

FOREIGN SHARE OWNERSHIP LIMITS IN THE BUSINESS FIELD OF MINERAL AND COAL MINING ON PEOPLE'S WELFARE

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Abstract

Natural Resources as an unrennewable resources are a gift from God Almighty and owned by the Indonesian people, according to Article 33 paragraph (3) of the 1945 Constitution, and their management must be used to realize people's welfare. In practice, the management of mineral and coal mining is carried out by involving foreign investors who require security guarantee for their business and investment. This research aims to answer the problem regarding setting limits on foreign share of ownership in the mineral and coal mining business sector in Indonesia and its implementation. This problem is then used as a basis for consideration to realize policies that have legal certainty to support efforts to realize people's welfare. This study uses two theories, namely the purpose of law (Gustav Radburch) and the theory of the legal system (Lawrence Friedman). The research method used is normative juridical with empirical juridical support.

The findings of the research show that in enforcing limits on foreign share ownership there is still law smuggling, for example through borrowing names or nominees to secure the interests of foreign investors even though normatively they do not fulfill the legal terms of agreement as stipulated in article 1320 of the Civil Code. For investors the nominee agreement is a legal solution to ensure the security of investment in the mining sector in Indonesia. Therefore, the state needs to carry out supervision and law enforcement so that limitation on foreign share ownership can be implemented in accordance with the applicable laws and regulations. So that the purpose of exploiting mineral and coal mining for the welfare of the people in the mining sector can be realized and in line with the constitutional mandate of Article 33 paragraph (3) of the 1945 Constitution.

Keywords: *Nominee Agreement, Mining, Society's welfare.*

Abstract

Sumber daya alam sebagai *unrennewable resources* yang merupakan anugerah Tuhan dan dimiliki oleh bangsa Indonesia, sesuai konstitusi Pasal 33 ayat (3) Undang Undang Dasar 1945 pengelolaannya harus digunakan untuk mewujudkan kesejahteraan rakyat. Dalam pelaksanaannya, pengelolaan pertambangan minerba dilakukan dengan melibatkan investor asing yang memerlukan jaminan keamanan bagi bisnis dan investasinya. Penelitian ini bertujuan untuk menjawab masalah mengenai pengaturan batasan kepemilikan saham asing pada bidang usaha pertambangan mineral dan batubara di Indonesia serta pelaksanaannya. Permasalahan itu selanjutnya dijadikan dasar pertimbangan untuk mewujudkan kebijakan yang berkepastian hukum guna mendukung upaya mewujudkan kesejahteraan rakyat. Penelitian ini menggunakan dua teori yaitu tujuan hukum (Gustav Radbruch) dan teori sistem hukum (Lawrence Friedman). Adapun metode penelitian yang digunakan adalah yuridis normatif dengan dukungan yuridis empiris.

Temuan hasil penelitian menunjukkan bahwa dalam menegakkan batasan kepemilikan saham asing masih terdapat penyelundupan hukum, contohnya melalui pinjam nama atau *nominee* guna mengamankan kepentingan investor asing meskipun secara normatif tidak memenuhi

syarat sah perjanjian sebagaimana diatur dalam Pasal 1320 Kitab Undang-Undang Hukum Perdata. Bagi investor, *nominee* merupakan solusi hukum guna menjamin keamanan investasi di bidang pertambangan di Indonesia. Oleh karena itu negara perlu melakukan pengawasan dan penegakan hukum agar batasan kepemilikan saham asing dapat dilaksanakan sesuai dengan peraturan perundang-undangan yang berlaku. Sehingga tujuan dari pemanfaatan pertambangan mineral dan batubara yaitu kesejahteraan rakyat di sektor pertambangan dapat terwujud serta sejalan dengan amanat konstitusi Pasal 33 ayat (3) UUD 1945.

Keywords: *Nominee Agreement*, Pertambangan, Kesejahteraan Rakyat.

A. Backgrounds

Indonesia is one of the largest owners of natural resources, especially mineral and coal in the world.¹ As a law country that adopts the concepts of a welfare state, Indonesia must utilize these natural resources to improve the welfare and prosperity of the Indonesia people.

