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Bargaining Position of The Government in the Mining Sector Regarding the Change to a Special Mining Business Permit

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ABSTRACT

Mineral and coal mining activities in Indonesia have been going on for a long time, and because of this, many legal instruments that support it have certainly been formed. Its arrangements regarding the exploitation of minerals and coal are in accordance with Pancasila and the 1945 Constitution, however, because the Minerba Law was only able to reach legal actions after the publication of the Minerba Law, matters related to contracts of work that existed before the Minerba Law were not covered. The existence of a contract of work is considered inconsistent with Pancasila, namely the Fifth Precept "Social Justice for All Indonesian People" and Article 33 paragraph (3) of the 1945 Constitution concerning the substance of earth, water and natural resources "controlled by the state" and "used for the greatest prosperity of the people" . Post-reform, with the spirit of decentralization and regional autonomy, mining policy was directed at supporting mining management authority by local governments, and at the same time, an concession system based on mining business licenses was introduced. Contracts of work, which are standard agreements, should provide a greater portion of profits to the Indonesian people as owners of natural resources, because they have a higher bargaining position. In reality, by becoming a party to a contract of work, it does not give the Indonesian government a balanced bargaining position. To be able to accommodate the interests of the community in terms of cooperation contracts in the field of mining exploitation, it is necessary to revise existing contracts by incorporating provisions that are legally binding on business actors and the Government, especially those relating to aspects of community development and the implementation of social responsibility of business actors.

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KEYWORDS:

bargaining position, government, contract of work, IUPK

I. INTRODUCTION

Discussing related to Mineral and Coal Mining Law in Indonesia is an interesting matter. Because Indonesia has abundant natural resources, it attracts investors to invest, both domestic and foreign investors. Responding to the investors' interest, the Government made regulations, one of which was a work agreement in the mining sector which was made in the form of a Contract of Work Agreement (hereinafter abbreviated as IUPK) in the form of a permit, this is a government tool that is juridically preventive, and is used as an administrative instrument to control people's behavior.

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The nature of a permit is preventive, because it is part of the permit instrument, its validity cannot be separated from orders and obligations, so it must be obeyed by the permit holder. This is supported by the use of civil law instruments by the government, especially contract law, in the management of government affairs (contractualization), where there has been a mixture of private and public elements in the contractual relationship that has been formed.

Contracts made by the government therefore have different characteristics from private contracts in general. The implication of the mixing of private and public elements is not only regarding the validity of the contract formation, but also the implementation and law enforcement aspects. It is this element of public law that causes the legal rules and

principles in private contracts not to fully apply to contracts made by the government.[1]

The government has a higher bargaining position against contractors because the government is the ruler. It is simply closely related to the sovereignty of a nation, which is the main characteristic of the international legal system. Sovereignty has several functions, namely:

1) as an indicator of a country's ability to carry out international obligations and create its own international law.
2) the characteristics of the state as a subject of international law.
3) to give power to the government and authority over the territory and people in a special place.[2]

Based on state sovereignty, the government can enter into or cancel a private or public contract/permit, which is carried out with foreign mining contractors unilaterally. As has been understood in the laws of city governance, the sovereign power of the state certainly cannot be revoked. It is the capacity bestowed upon the government to defend and regulate all interests.

The mining sector is a sexy sector because it is a commodity with high economic value and has proven to have a major contribution in driving Indonesia's economic growth.[3] the periodization of the mining sector began in 1975 to 1985, the ten year era is often called the golden era, because this sector contributed more than 20 percent of foreign exchange to the national economy. Even though after this period the contribution of the mining sector in general had decreased, in non-oil and gas mining, especially coal, iron ore and copper, it has become more enthusiastic, especially since the 2000s. Then in the 2000-2010 period, non-oil and gas mining grew six percent, while in 2011-2019 it grew an average of 3.4 percent.[4]

This important contribution to the economy can also be seen in non-tax state revenue (hereinafter abbreviated as PNBP), namely at the end of 2018, for example, the mineral and coal sector contributed to realization of 50 trillion or 155.8 percent of the initial target of IDR 32.09 trillion.[5] Based on economic history, the mining sector has proven to play an important role not only in generating electricity, but also as fuel in the production of steel, cement, alumina processing centers, paper mills, chemical industries, and pharmaceuticals.

Contracts of work as a pattern of cooperation for foreign investment in the mineral sector have proven to be inappropriate to continue to serve as the basis for mining company operations in Indonesia because they are not based on the principle of proportional justice for all parties. Likewise, Law No. 11 of 1967 concerning Basic Principles of Mining which forms the basis for the use of Contracts of Work as a pattern of cooperation in the exploitation of the mineral sector in Indonesia must be repealed, because in addition to being sectoral and exploitative in nature, it is also oriented towards momentary interests, and glorify state revenues from taxes and royalties above all else.

