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## KETIDAKKONSISTENAN REGULASI TENTANG DIVESTASI SAHAM SEKTOR PERTAMBANGAN DI INDONESIA

*(THE INCONSISTENCY OF THE REGULATIONS ON DIVESTMENT OF  
SHARES IN INDONESIAN MINING SECTOR)*

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# **THE INCONSISTENCY OF THE REGULATIONS ON DIVESTMENT OF SHARES IN INDONESIAN MINING SECTOR**

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## **Abstract**

The development of mining activity in Indonesia is more rapid and useful. Yet, the natural resources production still cannot fulfill the national interest of Indonesia. However, Indonesia realize that they are limited in term of funding for the exploration and exploitation of natural resources. By the reason, to run the activities, Indonesia needs to cooperate with foreign parties, because in running a natural resources management required a huge capital, advanced technology, experts and there is a high risk as well. Therefore, to achieve the goal of the state, Indonesia obliged the foreign investment to divest the shares to Indonesia which is regulated in Article 112 of Law No. 4 of 2009 and Government Regulation No. 24 of 2012 which require foreign companies to divest their share until 51%. However, A week before takeoff his position as president, Susilo Bambang Yudhoyono enacted new Government Regulation No. 77 of 2014 which cut the amount of shares that have to be divest by foreign companies to Indonesia from 51% to only 30%. This legal research will analyze the current regulation on divestment of share in Indonesian mining sector and also analyze whether the current regulation on divestment of shares in line with Article 33 paragraph (3) of 1945 Constitution on state control over natural resources. This normative legal research come to the conclusion that the enactment of Government Regulation No. 77 of 2014 is against the Article 33 of 1945 Constitution which requires 'state control' over natural resources to ensure the greatest possible prosperity of the people. In order to achieve the goal of the state which is in line with Article 33 of 1945 Constitution, the government of Indonesia has to be firm in dealing with divestment of shares by regulating it in the Law level. Thus, the president cannot revise it easily and the legal enforcement of this regulation will be more effective and efficient.

***Keyword: divestment, share, mining sector***

## **A. Introduction**

Mining is one of the businesses priority from the Government of Indonesia before and after the enactment of Investment Act. Indonesia realizes that it is limited in term of funding and technology in the exploration and exploitation of natural resources. Consequently, for solving that issue, In 1967 Suharto's New Order government introduced Law No. 1 of 1967 on Foreign Investment and Law No. 11 of 1967 on the Basic Provisions of Mining. The political rationale behind these laws was to lay the foundation for a recovery from the chaos of the mid-1960s and to achieve accelerated economic development on which the legitimacy of the new government could be built (Kosim Gandataruna and Kirsty Haymon, 2011:221).

Moreover, those regulation was amended by the government with Law No. 25 of 2007 on Investment and Law No. 4 of 2009 on Mineral and Coal Mining. The reason behind the enactment of those law is to provide the benefits for the society and achieve the national interests. Thus, there are some changes in that regulations, one of them is about the divestment.

The divestment is sold some business units or subsidiaries to another party to obtain funds in order to nourish the company as a whole (Abdul Moin, 210: 332). Another definition about the divestment by Sally Wehmeir, divestment is the act of selling the shares you have bought in the company or taking money away from where you have invested (Salim HS, 2010:32).

Divestment provision regulated in the Article 112 of Law No. 4 of 2009 and Government Regulation No. 24 of 2012 which require foreign companies to divest their share until 51%. However, a week before takeoff his position as president, the President Susilo Bambang Yudhoyono enacted Government Regulation No. 77 of 2014 on the third amendment of the Government Regulation No. 23 of 2010 regarding the Implementation of Mineral and Coal Mining Business Activities. Through this regulation, the government cut the number of the shares that have to be divested by foreign companies to Indonesia from 51% to only 30%. As we know, the divestment of shares is the great momentum for Indonesia to manage the natural resources as mandated by Article 33 (3) of the 1945 Constitution to control the natural resources.

Based on the background above, this legal research analyzed the current regulation on divestment of share in Indonesian mining sector, whether the current regulation on divestment of shares in line with Article 33 paragraph (3) of 1945 Constitution on state control over natural resources

## **B. Discussion**

Foreign capital investment is realized to be complementary means for the acceleration of economic development of the country (Sudargo Gautama, 2006: 359). By the reason, to run the mining business activities, Indonesia need to cooperate with foreign parties, because in running a natural resources required a huge capital, advanced technology, experts and there is a high risk as well. However, Indonesia cannot depend on themselves to foreign parties

anymore, because we have to optimize the natural resources management for the greatest prosperity of the people of Indonesia.

In order to realize that, Indonesia has to involve in every sector of mining activities which were interpreted by the Constitutional Court in term of state control. State to control or sometimes called the right to state control is the only material rights that are explicitly granted to the Indonesia. Right to control the land, water, natural resources, and the branches of vital production should be used solely for the prosperity of the people of Indonesia (Afifah, 2013: 263).

