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Exploration of the Impact of Nominee Agreements in the Mineral and Coal Mining Industry on People's Welfare

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ABSTRACT

Non-renewable natural resources are considered a gift from God Almighty and are regulated by the Indonesian constitution, particularly Article 33 paragraph (3) of the 1945 Constitution, which demands that they be managed for the benefit of the people's welfare. However, in practice, the mineral and coal mining sector often involves investments from foreign parties who want security guarantees for their investments. This research addresses issues related to the regulation of foreign shareholding limits and the prohibition of nominee agreements in establishing mineral and coal mining business entities in Indonesia and applies concrete solutions in this context. The research method is a normative juridical approach supporting empirical juridical data. The results show that nominee agreements are often used as an invalid legal tool to protect the interests of foreign investors, even though they do not meet the legal requirements under Article 1320 of the Civil Code. For investors, nominee agreements are considered a legal solution to ensure the security of their investment in the mining sector in Indonesia. The Benefits Analysis Evaluation Study using the Cost-Benefit Analysis (CBA) Method found that nominee agreements significantly positively improve community welfare in Morowali Regency and Kutai Kartanegara Regency. However, to ensure investment security and better legal certainty, it is recommended to propose a legal idea (ius constituendum) by relaxing the foreign shareholding limit up to 51% from the establishment of the company until the exploration period of 10 years through amendments to the Mineral and Coal Mining Law.

Keywords: Agreement Exploration, Nominee Agreement.

INTRODUCTION

Indonesia has one of the world's largest reserves of natural resources, especially minerals and coal (Sony, 2021). As a legal state that adheres to the principle of a welfare state, Indonesia must use these natural resources to improve the welfare and prosperity of its people. Constitutionally, natural resources are considered the property of the Indonesian nation, managed by the state, and must be utilized for the greatest benefit of the people, in accordance with Article 33 paragraph (3) of the 1945 Constitution, which states that "The land and water and the natural resources contained therein shall be under the control of the state and shall be used for the greatest prosperity of the people".

In an effort to maintain state sovereignty in the management of natural resources, especially in the mineral and coal mining sector, the Government imposes restrictions on foreign share ownership in these companies through a share divestment mechanism (Sood, 2019). This provision is regulated in detail in Article 112 paragraph (1) of Law Number 3 of 2020 concerning Mineral and Coal Mining and Article 2 paragraph (1) of Minister of Energy and Mineral Resources Regulation (Permen ESDM) Number 43 of 2018 which regulates the procedures for implementing share divestment.

Facing the limitation of foreign share ownership in mineral and coal mining companies, some foreign investors try to circumvent the regulations by using a nominee agreement scheme to control shares. In addition, the application of the nominee agreement scheme also occurs due to changes from the Contract of Work system in Law No. 11 of 1967 concerning Basic Mining Provisions (Law No. 11 of 1967) to the licensing system regulated by Law No. 4 of 2009 concerning Mineral and Coal Mining (Law No. 4 of 2009). Mining companies can manage

and utilize natural resources in this licensing system, but if they violate licenses and statutory provisions, the state has the authority to revoke the license. This differs from the Contract of Work regime, where the state is in an equal position with investors.

Juridically normative, nominee agreements are prohibited to protect national interests and prevent monopoly by foreign parties, as stipulated in Article 33 paragraph (1) of Law No. 25/2007 on Capital Investment and Article 48 paragraph (1) of Law No. 40/2007 on Limited Liability Companies. Therefore, nominee agreements are considered a form of legal smuggling. However, while it is important to maintain state sovereignty in natural resource management, foreign investors' nominee agreements must be carefully considered in the context of formulating policies that support post-COVID-19 economic recovery and accelerated national development. Indonesia, which adheres to an open economic system, recognizes that investment, especially abroad, plays a crucial role in spurring economic growth and national development (Mas Rahmah, 2020). In the post-COVID-19 pandemic era, this investment is needed to increase equitable development and outcomes and maintain overall stability in the country.

