

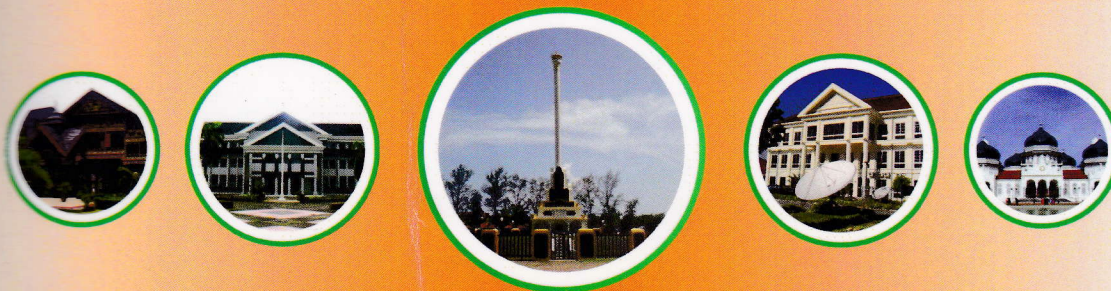


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Indonesia Responsibility On Sea Pollution Caused By Coal Mining (Study on Bengkulu River Pollution)

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Abstract

Bengkulu, which is located on coastal area and is adjoining directly with India Ocean, is one of provinces of Indonesia having a potential coal resource quality. In exploring and exploiting this resource, district government of Bengkulu has issued licenses to some companies. Unfortunately the activities of some company caused damage and pollution on headwaters and downstream of Bengkulu river basin at coastal area. Supposing it is not coped with soon by the government, the waste of the coal which caused damage and pollution will continue flow to the sea and gradually will empty into India Ocean. The activities that affect the damage of river and sea environment ecosystem will make Indonesia be responsible internationally. It is due to Indonesia has been agreed to be bound to *United Nations Convention on The law of the Sea* (UNCLOS) 1982. Notwithstanding UNCLOS 1982 gives right to states to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment, on the other side it lays obligation to protect and preserve the marine environment. State shall take, individually or jointly as appropriate all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize the policies in this connection. States also shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with UNCLOS 1982. If the District Government of Bengkulu does not pay attention to this problem, Indonesia will internationally be responsible for putting back the sea environment to the condition before the pollution took place. This responsible will take long time and much fund. It will also make Indonesia's credibility in international society goes down as they will value Indonesia does not care about its own environment, especially international sea environment. For that, it needs to provide preventive action soon by the district government, for being apart from responsibilities and for protecting the citizen right on health environment.

Key words: Indonesia Responsibility, Sea Pollution, Coal Waste.

Introduction

A state territory consists of land, air, sea, as well as the seabed and subsoil. Unlike the land which the boundary to other State can be set clearly, it is difficult to define a clear boundary on the sea because of its moving surface. For this on the sea can't be created a concrete boundary, it's only invisible ordinate point.

From regimes governed in United Nations Convention on The Law of The Sea 1982 (UNCLOS), only in internal water and territorial water have States absolute sovereignty, where in continental self as well as exclusive economic zone States only have sovereign rights.² States have jurisdiction for both the former and the later.³

Chapter 17 of Agenda 21 stated pollution from land based sources contributed 70% for marine pollution. It is no wonder if one says the sea is the world's dumping place. Over natural resources in a State territory, a state has a sovereignty to exploit and to explore it pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

² Sovereign rights is not to be confused with territorial sovereignty. Read Brownlie, Ian, 1979, *Principles of Public International Law*, 3rd ed, Oxford: Clarendon Press. P.111-112

³ For jurisdiction of a State read Shaw, Malcom N , 1997, *International Law*, 4th ed, Cambridge University, p 454-455; Churchill and Lowe, 1999, *The Law of The Sea*, 3rd ed, manchester University Press, p 65-69



In the case of mining, state has the right to control in accordance with Article 33 of the Constitution NRI 1945. Indonesia Government has to arrange, manage and control activities related to mining.