This issue begins with the amendment of Law No 11 of 1967, the new act which is Act 4 of 2009 show that there are some significant changes in mineral and coal mining business activities. The state is no longer as the parties which are inferior to foreign mining companies.

Furthermore, the divestment provisions are one of the issues which are regulated in the Law No. 4 of 2009, those regulations required a divestment after five years of production but did not specifically required the number of shares that has to be divested (Luke Nottage and Simon Butt, 2013: 6). Thus, the government regulations under Mineral and Coal Mining Act 2009 give the detail number of divestment that has to be conducted by the investor. However, the regulations of the number of divestment has been changed for many times from 2010-2014, namely:

**Table 1**  
**Number of Divestment of Shares**

|   |
|---|
| <b>Comparison on the Number of Divestment of Shares</b> |
|---|

|                      |   |
|----------------------|---|
| <b>PP 23 of 2010</b> | All types of mining permit license have to divest their 20% of share to Indonesian Participants in five years   |
| <b>PP 24 of 2012</b> | All types of mining permit license have to divest their 51% of share to Indonesian Participants in tenth years  |
| <b>PP 77 of 2014</b> | <ul style="list-style-type: none"> <li>a. Production Operation IUP and Production Operation IUPK and does not carry out its own processing and/or refining have to divest their 51% of share to Indonesian Participants in tenth years</li> <li>b. Production Operation IUP and Production Operation IUPK which carries out its own processing and/or refining activities have to divest their 40% of share to Indonesian Participants in fifteenth years</li> <li>c. Production Operation IUP and Production Operation IUPK which conducts underground mining have to divest their 30% of share to Indonesian Participants in fifteenth years</li> <li>d. Production Operation IUP and Production Operation IUPK which conducts underground and open pit mining have to divest their 30% of share to Indonesian Participants in tenth years</li> </ul> |

As stated in the chart, there are some differences among the regulation which is related to the number of shares. To begin with, the Government Regulation No. 23 of 2010 become the starting point of the divestment regulation in the mining sector, the foreign companies only allow having the shares approximately 80%.

By the reason, they have to divest their shares to Indonesia participants at least 20%. This restriction applied to all the types of mining business licenses. This restriction on the foreign investment made by the host country, are basically the authority of the country arising from its sovereignty (Sonarajah, 2004: 97). Unfortunately, two years after the enactment of this regulation, the government issued the new one, which is Government Regulation No. 24 of 2012.

The provisions in the GR No. 24 of 2012 showed a different point of view of policy in the field of mining. The policy became an antithesis to the earlier policy which gives more benefits for Indonesia. Because the foreign investor is obliged to divest 51% of their share to Indonesian participants. As a result of this regulation, in tenth years, Indonesia will be the majority of the shareholder of the mining companies.

In addition, the right to control of natural resources may apply better than before, not only through the licensing of mining as an instrument control but also when Indonesian participants were able to control a majority share of foreign mining companies in Indonesia. Furthermore, in 2014, the government issued the Regulation No. 77 of 2014 to replace the GR No. 24 of 2012, in the new regulation there are a lot of differentiation with the previous one. In the new regulation, the government divided the type of the mining business license which affects the number of shares that they have to divest to Indonesia. By the reason, there are so many critics go to the government, because the government cut the number of shares that have to divest by the type of the license.

Actually, there are no differences for the mining companies which do not carry out their own processing and/or refining, like the previous regulation they have to divest their 51% of share to Indonesian Participants in tenth years. However, for the mining companies which carry out their own processing and/or refining activities or the mining companies which conduct underground mining either open pit mining or not, they have to divest their



share 40% conduct production and refining and 30% for the underground mining.

If we take a look at the number of share in the last government regulation, we may see the number of shares to be divest are less than before. Whereas, the government should take this moment in order to realize the greatest prosperity of the people. By the reason, the promulgation of this regulation will let the government of Indonesia lose the momentum to become the dominant parties in the shareholders.

As we know, there are a lot of benefits that Indonesian will get if they become the majority of shareholder, for instance, they will get profit, dividends, and the important point, Indonesia will have the right to vote in determining the direction and policies of the company, that's one of them is to achieve the greatest prosperity of the people which is delegated by the Article 33 of the 1945 Constitution. However, the regulation has changed and give the bad impact for Indonesia.

