the drafts only benefitted mining companies. Therefore, I thought the new mining law would be published after this dissertation was finished, and I did not expect the bill to suddenly be discussed intensively in the DPR in just a few months, amid public rejection, and during the peak of the COVID-19 pandemic.

Mining Law 3/2020, is significant for this thesis, both in terms of its law-making process and its content. It allows us to compare the mining law that was made in the early days of the Reform period with the equivalent after more than 10 years under a completely different political climate. Fortunately, when I researched Mining Law 4/2009 I also questioned interviewees about the new draft of the law. Those interviews, together with meeting minutes and information issued by the DPR, form the basis of this chapter. Furthermore, because the issuance of this law was quite controversial, there were many news articles, position papers, and academic articles that I could use for my research.

This chapter examines the law-making process for Mining Law 3/2020, as well as the judicial review court cases for the law and its quality, from the same two perspectives I used to research Mining Law 4/2009 previously. First, following the same approach described in Chapter IV, I examine to what extent the law-making process for the new law responded to the environmental problems connected with mining licence issuance. Second, I analyse the quality of Mining Law 3/2020, in terms of addressing the environmental problems connected with mining licence issuance, based on the quality of law criteria used in Chapter III.

This chapter is divided into six sections, the first being this introduction. The second section explains which environmental problems connected with mining licence issuance persist, that only existed after the implementation of Mining Law 4/2009. The third section discusses the background of Mining Law 3/2020, especially the reasons why it was hastily drafted and approved. The fourth section discusses the dynamics of the making of Mining Law 3/2020, focussing on examining how the process responds to the environmental problems connected with mining licence issuance discussed in the second section. The fifth section assesses the quality of Mining Law 3/2020 in terms of addressing the environmental problems connected with mining licence issuance, which were also discussed in the second section, by using the features developed in Chapter II. The sixth section discusses Constitutional Court cases related to lawsuits filed by several parties, regarding the process of drafting and the content of Mining Law 4/2020. The seventh section is the conclusion. It answers the question of to what extent Mining Law 3/2020 responds to the environmental problems connected with mining licence issuance. It also describes the factors that have influenced responses to those problems, compared with the previous Mining Law 4/2009.

7.2 Environmental problems of mining licence issuance faced by the new mining law

As this research focusses on the extent to which Mining Law 3/2020 responds to the mining licence issuance problems related to the environment, this section first explains the problems that existed after Mining Law 4/2009 entered into force. After more than 10 years of the mining law, it appears that some problems described in Chapters II and III (above) persisted, whilst others changed.

Rampant illegal issuance of mining licences by regional governments

As explained in Chapter II, after the decentralisation policy was implemented, thousands of mining licences were issued by regional governments, which often did not comply with legal procedures. This meant that central government had to resolve two problems: the behaviour of the regional government, and the existence of thousands of problematically issued mining licences. As described in Chapter III, Mining Law 4/2009 contained provisions that regulated the behaviour of regional governments and limited their authority. In fact, after the enactment of Mining Law 4/2009, the number of mining business licences (*Izin Usaha Pertambangan*, or IUP) was much reduced, compared to the early days of decentralisation. As explained in Chapter II, after the decentralisation policy was implemented the number of mining licences increased to 10,000, (whereas previously

there had only been around 600), and the number declined to less than 5,000 (IUPs) in 2022.[1]

There are two reasons why issuance of IUPs in the region decreased. First, Mining Law 4/2009 stipulated that the central government had the authority to determine mining areas, and that the granting of mining areas must go through an auction process, so that regional government was no longer able to designate areas in which IUPs could be granted. Until 2021, the Ministry of Energy and Mineral Resources (ESDM) did not hold a single mining area auction.[2] An auction was actually scheduled to be carried out in 2020, but it was later postponed in order to wait for a regulation to be issued after the enactment of the new mining law.[3] Therefore, after the enactment of Mining Law 4/2009, no new mining metal and coal exploration licences (exploration IUPs) were issued (IMI, 2018: 32). Second, in 2014 there was a change in decentralisation policy for the mining sector with the enactment of Law 23/2014 on Regional Government. This law gives authority to issue metal and coal mining licences to the central government and provincial governments only, so the regent or mayor is no longer authorised to issue IUPs for metal and coal.

Although the number of new mining licences issued had decreased, the process of issuing extension IUPs and upgrading exploration IUPs to production operation IUPs continued. In recent years there have been extensions of IUPs and upgrades of exploration IUPs to production operation IUPs, which have been opposed by people living around the mining sites and by NGOs, leading to lawsuits in court. The issuance of extended IUPs and upgrading of exploration IUPs to production operation IUPs should have taken into account the technical, environmental and financial considerations regulated in Mining Law 4/2009 and Government Regulation 23/2010 (as described in Chapter III), but this was not always the case.

On February 28th 2018 *Wahana Lingkungan Hidup* (WALHI) filed a lawsuit at the East Jakarta Administrative Court against a production operation IUP which had been issued by the Minister of Energy and Mineral Resources to Ignasius Jonan, for PT. Mantimin Coal Mining (MCM).[4] According to Kisworo Dwi Cahyono, the Executive Director of WALHI South Kaliman-

1 https://modi.esdm.go.id/perizinan

2 Dunia Tambang, June 5th 2020, *ESDM Tunda Lelang Wilayah Tambang, Masih Menunggu Aturan?* - https://duniatambang.co.id/Berita/read/1008/ESDM-Tunda-Lelang-Wilayah-Tambang-Masih-Menunggu-Aturan

3 *Ibid*.

4 Mongabay, March 9th 2018, *Daerah Bulat Tolak Tambang Batubara MCM, Walhi Gugat Menteri karena Keluarkan Izin Produksi* - https://www.mongabay.co.id/2018/03/09/daerah-bulat-tolak-tambang-batubara-mcm-walhi-gugat-menteri-karena-keluarkan-izin-produksi/

tan, PT MCM's mining area of 5,908 hectares was located in the Meratu Mountains, which is a buffer ecosystem for Kalimantan Island and includes 1,398.78 hectares of secondary forest, 51.60 hectares of settlement, 147.40 hectares of rice field, and 63.12 hectares of river.[5] Although this claim was initially rejected by the State Administrative Court, WALHI won at the cassation stage.[6] The Supreme Court ordered the Minister of ESDM to cancel the IUP that had been granted to PT MCM.[7] The judge confirmed that part of the MCM mining area, which was located in a karst area, was also a geologically protected area, so mining there would channel water to the surrounding area.[8]

In the same year, WALHI sued the Minister of Energy and Mineral Resources at the East Jakarta Administrative Court, because he had issued an Approval of Production Operation Phase for PT. Citra Palu Minerals (CPM) through Decree of the Minister of Energy and Mineral Resources 422.K/30/DJB/2017. PT CPM was the CoW holder based on Presidential Approval B.143/Pres/3/ 1997. As explained in Chapter III, based on Mining Law 4/2009 there should be no more issuance of new CoW, as the Mining Law only recognized and regulated mining licenses (IUP). However, the Minister of Energy and Mineral Resources still issued an Approval of Production Operation Phase to PT CPM.[9] WALHI claimed that the minister had violated Law 32/2009 on Environmental Protection and Management, because PT CPM's mining area covered an area of 85,180 hectares in North Luwu, South Sulawesi, and in Donggala and Paringi Moutong, Central Sulawesi, which WALHI deemed to be conservation area.[10] The area was even included in the map of forest areas for which it is prohibited to grant new forest concession licences, based on the licensing moratorium policy to improve the governance of primary natural forest and peatland by the Ministry of Environment and Natural Resources.[11] It included at least 18,000 hectares of primary forest and part of a community forest.[12] However, the East Jakarta State Administrative Court (Pengadilan Tata Usaha Negara or PTUN) rejected the claim on the grounds that the government's decision is part of a contract between the government and PT CPM; therefore the government's decision would be a civil legal act and thus fall outside the

5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
9 Mongabay February 28th 2018, *Keluarkan Izin Operasi Tambang Emas di Sulsel-Sulteng, Walhi Gugat Menteri Jonan* - https://www.mongabay.co.id/2018/02/28/keluarkan-izin-operasi-tambang-emas-di-sulsel-sulteng-walhi-gugat-menteri-jonan/
10 Ibid.
11 Ibid.
12 Ibid.

jurisdixtion of the PTUN .[13] As a result PT CPM has continued its mining activities until the present.

Another case is a production IUP in Trenggalek, which was issued by the Governor of East Java in 2019. The local community rejected the production IUP granted to PT Sumber Mineral Nusantara (SMN), a gold mining company. The IUP mining area includes 12,891 hectares in total, comprised of 6,951 hectares of production forest, 2,779 hectares of protected forest, and 1,032 hectares of protected karst.[14] Eight-hundred-and-four hectares are located in rural settlements, 380 hectares are located in the fields, 280 hectares are located in plantations, 209 hectares are in areas prone to landslides, and 170 hectares are within community forest areas.[15] The mining area is also contrary to Trenggalek Regional Regulation 12/2012 on Regional Spatial Planning (Rencana Tata Ruang Wilayah or RTRW).[16] This case was not brought to court, but in 2021 the Regent of Trenggalek sent a letter to the Ministry of Energy and Mineral Resources requesting that the company's exploitation licence be either reviewed or cancelled.[17] The Minister replied that PT SMN had been asked to conduct a study of technical, economic and environmental aspects, including adjusting its territory to align better with the Trenggalek district spatial plan.[18] In addition, the Directorate General of Mineral and Coal would ensure that PT SMN conducted its mining activities by applying proper mining practices.[19] Nonetheless, the Trenggalek Regent still wanted PT SMN's IUP to be cancelled, because the IUP area was not in accordance with the Trenggalek district spatial plan.[20]

In this sense, issuing mining licences continued to be a problem after Mining Law 4/2009 had been enacted. Simultaneously, the thousands of problematic mining licences that were issued at the beginning of the decentralisation period have continued to cause problems. As explained in Chapter III, Mining Law 4/2009 did not respond to these mining licences.

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13 Katadata.co.id September 4th 2018, *Pengadilan Tolak Gugatan Walhi atas Izin Tambang Anak Usaha Bakrie* - https://katadata.co.id/arnold/berita/5e9a55d60e71d/pengadilan-tolak-gugatan-walhi-atas-izin-tambang-anak-usaha-bakrie; https://putusan3.mahkamahagung.go.id/direktori/putusan/cbf199d04365c5bacb1c2c44ee126b59.html

14 Mongabay November 11th 2021, *Soal Tambang Emas Trenggalek, KESDM Panggil Bupati, Penolakan Menguat [2]* – https://www.mongabay.co.id/2021/11/28/soal-tambang-emas-trenggalek-kesdm-panggil-bupati-penolakan-menguat-2/

15 Ibid.

16 Ibid.

17 Ibid.

18 Kabar Trenggalek May 19th 2022, *Surat Bupati Ditanggapi Kementerian ESDM, Mas Ipin Kekeh Minta Batalkan Tambang Emas Trenggalek* - https://kabartrenggalek.com/2022/05/surat-bupati-ditanggapi-kementerian-esdm-mas-ipin-kekeh-minta-batalkan-tambang-emas-trenggalek.html

19 Ibid.

20 Ibid.

Furthermore, the Clean and Clear Policy that was established to evaluate the mining licences (as described in Chapter V) could not overcome problematic mining licences. Therefore, mining licences with Clean and Clear status exist which do not fulfil environmental requirements, such as those pertaining to mine reclamation and post-mining.

Complex and non-transparent mining licensing procedures

As discussed in Chapter III, Mining Law 4/2009 does not address the problem of a complicated and non-transparent licensing system that could provide opportunities for abuse during the issuance of mining licences. There were various laws and regulations relating to mining licences, and companies were required to own several licences and other documents in order to carry out mining activities issued by different agencies. This complexity (as explained in Chapter III) was exacerbated by the limited regulations regarding transparency and public participation. Mining Law 4/2009 even issued a policy regarding auctions in the mining licensing process, thus adding to the complexity of the mining licensing system.

Since 2006, the government has issued a one-stop service policy, known as the One Door Licensing Service (*Perizinan Terpadu Satu Pintu*, or PTSP), which also affects the issuance of mining licences. As the process of issuing licences in Indonesia has always been complicated and lengthy, the PTSP was developed so that the whole licensing process would be in one place. It was hoped that this would make the process cheaper, less time-consuming, and less complicated. At first, the policy was built to facilitate licensing and other services for micro, small, medium and cooperative enterprises (*Usaha Mikro, Kecil dan Menengah*, or UKMK). President Susilo Bambang Yudhoyono issued Presidential Instruction 3/2006 on the Investment Climate Improvement Policy Package, which assigned the Ministry of Internal Affairs to develop guidelines for improving and simplifying licensing for UKMK and developing a one-stop licensing service system. This Presidential Instruction was followed up with the issuance of Minister of Internal Affairs Regulation 24/2006 on Guidelines for the Implementation of PTSP, which regulated PTSP in all regions and delegated the authority for licensing and other services from various agencies to the PTSP regional agency (*Perangkat Daerah Penyelenggara Pelayanan Terpadu Satu Pintu*, or PPTSP). However, because the PTSP was only intended for small and medium enterprises at that time, not all licences were delegated to the PPTSP. This included mining licences.

From that point onwards, the PTSP continued to develop up until issuance of Presidential Regulation 97/2014 on the implementation of One-Stop Integrated Services. In this Presidential Regulation, the PTSP aims to: provide legal protection and certainty to the public; shorten the service process; realise a service process that is fast, easy, cheap, transparent, certain, and

affordable; and, bring the community closer and provide it with wider services (Article 2). Based on this presidential regulation, all licensing and other services are carried out in an integrated manner and as a single process, making the application stage through to the decision making stage a one-door service. In central government, the PTSP is carried out by the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal*, or BKPM): in the provinces, the Provincial Investment and One Stop Service Agency, and in the districts/cities, the Regency/City One Stop Integrated Investment and Service Agency (Article 5). This Presidential Regulation stipulates standards for implementation of the PTSP, including the period of service for the PTSP which is set no later than seven days from the receipt of complete and correct licensing and other service documents (Article 15).

To implement the presidential regulation, the Minister of Energy and Mineral Resources issued Regulation 25/2015, on the Delegation of Authority for Granting Licensing for the Mineral and Coal sector within the Framework of the PTSP, to the Head of BKPM. Following issuance of the ministerial regulation, the entire process for issuing mining licences is now carried out by the BKPM. The Ministry of Energy and Mineral Resources assigns its employees to an office at the BKPM, giving them the special task of handling licensing applications. This delegation of authority is also carried out by the provincial government, to the office of investment and one-stop integrated services, in accordance with the rules regarding regional apparatus in Government Regulation 18/2016 on Regional apparatus.

The government also improved the PTSP by introducing an Online Single Submission (OSS) policy. With this system, all licences form one application and the company needs only to upload a licence file to the application and wait for approval. The OSS policy is regulated by Government Regulation 24/2018 on Electronically Integrated Business Licensing Services, which regulates how the OSS system works, including the OSS institutions, OSS funding, and so on.

However, the PTSP and OSS have not been without their own difficulties, in terms of achieving a faster, cheaper and more transparent licensing process. Several studies show that the PTSP has struggled with insufficient staff numbers, in particular when it comes to mining licences which require more technical and complex knowledge (Abdullah, 2017c: 59). During its implementation, the PTSP did not guarantee coordination between sectoral policies within its licence issuance process. This means it is always possible that a PTSP decision to grant a licence will run contrary to policies in other sectors, and as a result it is still possible that mining licences will be granted in protected and conservation forest areas (Abdullah, 2017c: 59). Moreover, information disclosure at the PTSP is still limited, even though access to information is needed to monitor whether or not any abuse of the licence issuance process is occurring (Abdullah, 2017c: 59).

The goal of making the licensing process faster and cheaper via the PTSP has not yet been achieved. Regional governments have different standards for service processes, and some regional governments have not set any timing or costing standards for the licence issuance process (Abdullah, 2017c: 60). Some PTSPs in the regions even raise illegal levies that must be paid by entrepreneurs (Halik, 2014: 2; Hidayat *et. al*, 2018: 147). OSS is also difficult to implement, because the government lacks the resources to do so. Not all regions have a stable internet network, making it difficult to carry out the licensing process online (Sauri, 2020: 70). Another problem is that there are still limited human resources in regional governments, which often renders online systems inoperable (Sauri, 2020: 72). These problems can also be used as reasons for business actors to return to manually managing their licences, making bribery and gratification easier (Sauri, 2020: 70-72). Thus, the existence of the PTSP and OSS has yet to be implemented effectively.

Disregard for environmental requirements when issuing mining licences

There were several weaknesses in the rules for issuing mining licences, as regulated by Mining Law 4/2009, implementing regulations, and related laws and regulations (as discussed in Chapter III), including the weak regulation of environmental requirements when issuing mining licenses, especially those related to mine reclamation and post-mining. Environmental requirements should form part of the process of issuing a mining license, but the mining law and its regulations did not stipulate that this was the case. Such provisions allow IUPs to be granted to mining companies that have no commitment to environmental protection whatsoever.

In fact, as shown in Chapter V, many IUP owners did not carry out reclamation and post-mining, even though they had obtained Clean and Clear status. As of June 2018, around 60% of IUPs that already had Clean and Clear certificates had not fulfilled the obligation to deposit reclamation guarantee funds.[21] Data for 2019 from the Financial Audit Agency (*Badan Pemeriksa Keuangan* or BPK) shows that, out of 4,726 companies holding IUPs, only 983 held reclamation guarantees and only 282 held both reclamation and post-mining guarantees.[22] Moreover, from data released in 2020, 8 Coal Contracts of Work, with a total mining area of 87.307 hectares,

21 Bersihkan Indonesia (2020). *Curang di Lubang Tambang; Kerentanan Korupsi Jaminan Reklamasi dan Pascatambang,* Auriga Indonesia, p. 11, available at: https://auriga.or.id/report/getFilePdf/id/report/64/2020_curang_di_lubang_tambang_kerentan_korupsi_jamrek_pascatambang_auriga2020_bersihkanindonesia_id.pdf

22 Results of Examination Semester 1/2019, The Supreme Audit Agency (*Badan Pemeriksa Keuangan*, or BPK), quoted from Bersihkan Indonesia (2020). *Curang di Lubang Tambang; Kerentanan Korupsi Jaminan Reklamasi dan Pascatambang,* Auriga Indonesia, p. 12, available at: https://auriga.or.id/report/getFilePdf/id/report/64/2020_curang_di_lubang_tambang_kerentan_korupsi_jamrek_pascatambang_auriga2020_bersihkanindonesia_id.pdf

whose concessions were due to expire in 2021, had not yet done any mine reclamation.[23]

Issuance of mining licences in environmentally vulnerable areas

As explained above, until 2021 no auctions of exploration IUPs had been held, which reduced the possibility of new mining activity happening in environmentally vulnerable areas. Moreover (as explained in Chapter V), the Clean and Clear policy resulted in reduced mining activity in several protected and conservation areas. In 2016, 1,901 companies had mining licences in conservation and protected forest areas, over a total area of 6,309,283 hectares. By 2019, the mining companies located in these forest areas had been reduced to 435 companies, over a land area of 1,772,966 hectares (BEM KM IPB, 2020: 15).

However, even though the overall number of operations has decreased, mining in environmentally vulnerable areas still exists. The extension of exploration IUPs and upgrading of IUPs to production IUPs are problematic approaches, as described above. The lawsuits against these IUPs mostly concern mining activities located in environmentally vulnerable areas, and/or which are detrimental to communities living near mining activity areas. Weakness in data collection, unclear regulations, and the lack of coordination with other land-use sectors have all continued to make it difficult to protect environmentally vulnerable areas from mining activities.

7.3 The broader context of the regulatory change

Shortly after its issuance Mining Law 4/2009 received criticism, mostly from mining business, because it was considered to be hampering the investment climate. They targeted: abolishing the contract of work (CoW) and the coal mining contract of work (CCoW), and replacing them with a licensing system; policy regarding domestic value adding obligations that required mining licence holders to carry out domestic smelting and refinery; the divestment obligation where, after five years of production, the holder of a mining licence whose business was owned by a foreign company was under obligation to divest shares to the government; and the limitation of mining licence areas.

23 Bersihkan Indonesia (2020). *Curang di Lubang Tambang; Kerentanan Korupsi Jaminan Reklamasi dan Pascatambang,* Auriga Indonesia, p. 11, available at: https://auriga.or.id/report/getFilePdf/id/report/64/2020_curang_di_lubang_tambang_kerentan_korupsi_jamrek_pascatambang_auriga2020_bersihkanindonesia_id.pdf.

In fact, the implementation of these measures did not run smoothly. Negotiations with contract holders were necessary for the contract system to be abolished, but the process of negotiation moved slowly for years (Sembiring, 2019: 81). The obligation to build smelting facilities and refineries was only fulfilled by a few mining companies (Sembiring, 2019: 82) and the government issued new regulations to relax these requirements, some of which even contradicted the mining law. For example, Government Regulation 23/2010 determined that any CoWs or CCoWs which have not yet received their first or second extension can be turned into an extended IUP without going through auction (Article 112) or through the mining licensing procedures regulated in Mining Law 4/2009. This article in fact contradicts Mining Law 4/2009 because (as explained in Chapter III) the Mining Law regulates that mineral and coal mining licences are only issued after an auction.