Data on the results of investment realization for the fourth quarter of 2020, The Ministry of Investment/Investment Coordinating Board notes that the management of mining, especially mineral and coal, is still dominated by foreign:

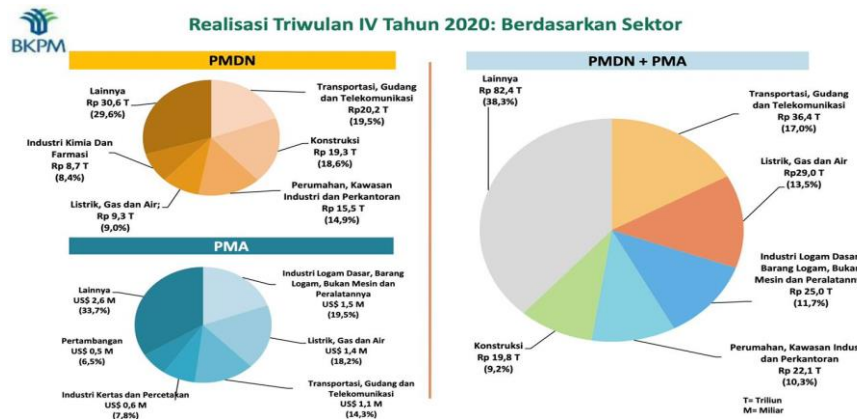


Figure 1.1. Realization of Quarter IV 2020: By Sector

Source: The Ministry of Investment/BKPM

From the figure it can be seen that investment in the mining sector is dominated by Foreign Investment. Majority foreign ownership of natural

1 Sony, "Indonesia is one of The Largest Mining producers in The World", www.feb.ugm.ac.id, <https://feb.ugm.ac.id/id/berita/2877-indonesia-salah-satu-penghasil-tambang-terbesar-di-dunia>, accessed February 18th 2021.

resources has caused the government to take strategic steps to save natural resources through divestment scheme of foreign ownership into shares of national companies.² The definition of share divestment is “Share Divestment is the number of foreign shares that must be offered for sale in Indonesia Participants.”³ In addition, the divestment of shares is also carried out to protect state sovereignty in the natural resources sector.

Responding to the limitation of foreign share ownership in mineral and coal mining business entities, foreign investors then appeared to use a borrowing name or nominee scheme to dominate share ownership.

By Normative Juridical, Indonesia has regulated the prohibition of borrowing names or nominees in the provisions of Article 33 paragraph (1) Law Number 25 of 2007 concerning Investment, (Law No.25 of 2007 concerning Investment), which reads: “Domestic investors and foreign investors who make investments in the form of a limited liability company are prohibited from making agreements and/or statements confirming that share ownership in a limited liability company is for and on behalf of other people.”

In addition, the provisions of Article 48 paragraph (1) Law Number 40 of 2007 concerning Limited Liability Companies, (Law No.40 of 2007 concerning Limited Liability Companies), stipulates that “Company shares are issued in the name of the owner.” This means that only individuals or business entities whose names are listed in the company’s articles of association are recognized as legitimate shareholders.

As a country that implements an open economic system⁴, investment in Indonesia is important in encouraging and increasing economic growth through national development. In the post -COVID 19- pandemic era,

² Muhammad Sood, 2019, Indonesia Environmental Law, Sinar Grafika, Jakarta, page. 172.

³ According to Article 1 Point 1, Regulation of the Minister of Energy and Mineral Resources Number 09 of 2017 concerning Procedures for Divesting Shares and Mechanisms for Determining the Price of Divestment Shares in Mineral and Coal Mining Business Activities.

⁴Economic System and an Open Trade System is basically based on the Neo Colonial Economic Tradition. Mas Rahmah 2020, Investment Law, Kencana, Jakarta, page. 255.

investment support, especially foreign investment, is urgently needed not only to increase the distribution of development and its results, but also to maintain national stability. In its implementation, these activities require investment as a supporting facility. Thus, investment policy, both domestic and foreign capital, is an integral part of the national development policy. The direction is, to be able to create a conducive climate especially for foreign investors to be genuinely interested in investing in Indonesia.

From the identification of the problems above, the problems are formulated as follows:

1. How is the setting for limits on foreign share ownership in the mineral and coal mining business sector in Indonesia?
2. How is the implementation of setting limits on foreign share ownership in the mineral and coal mining business sector in Indonesia to realize people's welfare?

