

Study of Stock Ownership Nominee Agreement in Mining Business to People's Welfare That Is Aligned for Sustainable Development Goals

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Abstract: The goal for Limitation of Foreign Stock's ownership to protect natural resources in Indonesia is not yet optimal because of the existence of nominee agreement. Which is a form of law smuggling. So natural resources that should be benefiting for Indonesia people's welfare, in reality it is enjoyed by Foreign Investor. This research is a normatif juridical research using secondary data and doing inductive analysis. From the result of the research is concluded that law smuggling in stock ownership nominee agreement prohibition in mining field is still exist because there is no monitoring, control, field observation, evaluation and law enforcement for nominee agreement practices in mineral and coal mining up to beneficial ownership in establishment and operational of mineral and coal mining business. Therefore it is needed to make a regulation to monitor, supervise and doing law enforcement by The Energy and Mineral Resources Ministry (ESDM) through Monitoring, Conrolling, Field Observation and Evaluation System (P3LE) towards stock ownership nominee agreement practices in mining business so that the management of natural resources can be benefiting for people's welfare and Sustainable Development Goals (SDGs) is achieved.

1 INTRODUCTION

Since late of 2019 until now the world is going through COVID-19 Pandemic, this pandemic also have an impact for Indonesia Country, which is causing the increase of poverty in Indonesia in the yaer of 2020, as mention by Central Bureau of Statistics (BPS), that "The percentage of people lived in poverty on September 2020 was 10,19 percent, had increased 0,41 percentage point to March 2020 and increased 0,97 percentage point to September 2019." Also "Number of people lived in poverty on September 2020 is 27,55 Million People, had increase 1,13 million people to March 2020 and increased 2,76 Million people to September 2019" (BPS, 2021).

The Government is trying to hold back the spike in the poverty rate by doing all kind of efforts, one of them is to exploit natural resourcess, especially in mineral and coal area.

As we know Indonesia is one of the biggest mineral and coal producer in the world (FEB UGM, 2019). Moreover, the country's revenue from natural resources is also large, So that's why the country has to optimize the mastery and management of those

natural resources which will be used for the prosperity of the people.

Our constitution has already arranged the natural resources belong to Indonesia nation, this is listed in article 33 paragraph (3) 1945 Constitution which reads "Earth and Water dan Natural Wealth contained therein is shall be controlled by the state and used as much as possible for the prosperity of the people", As Gustav Radbruch's opinion that taught that law have to have three basic principles which are : the value of justice (philosophical aspect), the vaule of benefit (sosiological aspect) the value of certainty (juridical aspect). So that each rule must be returned his validity to those 3 basic principle (Marwan, M, 2014).

The State Property Rights "contains authority to manage, supervise and monitoring the management or cultivation of minerals and also contain the obligation to used it as much as possible for the prosperity of the people. The mastery by the country is held by the government" (H.S, Salim, 2014).

So the understanding of Natural Resources is controlled by the state is the state have the right to manage the natural wealth so it can be enjoyed by the people. Where the people is " the passion and final

goal of welfare state that must be realized by the state and Indonesia Government". Managing natural wealth is one of the way to achieve prosperity (Sutedi, A, 2012).

To gain a real result for the people's welfare, natural resources must be managed. Management and natural resources needed process where those management and utilization process is doing by business called mining. The definition of Mining according to Article 1 number 1 law Number 3 year 2020 about the change in Law number 4 year 2009 about mineral and coal mining (Change in Mineral and Coal Mining Law), "Mining is part or all activity in order to utilize and manage mineral or coal that include general investigation, exploring, feasibility study, construction, mining, manage and/or purifying or developing and/or utilizing, trasporting and selling, also activity after mine". As currently mineral and coal mining is under Energy and Mineral Natural Resources Ministry, Directorate General of Mineral and Coal (herein after refer to as EnMR Ministry, Coal & Mineral Dirgen).

Because the management process required big capital, newest technology and experts in mining field therefore foreign domination occurred in mining business. That's why, to give benefit to the people of Indonesia and to protect the country's sovereignty in Natural Resources area, the government limited foreign stock ownership in mineral and coal mining area up to maximum 49% (Forty Nine Percent) as arranged by Provisions of stock divestment Article 112 paragraph (1) Change of Mineral and Coal Law.

