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Critical Analysis of Indonesian Negotiations - EU CEPA, Learning From Vietnam

Risking of Indonesian Natural Resources Sovereignty on the Access of Raw Materials for the European Union

Introduction

Economic growth targets of 7% in 2019 which has been targeted by Jokowi's Government inevitably participates in government efforts to encourage the increase activities of trade and investment, including through the trade or economic agreements (bilateral and multilateral) such as the Comprehensive Economic Partnership Agreement (CEPA) and Trans Pacific Partnerships (TPP). The EU Indonesia partnership plan (IEU) CEPA began through a study in 2010 which followed by a discussion of scoping paper in 2012, and has not been completed until President Jokowi came to Brussels in April 2016. After that the government

began to intensively formulate the partnership agreement documents with the EU on the investment and labor.

One of the economic cantilever of the EU is the processing industry and utilization of raw materials, in which at around 30 million people work in the processing industry and utilization of raw materials such as the automotive, machinery, construction, chemical and aerospace industries. The EU countries have an industrial advances and technological developments that require the availability of raw materials of minerals and energy from Asian and African countries; and others from several countries in Europe such as Russia and Ukraine. Consider the vital

needs of the EU for raw materials, the EU has a Raw Materials Initiative (RMI) which one of the objectives is to secure EU positions in the supply chain of raw materials. Under these conditions, raw materials producing countries began to implementing export quotas, including Indonesia. Indonesia bans export of raw materials since 2014, as mandated in Law No. 4 of 2009 on Mineral and Coal Mining (Minerba Law). The issue of raw materials has become a main focus in the EU-CEPA, as well as the EU's committed to implementing the Paris COP agreement, encouraging the use of renewable energy.

Indonesia's action to ban raw materials exports is the state's effort to increase the value of mining activities in Indonesia, including to affirm the position of the state as the holder of sovereignty over natural resources (including raw materials in it). These interests are certainly opposed when deal with the EU's need for raw materials, and hence this prohibition will possibly defined as trade barriers between the two regions, so it should be reviewed and if it is necessary to be eliminated.

Considering the vital of conflict interests of these two regions, it is important to explore the arrangements that may be agreed upon the Indonesia CEPA–EU draft that the discussion of it will impenetrate to the third around in September 2017. This paper attempted to analyze the possibility of model of IEU-CEPA arrangements regarding raw materials by reviewing the EU's interest as stated in RMI; review Scoping Paper Indonesia-EU CEPA, and review the regulatory model in Vietnam-EU CEPA.

EU Raw Material Initiative

The process of production (economy) in the EU is quite dependent on the import of energy and raw mineral materials from various regions. Such dependence is considered as a challenge that must be solved immediately, and one of them is through the Raw Materials Initiative (RMI) which launched by the European Commission in 2008 in order to respond the challenges towards access of the non-energy and non-agricultural raw materials. RMI is based on three pillars: a)

*to ensure a level playing field with regards to access to the resources in third countries; b) to foster the sustainable supply of raw materials from European sources; c) to boost resource efficiency and to promote recycling.*¹ In the development of 2011 and 2014, the European Commission through RMI established 20 types of raw materials in the critical category due to the potential supply shortage and the great impact on the economy compared to other raw minerals². Europe takes various steps in deal with such challenges, one of which is through the trade policies to intend at securing EU positions in global economic chains such as promoting trade in services, facilitating digital commerce, encouraging the mobilization of experts, securing EU access to raw minerals (including through various trade / FTA).³

*List of 20 Critical Raw Materials
(Base on RMI)⁴*

Antimony (Stibium)	Magnesite
Beryllium	Magnesium
Borates	Natral Graphite
Chromium	Niobium
Cobalt	Phosphate Rock
Coking Coal	Platinum Group Metals
Fluorspar	Heavy Rare Earth Elements
Gallium	Light Rare Earth Elements
Germanium	Silicon Metal (Silicium)
Indium	Tungsten (Wolframium)

Such an example of the EU dependence on Rare Earth⁵ from China, lithium from Bolivia and coltan from the Republic of Congo, which these elements are indispensable for technological development in deal with climate change,

1. <http://www.ima-europe.eu/content/raw-materials-initiative>

2. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0297>

3. Document, EU Trade for All

4. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0297>

5. 17 elements that include rare earth materials are : cerium (Ce), dysprosium (Dy), erbium (Er), europium (Eu), gadolinium (Gd), holmium (Ho), lanthanum (La), lutetium (Lu), neodymium (Nd), praseodymium (Pr), promethium (Pm), samarium (Sm), scandium (Sc), terbium (Tb), thulium (Tm), ytterbium (Yb) and yttrium (Y).

telecommunications and high – tech weapons⁶. Peculiarly, for rare earth, the global production is controlled by China with 97% of global production (2009) and 88% of global production (2016)⁷.