Literature Review

Gustav Radbruch taught that law must contain three basic values, namely: The Value of Justice or the Philosophical Aspect; The Value of Certainty or The juridical Aspect; The Value of Expediency or The Sociological Aspect. Every regulation must be validity reversible in terms of these three basic values.⁵

Lawrence Friedman says:⁶

“Legal system bring to mind not an abstract set of norms, but a working process, a breathing, active machine. The legal system is behavior, movement, demand, and response. Implicit in the way we talk and think about law is general, rather abstract picture of process. When someone sets the process in motion, we expect “the law” to react in a definite, patterned, nonrandom way. The legal system is part of society, and touches life at almost everything.”⁷

⁵ Adji Samekto, 2015, *The Shift In Legal Thought from The Greek era Towards Post Modernism*, Constitution Press, Jakarta. page. 77.

⁶ Look at Lawrence Friedman, 1977, *The Legal System: A Social Science Perspective*, Russel Sage, New York, page. 11-16.

⁷ Lawrence M. Friedman, *Law and Society, An Introduction*, Pretince Hall, Inc, Englewood Cliffts, N.J. 07632, 1977, page. 5,7,8. In Stefanus Laksanto Utomo, *Samin Community Legal Culture*, 2013, Alumni, Bandung, page. 64-65.

Lawrence Friedman states that the effectiveness and success of law enforcement depends on three elements of the legal system.⁸ The legal system is composed of 3 (three) components, namely Legal Substances, Legal Structure, and Legal Culture. As a system, the inherent characteristics of the legal system are Input, Process and Output. The essence of a system is its way of turning inputs into outputs.

B. Discussions

Setting limits on foreign share ownership in the mineral and coal mining business sector in Indonesia

As one of the largest producer of natural resources in the world, the state has full authority over natural resources. The constitution confirms that control of natural resources is in the hands of the state. This is stated in Article 33 paragraph (3) of the 1945 Constitution, herein after referred to as 1945 Constitution, which reads “Earth and water and the natural resources contained within are controlled by the state and used for the greatest prosperity of the people.”

The substance of the right to control by the state has implications for: First, “The state controls the land, water and natural resources contained within. The natural wealth contain within, in this research is understood as minerals or mining materials which are one of the national natural assets. Minerals are also a natural resource.”⁹ Second, “earth, water and the natural resources contained within in the form of minerals are used for the greatest prosperity of the people. The state’s right to control or state control rights is a concept based on the organization of power from all the people.”¹⁰ Both aspect of these rules cannot be separated from one another, the two of them are systematic

⁸ *Ibid*, page. 123.

⁹ Abrar Saleng, 2004, Mining Law, UII Press, Yogyakarta, page. 31.

¹⁰ John Salindebo, 1987, Land Problems in Development, Jakarta, page. 170. In Abrar Saleng, 2004, Mining Law, UII Press, Yogyakarta, page. 32.

unit. State control rights are instruments or instrumental in nature, while being used for the greatest possible prosperity of the people is the goal or the objectives.¹¹

The existence of the state's right to control and the existence of foreign domination in the management of natural resources underlies the setting limits on foreign share ownership. Limitation on foreign share ownership in Indonesia are regulated through a share divestment scheme regulated in Article 112 paragraph (1) of Law Number 3 of 2020 concerning Amendments to Law Number 3 of 2009 concerning Mineral and Coal Mining, which reads "Business entities holding Productions Operations (Izin Usaha Pertambangan/IUP) or Special Productions Operations (Izin Usaha Pertambangan Khusus/IUPK) at the stage of Production operation activities whose shares are owned by foreigners are required to divest share of 51% (fifty one percent) in stages to the Central Government, Regional Governments, BUMN, regionally owned enterprises, and/or national private enterprises."

Further in Article 2 paragraph (1), Regulation of Minister of Energy and Mineral Resources Number 43 of 2018 concerning amendments to Regulation of Minister of Energy and Mineral Resources Number 09 of 2017 concerning Procedures for Divesting Shares and Mechanisms for Determining the Price of Divestment Shares in Mining Business Activities Minerals and Coal, hereinafter referred to as Minister of Energy and Mineral Resources Number 43 of 2018 concerning Procedures for Divestment of Shares, which reads: "Holders of Production Operations (Izin Usaha Produksi/IUP) and Special Production Operations (Izin Usaha Khusus/IUPK) in the context of Foreign Investment, after 5 (five) years since production are required to divest shares gradually, so that in the tenth year the shares are at least 51% (fifty one percent) owned by Indonesian participants."