Currently has occurred stock ownership nominee agreement phenomenon in mining business to tricked the limitation of foreign stock ownership, by using Indonesian citizen name/s or Indonesia business entity.

Stock ownership based on nominee agreement is clearly a form of Law smuggling, both from the point of Criminal State Administration or Civil State Administration. Therefore nominee agreement is usually done through Privately Made Deed. In the big scale of mining, the process of making nominee agreement is a complex negotiation activity, in secret, time consuming and involved a lot of institution and profession. That's why the process of making nominee agreement needs to be monitored, controlled, observe in the field and evaluated by the government so Sustainable Development Goals (SDGs) is achieved, through monitoring system, controlling, Observation and Evaluation (P3LE).

2 METHODS (AND MATERIALS)

Based on the background above, the writer formulated problems such as :

1. How is the prohibition arrangement in the stock ownership nominee agreement in the establishment of mineral and coal mining business entity in Indonesia?
2. How is the ideal legal arrangements for stock ownership nominee agreement prohibition in mining business entity in order to achieve Sustainable Development Goals (SDGs) to create people's welfare?

2.1 Type of Research

This research is done in Legal studies domain. This research is Normatif Juridical Research. Normatif Juridical Research. Is a legal research that puts Law as a norm system building. Those norms among others are : principles, norms, rule of laws and regulations, agreements and doctrines (teachings), (Mukti, F & Yulianto, A, 2019). Normatif Legal Research by Soerjono Soekanto and Sri Mamudji is also said by the term Library Research (Soerjono, S & Sri, M, 2005).

2.1.1 Types and Data Sources

The Data Sources in Normatif Juridical Research is by researching library materials or secondary data (Dyah, S.O & A'an, E, 2018), that is data obtain from data, primary source book materials, rules, principles and concrete legal rules that apply in the Law system. All the rules, principles and that concrete legal rules are written rules (recorded rules) which is uphold by the country, can be found inside applicable laws and regulations (Teguh, P, 2019). Secondary law source include law books written by law experts, law dictionary, law encyclopedia, law journals, law dissertations, law thesis, law essay, law comments and court decision comments, etc (Dyah & A'an, 2018).

2.1.2 Data Collection Technique

Data collection technique is using library study which is secondary data collection technique; the source of the data is not from the people in person but from data or primary law source, for example; laws and regulations, books, documents and library materials or any other written materials which is related in an event or spesific activity related to problems formulated in this resaerch.

2.1.3 Analysis

This research using inductive analysis, by seeing specific things and look for a common things and generalized it.

3 RESULTS AND DISCUSSION

3.1 Arrangement for Stock Ownership Nominee Agreement Prohibition in Establishment and Operational Mineral and Coal Mining Business in Indonesia

3.1.1 Definition of Agreement

In deutch law, agreement or contract is called overeenkomst and agreement law is overeenkomstenrecht (C.S.T, Kansil, 1995). Agreement is the most important source that give birth to treaty. Treaty mostly come from agreement, however there are other sources that can give birth to treaty. Those other sources are laws. In article 1233 code of civil law, every treaty is made because there were approval, or because laws, means that there are treaty made from agreement and there are also treaty made from laws.

In article 1234 code of civil Law mention that every treaty is to give something, do something or to not do something.

Treaty or agreement have to qualify the legal terms of agreement where the legal terms is regulated in article 1320 code of civil law. Article 1320 code of civil law is the main instrument to tested the validity of a contract that made by both term which are (Agus Y.H, 2014):

- 1) agree; both term which ties itself together agree means approve or uniformly about main things that put in the agreement.
- 2) capable; to make an agreement in the principles, every adult person who have fully grown and has a healthy mind is capable according to law. In article 1330 code of civil law mention persons who do not qualify to make an agreement are :
 - a) person who is not an adult yet;
 - b) person that been put under efficacy;

- c) women set by law, and every person the law has forbid to make a certain agreement.
- 3) certain things, means something that is an object of an agreement. The object can be item/s that already exist or will exist (Danang, S &Wika, H.P. (2016)).
The object of the agreement can be item/s, service/s and dont do anything (Ratna A, (2014).
- 4) A halal cause; means the contents of the agreement cannot be something forbid by the law.¹