Five years after its enactment, the DPR and the government proposed putting the amendment of Mining Law 4/2009 on the agenda for the 2014-2015 National Legislation Programme (*Program Legislasi Nasional*, or Prolegnas). They considered that the mining law had not been able to fix the developments, problems, and legal needs concerning the implementation of mineral and coal mining, especially issues with licensing, smelting and refineries (amongst others).[24] Moreover, Mining Law 4/2009 had been submitted for judicial review seven times to the Constitutional Court (*Mahkamah Konstitusi*, or MK) and four of the petitions had been granted, so there were changes to several articles of the mining law.[25] Furthermore, contrary to the Mining Law, Regional Government Law 23/2014 stipulated that the authority to manage metal and coal henceforth was only given to the central government and provincial governments, removing it from district/city government control.[26] Therefore, the mining law policies should be adjusted to regional autonomy policies as regulated in Regional Government Law 23/2014.

On the other hand several parties, especially NGOs, feared that amendments to the mining law would only benefit mining companies, especially CoW and CCoW holders, leading them to oppose the amendment process (Primayogha, 2020). United in a civil society coalition, JATAM, ICEL, PWYP, ICW, WALHI, KIARA, AMAN, PATTIRO, HuMA, IGJ, Article 33, Solidaritas Perempuan, Epistema Institute, FWI and AURIGA rejected the bill, specifically because its substance favoured the interests of large-scale companies, most of all the owners of CoWs and CCoWs, over the local

24 Academic Paper for the Draft Law on Amendments to Law Number 4 of 2009 concerning Mineral and Coal, House of Representatives, Republic of Indonesia, 2018, p. 1.
25 Ibid.
26 Ibid.

people's right to manage their own territory.[27] Mining Law 4/2009 was an obstacle to coal companies holding CoWs and CCoWs continuing their mining activities, because (as explained above) the mining law abolished the contract system and replaced it with a licence system that included auctions to obtain a mining business area licence (*Wilayah Izin Usaha Pertambangan*, or WIUP). In addition, there was a mining area limit for each mining licence. Thus, if the mining companies were to continue their business and follow the procedures regulated in Mining Law 4/2009, they had to follow licensing procedures and the mining area was likely to be reduced. This included eight CCoWs whose contracts were/are due to expire between 2019 and 2026.[28] For mining companies that own CCoWs, it would be more profitable if Mining Law 4/2009, which has a number of rules that make it difficult for them to extend their business, were to be amended.

Furthermore, NGOs were opposed to amendment of the mining law because, as the bill provided the opportunity to inflict damage on vulnerable areas, such as coastal areas, small islands and protected and conservation forests, including marine waters, environmental protection would dramatically diminish.[29] The bill was also unclear about mining reclamation and post-mining.[30]

Despite the protests, drafting of the law continued in the DPR, even though the process seemed slow right up until 2018. Only a few drafts were shared with the public by the DPR during the three year period, and no significant changes were made in each of the drafts. The Executive Director of Indonesia Resources Studies (IRESS), Marwan Batubara, thought that between 2015 and 2018 the bill was only intermittently discussed.[31] However, on February 11th 2020, when the government and the 2019-2024 DPR period had just begun, the bill started to be discussed seriously. The process of making new Mining Law 3/2020 only involved a few stakeholders (Hidayati, 2020: 26). Even *Partai Demokrat* stated that the bill was not open

27 Position Paper for the Civil Society Coalition for Advocating the Mineral and Coal Law, Coalition of Civil Society Advocating the Draft Mineral and Coal Law, Jakarta, March 22nd 2016.

28 The CCoWs were held by PT Tanito Harum, PT Arutmin Indonesia, PT Kendilo Coal Indonesia, PT Kaltim Prima Coal, PT Multi Harapan Utama, PT Adaro Indonesia, PT Kideco Jaya Agung, and PT Berau Coal: https://www.esdm.go.id/id/media-center/arsip-berita/daftar-pkp2b-yang-kontraknya-akan-berakhir

29 Position Paper for the Civil Society Coalition for Advocating the Mineral and Coal Law, Coalition of Civil Society Advocating the Draft Mineral and Coal Law, Jakarta, March 22nd 2016.

30 Ibid.

31 Sindonews.com 29/05/2020. UU Minerba, Antara Kritik Pengamat dan Pembelaan DPR - https://ekbis.sindonews.com/read/37219/34/uu-minerba-antara-kritik-pengamat-dan-pembelaan-dpr-1589889911

to the public, although the regulation and management of minerals and coal must be planned, transparent, accountable, and based on principles of justice (Sartono, 2020: 125).

Along with the mining bill, the drafting of the Job Creation Law (known as the Omnibus Law) was proposed and discussed. This bill greatly influenced the mining law bill. The making of the Omnibus Law was first announced by President Joko Widodo, in the Inaugural Speech of the President and Vice President for the 2019-2024 period, at the Plenary Session of the Consultative Assembly of the Republic of Indonesia, on October 20th 2019. At the time, the president said that the government would invite DPR to issue two omnibus laws, namely the Job Creation Law and the Micro and Small to Medium Enterprises (*Usaha Mikro Kecil Menengah*, or UMKM) Empowerment Law. In his speech, the president said that the Omnibus Law was a law intended to revise several other laws. Indeed, eventually more than 100 laws were reviewed for compliance with the two omnibus laws, including Mining Law 4/2009.[32]

The objective of the Omnibus Law was to attract more investment by reducing the government bureaucracy that tended to hinder business. This was in line with the focus of the Joko Widodo administration, which was on infrastructure, de-regulation, and de-bureaucratisation (Warburton, 2016: 298). Joko Widodo's deregulation policy was designed to cut bureaucracy and attract infrastructure investment. De-bureaucratisation also aimed to streamline and reduce government procedures, in order to accelerate infrastructure projects (Warburton, 2016: 308).

Although the idea of the Omnibus Law looked promising in the midst of complex government bureaucracy, discussion of the job creation bill by the government received criticism from various parties, because it was hasty, non-transparent, and involved limited public participation.[33] In fact, the material discussed was wide-ranging, relating to more than 100 laws and regulations, and including topics that were very important to people's lives, such as labour rights and natural resource management. However, other important issues, such as human rights and the environment, received hardly any attention. Despite widespread criticism and rejection, the government continued to discuss the bill. In the end, hundreds of thousands of students and workers in various cities in Indonesia took to the streets,

32 Powerpoint Presentation for the Coordinating Ministry of Economic Affairs of the Republic of Indonesia, at the Focus Group Discussion Regarding Preparation of the Investment Ecosystem Omnibus Law (investment convenience), which was held on October 30th 2019.

33 For example, *Siaran Pers Pusat Studi Hukum Dan Kebijakan Indonesia (PSHK) Terkait Pengesahan Undang-Undang Cipta Kerja,* available at *https://pshk.or.id/publikasi/pengesahan-uu-cipta-kerja-legislasi-tanpa-ruang-demokrasi/*

demonstrating against the passage of the job creation bill, the mining bill, and the criminal code bill (which was also being discussed in the DPR).

However, neither parliament nor the government were impressed by the demonstrations. Unexpectedly, in a plenary session on May 12th, all the parties approved the Bill on Amendment to Mining Law 4/2009.[34] Research released by a number of NGOs shows that the rush to issue a new mining law was due to strong pressure from mining companies, and that key actors involved in making Mining Law 3/2020 had close relationships with mining businesses in Indonesia.[35] Nearly 50% of the 2019-2024 DPR members are entrepreneurs[36] and some of them are personally involved in the mining industry. The results of research conducted by Fraksi Rakyat Indonesia evidence the names of members of the DPR and government officials involved in discussion of the omnibus law bill and amendments to the mining law, and their affiliations with the mining industry.[37]

It is therefore evident that the government, the DPR and the mining industry supported each other in making the Omnibus Law and Mining Law 3/2020. To ensure political stability and muster support for his policy goals, President Joko Widodo needed to expand his governing coalition, accommodate personal interests, make deals with oligarchs, and be involved in the distribution of patronage (Warburton 2016: 298). This indicates how since the beginning of the post-New Order period oligarchy has continued in Indonesia. It has assumed forms different from the centralized oligarchy in the Suharto era to become an electoral oligarchy, i.e. one in which oligarchs reinforce their power through elections (Winters, 2013, 16-17). Furthermore (as discussed in Chapter II), even though the New Order period had ended, the relationship patterns between business people and those in government remained similar to what they had been before. People who had power and made profits during the New Order period have adapted and restructured the new political framework; in other words, the domination of the old elite has continued through new political vehicles (Hadiz, 2004: 64). Various parties, such as a number of NGOs and student activists related to democracy, had hoped that values as accountability, transparency, and human rights, could be realized, but these hopes were ultimately dashed (Hadiz, 2004: 65). Political networks and economic interests have sustained the oligarchy,

34 Chronology of the Preparation Process and Discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining, https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf

35 *Bersihkan* Indonesia; *Fraksi Rakyat* Indonesia (2020). *Omnibus Law: Kitab Hukum Oligarki, Para Pebisnis Tambang & Energi Kotor Dibalik Omnibus Law: Peran Konflik Keoentingan & Rekam Jejak*, available at: https://www.walhi.or.id/uploads/buku/Laporan%20OL%20Kitab%20Hukum%20Oligark_BI_FRI-min.pdf

36 Ibid.

37 Ibid.

whilst the reformist movement has weakened (Hadiz and Robinson, 2013: 52), a process that has only become more pronounced since Hadiz and Robinson published their analysis in 2013.

7.4 The making of Mining Law 3/2020

This section discusses the dynamics for the development of Mining Law 3/2020 in great detail. It is focussed on the process of problem-finding and analysis, and in particular the extent to which the regulations have responded to the environmental problems of mining licence issuance (similar to my analysis of the development of Mining Law 4/2009 in Chapter IV). First, this section describes the law-making rules, especially those related to problem-finding and analysis.

Law-making rules

Just as for the development of Mining Law 4/2009, the development of the Mining Law 3/2020 must comply with a number of law-making rules. The making of Mining Law 3/2020 must be in accordance with Law 12/2011 on the Making of Laws and Regulations, as amended by Law 15/2019 on Amendments to Law Number 12 of 2011 on Establishment of Laws and Regulations, and with Presidential Regulation 87/2014 on Implementing Regulations for Law 12/2011, as well as with two DPR Regulations on Rules of Orders. When the bill was formulated by the DPR for the 2014-2019 period the process needed to be in line with DPR Regulation 1/2014 on Rules of the House of Representatives of the Republic of Indonesia, whilst when the bill was discussed by the government and the DPR for the 2019-2024 period the process needed to be in line with DPR Regulation 1/2020 on Rules of the House of Representatives of the Republic of Indonesia

When Mining Law 3/2020 was drafted, the law-making rules were more detailed than those which were in effect when Mining Law 4/2009 was drafted. Moreover, several important rules had not existed previously, namely the requirement to attach an academic paper to every proposed law (Article 43 of Law 12/2011) – Law 12/2011 regulates the standards for writing academic papers (Article 43 of Law 12/2011). When Mining Law 4/2009 was drafted, the rules regarding public participation were very limited and DPR Regulation 1/2005 did not explicitly regulate public participation and law-making. Law 4/2010 regulated public participation in general, but when Mining Law 30/2005 was made, Law 12/2011 regulated the detailed mechanisms through which the public can be involved in law-making (Article 96 of Law 12/2011).

The previous Mining Law 4/2009 came from a government initiative, whereas Mining Law 3/2020 was a DPR initiative. Based on articles 103 and 112

of DPR Regulation 1/2014, a bill proposed by the DPR could be submitted by members of the DPR, a commission, or a combination of different commissions. Before compiling a bill, an academic paper regarding the material regulated in the bill must be written (Article 115 DPR Regulation 1/2014 and Article 44 Law 21/2011). Law 12/11 and DPR Regulation 1/2014 also regulate the structure of the academic paper. Furthermore, in the process of formulating the bill, the law-maker could also ask for public input as material for the Working Committee (*Panitia Kerja*, or *Panja*) to improve the bill (Article 117 of DPR Regulation 1/2014). After the bill has gone through a process of harmonisation, stabilisation and finalisation (Article 118-121 DPR Regulation 1/2014), a DPR plenary meeting (Article 122 DPR Regulation 1/2014) establishes it as a bill proposed by the DPR. The head of DPR then submits the bill to the president (Article 129 (2) DPR Regulation 1/2014). The president assigns a minister to represent him in discussion of the bill in the DPR (Article 91 (1) of Presidential Regulation 87/2014). The minister who represents the president conducts discussions and makes a problem list (*Daftar Isian Masalah* or DIM) (Article 92 (1) of Presidential Regulation 87/2014). In the process, the public can also provide input orally and/or in writing (Article 188 of Presidential Regulation 87/2014).

Subsequently, the DPR and the government (represented by the minister assigned by the president and his staff) discuss the bill in the DPR (Article 65 Law 12/2011). If discussion of the bill relates to any of the following: regional autonomy; central and regional relations; the formation, expansion, and merging of regions; the management of natural resources and other economic resources; or, the balance of central and regional finance, discussion at the first level is not only carried out by the DPR and government but also involves the applicable regional representative council (*Dewan Perwakilan Daerah*, DPD) (Article 65 (2) of Law 12/2011 and Article 149 (3) of DPR Regulation 1/2020).

Discussion of the bill in the DPR is carried out at two levels (Article 66 of Law 12/2011 and Article 142 (1) of DPR Regulation 1/2020). The first level of discussion consists of commission meetings, joint commission meetings, Legislation Board meetings, Budget Board meetings, and/or Special Committee meetings (Article 67 Law 12/2011 and Article 142 (2) of DPR Regulation 1/2020). The second level of discussion is the plenary meeting (Article 67 of Law 12/2011; Article 142 (2) of DPR Regulation 1/2020). Discussion of the contents of the bill at the first level consists of an introduction, discussion of problem inventory lists (DIM), and the submission of opinions (Article 68 of Law 12/2011; Article 149 (1) of DPR Regulation 1/2020). If first level discussions finish and the decision is made to proceed to second level discussion, the decision on whether or not to enact the bill as law happens at the plenary session. If the DIM discussion at first level cannot be completed within a certain period of the DPR, the discussion can either

continue or be referred to the DPR to carry over into the next period (Article 17A of Law 15/2019).

Based on the above description, problem-finding and problem analysis are carried out in the process of writing an academic paper and formulating the bill at the DPR, in the process of the government making DIM, and in the process of the DPR and the government discussing DIM. At every stage, the DPR and the government can ask for input from the public. Law 12/2011 stipulates that members of the public have the right to provide input orally and/or in writing, which can be done through public hearings, work visits, socialisation, and/or seminars, workshops, and/or discussions (Article 96 (1) and (2)). To make it easier for the public to provide input, every draft must be made easily accessible to the public (Article 96 (4)). Compared to previous law-making rules, the rules when Mining Law 30/2020 was made opened up more opportunities for the deeper analysis of problems and their alternative solutions, because there was both an obligation to produce an academic paper and standards for producing such papers. Moreover, there were detailed rules regarding public participation in the law-making process. Therefore, the process for making Mining Law 3/2020 should have been an improvement on the process for making the previous mining law.

Discussion of the mining bill during the 2014-2019 DPR period

The process of making Mining Law 30/2020 started well, by following the prevailing rules according to Law 12/2011 on the Formation of Legislation and DPR Regulation 1/2014. In 2015, the drafting team of the DPR Expertise Council (*Badan Keahlian DPR*, or BKD) began drafting the law and received input from several stakeholders, consisting of regional governments, universities and mining companies.[38] Commission VII of the DPR, the scope of which includes energy, research and technology, and the environment, also held a Public Opinion Meeting (*Rapat Dengar Pendapat*, or RDP) with stakeholders, including experts, associations related to mining, and universities. It also made working visits to several regions, to get input for improving the formulation of the bill.[39] The DPR also provided the academic paper, which had been made based on research supported by data from interviews with stakeholders in three provinces: Aceh, East Kalimantan, and South Sulawesi.[40] Data were also obtained from library searches, workshops, and several discussions and seminars that invited experts, academics, or NGOs

38 Chronology for the Preparation Process and the Discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf

39 Ibid

40 Academic Paper for the Draft Law on Amendments to Law Number 4 of 2009 concerning Mineral and Coal, House of Representatives, Republic of Indonesia, 2018.

to speak.[41] On March 29th 2018, the working committee presented the bill at the legislative body (*Badan Legislasi*, or Baleg) plenary meeting of the DPR, and it was agreed that the bill on amendments to Mining Law 4/2009 could be submitted as a DPR initiative bill.[42] The DPR then submitted the bill to the president on April 11th 2018.

However, it seemed that the process of deliberating on the DPR initiated mining bill in the government was not as smooth as the initial deliberation process in the DPR. Based on the information provided by the Minister of Energy and Mineral Resources, Arifin Tasrif, after the government received the bill from the DPR, it was discussed by the working committee team and had also been disseminated to various parties – including regional governments, universities, civil societies, professional mining organisations, and mining business actors in various cities – through public consultations running from 2018 to 2020[43]. However, later discussions on the bill in the relevant ministries seemed to have faced several obstacles, so they neither a list of problems or the DIM signed by the relevant ministries, both of which the president should submit to the DPR, were produced. Therefore, on June 5th 2018 the president submitted a letter to the DPR regarding the appointment of government representatives, namely the Minister of Energy and Mineral Resources, the Minister of Internal Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, to represent the president in discussing the Bill with the DPR, but the letter was still not accompanied by the DIM.[44]

On July 18 2019, the DPR held a meeting with a number of ministers to discuss the bill, but the government provided a DIM which had only been signed by the Minister of Energy and Mineral Resources. This indicated that the bill was not yet agreed upon by all the relevant ministers, therefore it could not be discussed.[45] Furthermore, in mid-September, a hearing meeting RDP) was held between the DPR and the Minister of Energy and Mineral Resources, for which the DIM had still not been prepared by the government. The DPR again granted the government extra time to complete the DIM.[46]

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41 Ibid.

42 Chronology for the Preparation Process and the Discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf

43 Minutes of the Working Committee Meeting on the Draft Mineral and Coal Law, Commission VII DPR with the Minister of Energy and Mineral Resources and the Ministry of Industry, May 11th 2020.

44 Chronology of the preparation process and discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf

45 https://pwypindonesia.org/id/pembentukan-ruu-perubahan-atas-uu-minerba-melanggar-prinsip-keterbukaan-akses-masyarakat-terhadap-informasi/

46 Ibid.

From this point onwards, the process of discussing the bill became increasingly unclear and closed. On September 23rd 2019 the president gave a press statement, asking the DPR to postpone discussion of the bill so that more input and better content could be obtained, in accordance with the wishes of the people.[47] However, there seemed to be sudden agreement between various parties, meaning that the bill was immediately discussed, because only two days later (on September 25th 2019 at 9 pm) the Ministry of Energy and Mineral Resources submitted the DIM of the bill to the DPR and it was signed by five ministers, namely: the Minister of Energy and Mineral Resources, Ignasius Jonan; the Minister of Industry, Airlangga Hartarto; the Minister of Finance, Sri Mulyani; the Minister of Home Affairs, Tjahjo Kumolo; and the Minister of Law and Human Rights, Yasonna Laoly. The Minister of Industry provided a note to the signatures.[48] However, the introductory letter read by the Secretary General of the Ministry of Energy and Mineral Resources explained that there were still several substantive matters in the bill that had not been agreed by the Ministry of Industry.[49]

The DIM was accepted by the DPR and Commission VII of the DPR formed a working committee for discussion of the bill via an internal meeting, on September 25th 2019, followed by an internal working committee meeting on September 26th 2019.[50] On 27th September 2019, the DPR scheduled a meeting for Commission VII of the DPR and ministers representing the government to discuss the bill. However, the meeting was cancelled due to a letter from the Ministry of Energy and Mineral Resources Number 1734/06/SJN.R/2019, dated September 27th 2019, regarding Postponement of Discussion on Amendments to Law Number 4 of 2009, which stated that the Minister of Energy and Mineral Resources had been directed by the president to postpone discussion of the bill.[51]

In fact, the DIM was eventually submitted just a few days before the end of the DPR term of office period for members of the DPR (running 2014-2019), meaning that discussion of the DIM could not start.[52] Therefore, discussion of the DIM by the DPR and government was not carried out within the 2014-2019 DPR period.

47 Ibid.
48 Ibid.
49 Chronology of the preparation process and discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf
50 Ibid.
51 Ibid.
52 Ibid.

Discussion of the mining bill during the 2019-2024 DPR period

On January 16th 2020 the legislative body of the DPR and the Minister of Law and Human Rights and the Legislative Design Committee of the DPD met. They decided to approve the continuation of the amendment process to Mining Law 4/2009, followed by discussions via 'carry over'.[53] Furthermore, based on the results of a plenary on January 22nd 2020, the bill has been stipulated for inclusion in the Prolegnas Priority 2020.[54] However (as explained above), the DIM for the bill was only submitted a few days before the 2014-2019 DPR period ended, so it had not yet been discussed. This violated Article 71A of Law 15/2019, which (as described in the sub-section on law-making rules, above) stipulates that the bill can only be submitted to the DPR for discussion during the next period if it has already undergone some DIM discussion.