Coal mining in Bengkulu city done by companies which licenses given by District Government has caused damaged and pollution in Bengkulu River. The coal waste has flown to the coastal area. Many people go there and collect the waste as their livelihood. On one side, people can earn money by collecting it but on the other side their activity damaged river basin and polluted the water. People who live along the river have been affected by itching on their skin after bathing from the river. This problem obviously constitutes District Bengkulu affairs in accordance with Act number 32 Year 2004 on District Government.

Recalling the sea is a moving surface, it's not possible that the pollution continue flow beyond Indonesia territory as geographically Bengkulu Sea is adjoining to India Ocean which belongs to international regime.

There are cases where pollution from mining activity of a State up to the neighbor sea territory. For example Montara case which is operated by Australasia PTTEP on Australia EEZ causing oil spill on Indonesia EEZ. This case is in settlement process. Montara case is different from Bengkulu river case as pollution in Bengkulu River comes from coal mining on the land. But however if it is not cope soon the same condition will occur, moreover pollution will not only be in to neighbor's sea but also to international sea that subject to international law.

This paper will discuss about how is Indonesia responsibility on sea pollution, especially pollution from coal mining, how does International Law regulate it? Is Indonesia bound to the regulations?

Materials and Methods

This research is a juridical normative (Soerjono Soekanto and Sri mamudji: 1983), in particular the inventory of international law related to marine pollution from land based activity.

Primary legal materials include all relevant legislation bot international and national.

Secondary legal materials that complement the primary legal materials include literatures relating to the topic of the paper.

The legal materials collected by the laws of search methods both written and unwritten law of primary and secondary legal materials. Search the written law and unwritten literature studies done both on line and off line.

The legal materials were analyzed by using legal interpratation which will lead to the anwers of the problems.

State Responsibility

State responsibility provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation. (Malcomn N Shaw, 1997, p. 541-543).

The essential characteristic of responsibility hinge upon certain basic factors. First, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally that loss or damage has resulted from unlawful act or omission.

Article 3 of the International Law Commission's Draft on State Responsibility provides that there is an internationally wrongful act of a state when:

- (a) Conduct consisting of an action or omission is attributable to the state under international law; and
- (b) That conduct constitutes a breach of an international obligation of the state.⁴

⁴ Year book of ILC as stated in Malcomn N Shaw, *Loc Cit*, p. 542



What becomes legal consequences of a breach of international law usually the duty of reparation.⁵

Marine Pollution from Land Based Sources

Pollution is not a modern phenomenon. It is not peculiar to man and may indeed have preceded him. Marine pollution is defined in article 1 of Law of the Sea Convention as : the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which result or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Sources of marine pollution can derive from shipping, dumping, sea-bed activities and land activities. From the four sources, the vast majority of marine pollution comes from land based sources.⁶ These can destroy or degrade vitally important habitats for marine species, and cause coastal erosion and siltation, which affect the health and productivity of the marine environment. The primary approach of administrators and legislators has generally been to tackle the problems of marine pollution according to the nature of the particular pollutants.

As defined in article 1 Montreal Guidelines For The Protection Of The Marine Environment Against Pollution From Land-Based Sources (Decision 13/18/II of the Governing Council of UNEP, Of 24 May 1985) Land-based sources means:

- (i) Municipal, industrial or agricultural sources, both fixed and mobile, on land, discharges from which reach the marine environment, in particular:
 - (a) From the coast, including from outfalls discharging directly into the marine environment and through run-off;
 - (b) Through rivers, canals of other watercourses, including underground watercourses; and
 - (c) Via the atmosphere;
- (ii) Sources of marine pollution from activities conducted on offshore fixed or mobile facilities within the limits of national jurisdiction, save to the extent that these sources are governed by appropriate international agreements.

Coal Mining

Mining is part or all phases of activities in the framework of research, management and exploitation of mineral or coal which includes general investigation, exploration, feasibility studies, construction, mining, processing and refining, transportation and sales, as well as post-mining activities.

Coal mining is the mining sediment carbon contained in the earth, including shale, peat, rock and asphalt.

In Indonesia coal mining is regulated in Act Number 4 Year 2009 on Mineral and Coal Mining and other Government Regulations. After Government enacted Act Number 32 Year 2004 on District Autonomy, environment control has become province and city affairs. They are under an obligation in organizing district autonomy, one of them is keeping and preserving the environment.

