

STATE REGULATION AND SOVEREIGNTY OVER THE DIVESTMENT OF FOREIGN SHARES AFTER CHANGES IN THE MINING LAWS

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ABSTRACT

State Sovereignty is used to make the rule of law in which the law is an incarnation of the will of the state. The law on the divestment of foreign shares of mineral and coal mining stipulated in Law No. 4 of 2009 concerning Mineral and Coal Mining, is considered insufficient to accommodate issues related to divestment, while Law No. 4 of 2009 on Mineral and Coal Mining, has now undergone changes with the issuance of Law No. 3 of 2020 on Mineral and Coal Mining. This study aims to find the regulation and sovereignty of the country against the divestment of foreign stocks after a change in mineral and coal mining laws. The research method uses normative legal research, with a statutory approach. The results showed that the country's sovereignty over the divestment of foreign shares is not only regulated in mining law but also regulated in investment law. State sovereignty over the divestment of foreign shares after a change in mineral and coal mining law is stipulated in Article 112 of Law No. 3 of 2020 concerning Mineral and Coal Mining and its implementing regulations, while the arrangement of submission of offers can be made by business entities holding Mining Business Licence (IUP Production Operations), Operation Production Special Mining Business Licence (IUPK Production Operations), Contact of Work (KK) and Coal Mining Concession Work Agreement (PKP2B). There is no time limit to apply the obligation to divest the first shares for foreign investment. The Indonesian party must provide an offer answer with a period of no later than 30 calendar days. Evaluation and negotiation of divestment share prices is conducted by independent assessors and the formation of divestment teams, while the share price of divestment is calculated using a comparison of market data and discounted cash flow.

Keyword: State Sovereignty, Divestment of Foreign Stocks, Mineral and Coal Mining, Indonesia.

INTRODUCTION

Sovereignty is used to describe the autonomy and power of the state to make the rules of law (national law) that apply in its territory and in sovereignty. It is also used to describe the power of the state to conduct international relations and other actions as the embodiment of its

sovereignty. Sovereignty is an important point of existence of a state, since only a sovereign state is willing and able to position itself in line with other states in the world.

Mac Iver mentions that sovereignty has three levels. The first one is the general will, meaning sovereignty is not the will of the state, but the will for the state, the will to defend it. The general will can be seen in a sense of obedience or a sense of heroism, in a willingness to accept the most class decisions or government decisions taken under the constitution. Thesecond is the holder of the highest sovereignty which means that the will of the state is the power that determines the politics or the direction of the state road at the last level. The third is holder in the legislative or governmental field which refers to sovereignty as an exclusive right, during the time given to the supreme power holder, to make generally applicable arrangements within the territory of his country, in written or unwritten form (Adolf, 1996).

In the concept of sovereignty, there is a principle of authority, namely freedom, power, or ability possessed by a person or a body to perform a legal action which can result in the effect, power, coercion, dominance, and control of others. Sovereignty is a constituent element in the formation of a state. This element arises as a result of the development of the capacity element to connect with other countries contained in the 1933 Montevideo confeder, and in international law.

When it is said that the country is sovereign, it is intended that the country has the highest power. The understanding of state sovereignty as the supreme power is what caused many misunderstandings. With this respect, Mochtar Kusumaatmadja postulates that the supreme power owned by the country is contrary to international law, especially relations between countries. Furthermore, international law is impossible to bind a country if it is the supreme power that does not recognize a higher power over it (Kusumaatmadja, 2010).

Sovereignty is the basic principle of order. It means that for its security, humans need a power that they obey together and which controls their actions for the sake of mutual peace, while law is the embodiment of the will of the state. The state creates law and the state is the only source of law that has sovereignty. This idea can be concluded in everyday people's lives that individual interests are always defeated by the interests of the state (Tanya, 2010).

Law Number 4 of 2009 concerning Mineral and Coal Mining in one of its articles has required foreign capital to divest shares to Indonesia of up to fifty percent of ownership shares. Share divestment in Indonesian law has been interpreted through Article 1 Paragraph (1) of the Ministerial Regulation Number 9 of 2017 concerning Procedures and Mechanisms for Determining the Price of Divestment Shares in Mineral and Coal Mining Business Activities, which means the number of foreign shares that must be offered for sale to Indonesian participants.

Divestment has a close relationship with investment and investment is a term related to finance and economics. The term relates to the accumulation of a form of asset with the expectation of obtaining a profit in the future. As stated by William J. Gole and Paul J. Hilger, divestment in a company should not be seen as an isolated financial transaction carried out to eliminate unwanted business units or simply to generate cash and divestment reflects the underlying strategy to position or restructure the organization with the aim of increasing organizational value.