This law also denies the community's customary rights, opens opportunities for human rights violations to occur, is not in favor of environmental preservation, and places minerals in a higher position than humans.[6] This paper discusses the reasons for the change in mining business processing from the Contract of Work system to the IUPK system, the legal politics of legislation regarding Minerba mining, and also the validity of the Contract of Work which was extended after the existence of an IUP.[7]

If understood further, the above arguments share several points of view related to the driving factors for changing the Contract of Work system to the IUPK system, as well as the theory of the welfare state which is used as a guide for analyzing the formulation of the problem. Furthermore, this paper intends to examine at a comparative level between the concept of Contract of Work and IUPK in investment in the mining sector. With the background

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[1] Simamora Sogar, " *Hukum Kontrak; Prinsip- Prinsip Hukum Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia*." LaksBang Pressindo. . 2017.h. 41.

[2] Alvik Ivar, *Contracting with Sovereignty- State Contracts and International Arbitration*, Hart Publishing, Oxford and Portland Oregon, 2011.

[3] Bank Dunia, "*Ringkasan Eksekutif Perkembangan, Pemicu dan Dampak Harga Komoditas: Implikasinya terhadap Perekonomian Indonesia*", Laporan Pengembangan Sektor Perdagangan, Kantor Bank Dunia Jakarta, 2010, h. 2

[4] Muhammad Ishak Razak, "*Kebijakan dan Dampak Ekonomi Sektor Pertambangan", dalam Kuasa Oligarki atas Minerba Indonesia? Analisis Pasca Pengesahan UU Nomor 3 Tahun 2020 tentang Pertambangan Minerba*, ed. Ahmad Khoirul Umam (Jakarta: Universitas Paramadina, 2021), hlm. 205-6 Universitas Paramadina, 2021), h. 205

[5] Kementerian Energi dan Sumber Daya Mineral Republik Indonesia, *Laporan Kinerja Tahun 2018* (Jakarta: Kementerian Energi dan Sumber Daya Mineral, 2019), h. 88-90

[6] Trihastuti, Nanik, "*Hukum Kontrak Karya, Pola Kerjasama Pengusaha Pertambangan Indonesia*", Malang: Setera Pres, h. 268.

[7] Fitria Nur Ngaini, "*Renegoisasi Kontrak Karya Dalam Bidang Pertambangan Pasca Lahirnya Undang-Undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral Dan Batubara Dalam Perspektif Politik Hukum*," Tesis, Fakultas Hukum Universitas Islam Indonesia, 2015, h 21

between Contracts of Work in the form of contracts and IUPK in the form of permits, the author will compare them.

By using a statutory approach regarding mining law and also a conceptual approach between contracts and permits regarding mining activities. The author will argue that a Contract of Work with an IUPK has a legal nature that is not much different, so that the substantial essence is that an IUPK that looks vertical (subordinate) is not necessarily different from a Contract of Work which has a horizontal (coordinative) instrument.

However, the authors are of the opinion that IUPK, which is in the form of a permit, provides more legal certainty and justice compared to a Contract of Work. From the background above, the authors take the following problems: 1. What is the government's position in mineral and coal mining activities? And 2. Does the IUPK provide legal certainty and justice for both parties, compared to the Contract of Work?

II. METHODOLOGY

This research is included in Normative legal research, namely normative juridical literature research. Normative juridical means that the research conducted refers to the legal norms contained in the laws and regulations and the norms that apply in society. Normative legal research is legal research conducted by examining books or literature, laws and regulations, and legal journals or mere secondary data. [8] Normative legal research focuses on positive legal norms in the form of statutory regulations, namely by examining laws and government regulations related to contracts of work, foreign investment, and IUPK.[9]

III. DISCUSSION

1. Government Position in Mineral and Coal Mining Activities

The State of Indonesia is a welfare state as manifested in the 1945 Constitution as the Constitution of the Unitary State of the Republic of Indonesia. As a welfare state, all government and state actions are aimed at achieving the maximum possible welfare for all its people. Substitution of a system will never be separated from the concept of State control over mining as explicitly normalized in Article 33 of the 1945 Constitution.

The substance of the article regulates the principle of control and exploitation of natural resources, both those on earth, water and the wealth contained therein, controlled by the state and used for the greatest prosperity of the people. As it is regulated in Chapter XIV regarding the National Economy and National Welfare. The substance of Article 33 paragraph (3) of the 1945 Constitution states that: "Earth and water and the natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people".