On February 13th 2020, Commission VII of the new DPR scheduled a meeting with the government to continue discussion on the DIM for the bill, and on the appointment of members of the working committee for the bill. Furthermore, the working committee and the government discussed the DIM from 17th February to 11th March 2020.[55] A report of the discussions was shared by Commission VII of the DPR via an online meeting on March 31st 2020.[56] The meeting was held online due to the COVID 19 pandemic. At the time, the content of the bill had become known and it triggered considerable public resistance.

Throughout the discussion of the bill, several community groups attempted to submit written objections, one of which was sent by the Coalition of the Mineral and Coal Concerned Society (*Koalisi Masyarakat Peduli Mineral dan Batubara* or KMPM), a group consisting of legal experts and mining observers.[57] The KMPM gave an open letter to the president on April 3rd 2020, rejecting discussion of the mining bill in the midst of the COVID-19 pandemic, because at the time public attention was focussed on efforts to deal with the pandemic.[58] The Ministry of Energy and Mineral Resources agreed to this objection and issued letter number 529/04/SJN.R/2020 to the DPR, requesting postponement of the bill meeting on the grounds that the

53 Ibid.
54 Ibid.
55 Chronology of the preparation process and discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf
56 Ibid.
57 https://pushep.or.id/problem-etis-dan-yuridis-undang-undang-no-3-tahun-2020-tentang-perubahan-atas-undang-undang-nomor-4-tahun-2009-tentang-pertambangan-mineral-dan-batubara/
58 Ibid.

government should first handle the spread of COVID-19.[59] The DPR then postponed continuing discussion of the bill.[60]

However, on May 11th 2020, the DPR started a first level discussion. In this meeting, eight parties agreed to submit the bill for a plenary session (second level discussion). Only one party, the *Partai Demokrat* did not agree, on the grounds that it was still during the COVID-19 pandemic.[61] Nevertheless, one day later (on 12th May), the bill was passed and became mining law.

Although the process of making Mining Law 3/2020 is controversial, because of this unexpected acceleration, at the last Commission VII of the DPR working meeting (on May 11th 2020), Bambang Wuryanto, Chairman of the Working Committee (*Partai Demokrasi Indonesia Perjuangan*, or PDIP) said that discussion of the bill was in accordance with the mechanism of law-making, because the bill had been continually discussed with the government since 2016.[62] A similar argument was made by a member of Commission VIII of the DPR, Maman Abdurahman, that the bill had been discussed not only for three months but since 2015, and that all procedures had been carried out, including meeting with experts, academics, and others.[63] He continued: "…this is done in a closed manner, to avoid misinterpretation by the public".[64] Indeed, from a formal perspective, every stage and requirement in the process of formulating the bill, from 2015 to 2019, seemed to have been in accordance with the rules of making law. However, discussion of the bill in the 2019-2024 DPR period, starting in 2020, *was* rushed and not in accordance with law-making rules. As explained above, a bill that has not yet reached the DIM discussion stage cannot be carried over or discussed further during the next DPR period, which is what happened in this case. Furthermore, the bill was discussed very quickly, ignoring the rules in Law 12/2011, which stipulate that each draft must be opened to the public, and that public participation is a right that must be fulfilled within the process of making a law.

59 Ibid.
60 Ibid
61 Chronology of the preparation process and discussion of the Draft Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining: https://www.dpr.go.id/dokakd/dokumen/K7-RJ-20200515-103121-1462.pdf
62 Minutes from the working committee meeting on the Draft Mineral and Coal Law, Commission VII of the DPR, between the Minister of Energy and Mineral Resources and the Ministry of Industry, 11th May 2020.
63 Sindonews.com 29/05/2020. UU Minerba, Antara Kritik Pengamat dan Pembelaan DPR - https://ekbis.sindonews.com/read/37219/34/uu-minerba-antara-kritik-pengamat-dan-pembelaan-dpr-1589889911
64 Ibid.

The sub-sections below focus on how the mining *licences* issuance problems related to the environment (as described in section 2) were addressed by this very rushed discussion of the mining bill.

Problem-finding

Unlike Mining Law 4/2009, the draft of which came from the government, the draft of Mining Law 30/2020 came from the DPR, so it was the DPR that initially identified which problems needed to be resolved in the mining law. The formulation of the draft mining law in the DPR (as explained in the section above) was achieved by: the DPR Expertise Council (*Badan Keahlian DPR* or BKD) formulating the bill and receiving input from various stakeholders; a public opinion meeting (or RDP) with stakeholders; working visits to several regions; and research to produce the academic paper. Thus, problem-finding could happen through the formulation process.

However, initially Mining Law 4/2009 was amended only for specific reasons, which were the Constitutional Court's decision, changes in mining management authority regulated by Regional Government Law 23/2014, and the fact that Mining Law 4/2009 had not been able to tackle the development of mining management. Therefore, the DPR only focussed on issues related to these matters. Although the DPR also paid attention to several other issues in the academic paper, some of which related to mining licences – such as the rampant buying and selling of IUPs, the fact that some regions did not implement the One-Stop Integrated Service or PTSP, and overlapping licences in the same area – these were not discussed in depth in the academic paper.[65] The contents of the mining bill issued by the DPR also did not contain any responses to these issues.

In the mining bill discussion meetings between the DPR and the government, issues related to the issuance of mining licences were never discussed, although several such issues were in the academic paper. Even at the first meeting between the DPR and the government to discuss the mining bill, these issues were not mentioned.[66] The environmental issue also hardly appeared. Although mine reclamation and post-mining were raised by

65 Academic paper on the Draft Law on Amendments to Law Number 4 of 2009 concerning Mineral and Coal, House of Representatives, Republic of Indonesia, 2018.

66 Minutes for the DPR Commission VII working meeting between the Minister of Energy and Mineral Resources, the Minister of Home Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, July 18th 2019.

several members of the DPR, these issues were not discussed further.[67] Although several members of the DPR spoke out about the issues, they were dismissed and the discussion immediately moved on to other issues.[68]

In contrast to the making of Mining Law 4/2009, where problem-finding was dominated by its initiator (the government), problem-finding during the making of Mining Law 30/2020 was not dominated by its initiator (the DPR), and the government also proposed several issues for the agenda. As the government actively proposed several issues for resolution in the new mining law, the discussion of amendments to Mining Law 4/2009 was ultimately not only about the agenda proposed by the DPR, but also about the issues not discussed in the academic paper or regulated in the mining bill made by the DPR.

In the meeting on July 18th 2019 the government added several issues that needed to be regulated by the new mining law, including: the settlement of inter-sectoral land use issues; strengthening of the concept of mining areas where investigation and research activities could be carried out in all mining jurisdictions; increasing the use of coal as a national energy source; strengthening the policy to increase the added value of minerals and coal; encouraging exploration activities to increase the discovery of mineral and coal deposits; special arrangements regarding licences for rock exploitation; strengthening the role of central government in fostering and controlling regional governments; strengthening the role of State-Owned Enterprises (*Badan Usaha Milik Negara* or BUMN); and, changing CoWs and CCoWs into IUPKs, in the context of continuing operations.[69] Furthermore, in a meeting between Commission VII of the DPR and the government, on February 13th 2020, the government added several issues, including: the removal of a

67 Minutes for the working meeting between the Commission VII DPR RI, the Minister of Energy and Mineral Resources, the Minister of Home Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, February 13th 2020. One member of the National Awakening Party (FKB) faction, Ratna Juwita Sari (in a meeting between Commission VII DPR and the government on February 13th 2020) questioned why none of the issues proposed for regulation in the revision of the mining law related to the preservation of ecosystems and the environment, even though the data submitted by the Director General of Minerals and Coal showed that only 37% of companies holding mining licences have paid reclamation guarantees, and only 15% have paid post-mining recovery guarantees. Several members of the DPR from other parties - such as Mulyanto from the Social Justice Party (PKS) faction, and Dyah Roro Esti from the Golkar Party faction - also agreed that environmental issues, especially those linked to reclamation, needed to be discussed further.

68 Minutes for the working meeting of the Commission VII DPR RI with the Minister of Energy and Mineral Resources, the Minister of Home Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, February 13th 2020.

69 The Minister of Energy and Mineral Resources, Ignasius Jonan, in the minutes for the working meeting between Commission VII of the DPR with the Minister of Energy and Mineral Resources, the Minister of Home Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, July 18th 2019.

minimum area for exploration mining business licences (*Wilayah Usaha Pertambangan* or WIUP); changing the IUP-IUPK period for IUP-IUPK owners who were integrated with processing and refining facilities or power plants; changing people's mining areas (*Wilayah Pertambangan rakyat*, or WPR), for community mining licences, from 25 hectares to 100 hectares; and creating a national mineral and coal management plan.[70]

The mining licence issuance problems related to the environment never appeared in the discussion of Mining Law 3/2020. Based on the explanation above, this is due to *first*, when the DPR drafted the mining law it was considered as a bill to amend Mining Law 4/2009 only, rather than a new bill, so the DPR only responded to urgent issues and, as a result, the mining licence issuance problems related to the environment did not get enough attention. *Second*, the government played a dominant role in proposing issues to include in the agenda, whilst the public did not play an influential role in terms of proposing important issues for discussion. The process of discussing the mining bill did not open up opportunities for the public to play a significant role. Whilst the mining licensing issues proposed by the government in the discussion of Mining Law 3/2020 only focussed on the interests of mining companies, such as ensuring that CoWs and CCoWs would extend their mining business, and increasing the area of mining business licences and extending the mining licence period from those regulated by the old Mining Law 4/2009. Pressure from mining companies and the sustainability of the mining business were certainly more pronounced, compared to public interest issues, such as the environment.

Problem analysis

The making of Mining Law 30/2020 did not include an in-depth problem analysis process. The academic paper did not show adequate research quality, even though in the meantime (as explained above) rules that had been introduced which required the preparation of an academic paper according to certain standards. The academic paper explained the condition of mining management in Indonesia, including the problems regarding mining licence issuance, such as overlapping licences, public participation issues and Environmental Impact Assessment (EIA or *Analisis Mengenai Dampak Lingkingan* or AMDAL) implementation, but it did not clearly link these problems to the content of the proposed bill. The academic paper did not explain how the proposed amendments to articles of Mining Law 4/2009 could solve these real problems. Ultimately, it was not clear whether the academic paper made by the DPR was actually used as the basis for drafting the bill,

70 The Minister of Energy and Mineral Resources, Arifin Tasrif, in the minutes for the working meeting between Commission VII of the DPR with the Minister of Energy and Mineral Resources, the Minister of Home Affairs, the Minister of Finance, the Minister of Industry, and the Minister of Law and Human Rights, February 13th 2020.

because the academic paper was only released in 2018 and discussions on the bill began in 2015. In fact, it seems as if the academic paper only served to comply with the requirements of Law 12/2011.

Based on the minutes for making Mining Law 3/2020, few in-depth discussions on various problems were raised by either the DPR or the government. For this reason it is difficult to trace the process of discussing alternative solutions to decision-making. The DIM discussion stage consisted of a series of meetings held during the second half of February, and one on March 11th 2020. As explained above, on May 8th 2020 the process suddenly accelerated with first level decision-making discussion happening on May 11th 2020 and second level discussion and decision-making in the plenary session happening on May 12th 2020. All parties agreed to the bill on Amendments to the Mining Law 4/2009. This was an extremely rapid process, considering that no less than 82 % of the articles from the old mining law had been changed. Not all the minutes for making Mining Law 3/2020 were released to the public by the DPR and there was indeed no rule requiring the distribution of all the minutes when making laws; therefore, it is difficult to know how problems and solutions were discussed in these meetings. By contrast, all the minutes for making Mining Law 4/2009, the process for which was carried out over several years, are available to the public. This is another indication of a return to authoritarian forms of law-making.

In the last meeting between Commission VII and the government, on May 11th 2020, it was agreed that the bill should be adjusted to the draft Job Creation Bill, and for this reason authority for mining management was handed over to central government, while the regional governments dealt with minor licences only, such as small-scale rock and mining licences.[71] No further explanation was given for why the authority for mining should be given to central government. Thus, the authority for mining management was no longer adjusted to Regional Government Law 23/2014. Instead, it was adjusted to the Job Creation Bill.

In the meeting it was also reported that the mining bill regulated the business licensing (*perizinan berusaha)*, in order to harmonise licensing with the Job Creation Bill.[72] This decision did not take into account the complexity of the mining licence problems after the enactment of Mining Law 4/2009, as explained in the previous section. The new business licensing mechanism was included in the bill, but no explanation of how it could improve the mining licensing system was provided. Therefore, it is clear that problem analysis was not carried out when the business licensing mechanism was

71 Minutes for the working committee meeting on the Draft Mineral and Coal Law, between Commission VII of the DPR, the Minister of Energy and Mineral Resources, and the Ministry of Industry, May 11th 2020.

72 Ibid.

being introduced to the bill. In the DPR version of the bill, issued in 2018, regional governments were still given the authority to manage mining. When it came to the issuance of metal and coal licences in particular, authority was given to the central and provincial governments, in accordance with Regional Government Law 23/2014. The academic paper also seemed to support the division of authority between central government and the provincial governments, even though it also explained that the transfer of authority from district/city governments to the provinces would not be easy to implement, because the provinces lacked technical support capacity and available human resources, due to the large area they served.[73] Therefore, the academic paper proposed that provincial government should: be given the facilities and infrastructure needed to manage mining; be provided with adequate human resources; and have synergy with both central government and the district/city governments.[74] The rules regarding the revocation of regional government authority to issue mining licences and the business licensing system which suddenly entered the mining bill show even more clearly that there was no relationship between the mining problems raised and their solutions.

Hence, there was inadequate research in the academic paper, which had not analysed the problems in depth, meaning that there was no connection between the problems raised and the proposed articles that should be amended in Mining law 4/2009. In fact, in the end the academic paper was not used in the very brief discussion of the bill in a few meetings between February and March 2020. The process of discussing problems and alternative solutions between the DPR and the government also did not go through in-depth discussions. Therefore, several significant policies, such as those regarding licensing authority and the business licensing mechanism, entered the bill without any adequate analysis, just following the Job Creation Bill. There was no room to examine whether the policies were in line with the interests of mining management. So, how can we explain what happened? The answer, I would argue, is that all such considerations were sacrificed to the interests of mining business, especially CCoW holders whose contracts were almost at an end, and to the new job creation law.

7.5 The quality of Mining Law 30/2020

This section focusses on how the quality of the norms in Mining Law 3/2020 responds to the mining licence issuance problems related to the environment discussed in section 2. The analysis in this section uses the quality of law criteria described in Chapter III, which are clarity, coherency,

73 Academic paper for the Draft Law on Amendments to Law Number 4 of 2009 concerning Mineral and Coal, House of Representatives, Republic of Indonesia, 2018.

74 Ibid.

adequacy, feasibility, and environmental law principles, and criteria based on mining and environmental guidelines that have been issued by several international organisations.

The adequacy and feasibility of transferring authority to issue mining licences from regional governments to central government, in order to prevent the abuse of mining licence issuance in the regions

As explained in the previous section, after the enactment of Mining Law 4/2009 the issuance of exploration IUPs in the regions decreased, especially for metals, minerals and coal. However, problems connected to the issuance of mining licences have not ended, because the granting of extension IUPs and upgrading from exploration IUPs to production IUPs in some areas (not only by regional governments, but also by the central government) has resulted in communities near mining sites refusing licences, because they were being proposed for environmentally vulnerable areas. The new mining law appears to ignore the behaviour of licence issuing officials. Even though such behaviour is still problematic, the new mining law has removed Article 165 of Mining Law/2009 which provided a criminal sanction for officials who issued mining licences in contravention of the Mining Law and abused their authority. Removing this provision further opens up opportunities for abuse of authority.

Regarding the authority to issue mining licences by the regional government, there are significant changes. One of the reasons for amending and replacing Mining Law 4/2009 with Mining Law 3/2020 was to adapt it to be more in line with Regional Government Law 23/2014, which eliminates the mining management authority of district/city governments, especially for metal and coal, and hands authority over to provincial governments. However, in the end, due to the need to conform with the Job Creation Bill, which was also being discussed at the time of making Mining Law 3/2020, authority was finally handed over to central government. The rules for transferring the authority to issue mining licences to central government were not adequate for resolving the issue of license issuance misuse in the regions. Although it might have solved the problem of uncontrolled issuance of mining licences by regional governments, transferring the authority to issue mining licences to central government could not ensure a reduction in the issuance of illegal mining licences. As explained in Chapter II, more than 30 years of centralised mining licence issuance during the New Order period resulted in significant exploitation of mining resources through the misuse of licence issuance procedures, and certainly in local conditions and interests being ignored.

Furthermore, this rule seems difficult to implement (or not feasible), because it will be hard for central government to handle all of Indonesia's mining concerns. The academic paper even explains that there are dif-

ficulties in mining management at the provincial level, after Law 23/2014 handed mining management authority over to the provincial governments from the district governments, because the mining areas were too large to be managed by the provinces. Therefore, it will be even more difficult if only central government manages all the mining activity in Indonesia.

Clarity and adequacy rules in solving complex and non-transparent licensing

Mining Law 3/2020 neither responded to the problems and complexities with issuing mining licences, nor created transparency and public participation rules for issuing mining licences; therefore, Mining Law 4/2009 did not introduce any improvement. This may also have opened up opportunities for corruption within the mining licence issuance process. Even worse, as explained above, the law no longer contains provisions regarding criminal sanctions for mining licence issuers who violate the laws and regulations provided by Mining Law 4/2009.

Yet another problem is that the business licensing mechanism is unclear, because it is neither regulated in detail nor explained fully in the explanation section of the law. If it is not made clear in the implementing regulations, this ambiguity may create uncertainty in the implementation of mining licence issuance and open up opportunities for misuse. Therefore, this law is certainly not adequate for overcoming the problem of complexity and non-transparency in the process of issuing mining licences.

Adequacy of mining licence issuance rules to ensure compliance with environmental requirements

Although the academic paper explained that there were problems with the implementation of AMDAL, Mining Law 3/2020 made no improvement to the rules related to AMDAL. The rules are still the same as in Mining Law 4/2009. Neither is there any regulatory improvement regarding mine reclamation and post-mining. As was the case with Mining Law 4/2009, Mining Law 3/2020 does not take advantage of the licence issuance mechanism to ensure company compliance with mine reclamation and post-mining obligations. As explained in Chapter III, based on guidelines from several international organisations related to mining and the environment, a commitment to comply with reclamation and post-mining obligations should be part of the licensing requirements. Therefore, mine reclamation and post-mining guarantees must be paid before a mining licence is granted, for example. According to Mining Law 3/2020, mine reclamation and post-mining are not a part of the decision-making for the mining licence issuance process, so this obligation is largely symbolic. Even though the new mining law imposes criminal sanctions on companies that do not carry out reclamation and/or post-mining, which seems a step forward, its implementation will be difficult because the law also imposes administrative sanctions for

the same violation. Judges and lawyers may argue that the application of a criminal sanction must be based on the principle of *ultimum remedium* so that administrative sanctions must be applied first before criminal sanctions can be imposed (Paramitha eds., 2022: 34)

Coherence and adequacy of rules to prevent mining in environmentally vulnerable areas

As explained in Chapter III, the rules governing the protection of environmentally vulnerable areas are found in laws and regulations for fields other than mining; for example, in laws and regulations related to forestry, coastal areas and small islands. However, Mining Law 4/2009 stipulated a prohibition on mining in certain areas indicated by laws and regulations. This rule has not changed in Mining Law 3/2020, so mining licences can only be granted in areas permitted by the same laws and regulations.

The problem (as explained in Chapter III) is that other sectors have the authority to determine and plan their territory; for example, the forestry sector which has its own planning system. Meanwhile, there are no rules regarding inter-sectoral coordination for natural resource management. The laws and regulations regarding spatial planning also do not regulate coordination between sectors. Therefore, the laws and regulations related to the determination of territory do not encourage the realisation of a unified regulation which clearly shows areas that are environmentally vulnerable and does not allow for mining activity to occur there.

Mining Law 3/2020 introduces the term 'legal mining area' (*wilayah hukum pertambangan*, or WHP), which has the potential to conflict with other land uses. The law states that WHP is all land space or sea space, including space within the Earth as a single territorial unit, namely: the Indonesian archipelago, underwater land, and the continental shelf. The meaning of the term, the criteria for determining it, and how it is operationalised are not clear. The law also does not explain how the WHP relates to spatial plans. In the previous Mining Law 4/2009, there was only the term 'mining area' (WP), and this law stipulated that WP is part of the national spatial plan, while Mining Law 3/2020 states that WP is part of the WHP, and no longer refers to the national spatial plan. Separating the determination of mining areas from the national spatial plan has the potential to create differences between the determination of areas based on spatial plans and the determination of mining areas. This opens up disharmony in area designation. Furthermore, determining mining areas without referring to spatial plans is more likely to ignore the environment, because it prioritizes the mining sector. If the determination of a mining area were to refer to a spatial plan, the environment would be more likely to receive attention because the process of making a spatial plan must be based on a Strategic Environmental

Study (KLHS) which ensures there is a balance between economic, social and environmental interests.