So, with natural resources in mind, as a gift from God Almighty and owned by the Indonesian nation, they are used to achieve the welfare of the people. However, the state also needs additional funds from foreign investors, especially during a pandemic. Therefore, the existence of natural resources as unrenewable resources, the state still regulates the limitations of foreign share ownership. The regulation of natural resources, which has special characteristics in its exploitation, differs from the regulation of business entities in other fields. Meanwhile, the characteristics of foreign investors are that they want to become majority shareholders so that they can control the GMS. The purpose of controlling the GMS is none other than so that foreign investors can exercise control so that decisions taken are more in favour of foreign investors, besides that it is undeniable of course, to get BEP in a short time. A business activity's natural characteristic is to get the maximum profit. Therefore, it is necessary to see the purpose of making a nominee agreement in the mining sector so that it does not conflict with Article 33, paragraph (3) of the 1945 Constitution.

Based on identifying the problems above, it is necessary to make laws and regulations that regulate periodic supervision and law enforcement by the Government through relevant ministries, using the Monitoring, Controlling, Field Observation and Evaluation (P3LE) system to implement share divestment. This research is important because, during the COVID-19 pandemic and post-pandemic, the state needs a large source of funds to restore the economy, which can be obtained from an increase in state revenue through taxes, PNBP, and dividends that are reinvested in the country for a certain period with the hope of improving the national economy.

This research will focus on "The Impact of Nominee Agreement on Mineral and Coal Mining Business Entities on People's Welfare," by adding new contributions in theory, principles, and objectives of supervision and law enforcement on the phenomenon of nominee agreement practices, especially in the context of mineral and coal mining. This research aims to provide a unique contribution different from previous dissertations in this field.

RESEARCH METHOD

This research adopts the normative legal research method, which is a research approach that emphasizes law as a system of norms. This approach includes principles, norms, and rules in laws, regulations, treaties, and doctrines or teachings. The normative juridical method focuses on analyzing the structure and normative content of legal regulations and interpreting them within the framework of the applicable legal system (Fajar & Achmad, 2010). This approach is strengthened by empirical juridical research that considers people's legal behavior as a reaction to the existing norm system. This research also adopts a statute approach and a conceptual approach.

Data was collected through literature study and web browsing, utilizing various related documents from relevant agencies. The collected data was processed by editing and grouping into research components before conducting a descriptive analysis. This qualitative analysis is oriented towards cause-and-effect relationships and legal and institutional approaches. The analysis conducted in this research is a qualitative analysis of the law, considering that qualitative analysis in this research is an analysis whose justification formulation is based on the quality of theories, doctrines and opinions of experts and legal formulations (Mezak, 2006).

DISCUSSION

It is undeniable that natural resources have a strategic role in supporting national development. The management of natural resources generates foreign exchange for the country, becomes one of the most significant contributors to the State Budget (APBN), provides benefits to the Regional Budget (APBD), and improves the economy of the community around the mine. Indonesia is known as one of the countries with many natural resources spread across land, sea and air (Nurjaya, 2008). Geologically, Indonesia has great natural resource potential, especially regarding minerals and coal. According to the Ministry of Energy and Mineral Resources Geological Agency, the types of minerals in Indonesia are divided into two categories:

1. Metallic minerals such as nickel, gold, silver, tin, zinc, aluminium, and rare earth metals.

2. Non-metallic minerals and rocks such as limestone, kaolin, zircon, phosphate, gypsum, and potassium-bearing rocks.

Minerals are used as raw materials in various industries, including the green industry, electric batteries, manufacturing, defense, chemicals, and agriculture. In addition to minerals, coal is an important energy source used since colonial times due to its easy-to-mining characteristics. Coal is not only one of the significant export commodities but also a cheap source of electrical energy. Despite the increasing international trend towards green energy, coal remains a favourite both in Indonesia and the world.

This mineral and coal mining sector (minareba) significantly contributes significantly to Indonesia's Gross Domestic Product (GDP) and exports. The sector's contribution to GDP and exports increased from 4.38% and 12%, respectively in 2020 to 5.5% and 14% in the second quarter of 2021. The mining sector is critical to Indonesia's GDP, exports, government revenue, job creation and remote area development. It steadily contributes to state revenue through taxes, non-tax state revenue (PNBP) and royalties every year. The sector also has multiplier effects, such as creating jobs, improving the community's economy, and accelerating the development process in mine-producing areas.

According to the constitution, natural resources are declared state ownership whose management should be directed at improving the welfare of the people. However, there is still inequality in the benefits obtained by the Indonesian people from these natural resources. In 2020, JATAM recorded 45 cases of mining-related conflicts, which included issues of environmental pollution and damage (22 cases), conflicts related to land grabbing (13 cases), criminalization of residents who opposed mining (8 cases), and cases of termination of employment (2 cases). 13 cases of the conflict involved military or police officers (Jamil & Johansyah, 2021).