Article 33 paragraph (3) of the 1945 Constitution clearly states that everything, regardless of its form, which is contained within the territory of the unitary state of the Republic of Indonesia, with regard to land, water and the natural resources contained within them, is controlled or dominated by the state and used for the people, so that in the end the goal of the welfare state of the republic of Indonesia can be achieved.[10]

As for the scope of Article 33 Paragraph (3) of the 1945 Constitution, there is the phrase "the greatest prosperity of the people" so that it correlates and has significance with the phrase "controlled by the state" and the word "used". The meaning of the phrase "used" is part of a "purpose", which is part of the phrase "mastered", so the two have a causal relationship. So that it can be understood and concluded that the word "is used" as a frame due to "state control".

The Constitutional Court[11] as guardian as well as interpreter of the Constitution, in the ruling on trial case Number 1-021-022/PUUI/2003, gave the following interpretation of the phrase "controlled by the state":

> "Controlled by the state must be interpreted to include the meaning of control by the state in a broad sense that originates from and originates from the concept of sovereignty of the Indonesian people over all sources of wealth "earth and water and the natural wealth contained therein", including the notion of public ownership by the collectivity of the people over resources the said source of wealth. The people are collectively constructed by the 1945 Constitution which gives a mandate to the state to carry out policies (beleid) and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad) and

[8] Marzuki Mahmud P, "*Penelitian Hukum*", Kencana, Jakarta, 2019

[9] Anggraeni Nita, "*Perlindungan Terhadap Indikasi Geografis (Produk yang disertai Nama Tempat) dalam Kerangka Hukum Nasional dan Hukum Internasional*," Jurnal Hukum

[10] Rizka Rizkiana, *Divestasi Dalam Perubhan Kontrak Karya Menjai Izin Usaha Pertambangan Khusus*, Badamai Law Journal, *Vol. 5, Issues 2, September 2020,h.289-306*

[11] Janedjri M. Gaffar, "*Kedudukan, Fungsi dan Peran Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia",* makalah dalam Seminar Nasional Pancasila, Surakarta, 17/10/2009, tersedia pada https://www. mkri.id/public/ content/ infoumum/ artikel/pdf/ makalah 17_oktober_2009.pdf, h. 1.

supervision (toezichthoudensdaad) for the greatest possible goal of people's prosperity.[12]

Furthermore, Bagir Manan said that these two conceptions cannot be separated from one another. Both are a single systematic unit. The right to control the State is an instrument (instrumental in nature), while being used for the greatest possible prosperity of the people is an objective (objective).[13]

Regarding the government in managing natural resource assets that have economic value, it can be found in Article 33 of the 1945 Constitution which explains as follows:

1) The economy is structured as a joint venture based on the principle of kinship.
2) The branches of production which are important for the state and affect the livelihood of the people at large are controlled by the state.
3) Earth, water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people. In the development of the Indonesian constitution, after several amendments to the 1945 Constitution, this Article received the addition of two new paragraphs, namely:
4) The Indonesian economy is organized based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.
5) Further provisions regarding the implementation of this article are regulated in the law.

The addition of these two paragraphs is an accommodation of provisions regarding economic democracy contained in the Elucidation of the 1945 Constitution which has been deleted. The elucidation of Article 33 states that:[14] "In Article 33 it states the basis of economic democracy, production is carried out by all, for all under the leadership or ownership of community members. It is the welfare of society that takes precedence, not the prosperity of an individual."[15]

The constitutional basis for the management of natural resources in the history of independence was implemented or set forth differently, as will be read in the legal policies on mineral and coal mining. Even if they are different, this is actually part of the ongoing dynamics in responding to situations and challenges which certainly will not be the same in every era. Likewise, even if something doesn't change, then it also shows the continuity or stability of the legal order in dealing with mining.[16]

Along with this shift in authority, various problems occurred in the granting of mining permits. Indirectly, the delegation of authority has an impact on overlapping mining licenses, both vertically and horizontally. The overlap of permits for mining, forestry and plantations is a portrait of the poor system of permits for land use in Indonesia. Overlapping licenses in the mining sector occur in mining business permits (IUP); between IUP and customary land; also between IUP and other land use areas.[17]

This overlapping of IUPs in the mining sector and across sectors has caused many losses to the state, such as social conflicts, not maximizing state revenues from both tax and non-tax revenues, and hampered economic activity in these sectors (mining, forestry, plantations). The issuance of Law Number 4 of 2009 concerning Mining has become a momentum for renewal of Indonesian mining law.