The divestment in Indonesia, especially in the mineral and coal mining sector, is from foreign investment with Indonesian parties which include the Government, Regional Government, State-Owned Enterprises, Regionally-Owned Enterprises, and national private entities, while the object to be divested is shares or capital ownership in mining companies with ownership of more than fifty-one percent, because the shares invested by foreign investors in Indonesia through the regulation of investment and exploitation of mineral and coal mining can reach one hundred percent share ownership in the Company.

Divestment of foreign shares in Indonesia not only provides juridical reasons, but also delivers non-juridical ones. The non-juridical reasons include increasing state revenue, increasing regional income, and reducing foreign legal entities in the management and utilization of Indonesian mining natural resources. The juridical reason for divesting foreign shares in mineral and coal mining in Indonesia is related to the law which forces foreign mining companies to divest shares to the Indonesia. This is the impact of the content of divestment arrangements that use the word mandatory in divesting to the Indonesian side (Salim & Nurbani, 2013).

The divestment of foreign shares in coal mining in Indonesia is not specifically regulated in the law, but the divestment provisions are spread across various laws and regulations applied in Indonesia. Concerning the Regulation of foreign share divestment in Law Number 4 of 2009 concerning Mineral and Coal Mining, Ahmad Redi states that the provisions of Article 169 letter a and letter b in Law Number 4 of 2009 concerning Mining are contradictory, the divestment mechanism is unclear, the meaning of share divestment which is carried out directly to Indonesian participants as regulated in Article 97 Paragraph (2) of Government Regulation Number 23 of 2010 is vague, besides the mechanism for divestment of shares through auction is incomplete, and the percentage of sales creates uncertainty (Redi, 2014).

In addition to Ahmad Redi, Raras Ayu Mirati also argues that foreign share divestment regulations are considered not sufficient to accommodate issues related to divestment. Besides there are many regulations that can lead to legal dualism, this is because the rules do not specifically regulate divestment as the regulations have limited coverage to control and the Government seems hesitant in enforcing divestment obligations to foreign investors (Mirati, 2016).

Foreign share divestment regulations are a manifestation of the State's sovereignty over mineral and coal mining, while the mining law regulated in Law Number 4 of 2009 concerning Mineral and Coal Mining, has now undergone changes with the Law Number 3 of 2020 concerning Mineral Mining and Coal (Law, 2009). There is a change in the Mineral and Coal Mining law, it is hoped that there will be a change in state sovereignty over foreign share divestments and their arrangements, so that foreign investors who invest in Indonesia, especially in the mineral and coal mining sector, get knowledge and description of the policies carried out by the recipient State of capital and as the owner of natural resources.

Based on the elaboration above, it is required to investigate the regulation and state sovereignty over the divestment of foreign shares after the changes in mineral and coal mining law.

RESEARCH METHOD

The research employed normative legal research or library law research (Ibrahim, 2013). The research specifications used in this study include analytical descriptive, which provides an overview and exposure that analyzes an object. Analytical descriptive method is carried out to obtain a comprehensive and systematic general picture as well as to describe the existing situation or facts. As a normative legal research, the present study is based on an analysis of legal norms in the sense of regulations with a statutory and regulatory approach related to legal issues, with the aim of finding state sovereignty over foreign share divestment in mining law and its regulatory policies.

DISCUSSION

State Sovereignty over the Natural Resources in Indonesia

The term sovereignty is divided in several different ways: the sovereignty of international law refers to practices related to mutual recognition, usually between territorial entities that have formal juridical independence, Westphalian sovereignty that refers to a political organization based on the exclusion of external actors from the structure of authority within a particular area, Domestic sovereignty which means the formal organization of political authority within states and the ability of public authorities to exercise effective control within the boundaries of their own government, and interdependence sovereignty that is the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across their national borders (Krasner, 1999).

In international law, sovereignty has two main aspects, namely: external aspects, internal aspects, and territorial aspect of sovereignty. The external aspect means the right for everyone to freely determine their relationship with various countries or other groups without restraint or supervision from other countries. This aspect of sovereignty is often referred to as state independence, which is characterized by the existence of an equal position of a country in relation to other countries. Furthermore, the internal aspect of sovereignty, namely the exclusive right or authority possessed by the state to determine the forms of its institutions, the workings of the institution and the right to make desired regulations and actions to comply with these regulations. The last is the territorial aspect of sovereignty which is the full authority and exclusive ownership of the state over individuals and objects within its territory (Kelsen, 2006).