¹¹ Bagir Manan, "Principles, Procedures and Techniques for Compiling Legislation and Policy Regulations", Papers, Department of Mines and Energy", Jakarta, 1994, page. 6-7. In Abrar Saleng, *Ibid*.

The existence of limits on foreign share ownership is a form of sovereignty in the field of natural resources with the aim of managing mineral and coal mining to improve people's welfare. In reality, The Mining Advocacy Network Legal Aid Institute, commonly known as JATAM, noted that throughout 2020 there were 45 cases of mining conflicts, including environmental pollution and destruction (22 cases), land grabbing (13 cases), criminalization of residents who refused mining (8 cases), and termination employment relationship (2 cases). Of the total number of conflicts, there were 13 cases involving military and police officers.¹² The still existence of conflicts in the mining sector is proof that mining management has not been able to maximize the phrase "Natural Resources for the welfare of The People". Although constitutionally the objective of managing natural resources is to provide for the greatest prosperity of the people, but the prosperity of "certain groups" is an undeniable reality in the management of natural resources.¹³

Harmonization between the state's interests in realizing people's welfare without having to liberalize mining and also achieving economic benefits by foreign mining companies working on mining in Indonesia can be harmoniously established. The dominance of foreign companies does not necessarily mean "to colonize" third world countries through the strength of their capital, besides that host countries can be open to foreign investment that will enter their country.¹⁴

Limits on foreign share ownership through a share divestment scheme regulated in Article 112 paragraph (1) Law Number 3 of 2020 concerning Amendments to the Mineral and Coal Law. This provision is in line with Article 33 paragraph (3) of the Constitution which contains the philosophical foundation of natural resources, which is natural resources which are a gift

¹² Muh. Jamil and Merah Johansyah, "2020 Is The Year of Ijon Harvesting Politics of Mining, Criminalization that Ends in Disaster", *jatam.org*, <https://www.jatam.org/2020-adalah-tahun-panen-ijon-politik-tambang-kriminalisasi-hingga-berujung-bencana>, December 17th 2021.

¹³ Ahmad Redi, 2014, Indonesian Mining Law (Mining for The Prosperity of The People), Gramata Publishing, Jakarta, page. 32.

¹⁴ *Ibid.*

from God Almighty and owned by the Indonesian People must be utilized for the welfare of The Indonesian people. Based on this basis, foreigners and foreign business entities investing in mining cannot own 100% (one hundred percent) shares in mining business entities in Indonesia. Ownership of natural resources by the Indonesian people is collective, meaning that natural resources produced by an area do not necessarily belong to the area where these natural resources are located. But these natural resources belong to all Indonesia people from Sabang to Merauke.

In macroeconomic perspective, the mineral and coal mining sector is included in the primary industry category because it obtains raw materials from nature. Complying with the regulatory framework, the minerals and coal mining sector so far has been able to contribute through foreign exchange earnings from taxes, non tax-revenue (PNPB) and royalties. In addition, this sector has a number of multiplier effects, which are creating jobs, improving the community's economy and accelerating the development process, especially development in mining-producing areas. This is in line with Gustav Radbruch's theory of law objectives that law must have a goal of justice, benefit and legal certainty.

Implementation of setting limits on foreign share ownership in the mineral and coal mining business sector in Indonesia to realize people's welfare

Implementation of limits on foreign share ownership in the mineral and coal mining business sector is still experiencing obstacles, for example through borrowing names or nominee. This happens because there is no supervision of the implementation of limits on foreign share ownership or in law enforcement. By borrowing names or nominees, foreign investors become the dominant party or share controller. Whereas Indonesian citizens or local companies whose names are registered in the company's articles of association are only nominees and do not have voting rights, the rights to sell

shares, the rights to receive dividends. All of this rights have been transferred to foreign investors as beneficial owners. For foreign investors, the use of nominee is not intended to control the resources belong to the Indonesian nation, but rather is intended to secure their investment and the mining business activities they manage.