International Rules on Sea Pollution, especially from land based sources:

1. United Nation Declaration on Human Environmental 1972, Principle 7 provides
States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living

⁵ See the arbitral tribunal decision on the Rainbow Warrior Arbitration between France and New Zealand in 1990.

⁶ GESAMP estimation in 1990 show that 44% of it came from run-off and land based sources as stated in Malcomn N Shaw. P. 330, it increased significantly to be 80% in 2011, as stated UN General Assembly report on August 29th 2011.



resources and marine life, to damage amenities or to interfere with other legitimate uses of the seas.

2. UNCLOS 1982 Article 207 provides
 - a. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land based sources, including river, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.
 - b. States shall take other measure as may be necessary to prevent, reduce and control such pollution.
 - c. State shall endeavor to harmonize their policies in this connection at the appropriate regional level.
 - d. States, acting especially through competent international organizations or diplomatic conference, shall endeavor to establish regional rules...to prevent, reduce and control pollution of marine environment from land based sources.
3. Rio Declaration on environment and development 1992,
Principle 2 provides:
States has, in accordance with the Charter of International law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Principle 13 provides:
States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction

Principle 16 provides polluter pays principle
Principle 19 provides
States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those states at an early stage and in good faith
4. The Montreal Guidelines for the protection of the marine environment against pollution from land based sources 1985
Basic Obligation lays in article 2 which provides:
States have the obligation to protect and preserve the marine environment. In exercising their sovereign right to exploit their natural resources, all States have the duty to prevent, reduce and control pollution of the marine environment.
Other derivatives obligations are on article 3 to 19.
5. The Global Program of Action for the protection of the marine environment from land based activities 1995
The GPA is a comprehensive programs, aimed at mitigating and preventing the degradation of the coastal and marine environment caused by land-based activities. It is not only designed to identify problems and possible solutions, but also to implement concrete actions that address the problems with tangible results. It targets major threats to health, productivity and biodiversity of the coastal and marine environment resulting from human activities on land through integrated, multi-sectored programs premised on serious commitment at all policy levels.



From the 5 international regulations only UNCLOS 1982 which has legal binding and is a hard law, while the others are soft laws.⁷ However in international community good faith from a State to subject to international regulations plays an important role. Meanwhile soft law has been a choice of sources of international law. This due to its ability in giving solution to legal issues which haven't been regulated in a convention.

Indonesia's Responsibility

Although Indonesia has sovereignty over its natural resources but as a member of UNCLOS and as a part of international community, Indonesia should have run what have been agreed.

According UNCLOS 1982 article 235, States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

States shall ensure that recourse is available in accordance with legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical person under their jurisdiction.

With the objectives of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Over marine pollution Indonesia has responsibility as we have ratified UNCLOS 1982 through Act Number 17 Year 1985. The ratification is a proof that we want to be bound to the convention.⁸

In carrying out its responsibility avoiding marine pollution, Indonesia hasn't had any acts which specifically govern pollution from land based sources, but general rules on environment protection can be found in:

1. Act no. 32 year 2009 on Environment Protection and Management. This act doesn't regulate pollution from land based sources especially, but it governs over the environment generally, including sea environment.
2. Government Regulation Number 19 Year 1999 on Pollution Control and/or destruction of the Marine Environment. Article 16 provides
 - (1) Any person or person in charge of the business and / or activities that cause pollution of / or the damage required to restore the quality of the ocean sea.
 - (2) Guidelines on the quality of Recovery Sea referred to in paragraph (1) shall be determined by the agency head in charge.

Over coal mining, Indonesia has enacted:

1. Act no. 4 year 2009 on Mineral and Coal Mining
2. Government Regulation No. 23 Year 2010 on the Implementation of Mineral and Coal Mining

From these regulations we know that Indonesia Government has made efforts to manage this activity not to cause pollution from the very beginning until post mining. Seriousness of Indonesia can also be seen from requirement to have environment license for a company to get business license. In term of environment license

⁷ About soft law read Van Hoof, 2000, *Pemikiran Kembali Sumber-Sumber Hukum Internasional*, Alih bahasa HATA ALI, Bandung:Yayasan HAM Demokrasi dan Supremasi Hukum, P. 380-388.