In addition, in determining the mining licence area (WIUP), the Mining Law 3/2020 removes the environmental protection criteria regulated in Mining Law 4/2009. This may lead to the issuance of mining licences in areas which are environmentally vulnerable. Furthermore, the Mining Law stipulates that areas that have been designated as WIUP cannot be changed. This provision is certainly difficult to accept because environmental conditions *can* change, not to mention the conditions of local communities.

Hence, Mining Law 3/2020 is neither coherent nor adequate to prevent mining in environmentally vulnerable areas. As explained above, rules regarding the determination of mining areas are not sufficient to protect environmentally vulnerable areas due to a lack of environmental considerations in determining mining areas. Furthermore, although the rules regarding the determination of WHP or WP do not seem to contradict other laws and regulations, they are related to other sector areas, and there is no rule to harmonise the determination of mining areas with the rules regarding land planning in other sectors. Furthermore, there is no rule regarding coordination between sectors. In addition to potential conflicts with other sectors, areas that other sectors have determined as environmentally vulnerable might be ignored in the process of determining mining areas. Determining mining areas without coordination with other sectors and eliminating the environmental protection criteria in determining mining areas also make this Mining Law inadequate to prevent mining in environmentally vulnerable areas.

Ultimately, Mining Law 3/2020 reflects a rushed process of law-making which lacks sufficient research and is only intended to satisfy certain interests. This mining law not only does not resolve the mining licence issuance problems related to the environment, but its environmental protection rules are worse than Mining Law 4/2009.

7.6 Court cases following approval of the law

Submission of formal and material review to the Constitutional Court

Not long after the bill was passed as Mining Law 3/2020, the Constitutional Court received a lawsuit on both the grounds for the law-making process (formal review), and the law's contents (material review).

An application for a formal review (case number 59/PUU-XVIII/2020) was filed by Kurniawan, a researcher at the Synergy Control Organisation for State-Owned Enterprises (BUMN). His petition focussed on monitor-

ing, responding to, and providing input to the BUMN in the mineral and coal sector, and along with his co-petitioner Arif Zulkifli, Lecturer and Consultant in Environmental and Mining Law, he argued that the Regional Representative Council (*Dewan Perwakilar Rakyat Daerah*, or DPD) was not involved in discussions on the Bill on Amendments to Mining Law 4/2009, even though the DPD has constitutional rights to discuss any bill related to natural resources, as there are interests connected with the relationship between central government and the regional governments, as determined by Article 22D, paragraph (2), of the 1945 Constitution.[75]

Another petition for a formal review of Mining Law 3/2020 was submitted in case number 60/PUU-XVIII/2020. This petition was submitted by eight applicants: Tamsil Linrung, a DPD member from South Sulawesi; Erzaldi Rosman Djohan, the Governor of the Bangka Belitung Islands; Alirman Sori, Chair of the DPD Law Drafting Committee (Panitia Perancang Undang_ undang or PPUU); Hamdan Zoelva, from the Islamic Union Association; Marwan Batubara, from Indonesian Resources Studies/IRESS; Budi Santoso, from Indonesia Mining Watch; Ilham Rifki Nurfajar, Secretary General of the Mining Student Association; and M. Andrean Saefudi, Chairperson of the Indonesian Law Student Association. Their main reasons for requesting a formal review, as conveyed by their attorney (Ahmad Redi), were first, that the bill did not qualify to be continued for discussion or carried over, because: there had been no discussion of the DIM for the bill; discussion of the bill had been carried out behind closed doors and not in the DPR building; and, although discussion of the bill should have been carried out via meetings that were open to the public, there was no participation by the public and stakeholders. In fact, the bill related to the management of natural resources which were important for the state and which affected the livelihood of many people. Second, discussion of the bill did not involve the DPD, even though Article 22D of the 1945 Constitution, Article 249 of Law 17/2014, and the Constitutional Court's Decision 92/PPU-X/2012, all state that the DPD has the authority to discuss bills relating to central and regional government relationships, as well as to discuss the management of natural resources and other economic resources. Third, efforts to continue formation of the bill in the 2019-2024 DPR period were carried out via a process that was too fast (with discussions happening over a period of just two weeks), even though the volume of material was very large (consisting of 938 DIM and more than 80% of amendments). Fourth, the first level discussion at the DPR on 11th May 2020 and the second level discussion in the plenary meeting on 12th May 2020 were both carried out virtually, without the physical presence of DPR members. Lastly, decision-making on the bill had not been sensitive to the Covid-19 pandemic, for which Large-

75 https://www.mkri.id/index.php?page=download.Putusan&id=3758

Scale Social Restrictions (Pembatasan Sosial Berskala Besar, or PSBB) had been issued by the government in April-May 2020.[76]

Another petition for a material review of Mining Law 3/2020 (case number 58/PUU-XVIII/2020) was submitted by: Bahrul Ilmi Yakup, a constitutional lawyer and legal consultant; Dhabi K. Gumayra, a lawyer; Yuseva, a lawyer and legal consultant; Iwan Kurniawan, a lawyer and legal consultant; Mustika Yanto, a lawyer and legal consultant; and Rosalina Pertiwi Gultom, a mining law enthusiast. The review was proposed because (amongst other things) Article 35 paragraph (1) of Mining Law 3/2020 stipulates that the authority to issue IUP lies with central government, and this negates the autonomy possessed by the province or district/city, so it runs contrary to Law 23/2014 and Article 18, paragraphs (1) and (2) of the 1945 Constitution.[77] This also has the potential to create legal uncertainty, because regional governments still have licensing authority for spatial planning, the environment and forestry, which are closely related to the issuance of mining licences.

Yet another petition for a material review was submitted by: Helvis, an advocate; Muhammad Kholid Syeirazi, entrepreneur/General Secretary of the Nahdlatul Ulama Association of Scholars (Ikatan Sarjana Nahdglatul Ulama or ISNU); and, the Legal and Constitutional Study Forum (Forum Kajian Hukum Konstitusi or FKHK) – case number 64/PUU-XVIII/2020. The reason for this judicial review was that in Article 169A of Mining Law 3/2020 CoWs and CCoWs are given a 'guarantee' of extension to IUPKs, as a continuation of their contract. Article 169A contradicts Article 27 paragraph (1) of the 1945 Constitution, which states that "all citizens are equal before the law and government, and are obliged to uphold the law and the government, with no exceptions", whilst the article provides differential treatment between holders of COW and CCoW and other private business entities, concerning obtaining IUPKs.

Another material review of Mining Law 3/2020 (case number 65/PUU-XVIII/2020) was proposed by Erzaldi Rosman, Governor of the Bangka Belitung Islands. The reason for the review was that Article 4 paragraph (2), Article 6, Article 7, Article 8, Article 21, Article 48 letters a and b, Article 67 and Article 173B all stipulate that government affairs in the mining sector are also central government affairs.[78] This has potential to trigger conflict

76 Kontan.co.id. 11/07/2020. *Baru disahkan, mengapa UU Minerba digugat ke Mahkamah Konstitusi?* - https://industri.kontan.co.id/news/baru-disahkan-mengapa-uu-minerba-digugat-ke-mahkamah-konstitusi

77 https://www.mkri.id/public/content/persidangan/resume/resume_perkara_2162_Perkara%20No.%2058.pdf

78 https://www.dpr.go.id/jdih/perkara/id/1763/id_perkara/1356

between local communities and the central government, and to contradict Article 18 paragraph (2) and paragraph (5) of the 1945 Constitution.[79]

Subsequent petitions for material review were submitted by NGOs, the Clean Indonesia Team (consisting of WALHI and JATAM, of East Kalimantan), and Nur Aini, a resident of Banyuwangi and Yemen, and a Bangka Belitung fisherman, with case number 37/PUU-XIX/2021. This judicial review was based on several points of objection: Article 4, regarding the control of minerals and coal held by central government by the state is not in accordance with Article 28C paragraph (2), Article 28D paragraph (1), Article 28H paragraph (1), and Article 33 paragraph (4) of the 1945 Constitution; the 'guarantee' that there will be no change in the use of space and area in the WIUP, WIUPK or WPR, as regulated in Article 17 A paragraph (2), Article 22 A, Article 31 A paragraph (2), and Article 172 B paragraph (2), contrary to Article 28H paragraph (1), Article 28C paragraph (2), and Article 28D paragraph (1) of the 1945 Constitution; the provision stating that anyone who has a mining licence and who hinders or interferes with mining business activities is subject to the criminal sanctions in Article 162 (later amended to those in Article 39) of Law 11/2020 concerning job creation is contrary to the right to a sense of security and freedom from fear, as regulated in Article 28C paragraph (1), Article 28D paragraph (1) and Article 28G paragraph (1) of the 1945 Constitution; Article 169A of Law 3/2020, which provides the 'guaranteed' extension of CoWs and CCoWs into mining licences, and Article 169B paragraph (3), regarding the continued operation of the contract/agreement, are contrary to the principle of equality before the law in Article 28D paragraph (1), and the principle of citizen participation in Article 28 H paragraph (1) and Article 33 paragraph 3 and paragraph (4) of the 1945 Constitution.

Constitutional court decisions

The Constitutional Court rejected the plaintiffs' petitions for formal review in case numbers 59/PUU-XVIII/2020 and 60/PUU-XVIII/2020.[80] The judge stated that the plaintiffs' reason that the bill did not meet the qualifications for a carry-over bill because it had not yet undergone discussion was unreasonable, because it was the opinion of the DPR that the bill *had* been included in level I discussions and had had a DIM during the previous DPR period. Therefore, the judge was of the opinion that the requirement that there had been discussion of the DIM (as per Article 71A of Law 15/2019) was satisfied by the government submitting the DIM the DPR. In addition, this was in accordance with Article 110 paragraph 1 of the DPR Rules of Procedure 2/2020, which states that the bill can be carried over if it has undergone level I discussions and has a DIM.

79 Ibid.
80 https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_7112.pdf

The judge also stated that the plaintiffs' argument regarding discussion of the bill violating the principles of openness and public participation was unreasonable, because the government and DPR had proven that socialisation and public discussion were carried out during the design period. Meanwhile, regarding the plaintiffs' argument that discussion of the bill was mostly carried out outside the DPR building, the judge was of the opinion that it was permitted by Article 254 paragraph (3) of the 2020 DPR Regulation, which states that all types of DPR meetings should be held within the DPR building, unless otherwise specified, and that meetings can be held outside the DPR building with the approval of the DPR leadership.

The plaintiffs' argument regarding the non-involvement of the DPD was also unreasonable, according to the judge, because the DPD had submitted a written statement at the Constitutional Court trial, which basically stated that the DPD had been involved from the preparation stage of the 2015-2019 Mid-Term National Legislation Programme onwards, followed by the 2020-2024 National Legislation Programme. Whilst the judge agreed that there was no regional government involvement in discussion of the bill, neither were there any laws or regulations requiring the involvement of regional governments in making laws.

For the plaintiffs' argument that decision-making in the Commission VII Working Meeting and the DPR Plenary Meeting did not meet requirements because they were both carried out virtually, the judge was of the opinion that these meetings were held when Indonesia was facing the Covid-19 pandemic, so the implementation of duties and functions by the DPT and the President kept running through the use of information and technology facilities in the form of video or virtual meetings. In addition, virtual meetings are permitted by Article 254 paragraph (4) of the 2020 DPR Standing Orders, as long as there is a state of danger, compelling urgency, extraordinary circumstances, conflict situations, natural disasters, or certain other circumstances provoking national urgency.

Finally, in addressing the plaintiffs' argument that the Mining Law should be in the form of a replacement law, rather than an amendment law, because the amendments concerned 85 % of the law, the judge was of the opinion that, in accordance with point 237 of Attachment II of Law 12/01, laws and regulations containing more than 50% amendments are better when repealed and rearranged into the new laws and regulations – 'better' entailing a suggestion, rather than a requirement.

However, of the eight judges, three – Wahiduddin Adams, Suhartoyo, and Saldi Isra – gave dissenting opinions.[81] The reason the three judges dissen-

81 Ibid.

ted was because there was a discrepancy between the requirements to discuss the DIM, in Article 71A of Law 15/2019, and Article 110 paragraph 1 of the DPR Regulation 2/2020, which only requires having a DIM. Therefore, it was necessary to ask whether the incoherence of these rules was something that happened intentionally, and whether the DPR Regulation 2/2020 was made for the purpose of discussing the mining bill. The questions arose because DPR Regulation 2/2020 had been passed recently by the DPR, on April 2nd 2020. Therefore, DPR Regulation 2/2020 could not be used for the legal event of 'carry-over approval' for the mining bill, which had occurred on September 25th 2019, and the process of making the mining law contained formal defects, so there was no need to prove the possibility of other formal defects, as argued by the applicants. Based on these legal considerations and arguments, the three judges stated that the Constitutional Court should have granted the applicants' request for a formal review, and stated that Law 3/2020 had no binding legal force.

Meanwhile, in the material lawsuit case number 58/PUU-XVIII/2020, the judge decided that not all petitioners had standing. For those who were an association in the form of a civil legal entity, individual professional Indonesian citizens such as lecturers and advocates, and individual Indonesian citizens who were concerned about mining law, no loss was caused (either directly or indirectly) by the enactment of the norm, and there was also no cause-and-effect relationship between the perceived constitutional loss and the enactment of the norm requested for review.[82] The applicants who had a direct legal relationship with the enactment of the norm included the regional government, the Regional Head, and the Regional People's Representative Council (Dewan Perwakilan Rakyat Daerah, or DPRD), which were elements of regional government administration, because the norms that were questioned about their constitutionality by the applicants were part of regional affairs, as well as other legal subjects that had a direct relationship with mineral and coal mining licences.[83]

The material review case 64/PUU-XVIII/2020 was slightly more successful. The Constitutional Court granted part of the plaintiffs' request, regarding the word 'guarantee' in Article 169A (1) Mining Law 3/2020, which stipulates that CoWs and CCoWs will automatically be guaranteed renewals as IUPKs. The panel of Constitutional Court judges considered this part unconstitutional. The court found that CoWs and CCoWs are private legal relationships that automatically end when the term of the agreement is reached. Because a legal relationship between the government and private business entities is no longer contained in CoWs and CCoWs, they cannot be given priority in the form of guarantees for an extension to become IUPKs. The provision of such guarantees will reduce the degree of natural

82 https://berkas.dpr.go.id/puspanlakuu/resume/resume-public-703.pdf
83 Ibid.

resource control by the state. The guarantee for granting IUPKs also closes the opportunity for domestic business entities to play a role in advancing the economy in accordance with the spirit of Article 33 of the 1945 Constitution. The Constitutional Court also stated that the word 'guarantee' in Article 169A (1) of Mining Law 3/2020 will be changed to: "CoWs and CCoWs may be 'granted' an extension into IUPKs as a Continuation of Contract/Agreement Operation, after fulfilling the stipulated requirements…" Although this looks like progress, in practice it will make little difference. The new formulation will still make it easy for CoW and CCoW holders to continue their mining activities, because they do not have to go through licensing procedures to get an IUP, including auctions. This is in spite of the fact that Mining Law 4/2009 stipulates that all mining companies must go through a licensing process, as regulated in the law.

Meanwhile, for the review case number 65/PUU-XVIII/2020, according to the judges of the Constitutional Court, the applicants' petition was unclear.[84] For example, there was no provision in Article 100A and Article 169B paragraph (5) letter g, as requested by the applicants; moreover, the applicants did not convey the contents of the article in their application, so the court could not which article was being referred to by the petitioners.[85]

The efforts of various parties to review Mining Law 30/2020 have in fact not changed the situation. The haphazard process of making Mining Law 30/2020 was considered by Constitutional Court judges not to violate the law, meaning that the law must be implemented, and the judge's decision to grant a material review for case 64/PUU-XVIII/2020 (as explained above) has had no significant impact.

7.7 Conclusion

This chapter examined the extent to which Mining Law 3/2020 responds to the mining licence issuance problems related to the environment, by researching the making of the mining law and the quality of the law, using the approach and criteria for reviewing Mining Law 4/2009, which are discussed in chapters III and IV.

In a similar way to Mining Law 4/2009, Mining Law 3/2020 does not address the mining licence issuance problems related to the environment. Both laws lack in-depth analysis of the issues related to mining. However, Mining Law 3/2020 was originally only intended to amend some provisions in the previous Mining Law 4/2009, and the conditions under which

84 https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_7112.pdf
85 https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_7112.pdf

Mining Law 3/2020 was made made it less likely that problems would be found and resolved.

The mining bill was a DPR initiative designed to respond to: several Constitutional Court decisions amending several articles in the Mining Law 4/2009; the issuance of Regional Government Law 23/2014, which changed the authority for mining management; and, several rules in Mining Law 4/2009 that were not in line with mining industry interests. Thus, the objectives were quite different from the previous Mining Law 4/2009, which was intended to change the pattern of mining management in Indonesia. Therefore, the research for amendments to the mining law did not cover all mining issues, so environmental problems caused by issuing mining licences were not taken into account. The academic paper that should have underpinned the mining law drafting had not been adequately prepared and did not show a link between the problems raised and the articles in Mining Law 4/2009 proposed for amendment. In the end, it did not appear that discussion of the mining law had referred to the academic paper. At the same time, mining businesses were pressing for changes to the old Mining Law 4/2009, which was considered to be hampering the mining industry, especially when it came to the status of CCoWs which had almost expired. The government then proposed various agendas for inclusion in changes to the mining law. These were all agendas that benefitted the mining industry, but certainly did not include any matters of public interest.

In the end, Mining Law 3/2020 was made in a hurry and it was not transparent. Although the draft law was made in 2015, discussion of the DIM was only carried out in February and March 2020. This precluded an in-depth research process. For comparison, discussion of the DIM when making Mining Law 4/2009 took three years. At the same time, the Job Creation Bill aimed to encourage investment and was discussed in a timely manner, and this is now the law that regulates various kinds of substances and forms the basis of hundreds of laws and regulations in Indonesia, including those related to mining. Therefore, very shortly before it was agreed that Mining Law 3/2020 would be ratified, several provisions were included in the draft in order to conform with the Job Creation Bill, without adequate analysis, which changed the orientation even more strongly. The Job Creation Bill created a completely new situation.

Thus, the law-making process for Mining Law 3/2020 was seriously compromised, and the result was dramatic, from an environmental perspective. The content of Law 3/2020 ignores mining licence issuance problems related to the environment, even though the mining law changes 85% of Mining Law 4/2009. Several rules in Mining Law 4/2009 that were weaknesses in responding to mining licence issuance problems related to the environment have not changed, such as not including mine reclamation and post-mining requirements in the mining licence issuance process. However,

there are several rules in Mining Law 3/2020 that may even create new problems, such as the abolition of environmentally related criteria in determining mining areas and the abolition of sanctions for government officials who grant mining licences that are not in accordance with legal procedures. Moreover, the licensing system has also been changed to include business licensing, in an attempt to adjust to the Job Creation Bill. There is no clear explanation of this term, which adds further ambiguity.

Mining Law 4/2009 (as described in Chapter IV) did not undergo adequate analysis, so mining licence issuance problems related to the environment were not addressed appropriately. However, because Mining Law 4/2009 was made within sufficient time and with strong commitment from the DPR and the government at that time, many provisions were an improvement on the previous Mining Law 11/1967. In addition, Law 4/2009 was made in the early days of the reform era, when certain public interest issues were still very popular, whereas Mining Law 3/2020 was made only for certain interests, in a process demonstrating the power of oligarchs. Therefore, the research process for making Mining Law 3/2020 was considered to be irrelevant.

VIII Conclusion

8.1 Indonesian laws, regulations, policies and bureaucracies addressing environment-related mining licence issuance problems

While mining plays an important role in the economy of countries like Indonesia, its economic benefits come at the expense of severe environmental impacts. These include endangering many species and creating severe environmental pressures on ecosystems, as well as deforestation and forest degradation. To mitigate the impacts of mining on the environment, mining licensing is a key legal instrument. It concerns the process of the government granting mining rights to a company or other legal entity, in exchange for its commitment to exploring, developing or producing minerals. The licensing process is the key tool for the government to control mining activities, including ensuring that such activities will not harm the environment. However, mining licensing in Indonesia has been a great challenge because licences are not used as a legal tool to prevent environmental damage, but instead they serve to legalise the exploitation of natural resources. Therefore, problems related to licensing processes for natural resource exploitation are directly connected with the destruction of the environment.

One of the important problems related to the mining licensing system is the process of issuing mining licences, because it is at this stage that the decision is made whether the proposed mining activities can be carried out. This thesis has discussed the extent to which laws, regulations, policies and government bureaucracies in Indonesia have taken into consideration environment-related mining licence issuance problems, from the beginning of the reform period (*Reformasi*) in 1998 to the present. I did so through an examination of the laws, regulations and policies that are most relevant to the issuance of mining licences, namely the Mining Law 4/2009, the Clean and Clear Policy, the Mineral One Map Indonesia (MOMI) policy and, most recently, the Mining Law 3/2020 which amends Mining Law 4/2009. As the quality of laws, regulations and policies cannot be separated from how they were created and implemented, this research also examined the law-making process of the main pieces of law, as well as the policy- and regulation-making in the Indonesian government bureaucracies. In this chapter I will present and discuss my main findings.