These regulations have different characteristics. It depends on the conditions at the time the regulation was formed. The legal politics of forming statutory regulations is very contextual. The influence of the political, economic and social atmosphere will be an aspect that influences the mood in the formulation of laws and regulations.[18]

Along with the existence of regional government authority in mining management, damage to environmental functions is also increasingly common.[19] From the regulatory aspect, there are actually instructions and directions on how mining activities should be carried out. However, perspectives and orientations regarding decentralization and regional autonomy which are limited to the existence of regional government authority and income distribution, have

[12] Putusan Mahkamah Konstitusi Nomor 001-021-022/PUU-I/2003, h.334

[13] Manan, Bagir, "*Bentuk-bentuk Perbuatan Keperdataan yang dapat Dilakukan Oleh Pemerintah Daerah*", Bandung : Majalah Ilmiah UNPAD No. 3, Vol. 14, 1986

[14] Arif Firmansyah, "Penafsiran Pasal 33 UUD 1945 dalam Membangun Perekonomian di Indonesia", Syiar Hukum, Vol. 13, No. 1 (2012), 266-267

[15] Salinding, Marthen B. "*Prinsip Hukum Pertambangan Mineral dan Batubara yang Berpihak kepada Masyarakat Hukum Adat*".*Jurnal Konstitusi*, 16, 1 (2019): 148-69. DOI: 10.31078/jk1618

[16] Sitompul, Martin. "Mendulang Sejarah Tambang Nusantara". ttps://historia.id/ekonomi/articles/mendulang-sejarahtambang-nusantara-/2017 Diakses 2/5/2023.

[17] Redi, Ahmad. *Hukum Energi: Konsep, Sejarah, Asas, dan Politik Hukum*.Depok: Rajawali Pers, 2020,h.10

[18] Hayati, Tri. *Era Baru Hukum Pertambangan di Bawah Rezim UU No. 4 Tahun 2009.* Jakarta: Yayasan Obor Indonesia, 2015,h.49

[19] Erwiza Erman,"*Aktor, Akses, dan Politik Lingkungan di Pertambangan Timah Bangka*", *Masyarakat Indonesia*, 36, 2 (2010), h. 72

resulted in efforts to exploit potential mineral and coal resources in the regions with the aim of obtaining additional income.

2. A Special Mining Business Permit Provides More Legal Certainty and Justice for Both Parties, Compared to a Contract of Work

Mining issues particularly concern gold mines as an example mining company PT. Freeport Indonesia, which is located in Mimika Regency, Papua, is currently a hot legal issue. The change from a Contract of Work to an IUPK has resulted in a change in the existence and position of PT. Freeport Indonesia with the Government of Indonesia.

Because if it is based on a contract (agreement), the position of the two is at least in an equal position because it is based on the existence of rights and obligations. However, on the contrary, if you use an IUPK, then the position of the Government of Indonesia will be higher because it is positioned as the party authorized to issue permits, because full control of the IUPK lies with the full authority of the Government.

Because if it is based on a contract (agreement),[20] the position of the two is at least in an equal position because it is based on the existence of rights and obligations. However, on the contrary, if you use an IUPK, then the position of the Government of Indonesia will be higher because it is positioned as the party authorized to issue permits, because full control of the IUPK lies with the full authority of the Government.

The change from a Contract of Work to an IUPK has resulted in a change in the existence and position of PT. Freeport Indonesia with the Government of Indonesia. Because if it is based on a contract (agreement),[21] the position of the two is at least in an equal position because it is based on the existence of rights and obligations. However, on the contrary, if you use an IUPK, then the position of the Government of Indonesia will be higher because it is positioned as the party authorized to issue permits, because full control over the granting of IUPK lies with the full authority of the Government.

The change from the Contract of Work to an IUPK does not solely lie in the implication problem regarding the position between the Government of Indonesia and PT. Freeport Indonesia is experiencing changes. The legal issue also lies in the issue of whether the change implies a violation of the principles or principles of a contract or agreement made and agreed upon as known as the sanctity of contract and the principle of good faith in contracts. - civil contract[22]. Given that these changes occurred before the end of the contract of work from PT. Freeport in 2021, so it seems that there has been a termination of the contract of work when the agreement or contract was still ongoing to later become an IUPK.

Even though basically every contract or agreement according to law is binding as a law for those who make it, it cannot be changed in any way except with the agreement of the two parties who are previously bound. This basis also gave birth to and is known as the principle of binding force (pacta sunt servanda).[23] Changes in the Contract of Work to Special Mining Business Permits (IUPK) if one looks closely, it is not only the legal issues as stated above but also the issue regarding the obligation to divest shares of 51% (fifty one percent) which after all this time has never been realized.