Agreement or contract according to its name divided into 2 (two) parts called a name contract (nominaat) and a nameless contract (innominaat). This classification is based in the name of agreement that listed in Article 1319 Code of Civil Law:²

- a. A name contract (nominaat)
Nominaat contract is a contract known in Code of Civil Law. Which include in the contract are buy and sell, change and exchange, rent and renting, civil partnership, grant, deposit counter, lease, borrow and borrowing, power of attorney, liability for debt, reconciliation, etc (H.S, Salim,2019).
- b. Nameless Contract (innominaat)
Innominaat contract is a contract that appear, grow and develop in the society. For example is a production sharing contract, joint venture, contract of work, construction contract, leasing, buy rent, franchise, surrogate mother, management contract, technical assistance contract, etc (H.S, Salim, 2019).

3.1.2 The Definition of Nominee Agreement

Basicly the concept of nominee agreement is not known in Continental European law system or Anglo Saxon that apply in Indonesia, Indonesia just recently know the concept of nominee agreement and is frequently used in several law transaction especially agreement after the growth of foreign investor around the year 1990 or so, and because foreign investor interest to invest their capital in Indonesia based on quite a large amount of profit and cheap labor wages (Endah, P, 2018).

Nominee agreement is included in innominaat agreement/contract and this agreement exist in

¹ Article 1337 Code of Civil Law, "A cause is forbidden if it is forbidden by the law or if it is in the contrary with decency or public order".

² Article 1319 Code of Civil Law, "Every agreement, that is have a specific name or doesnt have a certain name, submit to general rules that is include in this chapter or the previous chapter".

business world, exist and develop and used in everyday life.

In the agreement law in Indonesia the form of stock nominee agreement is innominaat agreement (H.S, Salim, 2003), or nameless agreement where Code of Civil Law is not regulating this nominee agreement.

The definition of Nomine according to Black Law Dictionary is “by the name of *or* under the name or designation of” (Campbell, H, 1979). Other definition according to Black Law Dictionary is “one who has been nominated *or* proposed for an office. One designated to act for another in his or her place” (Campbell, H, 1979). Used to mark an agent or representative sometimes is used more than to act for other party or as a receiver of scholarship from other party.

Nominee according to article 1 paragraph (6) Regulations of The Directorate General of taxes number PER62/PJ.2009 about Prevention of Misuses of Double Tax Avoidance, is person or entity that legally have (legal owner) a wealth and/or income for the benefit of or a mandate of a party which is actually become the wealth owner and/or based on the mandate of a party who actually enjoyed the benefit or income.

Stock ownership nominee agreement is a agreement made and approve by both parties (in this case is between the real owner of the stock [beneficiary] with a person which his/her name is used [ominee]), for the interests that wanted by one of the party for stock ownership in a Limited Liability Company (PT).

That stock nominee agreement is a written agreement between two parties where one of them agreed to do an act of law which made an impression to others (pretending), that party is the the stock holder or a director of a company, as for that act of law he/she done is actually for the benefit or interest of the other party.

3.1.3 Nominee Agreement Prohibition

Nominee agreement is prohibit in Investment Law, the prohibition can be found in Article 33 paragraph (1) Law Number 25 year 2007 about investment (Law Investment), which are:

- (1). Domestic investors and foreign investors who do investing in a form of limited liability company is prohibited to make an agreement and/or statement which emphasized that the stock ownership in that limited liability company is for and on behalf of other person.

Although in Article 33 Investment Law has already regulated about nominee prohibition, but in mining business there are still phenomenom of nominee agreement practices. That is because there is no monitoring and strict law enforcement from the government especially with nominee agreement phenomenom practices in establishment or operational in mining business. Where the government should be doing monitoring through Monitoring system, Controlling, Field Observation and Evaluation (P3LE), and also doing firm legal action for those offender or nominee agreement practicer.

3.2 The Establishment and Operational of Mining Business Entities in Order to Achieve Sustainable Development Goals (SDGs) to Create People’s Welfare

3.2.1 Establishment of Mining Business Entities in Indonesia

The concept that Limited Liability Company is a law entity gave birth to Limited Liability Company existence as an independent law subject, with a separate existence for the stock holders (Mulhadi, 2020). This thing is the one that makes a lot of investors choose Limited Liability Company as a busniess entity, because there is a differentiation between the company’s wealth and the stock holder’s wealth.

