IMPLICATIONS OF DIVESTMENT REGULATIONS INDONESIA ON FOREIGN MINING COMPANIES AS CONTRACT HOLDERS

SUWARSIT SUWARSIT & YOYO ARIFARDHANI
Department Of Law, Pancasila University, Jakarta Indonesia.
Email: suwarsitshmhcla@gmail.com

***Abstract* - *Mining indonesian regulation Article 112 of Law No. 4 of 2009, requires foreign companies to divest, while Article 169 of Law No. 4 of 2009, beside requires companies holding Contracts of Work (KK) and Coal Mining Concession Work Agreements (PKP2B) to adjust the contents of their contracts no later than one year, on the other hand, KK and PKP2B which existed before the issuance of Law no. 4 of 2009 was given certainty to expire until the expiration date. This study examines the implications of divestment regulation requirements for foreign companies who are holders KK and PKP2B. The results show that the divestment obligations of several foreign contract holders have led to disputes with the Indonesian participants as the purchaser of shares, for several reasons as are the absence of the right to buy in contract KK and PKP2B and the Indonesian participant's limited capital.*
Keywords: *Shares Divestment, Indonesian Mining, Contracts of Work.*

INTRODUCTION

The presence of foreign capital in Indonesia being a developing country is important, particularly in their efforts of stopping the economic downturn and carrying out economic development. This has been recognized since 1967, with the passing of Law No. 1 of 1967 Concerning Investment of Foreign Capital. There are several forms of foreign investments in Indonesia, such as Joint Venture, Joint Enterprise, and Contract of Work (hereafter called KK). A Joint Venture is a collaboration between foreign and national investors based on an agreement. This collaboration does not form a new legal entity; thus, is contractual in nature and does not merely seek to make profits but also provides work experience for the national parties. Meanwhile, a Joint Enterprise is a cooperative foreign investment between foreign capital, or capital originating from abroad, and national capital. A new company in the form of a Limited Liability Company with an Indonesian legal entity may then be formed.[1]

The form of the Joint Enterprise is almost the same as the form of the KK, the difference being that if a foreign party invests in Indonesia by forming an Indonesian legal entity, such as a Limited Liability Company, the term of cooperation isspecifiedin the contract. The form of the KK is based on Article 8, Paragraph (1) of Law No. 1 of 1967, which explains that foreign investment in the mining sector is based on a collaboration with the government based on a Contract of Work or other form, such as a Coal Mining Concession Work Agreement (hereafter called PKP2B).

The use of KK and PKP2B contracts in the mining sector in Indonesia was inspired by the formulation of Article 5a, which is an addition and amendment to the Indische Mijn Wet 1899. Compared to the provisions in 5a of the Dutch East Indies contract, the KK contract contains more complete and comprehensive provisions. This mining contract gives the contractor the right to carry out his business continuously from the survey stage, to exploration, and exploitation.[2]

KK contract also gives broader opportunities for foreign investors to do business in the mining sector because the management of operations is entirely in the hands of the contractor, thus, has absolute rights and authority to regulate and prioritize the interests of the company and maximize profits. Consequently, cooperations in the form of KKs attract more investors to invest their capital compared to the production sharing contract, which is more often used natural gas mining.

State sovereignty in the mineral and coal mining resource sector is regulated in Law No. 4 of 2009 of the Republic of Indonesia Concerning Mineral and Coal Mining. This is a major legal reform replacing the previous legislation Law No. 11 of 1967 concerning Basic Mining Provisions and contains the following main ideas:

a. Because minerals and coal are non-renewable resources, the Indonesian government, which is composed of the Central Government, regional governments, and private sector organizations, is in charge of developing and using them;
b. Based on permits issued by the national government and/or regional governments in accordance with their respective authorities, which are consistent with regional autonomy, the Indonesian government also permits businesses with Indonesian legal entities, cooperatives, individuals, and local communities to engage in mineral and coal extraction;
c. In order to achieve decentralization and regional autonomy, the administration of mining for minerals and coal is carried out in accordance with the principles of externality, accountability, and efficiency, including both the national and regional governments of Indonesia.

As regulated in number 2, explain that the Government of Indonesia will provide opportunities for businesses that are Indonesian legal entities to carry out mineral and coal concessions based on permits. Article 35 of Law No. 4 of 2009 provides that the form of mining concessions is not in the form of a KK but in the form of a permit. These permits include Mining Business Permits (IUP), People's Mining Permits (IPR), and Special Mining Business Permits (IUPK).