The quality of Indonesian laws and regulations concerning environment-related mining licence issuance problems

The environmental law literature shows many different approaches, strategies and mechanisms to regulate the behaviour of actors and address environmental problems (for example, Wilkinson, 2002; Lemos & Agrawal, 2006; Faure, 2012; Martin & Kennedy, 2015; Gunningham & Holley, 2016). Independent of the approach taken, the laws, regulations, and policies issued by the government always play a role in the effectiveness of instruments in addressing environmental impacts. They are important because they create a framework within which different strategies and instruments can operate. Since the role of laws, regulations, and policies as standards for the application of all environmental instruments is so important, their existence alone is not enough; the laws, regulations and policies need to be of good quality (Bell et.al., 2017: 106).

The historical review in Chapter II shows how in Indonesia laws, regulations and policies related to the issuance of mining licences and mining contract agreements have contributed to environmental problems, rather than addressed them. The environmental impact of mining over time seems to have been ignored in the making of laws and regulations. In the early days of the reform period, mining licence issuance problems related to the environment became worse compared to the New Order period, and also more complex. Chapter II identified several mining licence-related environmental problems, namely: 1) rampant issuance of mining licences by regional governments, which were not in accordance with legal procedures and which ignored the environment; 2) complex and non-transparent mining licensing procedures; 3) lack of environmental safeguards in the issuance of mining licences; and 4) issuance of mining licences in environmentally vulnerable areas.

Chapter III showed that Mining Law 4/2009, which was formulated in the reform period, and other laws and regulations related to the mining licensing process and environment did not sufficiently address environment-related mining licence issuance problems as identified above. It did so using relevant quality of law criteria to assess whether various laws and regulations had the ability to solve the problems concerned. These criteria were clarity, coherence, adequacy, feasibility, and conformity with environmental principles and standards from international guidelines regarding mining and the environment.

The assessment found that the legal framework did not respond to several problems, including the complex and non-transparent mining licensing process, as well as the need for public participation in the mining licence issuance process. The Mining law regulated neither a transparent, simpler regulation of the licence issuance process, nor did it provide certainty

regarding time and costs; therefore, the rules were not adequate to resolve the issue. The complexity of issuing licences was exacerbated by the absence of rules regarding transparency and public participation. As during the previous regime, the Mining Law and its implementing regulations did not regulate transparency and public participation in the mining licence issuance process, even though such transparency and public participation in mining were standard in almost all international guidelines related to mining and the environment. Furthermore, the Mining Law failed to establish measure to prevent the issuing of mining licenses in environmentally vulnerable areas.

Neither were the rules regarding the determination of mining areas adequate. Some environment-related criteria for determining mining areas were in place, but there was no clarity regarding those criteria, and they were not explained by the mining law or its implementing regulations. Therefore, there was no guarantee that environmental interests would be considered in the determination of mining areas. It seems that the mining law left the protection of environmentally vulnerable areas to other laws and regulations related to the environment and natural resources, but unfortunately neither did these firmly and clearly regulate the protection of certain areas from mining activity (for example the Spatial Planning Law and its implementing regulations, as well as the Law on the Protection and Conservation of Natural Resources and their Ecosystems). Furthermore, the rules regarding the process of determining mining areas were not coherent with other laws and regulations governing the determination of the use of areas by other sectors, which created ambiguity in answering the question which areas were environmentally vulnerable and therefore protected from mining licence issuance.

Even though some of the provisions in Mining Law 4/2009 responded to environment-related mining licence issuance problems, they did not meet the quality of law criteria defined in Chapter III. A good example is the Mining Law's response to the problem of rampant issuance of mining licences by regional governments that were not in accordance with legal procedures. This problematic behaviour of regional governments was addressed through adequate norms, which limited and imposed supervision on the authority of the regional government. However, given the capacity of the central government and these rules were difficult to implement or they were not feasible because of lack of capacity and resources of the central government. Likewise the Mining Law also responded to the lack of environmental safeguards in the issuance of mining licences by regulating mine reclamation and post-mining. However, the Mining Law and government regulations were not adequate for several reasons; most importantly they did not make mine reclamation and post-mining plans and their guarantee funds part of the consideration for deciding to grant the IUP. This would have opened an opportunity to force companies to better comply with environmental requirements.

Mining Law 4/2009's weaknesses in responding to and resolving environment-related mining licence issuance problems were not corrected by Mining Law 3/2020, which has amended several articles of Mining Law 4/2009. In fact, several rules in Mining Law 3/2020 are worse than those in the previous mining law, such as the abolition of environment-related criteria in determining mining areas, and the removal of rules that provide sanctions for government officials who grant mining licences that are not in accordance with legal procedures.

In summary, the laws and regulations related to the issuance of mining and environmental licences do not meet the quality of law criteria in terms of their ability to solve problems. Although Mining Law 4/2009 established a few more environmental provisions than its predecessors (e.g. by regulating the environmental requirements for the issuance of mining licences), many environmental issues remained unaddressed. Disappointingly, Mining Law 3/2020 holds even fewer rules regarding the environment than Mining Law 4/2009.

After assessing the two mining laws, 4/2009 and 3/2020, it can be concluded that their content has remained focused on the development of the mining industry. The laws' primary objective seems to be promoting economic gains through the mining industry, relegating environmental issues to a secondary placeNeither of these two laws focus on solving existing mining-related problems, least of all environmental ones.

The influence of the Indonesian law-making process on the quality of mining laws in terms of addressing environment-related mining licence issuance problems

The quality of law is determined by the law-making process, and the process may make it difficult to create good quality laws. Therefore, this thesis analysed the genesis of Mining Law 4/2009 and Mining Law 3/2020 as the main laws governing the issuance of mining licences. It did so by examining how environmental-related mining licence issuance problems were discussed, and what factors influenced this discussion.

Several factors in the process of making the two mining laws contributed to the limited consideration of mining licence issuance problems related to the environment. One factor was the role of participants in the process of making the mining law. The Ministry of Energy and Mineral Resources dominated problem-finding, problem analysis and problem solving, because Mining Law 4/2009 was a law initiated by the government. Other stakeholders, such as the House of Representatives (*Dewan Perwakilan Rakyat*, or DPR) did not really play a role in the identification and research of problems that the law should address. This reduced the possibility that environmental-related mining licence issuance problems would be included in the agenda for discussing the mining bill. The DPR only focused on

the problems and solutions on the agenda that had been prepared by the government. Dominant in this agenda were the problem of domination of mining by foreign companies and the problems related to the management of mining by regional governments.

The same applied to other stakeholders, notably experts and NGOs. The Department of Energy and Mineral Resources appointed several experts who were knowledgeable on the issues mentioned above. These experts, with expertise in mining law, international law and government administration and regional autonomy, only focused on the problems and solutions the government considered important. NGOs did not engage in the law-making, because they contested the exploitative paradigm underlying the mining bill and in response the government excluded them from the process. The non-involvement of other parties in problem-finding resulted in a one-sided government perspective only, which limited problems to those that have a direct impact on the development of the mining industry alone.

Furthermore, the making of Mining Law 4/2009 was not supported by adequate research. At that time there were weaknesses in Indonesia's law-making rules which did not encourage in-depth research. To start with, there was no rule regarding research standards for drafting academic papers. Therefore, even though the government and the DPR followed all the procedures, including the preparation of an academic paper, the research carried out for this purpose was inadequate. The government drafted an academic paper that should be a reference in making the mining law, but its contents did not reflect any form of comprehensive research of mining problems and their potential solutions. Although the DPR held hearings with stakeholders and made field visits to several regions, the results of these visits and the knowledge obtained during these hearings was not taken into consideration during the discussion of this law. Apparently DPR-members did not encounter a connection between the issuance of mining licences and environmental problems, or they had other reasons to ignore them.

As demonstrated in Chapter 7, these problems of the lawmaking process were even worse in Law 3/2020.Firstly, the making of Mining Law 3/2020 was originally intended to only amend some of the provisions in Mining Law 4/2009. Therefore, the research did not cover all issues involved in mining, and especially not those concerning the environment. Moreover, just as in the case of Mining Law 4/2009, the academic paper was not based on proper research, and it did not show a link between the problems raised and the articles in Mining Law 4/2009 proposed for amendment. Remarkably, mining issues and their solutions were not even mentioned in the discussions between the government and the DPR.

Secondly, more than its predecessor this mining law was driven by the economic interests of those in power. There was considerable pressure from the

mining industry to immediately amend Mining Law 4/2009. Several mining companies needed to ensure protection for their *Perjanjian Karya Pengusahaan Pertambangan Batubara* (PKP2B) or Coal Contracts of Work CCoWs, which had almost expired. As a result, Mining Law 3/2020 was made in a hurry and in such an untransparent manner that other interests were neither raised nor met. There was no adequate research to identify problems, analyse them, and discuss alternative solutions. Moreover the process involves only a few relevant stakeholders and hence, the opportunity to obtain input regarding environment-related mining licence issuance was lost. In fact, in its attempt to issue the draft mining law quickly, the making of Mining Law 3/2020 even violated several law-making procedures.

The process was furthermore determined by the wish of the government to align the new mining law with the job creation bill which was being drafted at the time. This bill intended to serve as a reference point for all business-relevant laws and regulations in Indonesia, in order to create a conducive and attractive business climate for investors and increase Indonesia's economic growth. Therefore, without any adequate analysis or discussion, policies related to mining in the job creation bill were directly included in the mining bill.

To sum up, the law-making process clearly affected the quality of law in responding to environment-related mining licence issuance problems. The analysis of the dynamics of making Mining Law 4/2009 and Mining Law 3/2020, in Chapters IV and VII, shows that both were made to satisfy particular interests, and that these were given priority, instead of focusing on genuine problems such as environmental-related mining licence issuance problems. Although environmental issues were discussed in the making of the laws, they were not a priority. In addition, other factors as the biased selection of participants in the lawmaking process, inadequate research and lack of public participation further contributed to this disregard for environmental issues.

Although neither of the mining laws adequately respond to mining licence issuance problems related to the environment, their level of response to the issues is different. Mining Law 4/2009 was made through a long process, buoyed by the enthusiasm of the government and the DPR to improve mining management during *Reformasi*. The mining law-makers had the desire to build a better mining management pattern in the national interest. Therefore, even though the research and analysis of the problem were inadequate, the process of lawmaking was more open to input over a long period of time. Several problems related to the issuance of environment-related mining licences *were* responded to. In addition, the law-making process led to the inclusion into the mining law of several new provisions for environmental protection, which had been absent from the previous mining law.

This is different from the process of making Mining Law 3/2020 which was carried out over a very short timeframe and was aimed specifically at satisfying the interests of mining companies. Under such conditions, of course, it is not possible to conduct research on mining and environmental issues in a comprehensive manner, and there is little opportunity for giving and receiving input. Therefore, environment-related mining licence issuance problems were ignored, and some rules related to environmental protection in the previous law were even removed. The two mining laws were made under different political conditions and the dynamics of the lawmaking process reflected this. Although both were created in a situation of domination by oligarchs whose mining interests were prioritized over environmental interests, Mining Law 4/2009 was made not long after the start of the reform period, when public interest issues were still popular. Moreover, law-makers had the desire and enthusiasm to totally change and improve mining management, which had been regulated for decades by Mining Law 11/1967. Mining Law 3/2020, however, was made only to serve particular interests. The spirit of paying attention to public interests, including the environment, had faded and could not counter the dominant economic discourse serving these particular interests.

Indonesian policy-making and implementation in government bureaucracies related to the issuance of mining licences, and their contribution to overcoming environment-related mining licence issuance problems

The government also sought to resolve problems related to the issuance of mining licences by developing relevant policies. This section discusses research findings regarding the extent to which two government policies, C&C and MOMI, have addressed the problem of issuing mining licenses related to the environment.

The first one, C&C, aimed to verify the legality of the issuance of existing mining licences. This policy was implemented until 2017 and resulted in grouping mining licences into those which had received C&C certificates, and those which had not, meaning that some mining licences were ultimately revoked. Mining licences which had received a C&C certificate were put into the MOMI database. Therefore, various parties, especially the public and NGOs, hoped that C&C could resolve the problem of the large number of mining licences being issued via unlawful procedures which, in turn, had created serious environmental and social problems. However, in practice the policy did not work out as expected, and it therefore did not improve environmental conditions at all.

The first weakness of the C&C policy was that its legal basis was a regulation of the: Minister of Energy and Mineral Resources (Regulation 43/2015 on Evaluation Procedures for the Issuance of Mineral and Coal Mining Business Licences). As explained in Chapter III, Mining Law 4/2009 did

not regulate the problem of thousands of mining licences that had been issued by regional governments via unlawful procedures in the early days of decentralisation. Therefore, the government issued this Minister Regulation 43/2015 without referring to any higher laws or regulations. As it lacked a proper legal foundation its implementation became contested. Added to this problem, the rules in the Ministerial Regulation were not comprehensive and, like other regulations made at government level, it had not gone through an in-depth review process, especially regarding the extent to which the regulation could be implemented with reference to the bureaucratic conditions in Indonesia – which include rampant illegal acts committed by government employees and weak coordination between the central government and governments. Although, as explained above, law-making in Indonesia often lacks research, analysis and participation, the possibility of research and public participation in regulation-making at government level is even lower.

As a result, the content of the Ministerial Regulation had several weaknesses. One was that the criteria for mining licences included in the clean and clear category did not include compliance with all the requirements in the other applicable laws and regulations. Some of these were criteria related to the environment, such as the placement of guarantee funds for mine reclamation and post-mining and the existence of IPPKH for mining activities in the forest. This means that, even if mining licence holders did not have these documents, they still could obtain a clean and clear certificate. In fact, both were important documents and their violation had become an issue in Indonesia. Therefore, the legal criteria for a mining licence did not cover all the environmental protection requirements issued by other sectors.

Moreover, the mining licence assessment mechanism in the Regulation only served to check whether the document was complete. This was risky, because there was always a serious possibility that the document had been obtained illegally, as had been common practice. This is similar to the implementation of the Legality of Wood System (SVLK) to eradicate illegal logging in Indonesia (as described in Chapter V), where legality verification only consists of checking the completeness of documents while many documents are obtained illegally.

Weaknesses in the Ministerial Regulation ultimately had an impact on its implementation, which did not run smoothly. Many district/city governments did not want to submit mining licence documents to the provincial government to be reviewed, even though the Regulation required them to. This was due to the problem of coordination between levels of government that marred the government since the beginning of decentralisation and here the weakness of a minister regulation enabled regional governments to refuse. A similar problem of coordination occurred between the provin-

cial and district/city governments in South Sumatra Province, where the provincial government had difficulty obtaining mining licence documents from the district/city government. Second, this assessment did not verify the authenticity of documents, therefore not detecting the many cases of forged licences.

Some of these problems were overcome by the involvement of the Corruption Eradication Commission (KPK), in collaboration with several parties (such as NGOs and universities), by encouraging institutions in the central government and regional governments to coordinate with each other. The collaboration also encouraged mining companies to comply with forestry and mine reclamation and post-mining regulations, even though the lease-use forest area licence IPPKH and mining and post-mining reclamation documents did not include the clean and clear criteria regulated in Minister Regulation 43/2015. This effort was beneficial for the implementation of the C&C policy, at least in South Sumatra Province, where the provincial and district governments were finally encouraged to coordinate. In addition, in South Sumatra, the issuance of mining licences in conservation areas and protected areas decreased. However, it was impossible for KPK and other stakeholders to supervise the implementation of all the mining licences in the field.

Mining licence verification led to the conclusion that many licences should be revoked, but many regional governments did not want to. There were exceptions, however. In South Sumatra Province, the government revoked mining licences in accordance with Minister Regulation 4/2015, as government officials in the province had no interest in avoiding revocation. A number of mining companies whose licences had been revoked filed a lawsuit with the state administrative court. Amongst the cases that were brought to court, the judge decided to cancel the revocation of the mining licences in two cases. These demonstrated that the weaknesses in Ministerial Regulation 43/2015.[1] This made it difficult to catch all the problematic mining licences.

In summary, the C&C policy was not suitable for solving the problem of thousands of mining licences being obtained through unlawful procedures. This was because several legal requirements for the issuance of mining licences, regulated by various laws and regulations, were not included in the C&C criteria. As a result, even if a mining company did not follow the requirements, its mining licence could still be categorised as a C&C mining licence. Another reason is that the legality verification mechanism was limited to checking documents, not assessing the legality of the process to

1 For details please refer to Chapter V.

obtain those documents, so it was always possible that the licence documents had been obtained illegally.

On the other hand, the policy was useful for collecting data on mining licences that were previously difficult to obtain and for ensuring that there was no overlap between similar mining licences based on documents. In fact the government, and especially the mining sector, considered the policy successful because it had screened and taken action on non-clean and clear mining licences. However, it was unable to solve the problem of thousands of problematic mining licences, especially in relation to the environment.

The only successful case from this book is the development of MOMI, which made single integrated spatial data related to mining areas throughout Indonesia available to access by anyone. Before MOMI, such access was difficult, if not impossible. Integrated data in MOMI help to provide the public with single spatial information which can be used to monitor mining licences. This may help to prevent the issuance of licences in environmentally vulnerable areas, as well as lessen the overlapping of mining licences caused by unclear data regarding mining areas. MOMI has collected spatial data related to mining and compiled them into one integrated database that can be accessed anywhere.

As could be expected MOMI's development was challenging. Documents related to spatial data from several units in the Ministry of Energy and Mineral Resources had to be collected, as well as from various agencies that manage land, such as forestry and regional governments. This means that the project had to confront the notorious fragmentation of the Indonesian government bureaucracy known as *ego sektoralism*. However, several factors affected the success of the spatial data collection for MOMI.

First, MOMI had a strong legal basis, as Mining Law 4/2009 stipulated that the government should make a mining information system, which was then regulated in more detail in a government and a ministerial regulation.[2] Secondly, integrated data was needed to determine mining areas, which was an important interest for the government itself. Charged with this task the Sub-Directorate for Mineral and Coal Area Management of the Ministry of Energy and Mineral Resources tried to collect data through communication and negotiation with other units or other agencies, and by making MoUs with other agencies collect spatial data. This supported their main task of determining mining areas. Third, other units or agencies also needed MOMI data and were therefore willing to exchange the ones they held. Fourth, at the time there was a general push for data integration. During the develop-

2 Government Regulation 22/2010 on Mining Areas and Minister of Energy and Mineral Resources Regulation 12/2011 on Procedures for Establishing Mining Business Areas and Information Systems for Mineral and Coal Mining Areas.

ment of MOMI there a national policy for the integration of data emerged, notably the One Map Policy. The One Map Policy intended to integrate all the spatial data in Indonesia, each sector managing its own data and providing spatial data for One Map. And finally, just as in the case of C&C, the Corruption Eradication Commission (KPK) played an important role. It supported the development of MOMI, including helping with the collection of mining data by forcing regional governments to submit licensing documents to the Ministry of Energy and Mineral Resources, threatening them with investigations if they would refuse.

In summary, MOMI was a success. It had the potential to contribute to solving the issues around mining licence issuance, especially regarding the issuance of mining licences in environmentally vulnerable areas and the issuance of overlapping mining licences, both of which are caused by unclear data for mining areas.

Now what is the most important general positive lesson we can draw from these two cases? I would say that they show foremost how a powerful agency like the KPK can make the difference. If it had not been for the KPK, C&C would have failed in South Sumatra as well and MOMI would at least have been much more difficult to implement. Put in more general terms, in a problematic government bureaucracy, a dominant institution like the KPK, with resources and power, can improve both policy-making and implementation. The KPK can force government institutions at the central and regional levels to carry out their obligations, help them build policies using their own resources, and get various stakeholders involved in supporting these policies. The problem is that in the long term, a policy cannot rely on the existence and assistance of other institutions like the KPK, especially when the resources and time required to deal with a large area such as Indonesia become limited. This is also clear from the C&C case as it was impossible for KPK to supervise the implementation of all mining licences in the field and throughout Indonesia.

8.2 Lessons from Indonesian laws, regulations, policies and bureaucracies in dealing with environment-related mining licence issuance problems

The influence of quality of law in resolving problems

Many studies on the effectiveness of environmental law in dealing with environmental problems, especially in developing countries, focus on implementation and law enforcement issues. This is also the case in Indonesia, where problems related to the environment and natural resources are considered more a matter of legal implementation, rather than a subject for law itself (for example, Arnscheidt, 2009: 4). A good example concerning

Indonesia is a study by Faure et al. focusing on the issue of corruption and the problems it causes in the application and enforcement of environmental standards (Faure *et.al.*, 2010:100). On the other hand, this research shows that the quality of law may have important consequences for the effectiveness of handling problems related to the environment.

