



Nickel Smelter Moratorium: Efforts to Establish Laws to Ensure Legal Certainty of Foreign Direct Investment

Firman Silalahi¹, Kenny Jesica²

^{1,2} Ilmu Hukum, Fakultas Hukum, Universitas Sumatera Utara, Medan, Indonesia

Email: ¹firmanilahii14@gmail.com, ²kennyjesica1@gmail.com

Abstract

The downstream effort is not solely an economic motive, but there are efforts to pursue the target of net zero emissions through the development of Electric Vehicles (EV). Therefore, in the future the transportation sector will shift to the EV ecosystem. Support for the EV ecosystem requires components such as batteries whose raw materials come from nickel ore produced using hydrometallurgical methods. This research uses a normative legal research method (legal research) which combines secondary materials in the form of supporting data on the application of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining in Indonesia. In this research, the authors conclude that the increase in investment of nickel downstream projects has raised concerns about the amount of Indonesian nickel reserves, so the government should plan a moratorium on Rotary Kiln Electric Furnace ("RKEF") type smelters and switching to High Pressure Acid Leaching ("HPAL") smelters. To ensure legal certainty, the government must form regulations aimed at complying with mechanisms and procedures that are in accordance with state administration and capital investment.

Keywords: Downstream; Foreign Investment; Nickel.

Introduction

Indonesia is a country that is blessed with abundant natural resources. Indonesia has a variety of mining materials, such as coal, nickel, copper, gold, tin, and so on. The 1945 Constitution through Article 33 Paragraph (3) states "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people." The articles contained in the basis of this constitution are the legal basis for Indonesia to improve the national economy by utilizing all the natural resources it has for use and distribution to the community. Nowadays, Nickel as one of the mining materials is currently being downstreamed. According to United States Geological Survey (USGS) data, Indonesia's total nickel reserves will be around 21 million metric tons in 2022 and contribute to 21% of total global nickel reserves. Downstreaming seeks to increase the domestic added value of a commodity through limiting the export of raw materials by converting them into finished goods which are the result of processing these raw materials.¹ The aim of nickel downstreaming is considered to be to increase the country's income from international trade, such as exporting nickel derivative products to other countries.

This downstream effort is not solely an economic motive, but there are efforts to pursue the target of net zero emissions through the development of EV. Currently, the Indonesian transportation sector still uses fossil energy which

¹ Muhammad Agung dan Emmanuel Adi, "Increasing Investment and Nickel Downstreaming in Indonesia," *Journal of Social Sciences and Education (JISIP)* 6, no. 2 (t.t.): 4017.

causes greenhouse gas effects. Thus, in the future the transportation sector will shift to the EV ecosystem. Support for the EV ecosystem requires components such as batteries whose raw materials come from nickel ore produced using hydrometallurgical methods.²

In an effort to support this downstream step, Indonesia has also implemented a ban on nickel ore exports through Ministry of Energy and Mineral Resources (MEMR) Regulation Number 11 of 2019 concerning the Second Amendment to MEMR Regulation Number 25 of 2018 concerning Mineral and Coal Mining Business. This prohibition on export activities applies to sales of nickel with a grade <1.7%.³ This export ban also has its own challenges after the European Union sued Indonesia to The World Trade Organization (WTO). On 17 October 2022, Indonesia was charged with violating the provisions of WTO article XI GATT 1994 and resulted in Indonesia's defeat.⁴ Indonesia has also filed an appeal as a legal mechanism to continue fighting for the ban on nickel ore exports.

The large potential for downstream nickel will also affect state revenues such as duties, royalties, and taxes. However, efforts to increase state revenues must start with the construction of a nickel ore management industry. Through Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining ("Minerba Law"), Article 102 Paragraph (1) letter a states that "Holders of Mining Business Permits (IUP) or Special Mining Business Permits (IUPK) at the Production Operation activity stage are obliged to increase the added value of Minerals in Mining Business activities through Processing and Refining for metal mineral mining commodities." Article 103 Paragraph (1) of the Mineral and Coal Mining Law also states that the processing and refining of minerals resulting from mining is also carried out domestically.