On the other hand, by cutting the number of shares itself, this regulation is not in line with the spirit of Article 33 of 1945 Constitution which was interpreted by the Constitutional Court. As we know, the Constitutional Court has decided that the mining sector is one of the vital production branch that owned by the people collectively, by the reason the people give the mandate to the state to make policy (*beleid*), perform administration (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and oversight (*toezichthoudensdaad*). The five functions of state authority are integrated to

achieve the purpose of the state, namely the prosperity of the people. One of the important point from the Constitutional Court decision is the government have to take a part in the management (*beheersdaad*) of the mining sector itself. The Constitutional Court decision give the guidance on how the conception of State control over the natural resources may be applied. If the five tasks of the government may not apply in unity, it has to interpret gradually based on the effectiveness to achieve the greatest prosperity of the people (Arief Hidayat, 2015: 9), namely:

- a) The state conducting direct management of natural resources
- b) The state makes the policy and performs administratively
- c) Regulation and supervision functions

From that interpretation, the first step that has to be done by the government is taking a part in the management of natural resources directly, and the divestment mechanism is one of the way to Indonesia to take a part in the management of natural resources generally and mining sector especially. However, there are many obstacles for Indonesia to manage the mining sector directly, moreover after the enactment of PP No. 77 of 2014 which cut the number of shares that has to divest to Indonesian participants. Even though for the mining companies who did not conduct the production and refining by themselves, they may divest their shares 51%, but for the rest of mining business license, they only oblige to divest 30%-40% of their shares.

Of course, this new regulation will give a bad impact on Indonesian parties because they lost their momentum to control the natural resources

directly and get the benefit from it. Even, Adian Napitupulu as one of the DPRs member, gives his critic to the government, in the case of PT. Freeport, that Indonesia potentially will lose the chance of taking a 21% of the share of PT. Freeport which means, they lose almost Rp. 45 trillion of the share values, or potentially lose approximately Rp20 Trillion average profit of PT. Freeport every year (Daurina Lestari, 2016).

In contrast, Mulyadi as one the DPRs member also give his comment against the opinion of Adian Napitupulu, he said that the government divided the type of mining business license and cut the number of shares, because, in underground mining, they need huge capital and high risk as well. By the reason, the government cut the number of shares that have to divest for that type (Samrut Lellossima, 2016). In this case, the author believes that the government should change the regulation on divestment in mining sector like the previous regulation because when the government cut the number of the shares, it against the Article 33 of 1945 Constitution which is related to the economic democracy and state control over natural resources.

The author agrees with the argument that delivers by Prof. Arief Hidayat, which mentions that Article 33 of 1945 Constitution is not against with the privatization. Indonesia will support the private as long as the privatization is not abolished the state control over natural resources. In this case, the government should act as the decision maker in every business activities who involved in vital production branch and/or affects the livelihood of many people. The most important things are, the privatization should

conduct in order to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people. If the privatization is contrary with the interest of Indonesia, that kind of privatization is prohibited (Arief Hidayat, 2015: 9).

From Prof. Arif point of view, the author believes that the government shall control the natural resources. It is clear in his opinion that the government should act as the “decision maker”. Generally, we may say that the word decision maker is related to the task of government which was interpreted by the Constitutional Court.

Specifically, that word also associated with one of task of the government which is management (*beherdaad*). If we relate that word to the Prof. Arief point of view, it is clear that the government has to involve directly in the management of mining sector, and one of the way to realize it by having good regulation, which gives more opportunity to the government to take over the management, and divestment is one of the best way to make it happen.

However, the current regulation on divestment of shares is not good enough, because it was against the spirit of state control over natural resources which was regulated in Article 33 of 1945 Constitution, and also the interpretation of the constitutional court of that Article. By the reason, the author suggests revising this regulation by the new one which obliges the foreign investor to divest 51% of their shares. Otherwise, we will not control

our natural resources and could not achieve the greatest prosperity of the people.

### **C. Conclusion**

The issuance of Government Regulation No. 77 of 2014 has given the significant changes in the provision of divestment in the mining sector. Because through this regulation, the government cut the number of the shares that have to be divested by the foreign companies for several types of mining business license. By having this regulation, the government of Indonesia show the inconsistency regarding the provision on divestment, because the amendment of government regulation has changed for several time in only 4 years which affected the legal certainty for the foreign companies. Moreover, Indonesia will loss the chance to become the majority of shareholders in several types of mining sector.

Whereas, the Article 33 of the 1945 Constitution has given the mandate to the state to control the natural resources for the greatest prosperity of the people. Even, the Constitutional Court decision No. 001-021-022/PUU-I/2003 has given the interpretation on the task of government in vital production branch, and let the government involve directly to the management of natural resources. Therefore, the enactment of Government Regulation No.77 of 2014 has given the significant changes on the divestment regulation by reducing the state control over mineral and coal mining. Which mean, Indonesia will lose the chance to control directly the management of mineral and coal mining

industries. Whereas, it is good momentum for Indonesia to control the management, because we cannot realize the greatest prosperity of the people, unless the state may use the opportunity in determining the direction and policies of the company which run the activities in the vital production branch generally, and mineral and coal mining specifically in order to achieve the goal of the state.

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