The definition of Limited Liability Company according to Article 1 number 1 Law Number 40 year 2007 about Limited Liability Company (Limited Liability Company Laws), said, “Limited Liability Company, herein after refereed to Limited Company is a legal entity which is a capital alliance, establish based on agreement, to do business activity with basic capital where whole of it divided into stocks and qualify the terms included in this laws and its implementing regulations”.

In the establishment of Limited Company is regulated in Limited Company laws about the Limited Company establishment procedures, Article 7 to article 14. It is said in Article 7 paragraph (1) Limited Company Laws, “Limited Liability Company is establish by minimum of 2 (two) person or more with Notarial Deed and made in Indonesian Language”, what is meant by “person” is an individual, Indonesian citizen or foreign citizen or Indonesian law entity or foreign law entity Mulhadi, 2020).

The provision for mining business entity in Indonesia beside based on Article 7 to Article 14 Limited Company Laws also have to follow rules and regulations that apply in mining sector.

But in reality there is a difference opinion between Public Notary as a general officials who brought out Limited Company Deed of Establishment. In a limited interview through *whatapps* as a media for communication, among others :

1. According to Notary Noviana Tansari, S.H., M.Kn, mining business entity establishment can be 100% foreign, but later on when the company/business entity have acquired Production Operation Mining Business License, it has the obligation to do stock divestment as regulated in:
 - a. Article 112 paragraph (1) Mineral and Coal law change about stock divestment, "The business entity that hold Mining License (IUP) or Special mining Business License (IUPK) on the stage of Operational production that it stocks is own by foreign is obligatory to do stock divestment amounting to 51% (fifty one percent) gradually to Central government, Regional Government, state-owned business entity, and/or national private business entity" which goal is to maintain Indonesia Sovereignty especially sovereignty in natural resources.
 - b. Article 2 paragraph (1), Energy and Mineral Resources Ministerial Regulation number 43 Year 2018 about change of Energy and Mineral Resources Ministerial Regulation number 09 Year 2017 about Stock divestment procedures and Fixed Stock Divestment Price Mechanism in mineral and coal business (herein after referred to as Energy and Mineral Resources Ministerial Regulation number 43 Year 2018 about Stock Divestment), about stock divestment, that is "The holder of Mining license (IUP) Operational production and Special mining license (IUPK) Operational Production in order for foreign investment, after 5 (five) years after production is obligatory to do stock divestment gradually, until tenth year it stock at least 51% (fifty one

percent) of it stock must belong to Indonesia participants.

2. According to Notary Buntario Tigris Darmawan, S.H., M.H since the establishment of mining business entity, maksimum of the foreign stock ownership is 49% (forty nine percent), according to provision Article 112 paragraph (1) Change of Mineral and Coal Laws and Article 2 Paragraph (1), Energy and Mineral Resources Ministerial Regulation number 43 Year 2018 about Stock Divestment). Because although the company is establish, if it doesnt meet the foreign requirement then the deed of establishment will be overruled by The Directorate General of Mineral and Coal, The Ministry of Energy and Mineral Resources.

According to the writer, in establishment of mining business entity have to refer to provision maximum limitation of foreign ownership which is 49% (forty nine percent) as stated in provisions that apply in mining area.

For an existing mining buiness entity which it foreign stock ownersip is 100%, that means according to currently divestment provision which exist in Article 112 Paragraph (1) Change of Mineral and Coal Laws about stock divestment juncto article 2 paragraph (1) Energy and Mineral Resources Ministerial Regulation No.43 Year 2018 about Stock Divestment, then those business entity must do stock divestment according to applicable regulations.

3.2.2 Mining for People's Welfare

The special features of a prosperous country is that the Government is responsible to create public welfare for their own people (H.R, Ridwan, 2014). According to E. Utrecht, "since a country actively involve in social association, then the government jobs more and more will become wide". The country's administration is given the responsibility to create public welfare (berstuurzorg), (Utrech, E, 1988).