The processing and refining of metallic minerals as referred to in Article 102 of the Minerba Law is by developing a smelter. In an effort to increase the number of smelters, the government can stimulate investment by providing tax facilities which include tax holidays and tax allowances. However, massive capital investment has had an impact on increasing the number of RKEF smelters which has caused an oversupply of processed products.⁵ It is feared that this condition could accelerate the decline in Indonesia's nickel reserves, so the Indonesian government should plans to implement a moratorium on the construction of the RKEF smelter and switch to a HPAL smelter.

Formulation of the Problem

Based on the explanation above, the authors are interested to discuss about the formulation of laws (*rechtsvorming*) which will be enacted by the government through the regulations. Considering that guaranteeing legal certainty regarding capital investment is very necessary to increase interest in building nickel

² Arfyana Rahayu, "Kebutuhan Nikel untuk Baterai Kendaraan Listrik Capai 59.000 Ton," diakses 27 Juni 2023, <https://industri.kontan.co.id/news/kebutuhan-nikel-untuk-baterai-kendaraan-listrik-capai-59000-ton>.

³ Republik Indonesia, "Peraturan Menteri Energi dan Sumber Daya Mineral tentang Perubahan Kedua Atas Permen ESDM No. 25 Tahun 2018 Tentang Pengusahaan Pertambangan Mineral dan Batubara," Permen ESDM No. 11 Tahun 2019 (t.t.), Pasal 62A.

⁴ Anggi Lubis, "Pakar Menjawab: apa jadinya jika WTO tolak banding Indonesia soal larangan ekspor nikel?," diakses 27 Juni 2023, <https://theconversation.com/pakar-menjawab-apa-jadinya-jika-wto-tolak-banding-indonesia-soal-larangan-ekspor-nikel-196658>.

⁵ Arfyana Rahayu, "Smelter Nikel Menjamur, Jokowi Sebut Karena Tidak Direm," diakses 27 Juni 2023, <https://industri.kontan.co.id/news/smelter-nikel-menjamur-jokowi-sebut-karena-tidak-direm>.

smelters, especially the increasing smelter construction targets. It is necessary to establish a law to accommodate this nickel smelter moratorium, so that the investment climate and state revenues can go hand in hand.

Research Methods

This research uses a normative legal research method (*legal research*), which is a type of research that explores and examines law as a norm or main rule in a system of written positive legal regulations. The author also uses secondary material in the form of supporting data regarding the application of Minerba Law in Indonesia.

Discussion

1. Legal Basis of Moratorium Policy

Based on the definition from Kamus Besar Bahasa Indonesia (“KBBI”), Indonesia dictionary, moratorium is an attempt to postpone something certain. In order of Indonesian law, the moratorium policy is frequent taken towards things urgency.⁶ As for the government's moratorium policies can take many forms such as the revenue moratorium candidate employee country civil, development moratorium of infrastructure building government in Indonesia, as well as a development moratorium of Coal Fired Power Plant.⁷ The moratorium policy is government discretion which is the authority to apply rules to situations concreteness, authority to measure situation the concrete, and authority to act even if there is none of the regulations.⁸

Although the moratorium policy is not regulated through existing laws and regulations in Indonesia, implicitly the government has authority on that matter. Law Number 30 of 2014 concerning Administration Government (“Administrative Law Government”) states that authority is a right that is owned by body and/or officials government or organizer other countries to take decision and/or actions in implementation government.⁹ Hence, the government has the authority to take decision and/or actions in implementation government including implementing a moratorium policy on existing matters on scope his authority.

Policy government not only form actions outlined in statutory regulations, but also in line with the form of policy composed public on policies that are codified or contained in statutory regulations and that policy only shaped government official statements.¹⁰ All policies adopted by good government that is

⁶ Kementerian Pendidikan, Kebudayaan, Riset, dan Teknologi Republik Indonesia, “Kamus Besar Bahasa Indonesia,” dalam *Moratorium*, 2016.