⁸ Ratification means an international act so named whereby a State establishes on the International plane its consent to be bound by a treaty (Article 2 (1) (b) Viena Convention on the Law of Treaties 1969 Read more about Consent to be bound in Aust, Anthony, 2000, *Modern Treaty Law and Practice*, Cambridge University, Cambridge, P. 75-99



revoked, business license will be canceled. Such environment license was not set in former Environment Act (Act No. 23 year 1997).

Law enforcement in coal mining is set in article 71 until 74 Act No. 32 Year 2009, while controlling is set in article 140 paragraph (3) Act No. 4 year 2009 and article 13 Government Regulation No. 55 Year 2010 on Development and Control of Management of Mineral and Coal Mining, and article 110 Government Regulation No. 23 year 2010 on the Implementation of The Mining Business.

Article 76 Paragraph (2) Act No. 32 Year 2009 provides four (4) types of administrative sanctions, they are: the written warning, government coercion, environmental license suspension and revocation of environmental licenses. For the application of administrative sanctions in the coal mining sector Minister, Governor and Regent/Mayor has the authority to grant administrative sanctions that are repressive in stages, which are: a) a written warning; b) Temporary suspension of part or all of the exploration or production operations, and c) Suspension and Revocation IUP, IPR, and IUPK.

In accordance with Indonesia responsibility based on UNCLOS and with Act Number 32 Year 2004, Bengkulu Government should possess regulations to prevent, reduce and control pollution of the marine environment from coal mining done by companies which licenses are given by The District Government.

Bengkulu River Pollution

Bengkulu river is a trajectory district river, so authority and responsibility to manage the water falls to Province Government. Efforts that have been done by Province Government in restrain water force are:⁹

- 1) Environment Program :
 - a. Water quality test
 - b. B3 waste processing control
- 2) Public Work Program: irrigation/drainage improvement, water door repair.
- 3) Forestry program; Reforestation, check dam, socialization to district government, company and society.

Notwithstanding the coal waste along Bengkulu river basin has damaged and polluted the river, society see this as a chance to earn money. Collecting coal waste began in 1999 by several people near downstream of estuary. But as time goes by the need of coal in micro bussiness increased and made other society along the river (Kelurahan Pasar Bengkulu, Tanjung Agung, Kembang Seri, Pondok Kelapa, Surabaya, Semarang, dan Desa Penanding (kota Bengkulu dan Kabupaten Bengkulu Tengah) do the same thing. This condition is due to marketing access is fairly easy.

Facing these matters Bengkulu Government should have set regulations over marine pollution from coal mining in which method used in taking coal waste which environmentally sound based, and law enforcement on environment licensed to the coal mining business doer. The absence of the regulations will bring disorder to siciety and damage to the environment.

Conclusion

Indonesia has ratified UNCLOS 1982 and enacted it in Act Number 17 Year 1987. The ratification means Indonesia is agree to be bound to the convention. By being apart to the convention Indonesia has responsibilities to enforce rules in it especially on marine pollution from land based sources and to harmonize laws and policies in accordance with the convention. Efforts to do so can be seen on:

1. Act No. 32 Year 2009
2. Act No. 4 year 2009
3. Government Regulation No. 55 Year 2010
4. Government Regulation No. 23 year 2010
5. Government Regulation Number 19 Year 1999

⁹ Data from Environment Body, Bengkulu 2012



Anyhow, there hasn't been any law governing marine pollution from coal mining in Bengkulu Government. The absence of the law will bring disorder to society and damage to the environment.

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Constitution of Republic of Indonesia 1945

Act Number 32 Year 2009

Act Number 4 Year 2009 on Mineral and Coal Mining

Act Number 17 year 2004 on Water Sources

Government Regulation Number 19 Year 1999 on

Government Regulation No. 55 Year 2010 on Development and Control of Management of Mineral and Coal Mining

Government Regulation No. 23 year 2010 on the Implementation of The Mining Business.

United Nation Convention on the Law of the Sea 1982