Actually, the limitation of foreign share ownership through a foreign share divestment scheme of 49% (forty nine percent) in the mineral and coal mining sector is a form of alignment with national interest. In addition, divestment is one of the key clusters in Law Number 3 of 2022 concerning amendments to the mineral and coal law, Even though the implementation is still not optimal due to limitations in the field of supervising the implementation of divestments, as well as the absence of law enforcement for stakeholders who violated this provisions. The absence of supervisors and law enforcement against divestment is a legal loophole for foreign investors to practice borrowing names or nominees. The negative impact of practice of borrowing names or nominees in the mineral and coal mining sector can cause, among others:

1. The control of mineral and coal mining company lies with foreign investors, so that company decisions are in favor of investors' interests. Company decisions on environmental compliance, compliance with Community Empowerment Program (PPM), and compliance with policies on using local labor.
2. Natural resources benefits are enjoyed by foreign investors.
The benefits of managing natural resources are enjoyed by foreign investors and will be brought back to their countries of origin. During the COVID-19 pandemic, the state hopes that dividends obtained from mineral and coal mining business will be reinvested domestically. By reinvesting into the country, it is hoped that it will be able to improve national economy. If foreign investors use

nominee agreement scheme, the dividends will be brought back to their country of origin.

The principles in divestment include the principle of Benefit, the principle of Freedom of Contract, the principle of consensualism, the principle of Pacta Sunt Servada, the principle of Good faith, the principle of Personality and the principle of Accountability.¹⁵ When summarized, the important point of divestment is the principle of benefit and the principle of good faith, namely that the divestment must be carried out in order to create as much prosperity as possible for all Indonesian people and the implementation must be carried out responsibly based on applicable law and on the other hand respecting applicable law or the agreement entered into.¹⁶

To safeguard national interests, it is necessary to divest shares of foreign investment, while in outline there are 2 (two) objectives for the divestment, which are:

1. Transfer of control over natural resources from foreign companies to the state.

Mining business entities in the form of foreign investment, in which the majority of the shareholders are foreign investors, all decisions made by the holders are in favor of the interests and benefits of the shareholders. With the divestment, the majority of shareholders are national companies in the form of State-Owned Enterprises (BUMN), Regional Owned Enterprises (BUMD) and national private companies. As a national company, in making decisions through the General Meeting of Shareholders (GMS) it is more in favor of the interests of the nation. Transfer of benefits from foreign companies to the state.

2. Transfer of benefits from foreign companies to the state.

¹⁵ H. Salim HS and Erlies Septiana Nurbani, 2014, Implementation of Legal Theory in Thesis and Dissertation Research, Raja Grafindo Persada, Jakarta, page. 9-31.

¹⁶ Academic Paper of the Bill on Amendments to Law Number 4 of 2009 concerning Mineral and Coal, page. 9-13.

If a divestment is carried out and the majority shareholder is the government through State-Owned Enterprises (BUMN), Regional Owned Enterprises (BUMD) or a national private company, the dividends from operations will remain in Indonesia.

Substantively, the regulation regarding limits on foreign share ownership through a share divestment scheme however has a clear legal basis and rationality of benefits. This is in line with Roscoe Pound's opinion¹⁷ that law function as a tool of social engineering. As an instrument of social reform or an agent of change, law must be in accordance with the goals of social justice so that the law can be obeyed by society.¹⁸ Good law is a law that can be accepted by society without coercion. In this case, the law is considered as a necessity. It means, a good law is constructed in legal substance that can be accepted and implemented by the legal structure and supported by legal culture. However the legal culture can only be formed if there is an understanding of society.

In terms of implementation, the regulations of limits on foreign share ownership in mineral and coal mining business entities up until now in Indonesia has not yet been implemented according to regulations. This is evident from the weak supervision of the implementation of share divestments. Weak supervision also allows the practice of borrowing names or nominees. In addition, the lack of supervision up to the annual Letter of Notification (SPT) report from shareholders is also an obstacle in efforts to realize the effectiveness of law enforcement in the mineral and coal mining sector.

Referring to Lawrence Friedman's opinion, that "the effectiveness and success of law enforcement depends on three elements of the legal system,

¹⁷ Roscoe Pound, 1972, *An Introduction to the Philosophy of Law*, Yale University Press. In Abrar Saleng, 2013, *Capita Selektta Natural Resources Law*, Membumi Publishing, Makasar, page. 13.