⁷ Kantor Regional BKN Yogyakarta, “Memaksimalkan Kebijakan Moratorium CPNS,” 11 September 2020, <https://yogyakarta.bkn.go.id/artikel/1/2020/09/memaksimalkan-kebijakan-moratorium-cpns>; Kementerian Komunikasi dan Informasi Republik Indonesia, “Moratorium Pembangunan Sarana dan Prasarana K/L,” 29 Februari 2016, <https://www.kominfo.go.id/index.php/content/detail/7026/moratorium-pembangunan-sarana-dan-prasarana-kl/0/berita>; Kementerian Energi dan Sumber Daya Mineral dan Direktorat Jenderal Energi Baru, Terbarukan dan Konservasi Energi, “Perpres Resmi Diteken, Era Baru Pembangkit Listrik Rendah Emisi Dimulai,” 20 September 2022, <https://ebtke.esdm.go.id/post/2022/09/21/3267/perpres.resmi.diteken.era.baru.pembangkit.listrik.rendah.emisi.dimulai?lang=id>.

⁸ Nafiatul Munawaroh, “Arti Diskresi, Ruang Lingkup, Syarat, dan Contohnya,” 5 Januari 2023, <https://www.hukumonline.com/klinik/a/arti-diskresi--ruang-lingkup--syarat--dan-contohnya-lt54b538f5f35f5/>.

⁹ Indonesia, “Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan” (2014). Article 1 Number 4.

¹⁰ Farid Wajdi and Andryan, *Law And Policy Public* (Jakarta: Sinar Graphics, 2022).

expressed through products legally or verbally, on in principle implemented to the greatest extent possible public interest. Moratorium policy issued by government should take into an urgency. Therefore, the government's moratorium policy as a discretionary authority confirmed have a certain purpose.

2. Tax Facilities as an Efforts to Stimulate Foreign Direct Investment

As building a smelter requires large costs, so it does requires large capital investment. Like PT. Vale Indonesia and PT. Bahadopi Nickel Smelting Indonesia which spent investment costs of around IDR 37.5 trillion to build the RKEF smelter.¹¹ Based on Article 168 of the Minerba Law, the government can provide tax facilities to attract investment. The tax facilities provided include tax holidays and tax allowances, each of which can be applied for if it is included in pioneer industries.

In an effort to increase the added value of minerals, smelter facilities are needed to support the nickel processing and refining process. Based on the explanation under Article 18 Paragraph (3) E of Law Number 6 of 2023 concerning Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation ("Law Number 6/2023"), "A pioneer industry is an industry that has extensive connections, provides high added value and externalities, introduces new technology, and has strategic value for the national economy." Smelter construction that originates from capital investment receives tax facilities from the government.

Regulations regarding investment that receive tax facilities are contained in Article 2 of the Investment Coordinating Board (BKPM) Regulation Number 7 of 2020 concerning Details of Business Sectors and Types of Production in Pioneer Industries and Procedures for Providing Corporate Income Tax Reduction Facilities ("RBKPM 7/2020"), "Corporate taxpayers who make new investments in pioneer industries can be given a corporate income tax deduction on income received or obtained from the Main Business Activities carried out". In the attachment to this regulation, the processing and refining of nickel metal from nickel ore using pyrometallurgical and hydrometallurgical types is included in the scope of the pioneer industry.