Conflicts in the mining sector show that natural resource management has not been optimal in fulfilling the goal of "natural resources for the welfare of the people". As a host country, Indonesia is interested in attracting investment because investment is important to increase economic growth, technological capabilities, productivity, national income, tax revenue, and other macroeconomic outcomes (OECD, 2001; Thomas, 2010). Foreign investment is needed for development in Indonesia to improve the welfare of the people.

The attractiveness of the mining sector in Indonesia has attracted a lot of interest from foreign investors, which is then anticipated by Law No. 3 of 2020 concerning Amendments to the Minerba Mining Law through Article 112 paragraph (1). This article regulates divestment provisions and limits foreign share ownership to a maximum of 49%. Foreign investment is very important for national development and equitable distribution of results. In some business fields, restrictions on foreign share ownership are imposed to protect national interests, especially in the mining sector. These restrictions encourage foreign investors to seek legal loopholes through nominee agreements or the use of borrowed names. Nominee agreements, which are a form of legal smuggling, occur in the field. In mining law, a nominee agreement is a borrowed name agreement entered into by individuals or business entities to circumvent foreign shareholding limits in mining companies.

1. Even though the share divestment provisions have come into effect, investors continue to practice nominee agreements with several purposes, including:

2. As a form of legal violation of the restrictions on foreign share ownership stipulated in laws and regulations.

3. To avoid taxes, especially after the enactment of Law No. 11/2016 on Tax Amnesty and Minister of Finance Regulation No. 118/PMK.03/2016 on its implementation.

4. To avoid vertical and horizontal conglomeration, the shareholding structure must be disguised. This practice usually occurs to hide the shareholding structure that is closely related to the asset ownership structure.

The practice of nominee agreements can be done in writing or verbally, generally in the form of a Statement and Power of Attorney prepared and issued by a notary. The creation of this document by a notary aims to provide a sense of security to foreign investors who invest in Indonesia. Initially, nominee agreements were created due to the Negative Investment List (DNI), which is regulated by a presidential regulation and updated regularly according to the needs of investment in Indonesia. Usually, nominee agreements take the form of an agreement document that includes a Letter of Representation and Power of Attorney kept by a notary. The contents of a nominee agreement generally include:

1. A statement from the nominee to the beneficial owner that the beneficial owner provides a sum of money to be deposited as share capital on behalf of the nominee.

2. Power of attorney from the nominee to the beneficial owner to take various actions, including: a. Amending the articles of association, attending annual and extraordinary general meetings of shareholders (GMS), and requesting and summoning shareholders to hold meetings. b. Requesting and receiving shares of the company after the shares have been printed. c. Selling, transferring, granting, or transferring shares in accordance with the portion owned. d. Requesting and receiving dividends and other profits on the company's shares, and bearing losses and risks in accordance with the portion owned. Request and receive dividends and other profits on the company's shares and bear losses and risks in accordance with the share portion if the company suffers a loss.

The prohibition against nominee agreements is expressly regulated in Article 33 paragraph (1) of Law No. 25/2007 on Capital Investment and Article 48 of Law No. 40/2007 on Limited Liability Companies. However, nominee agreements still occur as a form of deviation or legal smuggling. In national law, nominee agreements are known as name loan agreements, which investors use to secure their investments. This prohibition aims to create legal certainty in implementing the prohibition of borrowing names in accordance with the theory of agreement, which requires the fulfilment of the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code.

Nominee agreements normatively do not fulfil the valid agreement requirements stipulated in Article 1320 of the Civil Code. Agreement or consensus is only one of the four valid contract requirements according to Article 1320 of the Civil Code. As an agreement, a nominee agreement must fulfill the four valid requirements of an agreement according to Article 1320 of the Civil Code, namely the agreement of the parties binding themselves or agreement/consensus, capability or capacity, the certainty of terms, and lawful cause or consideration.