In the field of mining this is quite obvious. Since licensing has first and foremost been a tool to exploit mining, both in the form of contracts and licences, environment-related mining licence issuance problems have not been properly addressed by laws and regulations and as a result environmental problems have multiplied (Chapter II, Chapter III and Chapter VII). This is certainly not solely caused by the implementation of laws, regulations and policies, as these laws, regulations and policies themselves contribute to environmental problems. Implementation and enforcement of the law is only one of the factors determining the success of environmental law in managing the environment; another factor is quality of law. As Bedner argues, proper environmental management cannot be achieved if good law is absent, even when political and government conditions favour it (Bedner, 2003: 1)

Therefore, the quality of law needs to receive attention, from the government, legislature and researchers, to develop better rules and regulations. Even a law that looks good, when judged by certain criteria may be flawed. For example, many parties thought that Mining Law 4/2009 was a good law, because there were indeed several rules that changed the pattern of mining management in the previous mining law and many of its provisions were related to environmental protection (Chapter III). However, a deeper examination, using the relevant criteria to assess the response of the law to mining licence issuance problems related to the environment, revealed that Mining Law 4/2009 did not meet the quality of law criteria. It means that even though there were several good environment-related provisions in the mining law, the Mining Law did not respond to several key problems, and many of the rules did not meet the quality of law criteria. Such flaws made it difficult to resolve environment-related mining licence issuance problems.

However, it is necessary to note that (as explained in Chapter I) the quality of law criteria may vary, as they are contingent on historical, political, and social contexts, legal traditions, and the perspectives of various actors (Mousmouti, 2012: 192; Aitken, 2013: 1-2). Therefore, a law may be assessed differently by different parties. Many scholars link the quality of law criteria with the ability of the law to have an impact on social reality. For example, Mader argues that the substantive quality of law is associated with its impact on social reality (Mader, 2001: 121). Mousmouti also argues that an important element of quality of law is the effectiveness of law in real life (Mousmouti, 2012: 205). Furthermore, Seidman and Seidman provide guidelines for law-making so that the law can achieve the desired social

change (Seidman et. al., 2001). However, laws that achieve certain goals and produce the social impact desired by law-makers do not necessarily solve problems. This depends on the defined goals and social impact. My research shows that throughout Indonesia's history environmental problems related to mining have never been genuinely addressed by subsequent laws and regulations (see Chapters II, III and VII). The relevant laws and regulations have supported certain interests, with each mining law – Mining Law 11/1967, Mining Law 4/2009 and Mining Law 3/2020 – focusing on a different set of them.

The factors that influence quality of law when making laws

The way in which laws are made seriously influences the quality of law. Legal experts suggest that making ideal laws requires a rational process that can be justified to gain legitimacy for the law (Popelier and Verlinden, 2009: 14; Wintgens, 2016:11; Oliver-Lalana, 2016: 137). Therefore, Seidman and Seidman (2008) suggest law-makers to ensure that their law-making is supported by relevant research reports, which are logically structured, and based on facts and proper logic. The problem with this prescription is that law-making is a very complex and multi-faceted procedure that has social, political, and ideological moments and relationships (Peschka, 1984:287). The literature on law-making and policy-making also presents the various dynamics, as discussed in Chapters I and IV. The quality of law, including how problems are addressed in a law, depends on the particular dynamics pf the law-making process. This research shows the differences in the processes for making Mining Law 4/2009 and Mining Law 3/2020, which resulted in differences in how the two laws respond to the environment-related mining licence issuance problems. Based on the dynamics of making these two mining laws, below I will discuss the factors that influence the quality of law especially in terms of the quality of solving problems.

The first is the purpose of the law. In fact, a law is made for a specific purpose, as Florijn argues, the law mainly functions as a legal instrument to achieve a certain goal (Florijn, 2008: 76). The purpose of making a law can be a factor in not addressing a problem. If the purpose of making the law is not related to the problem, then the problem may not be addressed. For example, this research shows that Mining Law 4/2009 and Mining Law 3/2020 were made to serve certain interests and goals, and *these* were prioritised in discussions about making these laws, rather than the environment-related mining licence issuance problems identified in Chapter II. The purpose of making laws can be influenced or pushed by various factors, including political, social and economic conditions that may not have anything to do with the problems that some of the parties hope to resolve. The content of the law does show its connection with social, cultural, economic, political, ecological, and technological factors (Tamanaha, 2017: 80), but the law is not necessarily related to the problems each party expects to be resolved.

This research also shows that the rules related to the issuance of mining licences and mining contracts of works in Mining Law 11/1967 did not regulate the environment at all because, at the time, Indonesia was trying to attract investors to improve the country's economy after decades of stagnation, although there were also contemporaneous environmental mining-related problems occurring. In contrast, Mining Law 4/2009 was made during the reformation period, when there was a spirit of change in mining management, particularly towards the protection of the domestic mining industry and peoples' welfare – yet, once again, most environmental-related mining licence issuance problems were not addressed. And finally, Mining Law 3/2020 was made after the spirit of reform had already gradually disappeared and an accelerating impetus towards the interests of mining companies resulted in rules directed at specific economic interests, rather than to solving problems related to the environment.

The second factor concerning quality of law is the difference in determining the problem. Often enough what is considered a problem by law-makers is different from what other parties consider a problem. For example, this research has shown that the makers of Mining Law 4/2009 saw the problem of issuing mining licences as merely an abuse of authority by regional governments. However, this thesis shows that the environment is also impacted by the way mining licences are issued. This is in line with Kingdon's argument that, in reality, only a few conditions are considered problems by the government and hence enter the agenda (Kingdon, 2014). In this case other conditions, although considered by some parties to be crucial, were not included in the agenda, meaning that they were not problems that law-makers considered resolved. The agenda-setting process therefore narrowed down the collecting of problems that might be of concern to various parties to problems at the focus of the attention of policy-makers (Kingdon, 2014: 3).

According to Kingdon, one of the factors that determines the agenda to be discussed is which participants are involved in making the policy (Kingdon, 2014). Participants can be from anywhere: the government, parliament, the media, interest groups, or the general public (Kingdon, 2014: 15-16). As explained above, the government was the most dominant party in determining problems in the process of making Mining Law 4/2009 and Mining Law 3/2020. Even though there were other parties involved, their roles were not significant enough to determine the problems that were discussed as in need of being resolved through new law. The government determined the problems and prioritised the interests of the mining industry rather than public interest matters, such as environmental protection. This government domination narrowed the possibility of other objectives entering into the law-making process. On the other hand, the existence of parties outside the government who were active in the process of making laws in Indonesia have in fact influences the content of a law. One example is Bedner's

research on the active involvement of people who had sufficient knowledge about environmental law and strong political skills and influence, who greatly influenced the contents of the Environmental Management Law 23/1997 (Bedner, 2008). Another example is research on the making of the Village Law, which was carried out by Vel *et.al.*, where policy communities outside the government and parliament conducted demonstrations, legal debates, campaigns, and active lobbying and influenced the process of establishing the law (Vel *et.al.*, 2017). However, in the research presented in this book such influence was minimal.

The third factor is that making mining laws which also protect the environment is still a challenge, and therefore environment-related issues often remain unaddressed in mining laws. Law-making related to the environment often faces certain dilemmas and complexities, especially when dealing with economic interests (cf. Chambliss, 1979: 157-158; Lazarus, 2004: 14). Mining regulations aim to promote economic growth and development, whilst environmental regulations aim towards the protection of social, environmental and natural resources. Therefore, mining regulations may pursue two different interests: attracting investment and preventing certain kinds of activities (O'Callaghan & Vivoda, 2015: 34). Effective administration of a mining industry sector is determined by how well regulators are able to put into practice these two policy trajectories (O'Callaghan, 2010: 2019), but it is very difficult to combine them.

Although there are many international guidelines that encourage paying attention to the environment at every stage of mining activities (Chapter III), this research has found that the laws and regulations in Indonesia, to date, have prioritised mining development at the expense of the environment. In fact, in Indonesia conflicts between environmental and economic interests occur not only in the mining sector, but also in other natural resource utilisation sectors, such as agriculture and forestry. In the process of making natural resource-related laws in general, the interests of the sectors take precedence over the interests of the environment; for example, in the making of the Natural Resource Law which began in 2001. The contents of this bill affected all natural resource sectors and threatened changes to the way each of these sectors tried to realise some environmental protection. The process of discussing the bill showed the difficulty of pushing environmental issues for consideration when dealing with the interests of sectors that utilise natural resources. Therefore, even though the process of making the law was encouraged by the NGO-coalition on natural resource management and had support from the Ministry of Environment (Arnscheidt, 2009: 284-286), the bill was never ratified and subsequently discontinued. This means that even if there are participants who are active and have adequate knowledge relevant to the bill, they can never be effective if they question the exploitation of natural resources.

The fourth factor is lack of knowledge about the real problems that should be solved. This research shows that without adequate knowledge, even though the process of making laws is structured in accordance with the rules and takes a long time – such as the making of Mining Law 4/2009, it does not guarantee that it can solve real problems. Such conditions have been stated by legal scholars, such as Otto *et.al.*, who argue that the issue of law-making in developing countries is that the legislation in developing countries often pursues development, with ambitious plans, without prior evaluation of the conditions and lack of sufficient knowledge (Otto *et.al.*, 2008: 55). This lack of knowledge was also present in the making of Mining Law 4/2009 and Mining Law 3/2020 (Chapters IV and VII), where some members of the legislature did not really understand mining issues, let alone mining issues related to the environment. Other research on law-making in Indonesia shows that the DPR, despite its considerable power, and many members of parliament do not necessarily have the expertise to draft and research laws more in general (Datta *et.al.,* 2011: 43).

The fifth factor is lack of public participation. This was the case in the making of Mining Law 4/2009 and became worse in the law-making process of Mining Law 3/2020. Otto *et.al* argue that this is typical situation in developing countries where public access to the lawmaking process is often limited (Otto *et.al.,* 2008: 55). This condition eliminates the opportunity to get as much input as possible on the real problems and the solutions. This thesis shows that the level of participation in law-making is directly proportional to the level of quality of the law. In the making of Mining Law 4/2009, where the spirit of reform was still strong, the process of making the law sought to involve various parties, but public participation management did not ensure that inputs and criticisms were analysed. The weak participation in the making of Mining Law 4/2009 prevented the possibility of diverse inputs regarding the real problems, while only a few problems were addressed in the law-making process. In the case of of Mining Law 3/2020 the process was rushed and not participatory at all and as a result the quality of the law is even worse.

Factors that influence the success and failure of policy-making and policy implementation in government bureaucracy, especially policies related to solving environmental-related mining licence issuance problems

Solving state problems is not only dependent on the law-making process; government bureaucracies clearly play a very significant role as well. The literature on public policy generally states that the government bureaucracy implements policies after they have been established by the legislature (for example, Parsons, 1995; Dye, 2017). To implement policies, government organisations need to make adjustments, such as the formation of new organisations, agencies, bureaus or units, and translate laws into more operational regulations (Dye, 2017: 46-48). This research shows that indeed the

relevant government agencies not only implemented but also made policy – C&C policy – to respond the problems of thousands of mining licences issued by regional governments, many of which were unlawful. Here, the government agency not only made a regulation to implement a law, it also made a policy of verifying the legality of mining licences without guidelines from the mining law. This shows that, under certain conditions, government agencies face problems that must be resolved immediately, whilst the process of making or revising a law takes time. In such cases government agencies are inclined to issue their own policies in the form of regulations. In such cases they effectively become law-makers. Such bureaucratic conditions greatly affect the effectiveness of policies.

As explained above, this research shows that government organisations not only implement but also make policy when there are important problems that must be resolved in the absence of clear regulations for this process. Chapter V discusses how the government introduced C&C policy and then MOMI to verify the legality of thousands of mining licences, most of which were issued by regional governments, and some of which were issued through unlawful procedures. The government must make its own regulations without any higher legal basis governing the legal verification of mining licences. The absence of a higher legal basis for the issuance of regulations reduced the effectiveness of the policy. In addition, the condition of government organisations in Indonesia (as described in Chapter I) is fragmented and difficult to coordinate, and illegal practices by government officials are rampant.

The lesson in such a situation is first that to implement important and cross-sectoral policies, one needs laws or regulations that are higher than regulations issued by a government agency. Policy issued through the legislative process together with the government has stronger legal force than regulations issued only by one government organisation, especially in the context of a policy that covers the entire country, such as that verifying the legality of mining licences. A policy that is issued only by the government in the form of regulations contains several weaknesses, including a basic violation of hierarchy of laws and the absence of the kind of in-depth research required to make a law. Even though this research found that mining law-making lacks in-depth research, a policy issued only by a government organisation is even less likely to be based on this. Without adequate research in policy-making, as was demonstrated by the research findings behind the making of the C&C policy, it is difficult for regional governments to cooperate. In the case of C&C, this was because of the lack of coercive power to coordinate with other levels of government, meaning that there was no coordination strategy between government units or institutions in the context of implementing the policy. Moreover, the regulation was only issued by one government organisation, so its contents only prioritised the interests of that organisation, as is typical in a fragmented bureaucratic cul-

ture. As a result, other issues, including the environment, were neglected. Furthermore, the possibility of illegal practices in the implementation of the policy was also not taken into account.

Second, bureaucratic problems, as they occur in Indonesia, such as rampant corruption and fragmented government, influence the effectiveness of policy making and implementation. The C&C policy (Chapter V), as explained above, was not effective in resolving the problems of issuing mining licences due to bureaucratic problems. However, sometimes a problematic bureaucracy can still make and implement a policy. This research has demonstrated that the fragmented character of bureaucracy in Indonesia not always bars the making and implementing of a policy that requires coordination between government units or agencies, in line with the findings of several scholars showing that certain conditions and efforts can encourage coordination between bureaucracies (for example, Pressman & Wildavsky, 1973; Esman 1991; Bouckaert *et.al.* 2010). For example, the development of MOMI required collection of data from different government units and agencies in a situation of fragmented government organisations, but coordination between them could in fact be carried out. Some things that can enable coordination include making an agreement, or negotiating to get what you want (Pressman & Wildavsky, 1973: 134). This proved successful when agencies exchanged data during the development of MOMI. Another thing that can be sought is the presence of facilitators who can assist in the implementation of coordination, such as exchanging information, negotiating, contributing resources, and monitoring between agencies (Esman 1991: 74). This also happened during the development of MOMI. The KPK encouraged coordination between units and government agencies.

Research for this thesis on the making and implementation of policies in the government bureaucracy in Indonesia shows that there are several factors influencing the success of a policy. Policies will be successful if there are: good laws as the basis for setting a policy or programme; specific government units, divisions or agencies responsible for implementing the policy; coordination among relevant government units, divisions or agencies and other stakeholders; strong interest within the responsible government unit, division or agency; human resources with enthusiasm and adequate expertise; and, a favourable national political situation. Conversely, government policies or programmes will always be difficult to implement if the interests of the various parties involved are disrupted. Parties who feel their interests are disrupted will protect themselves by taking actions that hinder implementation of the policy.

In conclusion, this research shows that there have been more and more laws, regulations and policies in Indonesia since the start of the mining industry which are inadequate to resolve environment-related mining

problems, especially concerning mining licence issuance. This is in line with D'Hondt's research on the regulation of water pollution, which observed that although regulations are many, and varied, the problem of water pollution remains (D'Hondt, 2020). Unfortunately, the factors that hamper the quality of policies, laws and regulations in Indonesia, such as focusing on economic growth, law-making procedures, lack of knowledge, lack of public participation, bureaucratic behaviour, and political factors, are difficult to eliminate. These factors have existed since the making of mining and environmental laws in the colonial period until the making of Mining Law 3/2020. It is true that there are slight differences in policy making, laws and regulations in each period due to the influence of the political situation. A change that gave some hope were the policies created not long after the reform period with the enactment of the Mining Law 4/2009 and subsequent policies which responded to licensing and environmental issues. However, in general their impact has been limited. Policies, laws and regulations regarding mining have continued to favour mining development instead of the environment so that problems related to the environment have remained unaddressed. This book therefore supports the view that without good politics there cannot be good laws.

Summary

This thesis examines the issuance of mining licenses in relation to the environment in Indonesia and shows that from an environmental perspective, mining licensing in Indonesia remains a big challenge. Problems related to the mining licensing process have contributed directly to environmental degradation, especially after 1999 when decentralisation gave regional governments the authority to issue mining licences. The regional government has since issued thousands of mining licences without considering environmental aspects and sometimes in contravention of the law. The research tries to answer the question to what extent Indonesia's policies, laws and regulations have addressed such mining licence issuance problems, and how the government bureaucracy has developed policies in order to resolve mining license issuance problems.

In considering the importance of laws and regulations, policies and bureaucracy in resolving problems related to mining and the environment, this thesis includes an assessment of the quality of laws, regulations and policies, an analysis of the law-making process, and studies on how government bureaucracy makes and implements policies. It aims to answer two main research questions: 1) To what extent have laws, regulations and policies related to mining licence issuance in Indonesia contributed to resolving environment-related mining licence issuance problems, and what factors have influenced this process? 2) What lessons can be learned from the Indonesian case, in terms of laws, regulations and policies dealing with mining and environmental issues?

Chapter II discusses the laws, regulations and policies related to the issuance of mining licences and the environment in Indonesia from the colonial period to the reform period in 1998. The chapter shows how laws, regulations, and policies related to mining licence issuance and environmental problems have influenced each other. The chapter also examines the regulatory framework for mining licence issuance and the resulting environmental problems throughout this history. This includes how regulatory frameworks have contributed to an increase in environmental problems, and how subsequent laws, regulations and policies have responded to these problems.

The final part of Chapter II discusses four problems regarding the issuance of mining licences related to the environment during the reform period, which were partly an inheritance from the previous period but they became

more complex in the early reform period, when decentralisation began. These problems were: the rampant issuance of mining licences by regional governments, which were not in accordance with legal procedures and which ignored the environment; complex and non-transparent licence issuance procedures; the lack of environmental safeguards when issuing mining licences; and the issuance of mining licences in environmentally vulnerable areas.

Chapter II concludes that all the political periods had similar regulatory frameworks: rules regarding procedures for obtaining mining rights were lenient, and rules regarding environmental protection were weak. This was because mining licence issuance intended to develop the mining industry and serve the interests of powerful parties, in short, they were a legal tool for exploitation. As a result, the problems were never resolved by laws, regulations and policies.

Chapter III analyses the legal framework for issuing mining licences related to the environment after the reform period began. This chapter looks at the quality of Mining Law 4/2009, and other related laws and regulations, in terms of addressing the mining licence issuance problems related to the environment that were identified in Chapter II. In order to analyse these laws and regulations, Chapter III discusses and determines the appropriate criteria for assessing the quality of laws and regulations in addressing mining licence issuance problems related to the environment. These criteria are: clarity, coherence, adequacy, feasibility, and compliance with the environmental principles and standards set out in international guidelines on mining and the environment.

Chapter III concludes that Mining Law 4/2009 has not been able to resolve mining licence issuance problems related to the environment. Several problems were adequately addressed by Mining Law 4/2009 and its implementing regulations, such as the behaviour of regional governments in issuing mining licences through the restriction and supervision of regional government authorities, but the regulations are often difficult to implement or are simply not feasible. Neither did the Mining Law and its implementing regulations effectively address other problems, such as the complexity and non-transparency of mining and mining licences in environmentally vulnerable areas. The laws and regulations related to other natural resources were also insufficient for solving these problems. From the perspective of environmental law, the regulatory framework was not really in accordance with environmental law principles. In general most problems related to mining licensing and the environment were neither considered nor resolved.

Chapter IV analyses the making of Mining Law 4/2009, in order to find out why the quality of Mining Law 4/2009 does not meet the law's quality criteria and does not address some of the mining licence issuance problems

related to the environment, as discussed in Chapter III. Using insights from law-making and policy-making theory the chapter focusses on how problems were identified, analysed, and solved. The results are mixed. The drafting process was well-structured and in compliance with the rules regarding law-making. It took three years and included intensive discussions between the government, the House of Representatives (*Dewan Perwakilan Rakyat*, or DPR), and several experts. Law-makers, from the government and from the DPR, shared a sense of mission to finally change mining management in Indonesia after decades of the same pattern. Nonetheless, mining licence issuance problems related to the environment were not sufficiently addressed in the drafting of Mining Law 4/2009.

Several factors account for this. Firstly the Ministry of Energy and Mineral Resources dominated the problem-finding and did not allow other stakeholders to have an equal role in the process. Because problems only arose from the knowledge and perspective of this department, broader issues were not discovered, let alone addressed. Second, there was a lack of studies to support the making of the mining law. The academic papers prepared by the government did not contain adequate studies on mining in Indonesia. Third, the process of making mining laws in the DPR did not address real problems. Meetings between the government and the DPR only focused on the list of problems and articles prepared by the government. Hearings with various stakeholders in the DPR only conveyed general opinions regarding mining issues in Indonesia, and these were not discussed further during the drafting of the mining law. Neither were the results of field visits to several regions organised by the DPR discussed in depth. Fourth, because this is a mining law, it merely focused on the development of the mining industry, and not on environmental issues. Fifth, the making of the mining law was driven more by the idea of future mining management, whilst the problems that should have been resolved beforehand were ignored.