Tax holidays are given for exemption or reduction of income tax to new businesses for a certain period of time.¹² The provision of tax holidays is contained in Minister of Finance Regulation Number 130/PMK.010/2020 concerning Providing Corporate Income Tax Reduction Facilities ("RMF 130/PMK.010/2020"). Companies that are registered as taxpayers can obtain a reduction in Corporate Income Tax ("CIT"). Based on Article 3 paragraph (1), the criteria that a business entity must have are "Including pioneer industries, having the status of an Indonesian legal entity, and investing new capital that has never been issued." The Corporate Income Tax reduction can be given at 100% provided the value of new capital investment is at least 500 billion and can be given 50% with the value of new capital investment between 100 billion to 500 billion. Based on article 3 Paragraph (2) RMF 130/PMK.010/2020, pioneer

¹¹ Riani Sanusi Putri dan Grace Gandhi, "Groundbreaking Proyek Smelter Hijau Nikel di Morowali, Airlangga: Total Investasi Rp 37,5 Triliun," 10 Februari 2023, <https://bisnis.tempo.co/read/1690097/groundbreaking-proyek-smelter-hijau-nikel-di-morowali-airlangga-total-investasi-rp-375-triliun>.

¹² Irwan Aribowo dan Deny Irawan, "Menarik Investasi ke Indonesia Dengan Tax Holiday," *Jurnal Pajak dan Keuangan Negara* 2, no. 2 (2021), <https://jurnal.pknstan.ac.id/index.php/pkn/article/view/1184>.

industries include the base metal industry which includes the construction of nickel smelters, so that business entities can apply for tax facilities.

Tax allowance aims to reduce income tax originating from the amount of investment invested in regional business sectors.¹³ The provision of tax allowances is stated in Government Regulation Number 78 of 2019 concerning Income Tax Facilities for Investment in Certain Business Fields and/or in Certain Regions ("GP 78/2019"). Based on Article 3 paragraph (1) GP 78/2019, companies can enjoy tax facilities in the form of "30% reduction in taxable income, accelerated depreciation on tangible fixed assets and accelerated amortization on intangible assets, imposition of CIT on dividends paid to foreign taxpayers other than in the form of businesses are still subject to 10% or based on the applicable tax treaty, and compensation for losses longer than five years but not more than ten years." Referring to the attachment of this regulation, the requirements for nickel ore mining are the construction of new and/or expansion of the smelters.

The provision of tax facilities is intended to trigger the inflow of investment, especially foreign investment. The large costs of building a smelter require support from capital investment to develop the nickel downstream industry to the management of derivative products. Smelter construction is necessary to carry out the processing and refining of nickel ore into semi-finished or finished products. The expected output after providing this tax facility is the construction of an integrated nickel industry which will then contribute as a source of state revenue through taxes, export duties and even non-tax revenue.

3. Legal Establishment of Moratorium on Smelter Rotary Kiln Electric Furnace (RKEF)

The development of nickel production in Indonesia should be a sustainable development for domestic interests, so the good governance between the government and business entities is needed to make this happen.¹⁴ Business entities generally carry out two methods of processing nickel ore based on processing techniques, namely RKEF Smelter and HPAL Smelter.¹⁵ The RKEF smelter processes laterite ore containing nickel and chromium which produces steel, chromium iron, and ferronickel. The RKEF smelter, which requires large energy consumption, is capable of producing pig iron (a high carbon material) which is also known as Nickel Pig Iron ("NPI"). In Indonesia, the construction of the RKEF Smelter was carried out by the Tsinghan Group which is operated by PT. Merdeka Battery Minerals, Tbk, which is located in the Indonesia Morowali Industrial Park (IMIP), is capable of producing 19,000 tons of NPI per year from its two smelters and 50,000 tons of NPI per year from another smelter.¹⁶

On the other hand, the HPAL Smelter has been built globally and is the latest technology for processing nickel limonite ore with sulfuric acid at high

¹³ Verren Arfani Lusiana, Hanauri Tasya Aisah, dan Meti Wijayanti, "Dampak Pemberian Insentif Pajak dan Tax Allowance atas Investasi dan Rasio Pajak di Indonesia," *Media Riset Akuntansi* 11, no. 2 (2021), https://journal.bakrie.ac.id/index.php/journal_MRA/article/view/2320.

¹⁴ Muhammad Imam Akbar Hairi dkk., "Governance for Sustainable Development for Nickel Project in Indonesia," *Jurnal Kebijakan dan Administrasi Publik* Vol. 27, no. 2 (2023).