In Indonesia, the potential of rare earth is not as well as China or America or like Malaysia and Vietnam⁸ (Vietnam has CEPA with EU). Indonesia is estimated to have a rare earth mineral potential of 8,000 tons on land and can be up to 577,000 tons at sea⁹. Two types of rare earth that are found in Indonesia are monazite and xenotime (category of phosphate mineral), in addition there are also Zircon, Placer Gold, Uranium, Bauxite¹⁰. In addition, Indonesia itself does not have yet a detailed arrangement on the exploitation of rare earth minerals. Nevertheless, Indonesia has arranged a number of rare earth elements in Government Regulation (PP) No. 23 of 2010 on the Implementation of Mineral and Coal Mining Activities. Article 2 of PP mentioning dysprosium, erbium, lanthanum, neodymium, scandium, and ytterbium. Therefore, Indonesia's rare earth potential should be managed as well as possible and does not take convenient to open an access based on the Indonesia-EU CEPA negotiations.

Scoping Paper of Indonesia-EU CEPA

IEU-CEPA aims to accelerate the liberalization and market access for trade in goods, services and investments between the parties. One of the purposes of the negotiations is to adopt relevant international standards on trade in goods, services and investments; as well as eliminating

and / or removing obstacles or barriers that harm both parties. The Scooping Paper of Indonesia – EU CEPA encompasses the discussion of some issues such as goods, energy and raw materials, services, investments, public procurement, competition policy, intellectual property rights, trade and sustainable development. The EU's interest in raw materials in Indonesia has showed clearly in discussion of goods, energy and raw materials. In this context, the step of limiting exports in the form of export duties and quotas is considered an obstacle, although it is recognized as a step to increase additional value for Indonesia. Although the export restrictions have been imposed on various types of goods, the limitation in the export of raw materials for mining has become an important focus retrieving Indonesia is considered as an important producer of various mining goods. Then, that subject, during the discussion of the Scooping Paper of Indonesia – EU CEPA, Indonesia has agreed to consider abolishing all export restrictions.¹¹

Typically, the restrictions on the export of energy and raw materials by Indonesia are considered having a negative impact on the market of raw materials, domestic and international energy, including the prohibition on export of raw materials which has been enforced since 2014. Thus, it is agreed to insert the provisions on energy and raw materials in every trade agreement .

“Indonesia's energy and raw materials sectors present both great opportunities and challenges. Indonesia is a resource rich country, with a significant production of oil and gas as well as of minerals and metals. At the same time, Indonesia maintains a number of trade and investment restrictive measures that have a negative impact on energy and raw materials domestic and international markets. Such protectionist measures include an export ban on unprocessed minerals introduced in 2014, local content requirements, the prohibition of the privatization of SOEs in the natural resources sector as well

6. <https://www.boell.de/en/ecology/resource-governance-analysis-of-the-eu-raw-materials-initiative-11124.html>

7. <https://www.boell.de/en/ecology/resource-governance-analysis-of-the-eu-raw-materials-initiative-11124.html>

8. Vietnam encouraged the rare earth production from 250 MT in 2015 to 300 MT by 2016, Vietnam is among the top eight rare earth producers in the world. <http://investingnews.com/daily/resource-investing/critical-metals-investing/rare-earth-investing/rare-earth-producing-countries/>

9. <http://pdis.bppt.go.id/ptm/index.php/kegiatan-dan-kerja-sama/berita/225-fgd-potensi-mineral-lithium-mineral-ikutan-timah-serta-dukungan-kementerian-perindustrian-terhadap-industri-logam-di-indonesia>

10. https://www.researchgate.net/publication/280302337_Overview_of_Rare_Earth_Elements_in_Indonesia

11. See Issue on Goods in the Scooping Paper Indonesia – EU CEPA, pg. 13

as energy subsidies.”¹²

Even though the issue of energy and raw materials are both discussed in the Indonesia – EU Scooping Paper, the issue of raw materials becomes more significant whether considering the EU agenda to insert the Raw Material Initiative (RMI) agenda throughout the Free Trade Agreement (FTA)¹³, including Indonesia.