Chapter V discusses the C&C policy, which was designed to assess the legality of issuing metal mineral and coal mining licences in Indonesia. The policy, which was implemented from 2011 to 2017, was a response to the widespread issuance of mining licences in the regions through procedures that violated the law and were beyond the control of central government. The chapter examines why this policy failed to solve the problem of thousands of illegally issued mining licences. The first reason is that the legal basis for the C&C policy was only a ministerial regulation which did not carry sufficient legal authority. Second, the legality criteria stipulated in the relevant regulation did not cover the fulfilment of all the requirements for issuing mining licences in the applicable laws and regulations. Third, the mechanism for assessing mining licences only evaluated the completeness of documents, and it was easily abused. It is always possible that the documents have been obtained illegally, a practice that occurs often in Indonesia. Fourth, although the implementation of C&C in various regions across

Indonesia varied, many district/city governments were unwilling to hand over mining licence documents to the provincial government and denied they had a legal obligation thereto. Fourth, many regional governments refused to revoke mining licences, even though this was the appropriate sanction according to the relevant ministerial regulation.

Nonetheless, in several cases the C&C had a positive impact on the environment; for example, the revocation of several illegal licences, and a decrease in the number of mining licences in protected and conservation areas. This was mainly due to the support of C&C by the Corruption Eradication Commission (*Komisi pemberantasan Korupsi*, or KPK) and other parties such as NGOs and universities. The KPK deployed its position as a respected law enforcement agency to encourage government institutions at all levels to fulfil their obligations and coordinate their actions. C&C has also been useful for gathering data on mining licences that were previously difficult to obtain, and for ensuring that there is no overlap between the same types of mining licence.

Chapter VI discusses another policy related to the issuance of mining licences, called MOMI. This is a single database that integrates spatial data on mining areas throughout Indonesia. The chapter examines the dynamics behind the development of MOMI (particularly regarding the data collection process) between 2011 and 2016, when government agencies in Indonesia were generally fragmented.

This study found several conditions supporting the success of MOMI. First, there was a solid legal basis supporting MOMI (Mining Law 4/2009, Government Regulation 22/2010 on Mining Areas, and Minister of Energy and Mineral Resources Regulation 12/2011). Second, the development of MOMI was trusted to a government agency – the Sub-directorate of Mineral and Coal Regional Arrangements of the Ministry of Energy and Mineral Resources – which could use the database developed through MOMI for its daily operations. Third, other units and agencies were likewise interested in contributing data to the unit running MOMI – for example because they needed spatial data from the unit. Fourth, the development of MOMI was supported by a general trend of data integration in Indonesia, especially the One Map Policy. And finally, the development of MOMI was supported by the KPK through Korsup Minerba, which also assisted in forcing regional governments to submit licensing documents to the Ministry of Energy and Mineral Resources.

The use of MOMI should help solve several problems in issuing mining licences, especially regarding the problem of unclear mining area data. In addition to preventing overlapping mining licences, MOMI can also prevent the granting of mining licences for areas that are environmentally vulnerable, because MOMI includes spatial data for protected and conservation areas.

Chapter VII examines the extent to which Mining Law 3/2020 has responded to mining licence issuance problems related to the environment, by examining the quality of Mining Law 3/2020 and how it was drafted. It shows that Mining Law 3/2020 does not address any environment-related mining licence issuance problems.

There are several reasons for this. First, the drafters saw no need for an in-depth analysis of problems related to mining, because Mining Law 3/2020 was originally only intended to change several articles in Mining Law 4/2009. The Mining Bill was an initiative of the DPR designed to respond to several rulings by the Constitutional Court that amended articles in Mining Law 4/2009; to the issuance of Regional Government Law 23/2014, which shifted the authority of mining management to higher government levels; and, to several regulations in Mining Law 4/2009 that were not in line with the interests of the mining industry in Indonesia. Furthermore, the academic paper that constituted the basis for the draft was incomplete and unclear about the connection between the issues raised and the articles proposed for amendment. At the same time, mining business actors were pressing for changes to Mining Law 4/2009, which was considered to be hampering the mining industry.

The government proposed various topics for inclusion in the amendment to Mining Law 4/2009 that benefitted the mining industry rather than the public interest. Ultimately, Mining Law 3/2020 was made in a hurry and in an transparent manner. Discussion of the list of problems took place in February and March 2020, even if the draft had been available since 2015. At the same time, the Job Creation Bill was being discussed. This Law would become a reference for hundreds of laws and regulations in Indonesia, including those related to mining. Therefore, just before the new Mining Bill was passed, several new provisions were hastily included to bring it into conformity with the Job Creation Bill. Thus, the process of making Mining Law 3/2020 was highly compromised, and from an environmental perspective the results were dramatic. Mining licence issuance problems related to the environment were ignored, and the environmental protection in Mining Law 3/2020 is far worse than in Mining Law 4/2009.

Chapter VIII is the conclusion of my thesis. After a summary of the main findings it discusses what general lessons can be learned from this case. The first lesson is how important the quality of law is in solving problems. Many studies on the effectiveness of environmental law in dealing with environmental problems, especially in developing countries, focus on issues of law enforcement, ignoring this important part. They also ignore that law-makers may not have been interested in solving genuine problems but pursue other objective and that the dynamics of the law-making process to a large extent determine the quality of law in this respect.

The second lesson is that making mining laws which also protect the environment is a big challenge. Mining regulations tend to aim for economic growth and development and Indonesia has consistently prioritised mining development at the expense of the environment.

The third lesson is that law-makers often lack knowledge about the problems that should be solved. Without adequate knowledge law-makers will not make a law that really addresses problems, even if the law-making process is well-structured. Such lack of knowledge is exacerbated by a lack of public participation.

Fourth, government agencies often issue their own policies in the form of regulations. This is a problem when multiple sectors are involved where one needs laws or regulations from a higher authority. Moreover, this type of regulation lacks the in-depth research required for addressing complex problems.

A more positive finding is that even in the face of rampant corruption and fragmented bureaucracy policies may be implemented effectively. This requires adequate laws and regulations as a basis. It also helps when government agencies responsible for implementing the policy have a strong interest in implementation, when officials have adequate expertise and enthusiasm, and when there is a favourable national political situation.

In conclusion, this research shows that laws, regulations and policies in Indonesia have been unable to resolve environment-related mining problems, especially concerning mining licence issuance. It appears that a focus on economic growth, law-making procedures, lack of knowledge, lack of public participation, bureaucratic behaviour, and political considerations have impaired the quality of policies, laws and regulations in Indonesia. And while there have been differences over time according to the political situation, mining policies, laws and regulations have continued to favour exploitation at the expense of the environment. This book therefore supports the view that without good politics there cannot be good laws.

Samenvatting (Dutch summary)

Dit proefschrift bevat de bevindingen van een onderzoek naar de verlening van mijnbouwvergunningen in relatie tot het milieu in Indonesië. Het laat zien dat vanuit een milieuperspectief de verlening van deze vergunningen een groot probleem is. Mijnbouwvergunningverlening heeft direct bijgedragen aan de achteruitgang van het milieu, vooral na 1999 toen regionale overheden door decentralisatie de bevoegdheid tot vergunningverlening kregen. Deze overheden hebben sindsdien duizenden mijnbouwvergunningen afgegeven zonder rekening te houden met milieuaspecten en soms in strijd met de wet.

Het onderzoek laat zien welk beleid, wet- en regelgeving zijn ontwikkeld om problemen bij het verlenen van mijnbouwvergunningen op te lossen en welke rol de overheidsbureaucratie hierin heeft gespeeld. Het biedt een beoordeling van de kwaliteit van wet- en regelgeving en beleid, een analyse van het wetgevingsproces, en inzichten in de wijze waarop de overheidsbureaucratie beleid maakt en implementeert. Daarbij staan drie onderzoeksvragen centraal: 1) In welke mate hebben wetten, voorschriften en beleid met betrekking tot het verlenen van mijnbouwvergunningen in Indonesië bijgedragen tot het oplossen van milieugerelateerde problemen; 2) Welke factoren hebben dit proces beïnvloed?; en 3) Welke algemene lessen kunnen worden getrokken over de relatie tussen wetten, voorschriften en beleid met betrekking tot mijnbouw enerzijds en milieukwesties anderzijds?

Hoofdstuk II behandelt milieugerelateerde wetten, voorschriften en beleid in Indonesië vanaf de koloniale periode tot 1998. Het onderzoekt het regelgevend kader voor de verlening van mijnbouwvergunningen en de daaruit voortvloeiende milieuproblemen; hoe regelgevingskaders hebben bijgedragen aan een toename van milieuproblemen, en hoe vervolgens weer nieuwe wetten, regels en beleid zijn gecreëerd in reactie op deze problemen.

Het laatste deel van dit hoofdstuk bespreekt vier milieugerelateerde problemen met betrekking tot de afgifte van mijnbouwvergunningen in de periode na 1998. Deze waren deels een erfenis van de voorgaande periode, maar werden complexer als gevolg van de decentralisatie. Het gaat om: 1) de verlening van mijnbouwvergunningen door regionale overheden die niet in overeenstemming waren met de wettelijke procedures en geen

rekening hielden met het milieu; 2) complexe en ondoorzichtige procedures voor vergunningverlening; 3) het ontbreken van milieuwaarborgen bij vergunningverlening; en 4) vergunningverlening in ecologisch kwetsbare gebieden.

De conclusie is dat de regelgevingskaders gedurende alle politieke perioden vergelijkbaar waren: de regels met betrekking tot de procedures voor het verkrijgen van mijnbouwrechten waren soepel en de regels met betrekking tot milieubescherming waren zwak. Mijnbouwvergunningverlening had als doel om de mijnbouwindustrie te ontwikkelen en de belangen van rijke ondernemers te dienen. Kortom, vergunningen waren een juridisch instrument voor exploitatie met als gevolg dat milieu- en andere problemen niet werden opgelost.

Hoofdstuk III bespreekt het juridisch kader voor de afgifte van milieugerelateerde mijnbouwvergunningen vanaf 1998. In dit hoofdstuk wordt in het bijzonder gekeken naar de kwaliteit van Mijnbouwwet 4/2009 en de daarmee samenhangende wet- en regelgeving. Om deze wet- en regelgeving te analyseren, worden criteria besproken en vastgesteld voor de beoordeling van de kwaliteit van de relevante wet- en regelgeving. Deze criteria zijn: duidelijkheid, samenhang, adequaatheid, haalbaarheid, en overeenstemming met de milieubeginselen en -normen die zijn vastgelegd in internationale richtlijnen inzake mijnbouw en milieu.

Hoofdstuk IV analyseert de totstandkoming van Mijnbouwwet 4/2009, om te verklaren waarom die wet niet voldoet aan de eerder vastgestelde kwaliteitscriteria en geen oplossing biedt voor een aantal milieuproblemen die samenhangen met de verlening van mijnbouwvergunningen. Met behulp van inzichten uit de theorie over wetgeving en beleidsvorming richt het hoofdstuk zich op de manier waarop de Indonesische overheid heeft geprobeerd problemen te identificeren, te analyseren en op te lossen. De resultaten zijn gemengd. Zo was het wetgevingsproces goed gestructureerd en in overeenstemming met officiële wetgevingsregels. Het duurde drie jaar en omvatte intensieve besprekingen tussen de regering, het parlement, en experts. De wetsontwerpers, zowel die van de regering als van het parlement, deelden een gevoel van betrokkenheid om het mijnbouwbeheer in Indonesië eindelijk te veranderen na decennia van exploitatie volgens hetzelfde patroon. Desondanks heeft dit niet geleid tot een werkelijke aanpak van de milieuproblemen die samenhangen met mijnbouwvergunningverlening.

Dit is te wijten aan verschillende factoren. Ten eerste domineerde het Ministerie van Energie en Delfstoffen het identificeren van problemen en liet het andere belanghebbenden geen gelijkwaardige rol in het proces spelen. Hierdoor werden bredere problemen niet ontdekt, laat staan aangepakt. Ten tweede was er een gebrek aan ondersteunende studies. Het

'academisch ontwerp', dat door de regering werd voorbereid, maakte geen gebruik van degelijke studies over mijnbouw in Indonesië. Ten derde richtten de discussies in het parlement zich niet op werkelijke problemen maar op de lijst met problemen en artikelen die door de regering was opgesteld. Tijdens hoorzittingen met verschillende belanghebbenden werden alleen algemene meningen over mijnbouwkwesties in Indonesië naar voren gebracht, en vervolgens werden deze niet verder besproken. Evenmin werden de resultaten van de door het parlement georganiseerde veldbezoeken aan verschillende regio's uitgediept. En ten slotte stond nog steeds de ontwikkeling van de mijnbouwindustrie voorop en niet de problemen van het milieu.

Hoofdstuk V bespreekt het 'Clean & Clear'-beleid, dat diende om de rechtmatigheid van de uitgifte van mijnbouwvergunningen voor metaalmineralen en steenkool te beoordelen. Het beleid, dat werd uitgevoerd van 2011 tot 2017, was een reactie op de wijdverspreide verlening van mijnbouwvergunningen in de regio's via procedures die in strijd waren met de wet en die buiten de controle van de centrale overheid vielen. Het hoofdstuk verklaart waarom dit beleid er niet in slaagde om het probleem van duizenden illegaal uitgegeven mijnbouwvergunningen op te lossen. De eerste reden is dat de wettelijke basis voor het Clean & Clear-beleid slechts een ministeriële regeling was die niet voldoende juridische basis voor een effectieve aanpak bood. Ook waren de legaliteitscriteria in de betreffende verordening onvoldoende om de naleving van alle vereisten voor de afgifte van mijnbouwvergunningen te garanderen. Verder werd in het mechanisme voor de beoordeling van mijnbouwvergunningen alleen de volledigheid van documenten beoordeeld en niet of ze legaal waren verkregen. En ten slotte weigerden veel regionale regeringen om mijnbouwvergunningen in te trekken, hoewel dit volgens de relevante ministeriële verordening de passende sanctie was.

Niettemin had het Clean & Clear-beleid in sommige gevallen toch een positief effect op het milieu; zo werden er verschillende illegaal verleende mijnbouwvergunningen ingetrokken en nam hun aantal in beschermde gebieden af. Dit was vooral te danken aan de rol die de Commissie voor Corruptiebestrijding (Komisi pemberantasan Korupsi, of KPK) bij de uitvoering van het beleid speelde, vaak samen met andere partijen zoals NGO's en universiteiten. De KPK zette zich in om overheidsinstellingen op alle niveaus hun verplichtingen na te laten komen en om ze hun beleid te doen coördineren. Ook is het Clean & Clear-beleid nuttig geweest voor het verzamelen van gegevens over mijnbouwvergunningen en om ervoor te zorgen dat er geen overlap is tussen verschillende mijnbouwvergunningen.

Hoofdstuk VI bespreekt een ander beleid met betrekking tot de verlening van mijnbouwvergunningen, namelijk MOMI. Dit is een database die ruimtelijke gegevens over mijnbouwgebieden in heel Indonesië integreert

en die tussen 2011 en 2016 werd opgebouwd. Dat MOMI een succes werd had verschillende redenen. Ten eerste was er een solide wettelijke basis ter ondersteuning van MOMI. Ten tweede werd de ontwikkeling van MOMI toevertrouwd aan een overheidsinstantie die de via MOMI ontwikkelde database kon gebruiken voor haar dagelijkse werkzaamheden. Andere bestuursorganisaties waren ook geïnteresseerd in het leveren van gegevens voor MOMI omdat ze voordeel hadden bij deze database. Verder werd de ontwikkeling van MOMI ondersteund door een algemene wens tot gegevensintegratie en parallelle programma's zoals het One Map-beleid. En ook hier speelde de KPK een belangrijke rol, door regionale overheden te dwingen hun vergunningsdocumenten aan te leveren.

Het gebruik van MOMI zou moeten helpen bij het oplossen van verschillende problemen bij het verlenen van mijnbouwvergunningen. Naast het voorkomen van overlappende mijnbouwvergunningen kan MOMI ook voorkomen dat mijnbouwvergunningen worden verleend voor gebieden die ecologisch kwetsbaar zijn, omdat MOMI ruimtelijke gegevens bevat voor beschermde en beschermde gebieden.

In hoofdstuk VII wordt onderzocht in hoeverre de nieuwe Mijnbouwwet (3/2020) een antwoord biedt op milieugerelateerde problemen bij het verlenen van mijnbouwvergunningen. De teleurstellende conclusie is dat deze mijnbouwwet hier helemaal niets aan bijdraagt. Daar zijn verschillende redenen voor. Ten eerste zagen degenen die het wetsvoorstel voorbereidden geen noodzaak voor een diepgaande probleemanalyse. Mijnbouwwet 3/2020 was oorspronkelijk namelijk alleen bedoeld om verschillende artikelen in Mijnbouwwet 4/2009 in overeenstemming te brengen met uitspraken van het Grondwettelijk Hof en met Wet 23/2014 op het Regionaal Bestuur. Bovendien was het academische voorontwerp onvolledig en onduidelijk over het verband tussen problemen en de artikelen die voor wijziging werden voorgesteld. Tegelijkertijd drongen actoren uit de mijnbouwsector aan op wijzigingen van Mijnbouwwet 4/2009, die ze als een belemmering voor de mijnbouwindustrie beschouwden.

Uiteindelijk is Mijnbouwwet 3/2020 haastig en op een weinig transparante manier tot stand gekomen. De bespreking van de lijst met problemen vond in februari en maart 2020 plaats in grote haast, ook al was het ontwerp al vanaf 2015 beschikbaar. Tegelijkertijd werd het ontwerp voor de zogenaamde 'Werkgelegenheidswet' besproken, die als doel had allerlei economische sectoren te dereguleren. Daarom werden vlak voor de goedkeuring van de nieuwe Mijnbouwwet verschillende nieuwe bepalingen opgenomen om de wet in overeenstemming te brengen met de Werkgelegenheidswet. Vanuit milieuperspectief zijn de resultaten dramatisch. Problemen bij het verlenen van mijnbouwvergunningen zijn volledig genegeerd en de milieubescherming in Mijnbouwwet 3/2020 is nog veel slechter dan in Mijnbouwwet 4/2009.

Hoofdstuk VIII is de conclusie van mijn proefschrift. Na een samenvatting van de belangrijkste bevindingen wordt besproken welke algemene conclusies kunnen worden getrokken. De eerste is dat kwaliteit van het recht bij het oplossen van bijvoorbeeld milieuproblemen van groot belang is. Veel studies naar de effectiviteit van milieuwetgeving bij het aanpakken van milieuproblemen, vooral in ontwikkelingslanden, richten zich op kwesties van wetshandhaving en negeren dit belangrijke onderdeel. Ze gaan ook voorbij aan het feit dat wetgevers misschien niet geïnteresseerd waren in het oplossen van echte problemen, maar andere doelen nastreefden en dat de dynamiek van het wetgevingsproces in grote mate de kwaliteit van de wet in dit opzicht bepaalt.

De tweede conclusie is dat het een grote uitdaging is om mijnbouwwetten te maken die ook het milieu beschermen. Mijnbouwwetten zijn meestal gericht op economische groei en ontwikkeling en een land als Indonesië heeft consequent prioriteit gegeven aan mijnbouwontwikkeling ten koste van het milieu.

De derde conclusie is dat wetgevers vaak onvoldoende kennis hebben van de problemen die opgelost moeten worden. Zonder voldoende kennis zullen wetgevers geen wet maken die echt problemen aanpakt, zelfs als het wetgevingsproces goed is gestructureerd. Dit gebrek aan kennis wordt verergerd door een gebrek aan inspraak van het publiek.

Ten vierde vaardigen overheidsinstanties vaak hun eigen beleid uit in de vorm van regelgeving. Dit is een probleem wanneer er meerdere sectoren bij het aanpakken van een probleem zijn betrokken en men eigenlijk wetten of voorschriften van een hogere autoriteit nodig heeft. Bovendien ontbreekt ook hier bij dit soort regelgeving het diepgaande onderzoek dat nodig is om complexe problemen aan te pakken.

Een positievere bevinding is dat zelfs als er sprake is van corruptie en een gefragmenteerde bureaucratie beleid tóch effectief kan worden uitgevoerd. Dit vereist adequate wet- en regelgeving als basis. Het helpt ook als overheidsinstanties die verantwoordelijk zijn voor de uitvoering van het beleid een aantoonbaar belang hebben bij de uitvoering, als ambtenaren over voldoende expertise en enthousiasme beschikken en als de nationale politieke situatie gunstig is.

Alles overziend toont dit onderzoek aan dat de wetten, voorschriften en het beleid in Indonesië niet in staat zijn geweest om milieugerelateerde problemen met mijnbouwvergunningverlening op te lossen. Het lijkt erop dat een focus op economische groei, wetgevingsprocedures, gebrek aan kennis, gebrek aan publieke inspraak, bureaucratisch gedrag en politieke overwegingen de kwaliteit van het beleid, de wetten en de regelgeving in Indonesië ondermijnen. En hoewel er in de loop der tijd en afhankelijk van

de politieke situatie verschillen zijn geweest, zijn het mijnbouwbeleid en de mijnbouwregelgeving exploitatie blijven bevorderen ten koste van het milieu. Dit boek ondersteunt daarom de opvatting dat er zonder goede politiek geen goede wetgeving kan zijn, maar dat goede politiek alleen niet voldoende is.