¹⁵ Ender Kesinkilic, "Nickel Laterite Smelting Processes and Some Examples of Recent Possible Modifications to the Conventional Route," *Metals* 9, no. 9 (2019).

¹⁶ PT. MBMA, Tbk, "Smelter RKEF," t.t., <https://merdekabattery.com/id/business/rkef-smelters>.

temperature and pressure, thereby producing nickel and cobalt extracts.¹⁷ The process that the smelter goes through using the hydrometallurgical method is targeted to produce very high metal extraction and produce safe residue.¹⁸ The nickel ore processor will produce Mixed Hydroxide Precipitate (“MHP”) which is reprocessed into nickel sulfate and cobalt sulfate as cathode components for electric batteries.¹⁹ In Indonesia, Smelter HPAL operated by PT. Trimegah Bangun Persada, Tbk, is targeting the operation of the HPAL Smelter with a capacity of 65,000 tons.

Nowdays Indonesia has smelters with a total of 30 units, with 13 existing units and 17 units in planning.²⁰ The government c.q Ministry of Energy and Mineral Resources stated that it would evaluate increasing the RKEF smelter operation which uses high grade nickel (sapolite) as raw material to produce nickel pig iron (“NPI”) and ferronickel. High grade nickel is produced using pyrometallurgical techniques.²¹ However, future downstreaming will use an HPAL smelter that uses hydrometallurgical techniques. The HPAL smelter uses low grade nickel (limonite) as raw material to produce Mixed Hydroxide Precipitate (“MHP”) which is used as a material for making electric vehicle (“EV”) batteries.²² This is related to the nickel produced by each smelter, such as the RKEF smelter which produces sapolite with a content of 1.5% -3%, while the HPAL smelter which produces limonite only has a nickel content of 0.8% - 1.5%.²³ There are significant differences based on nickel levels, so there is concern that increasing sapolite production could reduce nickel reserves. Therefore, switching to an HPAL smelter could be a long-term solution for downstream nickel.

Bahlil Lahadalia, Minister of Investment, also expressed the same thing as the Ministry of Energy and Mineral Resources. That in the future the government will no longer provide tax facilities for investments that produce NPI.²⁴ The government's plan to stop providing tax facilities for the construction of the new RKEF smelter is considered to be the right step to extend the quantity of nickel reserves. The realization of the RKEF smelter moratorium must also involve the

¹⁷ T Gultom dan A Sianipar, “High pressure acid leaching: a newly introduced technology in Indonesia,” *IOP Conf. Series: Earth and Environmental Science* 413 (2020).

¹⁸ Labone Lorraine Godirilwe dkk., “Establishment of a Hydrometallurgical Scheme for the Recovery of Copper, Nickel, and Cobalt from Smelter Slag and Its Economic Evaluation,” *Sustainability* 15, no. 10496 (2023).

¹⁹ Raditya Helabumi Jayakarna, “Melihat Smelter Nikel di Pulau Obi,” 2024, <https://www.kompas.id/baca/foto/2024/01/18/melihat-smelter-nikel-di-pulau-obi>.

²⁰ Erlina F Santika, “Pemerintah Berambisi Bangun 53 Smelter pada 2024, Ini Rinciannya,” 27 April 2023, <https://databoks.katadata.co.id/datapublish/2023/04/27/pemerintah-berambisi-bangun-53-smelter-pada-2024-ini-rinciannya>.

²¹ Rezha Hadyan, “Pemerintah akan Moratorium Smelter Nikel RKEF, Apa Alasannya?,” 10 Juni 2023, <https://www.bloombergtechnoz.com/detail-news/8133/pemerintah-akan-moratorium-smelter-nikel-rkef-apa-alasannya>.

²² Verda Nano Setiawan, “RI Mau Jadi Raja Baterai, Ini 3 Pemain Raksasanya,” 8 Juni 2023, <https://www.cnbcindonesia.com/news/20230608195209-4-444333/ri-mau-jadi-raja-baterai-ini-3-pemain-raksasanya>.