Previously, licensing was a direct government intervention that was growing and expanding in various fields of government in modern countries. Direct control over various activities was exercised by the government by implementing a form of licensing, including in the mining sector. Licensing is a form of administrative coercion against parties who will take advantage of objects that have the nature of public interest, and a means ofcontrollingthe lives of many people. Thus, the granting permits can be implemented by conducting several activities such as laying down licensing standards that applicants must comply with.[3]

Based on Article 112 of Law No. 4 of 2009, foreign-owned business entities holding permits, namely Mining Business Permits and Special Mining Business Permits, are required to divest equity shares in favor of the Indonesian participants after five years of production. The divestment obligation of foreign investment is still carried out even though Law No. 4 of 2009 has undergone revisions with the issuance of Law No. 3 of 2020 of the Republic of Indonesia Concerning Mineral and Coal Mining.

The sovereignty of the Indonesian state in the mineral and coal mining resource sector still requires the divestment of foreign capital. According to Gole and Hilger, divestment is a provision that regulates the sale of shares owned by a company or how to get money from investments owned by a person.[4] Furthermore, according to Indonesian law, specifically Article 1 Number 8 of the Implementing Regulations of Government Regulation No. 23 of 2010 Concerning Implementation of Business Activities Mineral and Coal Mining, share divestment is the number of foreign shares that must be offered for sale to the Indonesian participants.

The mining law, through Article 112 of Law No. 4 of 2009, as well as the amendments specifically Article 112 of Law No. 3 of 2020 still requires Business entities holding IUP and IUPK at the stage of Production Operation activities whose shares are owned by foreigners, to divest 51% shares in stages to the Indonesian participants, comprised of the Central Government, Regional Governments, State-Owned Enterprises (hereafter called BUMN), Regional Government-Owned Enterprises (hereafter called BUMD), or National Private Business Entities.

Before the issuance of Law No. 4 of 2009, as well as its amendments specifically Law No. 3 of 2020 the mining business in Indonesia was undertaken not onlythroughpermitsbut also through contracts, namely KK and PKP2B. Article 169B of Law No. 4 of 2009 stipulates that the provisions contained in KK/PKP2B contracts are to be adjusted no later than one year from the promulgation of the law; while Article 169A of the same lawgives KK and PKP2B contracts validity until the end of the contract periods.

Article 112 of Law No. 4 of 2009, which requires foreign companies to divest, while Article 169 letter (b) of Law No. 4 of 2009, requires companies holding Contracts of Work and PKP2B to adjust the contents of their contracts no later than one year, such as divestment obligations in their contracts. On the other hand, Article 169 letter (a) of Law no. 4 of 2009, Contracts of Work, and PKP2B which existed before the issuance of Law no. 4 of 2009 was given certainty to expire until

the expiration date. The articulation of these three articles can be said to be vague or unclear which can confuse the public or business actors.

The implication of foreign share divestment arrangements for mining concessions for contract holders becomes important because Article 169 of Law No. 4 of 2009 provides two arrangements that can give rise to ambigu ous interpretations. The law requires that the contents of the contracts be adjusted, but on the other hand, the contracts are still enforceable beyond the expiration date provided.

Following a legal examination of the shares divestment process under Indonesian mining legislation, disagreements over share pricing and possible losses between nations and international investors are not uncommon. When a firm is expropriated or has its business license revoked, governments and international investors can differ on how to determine the share price or the company's worth.[5]

The issue of Indigenous co-ownership and equitable involvement has received fresh attention as a result of Indigenous control over mining operations.[6] Similar to requirement of the divestment of foreign capital shares to the Indonesian participants under Article 112 of Law No. 4 of 2009, this is an effort by the Indonesian government to provide broader opportunities for domestic investment.

In Indonesia, the main factor that influences foreign-owned companies to divest of their shares to the Indonesian participants is the laws and regulations. Contrastingly, in Japan's international coal business, the trend in divestment can be largely explained by commercial, institutional, and structural factors.[7]

In this study, thein consistencies in the regulations were analyzed to find differences in divestment regulations in the period of the issuance of Law No. 1 of 1967, the period after the issuance of Law No. 4 of 2009, and up to the present time.[8] The present study is different from Fifi Junita’s research on regulatory risks to mining investors which result in regulatory inconsistencies.