Negotiations for the CEPA between Indonesia and the EU itself has been going on in two rounds¹⁴ and one of the negotiating points in both meetings is about energy and raw materials. Journalist, Lana Drayer¹⁵ in his review on the report which released by EU related on the results of the Bali Round, explained that the EU tends to pursue freedom of investment in the Indonesian mining sector, and requested a limit in relation to the export ban on raw materials. The issue of raw materials is considered to be a potential issue that will continue to be debated in the next round.

High concern of the EU on the regulation of the prohibition on the export of raw materials basically seems not precise with the trade conditions between the two regions nowadays. Considering that the main import of EU from Indonesia is dominated by manufacturing industry which in 2016 reached more than 9140 billion euro, while in the import of raw material was at 686 billion euro, not much

as the import in agriculture sector which was at 4744 billion euro¹⁶. However, the rule becomes an important if the EU continues to increase its investment in Indonesia. In the last five years the EU flowing investment in Indonesia amounted to 13.3 billion US dollars, equivalent to 172.9 trillion IDR (exchange rate of Rp 13,000 per US dollar). The investment value from Europe in 2012-2016 had contributed by the basic chemical and pharmaceutical sectors with a share of 26 percent, followed by the mining sector 20 percent and warehousing and telecommunications reached 15 percent.¹⁷

Rare Earth Potential in Indonesia

Potential REEs in Indonesia and exploration status					
Province	Location	REE Minerals	Ore Minerals	Deposit type	Deposit status
North Sumatra	Banda Aceh	Monazite	Titanium, Magnetite, Zircon	Placer, Shoreline	Occurrence
Riau Islands	Singkep Island	Monazite, Xenotime, Allanite	Cassiterite, Ilmenite, Pyrite, Marcasite, Hematite, Ruble, Zircon, Tourmaline	Placer, Shoreline	Produced in the past as a by product of tin (Sn)
Jambi	Bukit Duabelas	Monazite	Ilmenite, Magnetite, Cassiterite, Zircon	Placer, Shoreline	Occurrence
Bangka-Belitung Islands	Bangka Belitung	Monazite, Xenotime, Allanite	Cassiterite, Ilmenite, Pyrite, Marcasite, Hematite, Ruble, Zircon, Tourmaline	Placer, Shoreline	Produced in the past as a by product of tin (Sn)
West Kalimantan	Kembajan Mountain	Monazite	Unknown	Placer, Shoreline	Occurrence
Irian Jaya (Papua)	Morni River	Monazite, Xenotime	Zircon	N/A	Occurrence; Earlier exploration indicated high radioactive elements

Learning from CEPA Vietnam – EU

Indonesia-EU is not the only one of CEPA in ASEAN member countries, there is also CEPA Vietnam-EU, Singapore-EU in 2015, Philippines followed in 2016. Meanwhile, Malaysia and Thailand which started negotiations in 2010 and 2013, are suspended. Therefore it is necessary

12. See the section of Raw Materials and Energy in the Scooping Paper CEPA of Indonesia-EU, pg.16

13. Trade for All, EU Commission, 2015

14. First round of negotiations proceeded in Brussels (September 2016) and second round proceeded in Bali (January 2017)

15. Lana Dreyer, Intellectual property and raw materials among top EU priorities, <http://borderlex.eu/indonesia-fta-papers-intellectual-property-raw-materials-among-top-eu-priorities/>

16. Directorate General of Trade of the European Commission, Trade Value of the European Union and Indonesia

17. <http://www.tribunnews.com/bisnis/2017/02/02/bkpm-lima-tahun-terakhir-investasi-eropa-yang-masuk-ke-indonesia-rp-1729-triliun>

to look into the contents of the previous EU CEPA agreement as a consideration for Indonesia.

In CEPA Vietnam-EU, raw materials relating to two main points of investment and state-owned enterprises. Raw materials has not mentioned explicitly, different from the energy that has specific discussions, but investment arrangements and state enterprises are closely related to the processing industry and the utilization of raw materials.

• Market Access

Chapter VIII and X on investment liberalization and state enterprises, both of them mentioned how the market could not be ignored in all trading activities, services or investments. Therefore, it is encouraged to eliminate the borders which obstruct the market access such as quota restrictions, monopolies, capital participation or shareholdings, especially on tariffs and non-tariffs. The establishment of import quotas will confine consumer demand and relate to local content policies that are also minimized. Local content is regulated in Chapter XIV on trade and investment in the renewable energy.