²³ Yudho Winarto, “Antam (ANTM) Beberkan Perbedaan dan Fungsi Nikel Kadar Tinggi dan Kadar Rendah,” 28 Juni 2022, <https://industri.kontan.co.id/news/antam-antm-beberkan-perbedaan-dan-fungsi-nikel-kadar-tinggi-dan-kadar-rendah>.

²⁴ Fransiska Nangoy dan Stefanno Sulaiman, “Indonesia cuts tax breaks to discourage low-quality nickel investment, minister says,” diakses 29 Juni 2023, <https://www.reuters.com/markets/commodities/indonesia-cuts-tax-breaks-discourage-low-quality-nickel-investment-minister-2023-05-03/>.

establishment of appropriate laws to guarantee legal certainty to the parties, especially maintaining the investment climate.

The legal formation plan regarding the RKEF smelter moratorium can be formulated by each ministry, such as the Ministry of Energy and Mineral Resources, the Ministry of Finance, and the Ministry of Investment by forming a Ministerial Regulation. For example, several regulations that provide facilities for nickel downstreaming can be formed by each ministry based on the main tasks and functions of that ministry. In an effort to limit the inflow of capital investment, the pioneer industry provisions on the RKEF smelter should no longer be implemented by revising RBKPM 7/2020. The revision was carried out by deleting the pyrometallurgical process in the attachment to the regulation, so that it no longer has pioneer industry status. To stop providing tax facilities, such as tax holidays and tax allowances, the business entity's application to obtain tax facilities can no longer be granted if the scope of the business no longer includes pioneer industries. To declare a moratorium on RKEF smelters and switch to HPAL smelters, provisions are needed regarding nickel processing and refining techniques that must be implemented in the future, namely hydrometallurgical techniques.

However, regulations regarding the moratorium on new RKEF smelters can also be established through a Presidential Regulation as was done with the moratorium on new Steam Power Plants ("PLTU") based on Presidential Decree Number 112 of 2022 concerning the Acceleration of Renewable Energy Development for the Supply of Electric Power ("PD 112/2022"). Based on Article 1 Paragraph 6 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations ("PD 12/2011") "Presidential regulations are stipulated by the President to carry out orders from higher statutory regulations or carry out government powers." The preparation of the Presidential Decree is carried out by forming a committee between ministries and/or non-ministerial institutions. It can be interpreted that the preparation of the Presidential Decree is to compile cross-ministerial regulations. The material contained in this Presidential Decree may contain the RKEF smelter moratorium mechanism, such as the ministry that prepares the moratorium process, time period, terms and criteria, industry status for investment, revocation of tax facilities, and what rights and obligations are still granted after the moratorium.

Both forms of legal products, Ministerial Regulations and Presidential Decrees, can be prepared based on the needs of state administration. The essence of these two legal products must guarantee certainty, justice, and legal benefits. This legal product must properly accommodate the intentions of the RKEF nickel smelter moratorium, especially the continued provision to switch to the HPAL nickel smelter. Moreover, the moratorium effort concerns many stakeholders which could impact the national investment situation as well. It is hoped that this legal product can provide the right mechanism to make maximum use of nickel downstreaming.

Conclusion

Efforts to downstream nickel in Indonesia are carried out through processing and refining processes as stated in the Minerba Law. This process is carried out by building a smelter construction which requires a large initial investment. Therefore, the government needs to provide facilities for investors in the form of tax facilities. The increased in capital investment of nickel

downstream projects has raised concerns about the shrinking amount of nickel reserves in Indonesia. The massive operation of nickel through the RKEF smelter does not provide maximum value addition. Based on these concerns, the government needs to plan a moratorium on RKEF type smelters and switch to HPAL smelters. To ensure legal certainty, the government needs to form regulations in the form of Presidential Regulations which then followed by Ministerial Regulations. The formation of this law is aimed at complying with mechanisms and procedures that are in accordance with state administration and capital investment.

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