Ringkasan (Summary in Bahasa Indonesia)

Disertasi ini mengkaji penerbitan izin pertambangan dalam kaitannya dengan lingkungan hidup di Indonesia dan menunjukkan bahwa dari sudut pandang lingkungan hidup, perizinan pertambangan di Indonesia masih merupakan tantangan yang besar. Permasalahan yang berkaitan dengan proses perizinan pertambangan telah memberikan kontribusi langsung terhadap degradasi lingkungan, terutama setelah tahun 1999 ketika desentralisasi memberikan kewenangan kepada pemerintah daerah untuk menerbitkan izin pertambangan. Pemerintah daerah telah mengeluarkan ribuan izin pertambangan tanpa mempertimbangkan aspek lingkungan dan terkadang bertentangan dengan hukum. Penelitian ini mencoba menjawab pertanyaan sejauh mana kebijakan dan peraturan perundang-undangan di Indonesia telah mengatasi permasalahan penerbitan izin pertambangan tersebut, serta bagaimana birokrasi pemerintah mengembangkan kebijakan untuk menyelesaikan permasalahan penerbitan izin pertambangan.

Mengingat pentingnya peraturan kebijakan, perundang-undangan, dan birokrasi dalam menyelesaikan permasalahan terkait pertambangan dan lingkungan hidup, maka disertasi ini mencakup pengkajian terhadap kualitas kebijakan dan peraturan perundang-undangan, analisis terhadap proses pembuatan undang-undang, serta kajian mengenai bagaimana birokrasi pemerintah membuat dan melaksanakan kebijakan. Penelitian ini bertujuan untuk menjawab dua pertanyaan utama penelitian: 1) Sejauh mana undang-undang, peraturan, dan kebijakan terkait penerbitan izin pertambangan di Indonesia berkontribusi dalam menyelesaikan permasalahan penerbitan izin pertambangan terkait lingkungan hidup, dan faktor apa saja yang mempengaruhi proses ini? 2) Pelajaran apa yang dapat diambil dari kasus Indonesia, dalam hal undang-undang, peraturan dan kebijakan yang berhubungan dengan isu pertambangan dan lingkungan hidup?

Bab II membahas tentang peraturan perundang-undangan dan kebijakan terkait penerbitan izin pertambangan dan lingkungan hidup di Indonesia sejak masa kolonial hingga masa reformasi tahun 1998. Bab tersebut memaparkan bagaimana peraturan perundang-undangan dan kebijakan terkait penerbitan izin pertambangan dan permasalahan lingkungan hidup telah saling mempengaruhi. Bab ini juga mengkaji kerangka peraturan penerbitan izin pertambangan dan permasalahan lingkungan hidup yang diakibatkannya sepanjang sejarah. Hal ini mencakup bagaimana kerangka peraturan tersebut berkontribusi terhadap peningkatan permasalahan lingkungan hidup, dan bagaimana kebijakan dan peraturan perundang-undangan yang

berikutnya dibuat menanggapi permasalahan tersebut. Bagian akhir Bab II membahas empat permasalahan penerbitan izin pertambangan terkait lingkungan hidup pada masa reformasi, yang sebagian merupakan warisan dari masa sebelumnya, namun menjadi lebih kompleks pada awal masa reformasi, ketika desentralisasi dimulai. Permasalahan tersebut antara lain: maraknya penerbitan izin pertambangan oleh pemerintah daerah yang tidak sesuai dengan prosedur hukum dan mengabaikan lingkungan hidup; prosedur penerbitan izin yang rumit dan tidak transparan; kurangnya upaya perlindungan lingkungan hidup pada saat penerbitan izin pertambangan; dan penerbitan izin pertambangan di wilayah yang rentan bagi lingkungan hidup. Bab II menyimpulkan bahwa semua periode politik memiliki kerangka peraturan yang serupa: peraturan mengenai prosedur untuk memperoleh hak pertambangan masih lunak, dan peraturan mengenai perlindungan lingkungan masih lemah. Hal ini disebabkan penerbitan izin pertambangan dimaksudkan untuk mengembangkan industri pertambangan dan melayani kepentingan pihak-pihak yang berkuasa, singkatnya merupakan alat eksploitasi yang sah. Akibatnya, permasalahan tersebut tidak pernah terselesaikan melalui peraturan perundang-undangan dan kebijakan.

Bab III menganalisis kerangka hukum penerbitan izin pertambangan terkait lingkungan hidup setelah masa reformasi dimulai. Bab ini mengulas kualitas Undang-Undang Pertambangan Mineral dan Batubara Nomor 4 Tahun 2009 (UU Minerba 4/2009), serta peraturan perundang-undangan terkait lainnya, dalam menangani permasalahan penerbitan izin pertambangan terkait lingkungan hidup yang diidentifikasi pada Bab II. Untuk menganalisis peraturan perundang-undangan tersebut, Bab III membahas dan menetapkan kriteria yang tepat untuk menilai kualitas peraturan perundang-undangan dalam mengatasi permasalahan penerbitan izin pertambangan terkait lingkungan hidup. Kriteria tersebut adalah: kejelasan, koherensi, kecukupan, kelayakan, dan kepatuhan terhadap prinsip dan standar lingkungan hidup yang ditetapkan dalam pedoman internasional mengenai pertambangan dan lingkungan hidup.

Bab III menyimpulkan bahwa UU Minerba 4/2009 tidak memiliki kemampuan menyelesaikan permasalahan penerbitan izin pertambangan terkait lingkungan hidup. Beberapa permasalahan memang telah direspon secara memadai melalui UU Minerba 4/2009 dan peraturan pelaksanaannya, seperti perilaku pemerintah daerah dalam menerbitkan izin pertambangan melalui pembatasan dan pengawasan kewenangan pemerintah daerah, namun peraturan tersebut akan sulit dilaksanakan. Sementara, UU Minerba dan peraturan pelaksanaannya merespon permasalahan lain, seperti permasalahan mengenai kompleksitas dan tidak transparannya penerbitan izin pertambangan dan pemberian izin pertambangan di wilayah yang rentan terhadap lingkungan hidup. Sedangkan peraturan perundang-undangan terkait sumber daya alam lainnya juga belum memadai untuk menyelesaikan permasalahan tersebut. Dari sudut pandang hukum lingkungan hidup, kerangka peraturan yang ada belum benar-benar sesuai dengan

prinsip-prinsip hukum lingkungan hidup. Secara umum, sebagian besar permasalahan terkait perizinan pertambangan dan lingkungan hidup tidak direspon apalagi diselesaikan.

Bab IV menganalisis pembuatan UU Minerba 4/2009, dengan tujuan untuk mengetahui mengapa kualitas UU Minerba 4/2009 tidak memenuhi kriteria mutu undang-undang dan tidak menjawab beberapa permasalahan penerbitan izin usaha pertambangan yang berkaitan dengan lingkungan hidup, seperti dibahas pada Bab III. Dengan menggunakan wawasan dari teori pembuatan undang-undang dan pembuatan kebijakan, bab ini berfokus pada bagaimana permasalahan diidentifikasi, dianalisis, dan dipecahkan. Hasilnya beragam. Proses penyusunannya terstruktur dengan baik dan sesuai dengan aturan pembuatan undang-undang. Proses ini memakan waktu tiga tahun dan mencakup diskusi intensif antara pemerintah, Dewan Perwakilan Rakyat (DPR), dan beberapa ahli. Para pembuat undang-undang, baik dari pemerintah maupun DPR, mempunyai misi yang sama untuk akhirnya mengubah pengelolaan pertambangan di Indonesia setelah puluhan tahun mengalami pola yang sama. Namun permasalahan penerbitan izin pertambangan terkait lingkungan hidup belum cukup dibahas dalam penyusunan UU Minerba 4/2009.

Beberapa faktor menyebabkan hal ini. Pertama, Kementerian Energi dan Sumber Daya Mineral (ESDM) mendominasi pencarian masalah dan tidak memberikan kesempatan kepada pemangku kepentingan lainnya untuk mempunyai peran yang setara dalam proses tersebut. Dikarenakan permasalahan hanya muncul dari pengetahuan dan sudut pandang departemen ini, maka permasalahan yang lebih luas tidak ditemukan apalagi ditangani. Kedua, kurangnya kajian yang mendukung pembuatan undang-undang pertambangan. Naskah akademis yang disiapkan pemerintah belum memuat kajian yang memadai mengenai pertambangan di Indonesia. Ketiga, proses pembuatan undang-undang pertambangan di DPR tidak menyelesaikan persoalan nyata. Rapat antara pemerintah dan DPR hanya terfokus pada daftar isian masalah (DIM) dan pasal-pasal yang disiapkan pemerintah. Dengar pendapat dengan berbagai pemangku kepentingan di DPR hanya menyampaikan pendapat umum mengenai permasalahan pertambangan di Indonesia, dan tidak dibahas lebih lanjut pada saat penyusunan undang-undang pertambangan. Hasil kunjungan lapangan ke beberapa daerah yang diselenggarakan DPR juga tidak dibahas secara mendalam. Keempat, karena ini undang-undang pertambangan, maka fokusnya hanya pada pengembangan industri pertambangan, bukan isu lingkungan hidup. Kelima, pembuatan undang-undang pertambangan lebih didorong oleh gagasan pengelolaan pertambangan di masa depan, sementara persoalan-persoalan nyata yang seharusnya diselesaikan terlebih dahulu justru terabaikan.

Bab V membahas tentang kebijakan C&C yang dirancang untuk menilai legalitas penerbitan izin pertambangan mineral logam dan batubara di

Indonesia. Kebijakan yang diterapkan pada tahun 2011 hingga 2017 ini merupakan respons terhadap maraknya penerbitan izin pertambangan di daerah melalui prosedur yang melanggar hukum dan berada di luar kendali pemerintah pusat. Bab ini mengkaji mengapa kebijakan ini gagal menyelesaikan masalah ribuan izin pertambangan ilegal. Alasan pertama, landasan hukum kebijakan C&C hanya berupa peraturan menteri yang tidak mempunyai kekuatan hukum yang memadai. Kedua, kriteria legalitas yang diatur dalam peraturan Menteri tersebut belum mencakup pemenuhan seluruh persyaratan penerbitan izin pertambangan yang diatur dalam peraturan perundang-undangan yang berlaku. Ketiga, mekanisme penilaian izin pertambangan hanya menilai kelengkapan dokumen dan oleh karenanya mudah disalahgunakan. Ada kemungkinan bahwa dokumen-dokumen tersebut diperoleh secara ilegal, sebuah praktik yang sering terjadi di Indonesia. Keempat, meskipun penerapan C&C di berbagai wilayah di Indonesia berbeda-beda, banyak pemerintah kabupaten/kota yang enggan menyerahkan dokumen izin pertambangan yang dipegang oleh mereka kepada pemerintah provinsi dan menyangkal bahwa mereka mempunyai kewajiban hukum atas hal tersebut. Keempat, banyak pemerintah daerah yang menolak pencabutan izin pertambangan, padahal sanksi tersebut sudah sesuai dengan peraturan menteri terkait.

Meskipun demikian, dalam beberapa kasus, C&C mempunyai dampak positif terhadap lingkungan; misalnya pencabutan beberapa izin ilegal, dan penurunan jumlah izin pertambangan di kawasan lindung dan konservasi. Hal ini terutama disebabkan oleh dukungan kepada C&C dari Komisi Pemberantasan Korupsi (KPK) dan pihak lain seperti LSM dan universitas. KPK menerapkan posisinya sebagai lembaga penegak hukum yang disegani untuk mendorong lembaga-lembaga pemerintah di semua tingkatan memenuhi kewajibannya dan mengoordinasikan tindakannya. C&C juga berguna untuk mengumpulkan data mengenai izin pertambangan yang sebelumnya sulit diperoleh, dan untuk memastikan tidak ada tumpang tindih antar izin pertambangan dengan komoditas yang sama.

Bab VI membahas kebijakan lain terkait penerbitan izin pertambangan, yaitu MOMI yang merupakan database tunggal yang mengintegrasikan data spasial wilayah pertambangan di seluruh Indonesia. Bab ini mengkaji dinamika perkembangan MOMI (khususnya dalam proses pengumpulan data) antara tahun 2011 dan 2016, ketika lembaga-lembaga pemerintah di Indonesia pada umumnya terfragmentasi.

Penelitian ini menemukan beberapa kondisi yang mendukung keberhasilan MOMI. Pertama, adanya dasar hukum yang kuat yang mendukung MOMI (UU Minerba 4/2009, Peraturan Pemerintah 22/2010 tentang Wilayah Pertambangan, dan Peraturan Menteri Energi dan Sumber Daya Mineral 12/2011 tentang Tata Cara Penetapan Wilayah Usaha Pertambangan dan Sistem Informasi Wilayah Pertambangan Mineral dan Batubara). Kedua, pengembangan MOMI dipercayakan kepada instansi pemerintah – Subdi-

rektorat Penataan Wilayah Mineral dan Batubara Kementerian Energi dan Sumber Daya Mineral – yang dapat menggunakan database yang dikembangkan melalui MOMI untuk operasional sehari-hari. Ketiga, unit dan lembaga lain juga tertarik untuk menyumbangkan data ke unit yang menjalankan MOMI – misalnya karena mereka membutuhkan data spasial dari unit tersebut. Keempat, perkembangan MOMI didukung oleh tren umum integrasi data di Indonesia, khususnya Kebijakan Satu Peta. Dan yang terakhir, pengembangan MOMI didukung oleh KPK melalui Kordinasi dan Supervisi Mineral dan batubara (Korsup Minerba) yang turut membantu memaksa pemerintah daerah untuk menyerahkan dokumen perizinan ke Kementerian ESDM.

Pemanfaatan MOMI diharapkan dapat membantu menyelesaikan beberapa permasalahan dalam penerbitan izin pertambangan, terutama terkait permasalahan ketidakjelasan data wilayah pertambangan. Selain mencegah tumpang tindih izin pertambangan, MOMI juga dapat mencegah pemberian izin pertambangan pada kawasan yang rentan lingkungannya, karena MOMI juga memuat data spasial kawasan lindung dan konservasi.

Bab VII mengkaji sejauh mana Undang-Undang Nomor 3 Tahun 2020 tentang Perubahan atas Undang-Undang Nomor 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara (UU Minerba 3/2020) menyikapi persoalan penerbitan izin pertambangan terkait lingkungan hidup, dengan mengkaji kualitas UU Minerba 3/2020 dan pembuatannya. Kajian tersebut menunjukkan bahwa UU Minerba 3/2020 sulit untuk menyelesaikan permasalahan penerbitan izin pertambangan terkait lingkungan hidup.

Ada beberapa alasan untuk itu. Pertama, para penyusun memandang tidak perlu adanya analisa mendalam terhadap permasalahan terkait pertambangan, sebab UU Minerba 3/2020 sedianya hanya bertujuan untuk mengubah beberapa pasal dalam UU Minerba 4/2009. Rancangan Undang-Undang (RUU) Pertambangan ini merupakan inisiatif DPR untuk menyikapi: beberapa putusan Mahkamah Konstitusi yang mengubah pasal-pasal dalam UU Minerba 4/2009; penerbitan UU Pemerintahan Daerah 23/2014 yang mengalihkan kewenangan pengelolaan pertambangan ke tingkat pemerintahan yang lebih tinggi; dan beberapa peraturan dalam UU Minerba 4/2009 yang tidak lagi sejalan dengan kepentingan industri pertambangan di Indonesia. Selain itu, naskah akademis yang menjadi dasar rancangan tersebut tidak lengkap dan tidak jelas antara keterkaitan antara permasalahan yang diangkat dengan pasal-pasal yang diusulkan untuk diubah. Pada saat yang sama, para pelaku usaha pertambangan mendesak perubahan UU Minerba 4/2009 yang dianggap menghambat industri pertambangan.

Pemerintah mengusulkan berbagai topik untuk dimasukkan dalam amandemen UU Minerba 4/2009 yang lebih menguntungkan industri pertambangan dibandingkan kepentingan masyarakat. Pada akhirnya UU Minerba 3/2020 dibuat secara terburu-buru dan tidak transparan. Pembahasan DIM

terjadi pada bulan Februari dan Maret 2020, padahal drafnya sudah ada sejak tahun 2015. Pada saat yang sama, RUU Cipta Kerja sedang dibahas. Undang-undang ini akan menjadi rujukan bagi ratusan peraturan perundang-undangan di Indonesia, termasuk yang terkait dengan pertambangan. Oleh karena itu, sesaat sebelum RUU Pertambangan yang baru disahkan, beberapa ketentuan baru buru-buru dimasukkan agar selaras dengan RUU Cipta Kerja. Oleh karena itu, proses pembuatan UU Minerba 3/2020 sangat terkompromikan, dan dari sudut pandang lingkungan hidup, hasilnya sangat dramatis. Permasalahan penerbitan izin pertambangan terkait lingkungan hidup diabaikan, dan perlindungan lingkungan hidup dalam UU Minerba 3/2020 jauh lebih buruk dibandingkan dalam UU Minerba 4/2009.

Bab VIII adalah kesimpulan dari disertasi saya. Setelah merangkum temuan-temuan utama, dibahas pula pelajaran umum apa yang dapat dipetik dari kasus ini. Pelajaran pertama adalah betapa pentingnya kualitas hukum dalam penyelesaian permasalahan. Banyak penelitian mengenai efektivitas hukum lingkungan hidup dalam menangani permasalahan lingkungan hidup, khususnya di negara-negara berkembang, hanya fokus pada persoalan penegakan hukum saja dan mengabaikan bagian penting tersebut. Mereka juga mengabaikan bahwa para pembuat undang-undang mungkin tidak tertarik untuk memecahkan permasalahan yang sebenarnya, namun mengejar tujuan lain dan bahwa dinamika proses pembuatan undang-undang sangat menentukan kualitas hukum dalam hal ini.

Pembelajaran kedua, membuat undang-undang pertambangan yang juga menjaga lingkungan merupakan tantangan besar. Peraturan pertambangan cenderung bertujuan untuk pertumbuhan dan pembangunan ekonomi dan Indonesia secara konsisten memprioritaskan pembangunan pertambangan dengan mengorbankan lingkungan.

Pelajaran ketiga adalah bahwa pembuat undang-undang sering kali kurang memiliki pengetahuan mengenai permasalahan yang harus diselesaikan. Tanpa pengetahuan yang memadai, pembuat undang-undang tidak akan membuat undang-undang yang benar-benar mengatasi permasalahan, meskipun proses pembuatan undang-undang tersebut terstruktur dengan baik. Kurangnya pengetahuan tersebut diperparah dengan kurangnya partisipasi masyarakat.

Keempat, lembaga pemerintah seringkali mengeluarkan kebijakannya sendiri dalam bentuk peraturan. Hal ini menjadi masalah ketika banyak sektor terlibat dan memerlukan undang-undang atau peraturan dari otoritas yang lebih tinggi. Selain itu, peraturan semacam ini tidak memiliki penelitian mendalam yang diperlukan untuk mengatasi permasalahan yang kompleks.

Temuan yang lebih positif adalah bahwa bahkan ketika korupsi merajalela dan birokrasi yang terfragmentasi, kebijakan tertentu tetap dapat dilaksanakan secara efektif. Hal ini memerlukan peraturan perundang-undangan

yang memadai sebagai landasannya. Hal ini juga membantu ketika lembaga-lembaga pemerintah yang bertanggung jawab melaksanakan kebijakan tersebut mempunyai kepentingan yang kuat dalam penerapannya, ketika para pejabat mempunyai keahlian dan antusiasme yang memadai, dan ketika terdapat situasi politik nasional yang mendukung.

Kesimpulannya, penelitian ini menunjukkan bahwa peraturan perundang-undangan dan kebijakan di Indonesia belum mampu menyelesaikan permasalahan pertambangan terkait lingkungan hidup, khususnya terkait dengan penerbitan izin pertambangan. Tampaknya fokus pada pertumbuhan ekonomi, prosedur pembuatan undang-undang, kurangnya pengetahuan, kurangnya partisipasi masyarakat, perilaku birokrasi, dan pertimbangan politik telah melemahkan kualitas kebijakan dan peraturan perundang-undangan di Indonesia. Meskipun terdapat perbedaan-perbedaan dari waktu ke waktu sesuai dengan situasi politik, kebijakan, dan peraturan perundang-undangan pertambangan terus berpihak pada eksploitasi dengan mengorbankan lingkungan. Oleh karena itu, buku ini mendukung pandangan bahwa tanpa politik yang baik tidak akan ada hukum yang baik.

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Curriculum Vitae

Feby Ivalerina Kartikasari earned a law degree from the Faculty of Law, Parahyangan Catholic University, Bandung, Indonesia in 1996. She became a researcher at the Indonesian Center for Environmental Law (ICEL) for eight years, before taking the master of environmental law and policy programme at the University of Kent, England in 2006. Feby then returned to ICEL, and she was also a legal consultant at several government agencies, such as the Attorney General's Office and Presidential Work Unit for Development Supervision and Control. Since 2013, she has been a lecturer in environmental law and spatial law at the Faculty of Law, Parahyangan Catholic University. In 2016, she was accepted as a PhD researcher at the Van Vollenhoven Institute of Leiden Law School of Leiden University. Feby has undertaken many research projects on environmental and natural resource issues.

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