According to research by Mas Rahmah and Muchammad Zaidun, the mining sector divestment policy has implications for foreign investment in Indonesia, and has the potential to hinder long-term investments and the attractiveness of investment in the Indonesian mining sector.[9] In contrast to the present study, they found that the long-term obstacles and attractiveness of investment in the mining sector for foreign investment were the factors causing the failure of foreign share divestment arrangements in terms of rights and obligations, because foreign share divestment arrangements in Indonesia force foreign companies to divest their shares through several issued regulations.

This research is not limited to the laws and regulations that have been published by the Government of Indonesia but includes several contracts entered into by foreign mining companies with the Indonesian government,[10] specifically the divestment obligations contained therein.[11]

1. DEVELOPMENTS IN COUNTRIES IN THE WORLD AS MOMENTUM FOR IMPOSING SHARE DIVESTMENT OBLIGATIONS.

Sudan is one of the countries in Africa that is experiencing internal conflict. The internal conflict in Sudan has been going on since 1989 and has become a complex issue. The various conflicts that occurred in Sudan led to the separation between the countries of North Sudan and South Sudan in 2011. The conflicts that occurred in Sudan were divided into two, the first was the conflict regarding the case of South Sudan and North Sudan and the second was the Darfur conflict.[12]

The divestment in Sudan aims to authorize State and local Governments to dispose of assets in companies conducting business operations in Sudan. Activities prohibiting direct investment and divestment authority in the State of Sudan are in four sectors, namely electricity production activities, mineral extraction activities, oil-related activities, and production of military equipment. Divestment in the State of Sudan provides an exception for business operations carried out. This exception covers South Sudan and businesses operating under license from the Office of Foreign Assets Control, where business operations consist of providing goods or services to marginalized populations, to internationally recognized humanitarian forces or organizations, or consisting of providing goods or services. which is only used to promote health or education.[13]

Since gaining independence from the combined authority of Britain and Egypt in 1956, Sudan has experienced political instability and civil conflict. Since the middle of the 1980s, internal disputes in Sudan have grown more violent and have most recently resulted in the crisis in western Darfur. 2003 saw Sudan. Human rights abuses by the Sudanese government and the government-backed Janjaweed militia include murder, rape, torture, burning of villages, and property destruction. [14]

Due to violations of human rights, Sudan has been designated by the US as a state sponsor of terrorism, leading to sanctions that restrict financial transactions and restrict international aid. While most US businesses are prohibited from doing business in Sudan by these restrictions. As many individual and institutional investors from all over the world have also applied pressure to owners in struggling non-US enterprises under the Sudanese government, the prohibitions on foreign assistance limitations and limits on financial transactions by the United States have created regulatory gaps. Individual and institutional investors from several countries have invested in Sudan, which has financial and social ramifications. Shareholder engagement.[15]

International support for the sanctions imposed by the United States came from various countries such as Arizona, California, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Minnesota, New Mexico, New York, North Carolina, Rhode Island, Texas, Vermont, Arkansas, Connecticut, Illinois, Maine, Maryland, Missouri, New Jersey and Oregon.

In December 2007, the United States government finally approved the Sudan Liability and Divestment Act which authorizes and encourages state and local governments to adopt Sudanese divestment measures such as prohibiting federal contracts with companies operating in the oil, power, minerals and military sectors of the United States Sudan.

Divestment in the State of Sudan aims to effectively encourage investors to present to shareholders companies who are hesitant about carrying out their operations in Sudan, create positive changes to help bring about complete peace in Sudan, minimize negative impacts on innocent civilians and protect investments. long-term and relevant in accordance with constitutional restrictions.[16]

By means of laws published in 2010, Divestment Occurs in Iran forbade investment operations for anybody with an investment in the Iranian energy industry totaling more than 20,000,000 United States Dollars (USD), including oil suppliers. or liquefied natural gas vessels, materials used to construct pipelines to transport oil or liquefied natural gas out of Iran, or financial institutions that extend loans to others for more than 45 days totaling more than USD 20,000,000.[17]

The divestment of foreign shares in Iran is the impact of increasing economic sanctions imposed by the United States. Initially, the International Congress in its findings concluded that the nuclear activities developed by the Iranian government to support terrorism were a threat to the security of the United States and other allies of the United States around the world.