Even though actually based on the applicable provisions, the divestment of shares of 51% (fifty one percent) of PT. Freeport to the Government of Indonesia has been enforced since 2011 ago. Thus, in this matter, according to the author's assessment, there is a blurring of legal norms in relation to the implementation of the statutory provisions regarding the change from the Contract of Work to the Special Mining Business Permit (IUPK) for PT. Freepot Indonesia in relation to the divestment of shares as mandated by Law No. 4 of 2009 concerning Mineral and Coal Mining (Minerba).

However, with the enactment and enactment of Law No. 4 of 2009 concerning Mineral and Coal Mining (Minerba) which replaced Law No. 11 of 1967, there was a shift in the scheme or form of arrangement from originally being based on a Contract of Work to a Special Mining Business Permit (IUPK). Thus the implementation of the operations of foreign companies (including PT. Freeport Indonesia) based on the Contract of Work (KK) has been going on for approximately 42 (forty two) years.[24]

This change, of course, has also brought changes in the legal relationship between the Government of Indonesia and PT. Freeport Indonesia. From the side of the Government of Indonesia, these changes have certainly brought a positive climate in the management and empowerment of natural resources after all this time the government's position has

[20] Salim H.S., *Perkembangan Hukum Kontrak Innominat,di Indonesia*, Cetakan ke tiga, Jakarta, Sinar Grafika, 2005,h. 63

[21] Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang bagi Para Pihak dalam Perjanjian Kredit di Indonesia*, Institur Bankir Indonesia, Jakarta. 1993,h.34

[22] Ridwan Khairandy, *Hukum Kontrak Indonesia dalam Perspektif Perbandingan*, 2016, FH UII Press, Yogyakarta

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been considered to be powerless to the fullest in utilizing its authority in the management of natural resources which is very related to the livelihood and welfare of the people. Indonesia. However, on the contrary for foreign companies such as PT. Freeport Indonesia, this change has had a significant impact and is considered to have disturbed the comfort of PT. Freeport Indonesia has been conducting its mineral mining business based on the Contract of Work.

Apart from the assessment stated above, what is clear is the regulation of the mineral mining business in general and the arrangements regarding divestment issues in particular caused by the change in the Contract of Work regime to the licensing regime in the Special Mining Business Permit (IUPK) from the start until the payment is made. PT. Inalum[25] to Freeport McMosran Inc (FCX) and Rio Tinto, to buy part of FCX's shares and Rio Tinto's participating interest in PT. Freeport Indonesia has never been free from controversy and inconsistency.

In the case of PT. Freeport Indonesia,[26] government consistency is needed in carrying out the mandate of Law No. 4 of 2009 and all implementing regulations should not cause inconsistencies that will lead to legal uncertainty. This was confirmed by Enny Sri Haratati, Director of the Institute for Development of Economics and Finance (INDEF), who[27] stated that regulations related to mining are almost inconsistent with the Minerba Law.

Even though the Minerba Law is in accordance with the constitution, the implementing regulations often seem to 'trick' in practice in the mineral and coal mining sector. In contrast to Ahmad Redi who stated that the arrangement for the divestment of shares in the mineral and coal mining sector as stipulated in Law No. 4 of 2009 and PP No. 23 of 2010 as amended by Government Regulation No. 24 of 2012 is still incomplete and fulfills the requirements in the formation of laws and regulations related to the substance of the regulation on share divestment, creating a legal vacuum.

Conversely, consistency will certainly give birth to legal certainty. This consistency will also be related to benefits to the state in terms of economic empowerment in accordance with the mandate of Article 33 of the 1945 Constitution. Explicitly in laws and regulations which result in the existence of binding obligations for every foreign shareholder in the mineral and coal mining sector is based on the fact that the fact that there is a need to control foreign capital in Indonesia so that the state, in this case the government, has more control over foreign capital in Indonesia.

IV. CONCLUSION

The change in the Contract of Work to a Special Mining Business Permit (IUPK) has brought legal consequences to the existence of PT. Freeport Indonesia in the field of share divestment, namely as an obligation that must be carried out without exception if PT. Freeport Indonesia still wants its mineral mining business to continue with all the requirements. The Indonesian government must have a firm stance in the mining business management policy as a sovereign country towards foreign companies making investments to comply with and comply with applicable laws and regulations without harming both parties and always be committed and consistent with the objectives of the mining business management policy by refers to Article 33 of the 1945 Constitution which focuses on the welfare of the people in particular and the Indonesian state in general.

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