The 1945 Constitution of the Republic of Indonesia has generally regulated the principle of control and exploitation of Indonesia's natural wealth, both on earth and in it, which are natural resources owned by and used for the greatest prosperity of the people. This is as regulated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "*Earth, water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people*" (Law, 1945).

The definition of being controlled by the State is that the production branches which are important for the State and which control the livelihood of the people are in the State. State

control includes regulating and/or organizing, especially to improve and enhance production, by prioritizing cooperative values. This is in accordance with the principle that production is carried out by all under the leadership or ownership of community members (Hayati, 2015).

The word controlled does not mean owned. The central government control through the economic regulations and policies without having to own. Being controlled by the state provides a direct indication that the market mechanism or the free price mechanism may not apply in the economy. The most important and the main objective are securing the interests of the state and the interests of the people at large.

Constitutionally, the role of the state in controlling natural resources is in accordance with Article 33 of the 1945 Constitution of the Republic of Indonesia. The phrase that indicates the state control as interpreted by the Constitutional Court in Decision Number 001-021-022/PUU-I/2003, December 21 (Cases, 2004), is: controlled by the state which has become the constitution of the Indonesian state, meaning that the people collectively give the state a mandate to make policies (*beleid*), management actions (*bestuursdaad*), regulation (*regelendsdaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*), of natural resources that is in its territory and as a means or instrument to achieve its goals, namely for the prosperity of the people, with these five meanings of control the State of Indonesia can monopolize its natural resource wealth.

State sovereignty contained in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, in its implementation can be seen in laws such as Law Number 22 of 2001 concerning Oil and Gas, Law Number 30 of 2007 concerning Energy, Law Number 21 of 2014 concerning Geothermal, Law Number 4 of 2009 concerning Mineral and Coal Mining, Law Number 32 of 2009 concerning Environmental Protection and Management, and others.

State Sovereignty over Mineral and Coal Mining Resources

State control over mineral and coal mining resources contained in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia begins with the issuance of Government Regulation Substituting for Law Number 37 of 1960 concerning Mining. The issuance of the regulation occurred during the transition period to restore unstable political and government conditions as a result of the colonial period by the Dutch Government. The regulation has ended the 1989 *Indische Mijn Wet (IMW)* made by the Dutch East Indies Government (Saleng, 2004).

The Government Regulation in Lieu of Law Number 37 of 1960 concerning Mining was replaced by Law Number 11 of 1967 concerning Basic Mining Provisions. The latest law which consists of 12 Chapters and 37 Articles begins to be implemented since December 2, 1967. It is issued in order to accelerate the implementation of national economic development by adhering to the 1945 Constitution of the Republic of Indonesia (Law, 1960; Law, 1967).

Law Number 11 of 1967 concerning Mining Principles is valid for 42 years until the issuance of Law Number 4 of 2009 concerning Mineral and Coal Mining. The law is centralized in nature so that it does not give authority to the regions to regulate it, especially in terms of granting permits, and mining rights which at that time were dominated by foreign companies

provided in the form of work contracts whose contract period was 35 years and can be extended by 25 years, so that the total period for one work contract is 60 years (Gultom, 2014).

Law Number 4 of 2009 concerning Mineral and Coal Mining changes the centralized system to a decentralized system by granting authority to local governments. The mineral and coal mining concession system has changed into a licensing system, such as mining business permits, people's mining business permits, and special mining business permits.

In 2020, Law Number 4 of 2009 concerning Mineral and Coal Mining has been applied for 11 years after the issuance of Law Number 3 of 2020 concerning amendments to Law Number 4 of 2009 about Mineral and Coal Mining. Mining law has undergone four changes since Indonesia's independence to suit the economic and political conditions of the country. One of the legal considerations made was the need for changes to legislation in the mineral and coal mining sector that can manage and exploit mineral and coal potential independently, reliably, transparent, competitive, efficient, and environmentally friendly, in order to ensure sustainable national development.

State sovereignty over mineral and coal mining resources after Indonesia's independence underwent four changes, namely regulated in Government Regulation in Lieu of Law Number 37 of 1960 concerning Mining, Law Number 11 of 1967 concerning Principles of Mining, Law Number 4 of 2009 concerning Mineral and Coal Mining, and Law Number 3 of 2020 concerning amendments to Law Number 4 of 2009 about Mineral and Coal Mining.