The Iranian government continues to commit serious violations of human rights, including suppression of freedom of expression and freedom of religion, unlawful detention, torture, and extended executions, and there is increasing interest by the State government, local governments, educational institutions, and institutions. private companies, business companies, and other investors to disengage from companies conducting business activities in the Iranian energy sector, because such business activities may directly or indirectly support the Iranian Government's efforts to manufacture nuclear weapons.

Through the United Nations Congress chaired by the United States at the instigation of the states of Iran, finally Iran was given economic sanctions prohibiting investment activities for anyone who has invested more than USD 20,000,000 in the Iranian energy sector, meaning foreign investment. In the Iranian energy sector, ownership is limited to less than USD 20,000,000 so that it can result in many foreign companies or foreign investment divesting their shares to Iranian business entities or Iranian domestic investors.[18]

Due to the economic sanctions imposed by the international community (UN) through the United States as the Chair of the Congress, divestment of foreign shares in Iran occurs in the energy sector, investments of more than USD 20,000,000 and financial institutions that extend credit of more than USD 20,000,000 to others for more than 45 days.

Divestment takes place in America, The Southwestern Bell Telephone Company, a division of the Bell Telephone Company, created by Alexander Graham Bell in 1877, served as the forerunner to AT&T (American Telephone & Telegraph), the largest communications provider in the world. It evolved into the Bell Telephone Company from the Bell Telephone Company. In 1885, American Telephone and Telegraph was founded; it eventually changed its name to AT&T Corporation.

Initially the United States telecommunications industry had experienced a period of unfair competition. Two companies in the industry of inventors are competing to develop new technologies. Alexander Graham Bell patented his invention on February 17, 1876, which was one hour ahead of Elisha Gray of Western Union. The two inventors, both Graham Bell and Elisha Gray, have patented their inventions as the dominant telecommunications company in the United States Government.

Bell Labs, Bell Communications Research, the AT&T International headquarters, and the National Association of Exchange Operators are all now located in New Jersey, the same state that has long been home to Bell Labs. In other areas of policy, New Jersey has a history of innovation, placing fourth on the 1969 Walker Innovation Index. Differences in policy choices in the two states lead to different tariffs for telephone users. This rate difference in the United States of America is that New York customers pay USD 17.00 per month, while New Jersey Bell in the same year customers have to pay USD 8.00 which means New Yorkers pay twice as much as New Jersey residents.[19]

Around 1985, neither New Yorkers nor residents of New Jersey paid the entire local service cost. About 65% of the municipal charge was paid by New Yorkers, compared to only 37% by residents of New Jersey. This disparity widened following the privatization as the percentage of local cost coverage climbed by 16% in New York from 1983 to 1986 but only by 2% in New Jersey over the same period.[20]

United States Government On January 8, 1982, after eight years of antitrust litigation, AT&T signed an agreement to disengage from its local operating company. The actual divestment was scheduled for January 1, 1984, to allow sufficient time for the development of a plan to break up the network and asset management of the world's largest company. This divestment aims to prevent the recurrence of incentives at the RHC level that led to AT&T's antitrust lawsuit.[21]

The Final Decision was handed down on January 24, 1956, with one of the reorganizations of AT&T, one of which was the transfer of ownership of a separate share of the Board of Commissioners providing exchange services and local exchange access from AT&T through the separation of the shares of the separated Board of Commissioners to AT&T shareholders, or by another disposition.[22]

The policies of the countries of Sudan, Iran and America towards their policy of requiring foreign capital to be divested, are the imposition of share divestment obligations in several countries in the world and become one of the most influential momentums in divesting shares of mining companies in Indonesia. The State of Indonesia through several regulations has taken a policy to provide greater opportunities for national business actors by requiring foreign capital to be divested with the aim of being able to be purchased by Indonesian national parties.

The divestments that occurred in Sudan, Israel, and America can be employed as a springboard for the divestments that occurred in Indonesia because the state can force international businesses to divest their shares through statutory rules. The governments of Sudan, Israel, and America have issued regulations requiring companies to divest their shares, despite the fact that the divestments occur for different political reasons, such as Sudan and Israel due to international sanctions, and the United States due to unfair competition against state companies.

2. REGULATIONS FOR DIVESTMENT OF FOREIGN SHARES IN MINERAL AND COAL MINING IN INDONESIAN

Law No. 1 of 1967 of the Republic of Indonesia Concerning Investment of Foreign Capitaland Indonesia's "Old mining law" Law No. 11 of 1967, regarding the Basic Provisions of Mining did not regulate at all the sale of shares or the take over of foreign capital ownership rights. The body of the law does not mention the arrangements for the sale or acquisition of foreign ownership rights, or implementing regulations providing for divestment or sale of foreign equity.