¹⁸ Tyler. Room R., 2006, *Why People Obey the Law*, Princeton University Press, Princeton and Oxford, New Jersey, page. 14. In Abrar Saleng, 2013, *Capita Selektta Natural Resources Law*, Membumi Publishing, Makasar, page. 13.

with inherent characteristics of the legal system, namely the presence of input, process and output. Meanwhile, the core of the legal system is how to turn input into output.” The theoretical view can be explained as follows:

1. Legal Substance

In term of substance, provisions regarding limits on foreign share ownership in mineral and coal mining business entities have been regulated through a hare divestment scheme. In addition, there are provisions regarding the prohibition of borrowing names or nominees. Provisions regarding limits on foreign share ownership are a form of constitutional policy that upholds state sovereignty in the field of natural resources. The limitation of foreign share ownership must be obeyed by all stakeholders. Meanwhile the provisions regarding the prohibition of borrowing names or nominees is a state policy to protect national interests.

2. Legal Structure

In terms of legal structure, the problem is how effectively these law enforcement officials carry out their duties and functions. The legal structures related to divestment provisions include officials from the ministry of energy and mineral resources c.q. Directorate General of General Law Administration (AHU), judiciary, regional legal institutions and regulators. Meanwhile, the legal structures related to the rules regarding the prohibition of nominee agreements are the Ministry of Investment/BKPM and The Ministry of Law and Human rights c.q. Directorate General of General Law Administration (AHU), judiciary, agencies and regulators. In practice, officials from the ministry of Energy and Mineral Resources, Ministry of Law and Human Rights and the Ministry of Investment/BKPM have not functionally supervised and enforced the law on divestiture provisions or the ban on nominee agreements. As they should.

3. Legal Culture

Legal culture is an element that has a key role and is a complement to legal substance and legal structure. The legal culture in the perspective of investment in mining business entities, is a combination of the legal culture that exists in the community around the mine, the government, business people and foreign investors.

The legal culture inherent in and brought by foreign investors from their countries such as china, is naturally different from the legal culture brought by investors from Japan, Korea, or the United Kingdom (UK) and other European countries. The characteristics of the investor's legal culture affect the form of business, management, interaction processes with other stakeholders. In general, Chinese investors are quicker to make decisions, more willing to take risks, but they also have weaknesses in the planning aspect, so they often change policies halfway through.¹⁹

C. Conclusions and Suggestion

Constitutionally, natural resources belong to Indonesia nation, are controlled by the state and are used for the greatest prosperity of the people. For its implementation, especially to maintain state sovereignty in the natural resources sector, limits on foreign share ownership in the mineral and coal mining business sector are regulated through a share divestment scheme. In practice, the implementation of limitation on foreign share ownership through a share divestment scheme is not supervised and there is no law enforcement so that borrowing names or nominees occurs.

The government needs to establish appropriate policies regarding limitation on foreign share ownership in order to support economic recovery through accelerating national development after the COVID-19 pandemic. For

¹⁹ Results of Limited Interview with Riyatno, deputy of Cooperation of the Ministry of Investment/BKPM on January 10th 2022.

foreign investors, the use of nominee is not intended to control the resources belonging to the Indonesia people, but rather to secure their investment and the mining business activities they manage.

Effective law enforcement against the practice of nominee agreements in mineral and coal mining business entities can be implemented through:

1. Written Reprimand

A written warning is given to companies that do not comply with the provisions on divestment of shares and do not carry out the re-investment of dividends obtained from mining business results.

2. Temporary Suspension of Activities

Temporary suspension of activities is carried out if a written warning, including administrative sanctions, is not carried out by the mineral and coal mining business entity that's commit a violation. The temporary suspension is enforced accompanied by a certain period of time, namely until when the activity is stopped.

3. License Revocation

Revocation of permits is carried out if after a period of temporary suspension of activities it is found that the mineral and coal mining business entity has not or has not carried out its obligations.

Based on the above analysis, effective supervision and law enforcement on the provisions limiting foreign share ownership through divestment schemes can be effective and can realize the constitutional mandate of Article 33 paragraph (3) of the 1945 Constitution, which is to be used for the greatest prosperity of the people.

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