Legal Basis for Divestment of Foreign Shares in Mineral and Coal Mining Law

1. Article 12 Presidential Decree Number 49 of 1981 concerning the Basic Provisions of Coal Mining Concession Agreements between State Coal Mining Companies and Private Contractors (Presidential Decree No. 49 of 1981), which explains the obligation to pay taxes and levies consisting of corporate tax at a rate fixed at 35% of taxable profit and starting the eleventh year since production, the contractor is obliged to offer his shares to Indonesian citizens.
2. Article 9 Presidential Decree Number 21 of 1993 concerning the Basic Provisions of Coal Mining Cooperation Agreements between State Coal Mining Companies and Private Contractors (Presidential Decree No. 21 of 1993), which explains that if the contractor company is a foreign investor, the contracting company must offer its shares to Indonesian citizens.
3. Article 112 of Law Number 4 of 2009 concerning Mineral and Coal Mining (Law No. 4 of 2009), which describes business entities holding Mining Business Permits and Special Mining Business Permits whose shares are controlled by foreign capital, after five years production must divest to the Indonesian side up to 51%.
4. Article 97 of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities (PP No. 23 of 2010), which explains that foreign capital holders of Mining Business Permits and Special Mining Business Permits are obliged to divest their shares after production, to the Indonesian side so that at least 20% of the shares are owned by Indonesian participants.
5. Article 97 of Government Regulation Number 24 of 2012 concerning the Implementation of Mineral and Coal Mining Business Activities (PP No. 23 of 2012), which explains the amount of shares that must be divested by the holder of a Mining Business Permit and a Special Mining Business Permit, after 5 years of production in the tenth year at the latest at least 51% owned by Indonesian participants.
6. Article 97 Government Regulation Number 1 of 2017 concerning the Implementation of Mineral and Coal Mining Business Activities (PP No. 1 of 2017), which explains that holders of Mining Business Permits and Special Mining Business Permits in the context of foreign investment, after 5 years from production,

are obliged to carry out divestment of its shares in stages, so that in the tenth year its shares are at least 51% owned by Indonesian participants and offer in stages to Indonesian parties.

7. Regulation of the Minister of Energy and Mineral Resources Number 9 of 2017 concerning Procedures for Divestment of Shares and Mechanism of Determining the Price of Divestment Shares in Mineral and Coal Mining Business Activities (Permen No. 9 of 2017).
8. Article 112 of Law Number 3 of 2020 concerning Mining amends to Law Number 4 of 2009 concerning Mining (Law, 2020), which explains that Production Operation activities whose shares are owned by foreigners are required to divest 51% of shares in stages to the Central Government, Regional Government, State-owned Enterprises of Indonesia (BUMN), regionally owned enterprises, and/or national private enterprises.
9. Decree of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number: 84 K/32/MEM/2020 concerning Guidelines for the Implementation of Bidding, Evaluation, and Calculation of Divestment Share Prices in the Mineral and Coal Mining Sector, is an implementing regulation in carrying out the mandate of Article 112 of Law Number 3 of 2020 concerning Mining, an amendment to Law Number 4 of 2009 concerning Mining (Ministerial Decree No: 84 K/32/MEM/2020).

Legal basis for Divestment of Foreign Shares in Investment Law

1. Articles 21 and 22 of Law Number 1 of 1967 concerning Foreign Investment, which explain that the Government will not revoke ownership rights to foreign capital companies except by law and in the event that the Government takes actions to take over foreign property rights, compensation will be given. The act of expropriation and the existence of compensation can be interpreted as a regulatory action against divestment of foreign shares.
2. Article 4 Government Regulation Number 17 of 1992 concerning Requirements for Ownership of Shares in Foreign Investment Companies (PP No. 17 of 1992), which describes foreign investment within a period of 5 years from the time the company starts commercial production, at least 5% of the entire value of the company's share capital is sold to the Indonesian side, and within a period of 20 years at least 20% of the share ownership or capital is expected to be on the Indonesian side.
3. Article 5 Government Regulation Number 50 of 1993 concerning Requirements for Share Ownership in Foreign Investment Companies (PP No. 50 of 1993), which explains that foreign investment companies are wholly owned by foreign participants, the value of paid-up capital is at least US\$ 2,000,000 (two million United States dollars) and within 20 years from the time the company starts commercial production as stated in its business license, at least 51% of the company's paid-up capital has been sold or transferred to Indonesian citizens.
4. Article 7 Government Regulation Number 20 of 1994 concerning Requirements for Ownership of Shares in Foreign Investment Companies (PP No. 20 of 1994), which describes foreign investment companies whose capital is formed as a joint venture between Indonesian parties and foreign parties or wholly foreign capital within the no later than 15 years from commercial production, selling part of its shares to Indonesian citizens through direct ownership or through the domestic capital market.
5. Article 6 Presidential Decree No. 75 of 1996 concerning the Basic Provisions of Coal Mining Concession Agreements between State Coal Mining Companies and Private Contractors (Presidential Decree No. 75 of 1996), which explains investment in the case that the private contractor company is a foreign investment company which all whose capital is owned by a foreigner, sells part of its shares to Indonesian citizens, in accordance with the applicable laws and regulations.
6. Article 7 of Law Number 25 of 2007 concerning Investment, which explains that the Government will not take action to take over investment ownership rights, except by law. Furthermore, the Government takes actions to nationalize or take over ownership rights, which will provide compensation or compensation.