In practice, nominee agreements used in mining business entities aim to avoid restrictions on foreign share ownership. This is contrary to the prohibition of nominee agreements and the foreign shareholding restriction provisions applicable to mining entities. From a legal perspective, nominee agreements do not meet the legal requirements, mainly because they violate the prohibition. Nonetheless, nominee agreements are not automatically declared void, as it is necessary to consider the investor's purpose in making them. However, in principle, using nominee agreements to establish mineral and coal mining business entities is invalid. Article 1337 of the Civil Code stipulates that an agreement becomes void if it violates the prohibition stipulated by law or is contrary to decency or public order. With the prohibition against nominee agreements, such agreements in establishing mineral and coal mining business entities must be considered legally void. Share ownership in mineral and coal mining business entities must legally be owned by Indonesian citizens or local business entities registered in the company's articles of association. The practice of nominee agreements in the mineral and coal mining sector can have negative impacts, including:

1. Regulation and supervision of Minerba mining companies is in foreign investors' hands, so company decisions are more favourable to investor interests. This affects the company's compliance with the environment, the Community Development Program (CDP), and policies on the use of local labour.

2. Benefits from the exploitation of natural resources by foreign investors will be returned to their home countries. During the COVID-19 pandemic, the state expects that dividends earned from mineral and coal mining companies can be reinvested domestically to support national economic growth. However, if foreign investors use nominee agreements, the dividends earned may return to the investor's home country.

Nominee agreements can be caused by weak supervision and ineffective law enforcement in implementing share divestment, which creates opportunities for stakeholders to use nominee agreements. The weak legal system is the main factor of this lack of optimal supervision and law enforcement. In addition, buying and selling shares in mining companies has become an alternative due to regulations that prohibit the transfer of Mining Business License (IUP) to other parties. Transferring shares in mining companies opens a loophole for creating nominee agreements. Supervision has yet to reach the beneficial owner level in mining companies. The requirements for buying and selling shares in mining companies are the same as those in other sectors, which is in stark contrast to the banking sector, which has a strict supervision system, including a share transfer process that involves a fit and proper test and the inclusion of an Annual Tax Return report for prospective new shareholders, directors, and commissioners.

Normatively, nominee agreements are a form of legal smuggling that contradicts the substance and culture of law and is not effectively enforced by law enforcement officials. Therefore, commitment in the legal framework to oversee the implementation of share divestment and prohibit nominee agreements is indispensable. The implementation of these two provisions requires support from public legal awareness, especially in appreciating the Government's efforts to improve people's welfare through optimizing the management and utilization of mineral and coal mining resources. However, in reality, the regulation of restrictions on foreign share ownership in mineral and coal mining business entities in Indonesia is still not running well in accordance with existing provisions. This can be seen from weaknesses in the supervision of the implementation of share divestment, which also allows nominee agreements to occur. Furthermore, weaknesses in supervising Annual Tax Return reporting from shareholders are also an obstacle in effectively enforcing the law in the mineral and coal mining sector.

It must be recognized that nominee agreements in mining business entities occur because foreign investors want security and certainty for their investments in Indonesia. For investors, security means an assurance of business continuity from possible takeover or closure of the company due to changes in politics, government policies, and the national security situation. Regardless of the situation, foreign investors want to remain in control of the company to determine policies in the face of changing situations to secure their investment. On the other hand, domestic investors are often limited in capital and need help managing mining businesses independently. The foreign investor factually becomes the majority owner of the shares through the nominee agreement. At the same time, the Indonesian citizen or local company listed in the company's articles of association serves only as a representative without the right to vote, sell shares, or receive dividends. Legally, all such rights have been transferred to the beneficial owner, the foreign investor, in accordance with the nominee agreement.

An EAL study has been conducted to reveal that nominee agreements have a positive and contributive impact in improving people's welfare in Morowali and Kutai Kartanegara Regencies. The impact of the use of nominee agreements on mineral and coal mining business entities in Morowali and Kutai Kartanegara includes:

1. Economic Benefits

Mining in Morowali and Kutai Kartanegara creates jobs, improving the local community's standard of living. Infrastructure built by mining companies, such as roads, opens previously isolated access, supporting economic activity. However, mining activities often damage provincial and district roads, requiring considerable maintenance costs to maintain the infrastructure. In addition, a professional shift from farmers to mine workers occurs, although many local people work in the informal sector or as unskilled labourers due to a lack of skills. To address this, the company provides CSR through education programs so that communities around the mine can continue their education up to college.

2. Social Impact

Social impacts that tend to be negative arise, such as community divisions due to conflicts or conflicts of interest between mining companies. While this is understandable from a business perspective, it requires anticipation and

a wise attitude to avoid social costs that can jeopardize social cohesion among the community. The potential for social insecurity must be watched, especially by local security forces.