• Investor-State Dispute settlement (ISDS)

One more important point in the Vietnam-EU CEPA document is on dispute settlement or dispute between the state and citizens / investors from other states through ICSID (International Center for Settlement of Investment Disputes). The dispute resolution provisions through ICSID are not only about the protection of investment from EU member countries, but also an efforts to eliminate state sovereignty in enforcing its rules. Moreover the rules in the country (in this case Vietnam) must not violate the rules which contained in the CEPA document. Whether the investment or trade protection has dominantly regulated in the CEPA document, the people outside of the capital vortex who should savoring or otherwise becoming victims of the investment, precisely do not get the protection and the opportunity to sued as well as the company or investor rights. Indonesia has had considerable experience with mining company claims through

the ISDS mechanisms, such as the case of Newmont Nusa Tenggara, Churchill, and the recent conflict between Indonesia and Freeport McMoran Inc., which leading to the possibility of settlement at the International Arbitration Tribunal.

Potential Impact of IEU – CEPA

- Abolition of Export Prohibition of Raw Materials

Nowadays, all the mining potential and energy resources is commercialized as a pillar of development. Commercialization of mining is the most noticeable from the number of mining permits that have been issued before and after the Minerba Law. These permits had been granted regardless the proper procedures, as the findings of the Korsup Team of KPK showed that there are many Non-Clean and Clear of IUP / Mining Permit (CnC).¹⁸

The legality of the state in ensuring commodification could be seen in PP No. 2 of 2008 on Types and Tariffs of Non-Tax State Revenue from Use of Forest Areas for Developmental Interests beyond Forest Activities which applicable to the Ministry of Forestry. With rent cost of Rp300 per square meter, a certain area can be privatized by a group of investors / corporations.

The mandate of the Minerba Law that prohibits the export of raw materials will contradict to the EU's interest in raw materials, which must be encouraged through CEPA, hence, the ban has opportunity to be abolished. The export prohibition of raw material along with the obligation to build a processing factory that aims to increase additional value for Indonesia, and to expose work occupation. This provision has becoming a barrier to market and export-import activities of raw materials. Since the ban has been imposed, there has been a declined in raw materials exports. In 2013, the exports of 13

18. <https://pwyp-indonesia.org/id/121269/korsup-kpk-dan-penataan-izin-tambang-sektor-minerba/>



ILWP-International Lawyer for West Papua

mining commodities reached 12,412,600 tons and dropped to 1,112,890 tons. The existence of exports nowadays is caused by the government issued a government regulation (PP) No. 1 of 2014 on the second amendment of PP No. 23 of 2010 on the Implementation of Mining Activities of Mineral and Coal Mining. The regulation gives an opportunity to mining companies to make limited sales of their produce, which came to be known as "relaxation". Relaxation of raw material exports continues to Jokowi's government. Even though the Jokowi's Government took a step of proposing a revision of the Minerba Law which seemed to be intentionally conducted to prepare "a red carpet" for CEPA or TPP agreement.¹⁹

- Regulations that subsequent the Market Desire

Every each of economic or trade agreement has stated that to respect and recognizes the rules in the partner country or each. However, 'the wing phrase' has closed with the obligation of the parties to honor the contents of the agreement. Therefore, the legislation by itself is requested to

respect and adjust to the interests of the market. Regulations in the fields of mining and oil - gas have been tend to the market or the interests of investors. Several provisions that are considered as contradictory to the interests of capital tend to be revised. For example the provisions of the Minerba Law concerning the obligation of smelter development, export prohibition, and divestment of shares. The regulation that will be subject of revision are regulations which governing investment, state enterprises, liberalization, monopolies and tariffs or non-tariffs: Minerba Law, BUMN/SOEs Law, Electricity Law, Geothermal Law, Energy Law and Government Regulation No. 79 of 2014.

- Privatization of Natural Wealth

The government program to establish a state-owned holding company in managing natural resources should be suspected as an effort to facilitate privatization. The establishment of holding is based on business sectors namely mining, oil and gas, housing, toll roads, financial services and food. Then, when the holding go-public, it would be easier to take over or at least 49% of shares as regulated in the BUMN Law regarding the majority shareholding of the government, at least 51% of shares owned by the government. The market door has control or managing the BUMN, even though not the majority. PT Inalum (Indonesia Asahan Aluminum) will be a holding in the mining sector. The core

19. One of the new objects that appears in the Minerba Law Revision Manuscript is the arrangement of Rare Earth (Rare Earth Metal), which there has not regulation yet for it.

business of PT Inalum has been processing bauxite raw materials. Thus, the government designed that PT Inalum would go public in 2016 and other SOEs are expected to do the same. Including Pertamina which becomes a holding in oil and gas sector. Through go - public, the special rights and privileges of the BUMN will be restricted.

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