Regulation of Foreign Share Divestment in Law Number 3 of 2020 concerning Mineral and Coal Mining

Submission of bids applies to business entities holding Mining Business Licence (hereafter IUP Production Operations), Operation Production Special Mining Business Licence (hereafter IUPK Production Operations), Contact of Work (hereafter CoW or KK) and Coal Mining Concession Work Agreement (hereafter PKP2B), while the obligation to offer is not given a five-year production time limit because of Article 112 of Law Number 3 of 2020 concerning amendments to Law Number 3 of 2020 concerning Mineral and Coal Mining, regarding the provision of five years of production being abolished, and the obligation to offer no time limit on when the first bid is executed to the Government.

Complete documents for the bid submission include a list of the composition of the board of directors and commissioners accompanied by the identity and identification number of the taxpayer, a list of shareholders up to the final beneficiaries, a document for calculating the price of divested shares in accordance with the offer letter, data on the balance of resources and reserves that have been verified by a person competent, approved feasibility study documents, environmental documents that have received approval, and financial reports for the last 3 years that have been audited by a Public Accountant.

Answers to offers from the Indonesian side consisting of the Government, Provincial Governments, Local Regency/Municipal Governments, State-owned Enterprises of Indonesia (hereafter BUMN), Regionally-owned Enterprises (hereafter BUMD), and National Private Business Entities, must provide answers within a maximum time limit of 30 (thirty) calendar days, whereas are not interested in the shares offered, then the offering is made in stages with a time limit of 7 (seven) calendar days each, namely to the Provincial Government, local Regency/Municipal Government, BUMN, BUMD, and National Private Business Entity.

The calculation of the price of the divested shares can use discounted cash flows on economic benefits based on free cash flows during the period from the time of the divested shares implementation and a comparison of market data. The calculation using the market data comparison method only applies to companies holding KK and PKP2B. This is contradictory to the discounted cash flow method which is more widely applicable to business entities holding IUP Production Operations, IUPK Production Operations, KK, and PKP2B.

The calculation of the price of divested shares is related to market comparison. If there has been a method in calculating the divestment share price in the CoW and PKP2B, it can be carried out using the method in accordance with the provisions contained in the CoW and PKP2B as long as it is more profitable for the Indonesian Government.

Evaluation and negotiation of share prices from the Government of Indonesia is given no later than 90 (ninety) days from the receipt of the share divestment offer. While in conducting the evaluation, the Government through the Minister may form a divestment team which has the task of evaluating and reporting the results of the evaluation of divestment share prices to the Minister, and appointing an independent appraiser who has a permit from the Minister of Finance based on consideration of the credibility and reputation of the prospective appraiser to

be appointed as well as the efficiency and effectiveness of state finances in accordance with the provisions of the legislation.

CONCLUSION

The state's sovereignty over the divestment of foreign shares in Indonesia is not only regulated in mining law but is also regulated in investment law. The state's sovereignty over the divestment of foreign shares after a change in mineral and coal mining law is regulated in Article 112 of Law Number 3 of 2020 concerning Mineral and Coal Mining and its implementing regulations, while the arrangement for submitting bids does not only apply to business entities holding IUP Production Operations, Production Operation IUPK, but also applies to business entities holding KK and PKP2B. The obligation to divest the first shares for foreign investment is not given a time limit for its implementation. The answer to the offer for the Indonesian party is obliged to provide an answer to the offer no later than 30 (thirty) calendar days. Evaluation and negotiation of the divestment share price is not an option for an independent appraiser, but the assessment can also be done by forming a divestment team, while the calculation of the divestment share price does not only use market data comparisons but can also be done with discounted cash flows.

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