3. Environmental Impacts

The mining process causes environmental damage, and the reclamation deposit paid by mining companies is often insufficient to cover the cost of post-mining restoration and reclamation. Water quality declines as trees are cut down, reducing groundwater deposits. Fishermen who still depend on the sea experience decreased income due to environmental pollution. However, there is a positive environmental impact in that farmers and fishermen whose land is bought by mining companies are employed by the company. If they continue to farm or become fishermen, there is a cooperation agreement through BUMDES where the mining company will buy agricultural products or fish produced for employee food needs.

Meanwhile, based on limited data and studies on Cost-Benefit Analysis (CBA), nominee agreements provide greater benefits than the costs incurred in terms of government and community burdens. Although nominee agreements are considered a legal circumvention of shareholding limits in mining entities, they significantly support policies to improve community welfare.

It is important to note that indicators such as Gross Regional Domestic Product (GDRP), local revenue from Non-Tax State Revenue (PNBP), and mining royalties show tremendous value in Morowali and Kutai Kartanegara. This shows that despite the controversy over their legality, the CBA study suggests tolerating nominee agreements because of the substantial benefits they provide to local communities. Thus, nominee agreements aim to ensure that foreign investors can safely invest and maintain managerial control through votes in the General Meeting of Shareholders (GMS), even though they cannot legally be the legal owners of the mine.

So, to overcome various normative and empirical problems faced in the mineral and coal mining sector, it is recommended that strategic policies be formulated as follows. First, it is necessary to adjust the share ownership policy to stop or eliminate the practice of nominee agreements. This is important because foreign investors need certainty and security when investing in Indonesia. The regulation on foreign share ownership can be relaxed to 51% for a period of 10 years with an evaluation every 5 years. After 10 years, investors must divest their shares so that the maximum ownership becomes 49%.

Second, if public political support does not support the share ownership relaxation policy, then the maximum share ownership limit for foreign investors of 49% is still applied. However, in daily operations, foreign investors are given the authority to manage the company with strict supervision from the Government through a monitoring, control, observation, and evaluation (P3LE) mechanism integrated with the Ministry of Energy and Mineral Resources (MODI) and the Investment Coordinating Board (BKPM). Thus, these measures are expected to strengthen the policy foundation in the mineral and coal mining sector, minimize the practice of controversial nominee agreements, and improve supervision and control of foreign investment to optimize economic and social benefits for the Indonesian people.

CONCLUSION

Based on the constitution, natural resources belong to the Indonesian people, are managed by the state, and are utilized to improve the welfare of the people as much as possible. In order to maintain state sovereignty over natural resources, especially in the mineral and coal mining sector, restrictions on foreign share ownership are carried out through a share divestment program. This provision is regulated in Article 112 paragraph (1) of Law No. 3 of 2020 concerning Mineral and Coal Mining and Article 2 paragraph (1) of Permen of ESDM No. 43 of 2018 concerning Procedures for Share Divestment. In line with that, there is a phenomenon of using nominee agreements to get around share ownership limits to secure the interests of foreign investors. In normative juridical terms, nominee agreements are prohibited to protect national interests while preventing foreign monopoly, as stipulated in Article 33 paragraph (1) of Law No. 25/2007 on Investment and Article 48 paragraph (1) of Law No. 40/2007 on Limited Liability Companies. On this basis, nominee agreements are considered legal smuggling. In the context of maintaining state sovereignty over natural resources, it is important to consider the use of nominee agreements by foreign investors by designing policies that support economic recovery through accelerated national development after the COVID-19 pandemic. From the perspective of foreign investors, nominee

agreements are not intended to control Indonesia's natural resources but to protect their investments and mining operations.

To date, the implementation of restrictions on foreign share ownership in mineral and coal mining entities in Indonesia still needs to overcome obstacles, which are reflected in inadequate supervision of the implementation of share divestment and the possibility of nominee agreements. The Indonesian Government has also been unable to rely on domestic investors due to limited capital and technology. Therefore, foreign investors often rely on nominee agreements to protect their investments in Indonesia, even though legally, they have no voting rights or control over their shares. This can lead to foreign investors de facto controlling the majority of shares, with Indonesian citizens or local companies acting as nominees in name only. To address the potential for foreign domination, strict oversight mechanisms and effective law enforcement are required, particularly about share divestment and the reuse of dividends from mining companies in Indonesia.

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