The existence of "berstuurzorg" obligation bring a special consequences for the country's administration. To implement responsibility for the achievement of people's welfare, organize education to the people, and everything else well, needs free of will to act according to self initiative in state administration, especially in emergency administration, and more especially in emergency problem/s that suddenly appear and never occurred before, so a state institutions that has legislative power has never been made before Utrech, E, 1988).

Indonesia is one of the adherent of material rule of law country concept, who adopt welfare state country concepts, and implicitly can be found in general explanation of 1945 Constitution, and if you examine further the main concept of 1945 Constitution, we can conclude that Indonesia is a material law country or we can also said state welfare concept where the government has the absolute responsibility to advance public general welfare and to manifest social justice for all the citizen (Hadiyono, V, 2020).

In the natural resources field then the concept of welfare in Indonesia must correspond with Article 33 paragraph (3) 1945 Constitution, then natural resources especially mineral and coal must be manage through mining business and can gain benefit for the people's welfare.

3.2.3 Definition and Purpose of Sustainable Development Goals (SDGs)

The definition of Sustainable Development Goals as stated in Presidential Decree number 59 Year 2019 about Implementation of Achieving the Goals of Sustainable Development, Article 1 number 1, "Sustainable Development Goals (SDGs) is a document that contain global goals and objective from year 2016 up to year 2030."

SDGs has now enter its Fifth Year, since set on September 2015 in United Nations General assembly³ that attended by 159 Head of State, where SDGs is a 2030 Global Agenda, which is implemented by all the nations in the world (Bappenas, 2020).

In line with the formulation of SDGs in global level, Indonesia is also arranging The National Medium-Term Development Plan (RPJMN) year 2015-2019 and 2020-2024, so the substance that is inside SDGs has aligned with RPJMN which is a Nawacita explanation as Indonesia Republic President Mr. Joko Widodo's vision and mission (Bappenas, 2020). Nawacita is a National development Agenda which is poured in President and Vice President's Vision-Mission (Kumolo T & Tim, 2017) In general, National Development strategy underlined things such are: (1) development norm; (2) three dimensions development; (3) conditions need to be fullfileed so the development could take place; also (4) quick wins programs (Kumolo T & Tim, 2017).

The purpose of SDGs is a development that maintain the people's economy growth continuously, a development that maintain the quality of the

environment that guarantee justice and implementation of governance that is capable to maintain the growth of quality of life from one generation on to the next generation (Bappenas, 2020). SDGs is a global commitment and also national commitment in effort to make the people prosperous, that include 17 goals which are: (1) Without Poverty; (2) Without Starving; (3) Healthy and Prosperous Life; (4) Quality Education; (5) Gender Awareness; (6) Proper Clean water and Sanitazion; (7) Clean and Affordable Energy; (8) Decent Job and Economy Growth; (9) Industry, Innovation and Infrastructure; (10) Reduced Inequality; (11) Sustainable Cities and Residences; (12) Responsible Production and Consumption; (13) handling Climate Exchange; (14) Sea Ecosystem; (15) land Ecosystem; (16) Peace, Justice and Strong Institution; (17) Partnership to Achieve Goals (Bappenas, 2020).

4 CONCLUSIONS

Indonesia is one of the biggest natural resources producer in the world, then in managing it must have benefits for people's welfare. Therefore natural resources authority is held by the country, also the country limited the maximum of stock ownership. But that is tricked by foreign investors by making nominee agreement. The nominee agreement phenomenon is a form of Law smuggling and violated the country sovereignty in natural resources area.

That's why the process of making nominee agreement need to be monitored, controlled, observe in the field and evaluated by the government so Sustainable Development Goals (SDGs) can be achieved, through Monitoring system, Controlling, Field Observation and Evaluation (P3LE).

According to article 33 paragraph (3) 1945 constitution, natural resources management must have:

1. The value of Justice, that is fair that all natural wealth is given by The Almighty God and in Indonesia possession, not only belong to one area only;
2. The value of benefit, that is, the natural resources management must benefit for all the nation so that the recipient of the permit must pay taxes, royalty or non-tax revenue (PNBP) where all the money is used for the benefit of the people;

³ PBB (Perserikatan Bangsa-Bangsa).

- The value of certainty, that is, the government as the competent authority not just give permit to business entity that will manage mining, but also doing monitoring and law enforcement so SDGs is achieved.

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