After the issuance of Law No. 1 of 1967, several implementing regulations were enacted by the Indonesian government to regulate the divestment or attempts to take over foreign ownership, namely:

a. According to Presidential Decree No. 49 of 1981, Article 12 of the Basic Provisions of Coal Mining Concession Agreements between State Coal Mining Companies and Private Contractors states that by the end of the tenth year following the beginning of the production stage, contractors must offer at least 51% of their shares to the government and/or Indonesian citizens.

b. In accordance with the laws governing foreign investment, a contracting company that is a foreign investor must offer its shares to the government, commercial entities, or Indonesian citizens. This is stated in Presidential Decree No. 21 of 1993, which also outlines the fundamental provisions of coal mining concession agreements between state coal mining companies and private contractors.

c. Foreign investment companies whose capital is formed as a joint venture between Indonesian and foreign parties or as wholly foreign capital are required to sell some of their shares to Indonesian citizens or legal entities within a maximum of fifteen years of commercial production, according to Article 7 of Government Regulation No. 20 of 1994 of the Republic of Indonesia regarding the Requirements for Ownership of Shares in Foreign Investment Companies.

The President of the Republic of Indonesia issued Presidential Decree No. 75 of 1996 about the Basic Provisions of Coal Mining Concession Agreements between State Coal Mining Companies and Private Contractors, which states that investments acting as private contractor companies are required by Indonesian law to establish a legal entity. If the private contracting company is a foreign investment company whose entire capital is owned by a foreign citizen or legal entity, the private contracting company must sell a portion of its shares to Indonesian citizens and/or legal entities in accordance with applicable laws and regulations.

Some of the above arrangements refer to the divestment arrangements in the PKP2B held by the company PT Asmin Koalindo Tuhup and the KK held by PT Koba Tin. The contents of Article 21 Paragraph (3) of the Contract of Work (KK) between the government of the Republic of Indonesia and PT Koba Tin state that the number of shares that must be offered to Indonesian participants must comply with the provisions of Government Regulation No. 20 of 1994,[23] as the provisions apply to foreign investment share ownership. Meanwhile, the PKP2B agreement held by PT Asmin Koalindo Tuhup PKP2B reads:[24]

"Subject to the provisions below, the Contractor warrants that its shares owned by foreign investors will be offered for sale or issuance to the Government or Indonesian citizens or Indonesian companies controlled by Indonesian citizens (hereinafter referred to as 'Indonesian participants'). For Foreign-Owned Company (hereafter called PMA) Contractors, the number of shares to be offered to Indonesian participants must meet the requirements of Ministerial Regulation No. 20 of 1994 as the requirements apply to share ownership in Foreign Capital Companies. Concerning PMA Contractors, in the event of an increase in the share capital of the Indonesian Participating Contractors, the Contractors are entitled to purchase new shares in proportion to the number of shares they currently hold to provide an opportunity for them to maintain their proportionate share holding in the contractor, provided that this does not apply for shares registered by contractors on the Indonesian stock exchange. There is not a single case where the shares of Indonesian participants in PMA contractors are treated less favorably than the shares of other participants. In PMA Contractors, Indonesian participants are entitled to appoint members of the Contractor's Board of Commissioners in accordance with the ratio of the number of shares they have in the Contractor; however, the Contractor will not be asked to increase the number of members of the Board of Commissioners to more than ten people just to maintain an absolute comparison of the members of the Board of Commissioners appointed by foreign participants and Indonesian participants".

In the two contracts mentioned above—KK and PKP2B—the share divestment follows the rules stipulated in Government Regulation No. 20 of 1994. However, Government Regulation No. 20 of 1994 does not regulate the offering of shares nor provide for the documents for submitting an offer, the time limit for the offer, or the method of calculating the price of divested shares. Nonetheless,

although the divestment arrangements for the two companies are incomplete, the agreements are between mining contractors entering Indonesia and the Indonesian government, based on mineral and coal mining concession contracts, namely KK and PKP2B, thus governed by the applicable Indonesian laws and regulations.

With regard to mining laws, law after the issuance of Law No. 4 of 2009, the Indonesian government has issued several implementing regulations on the divestment of foreign shares, such as Government Regulation No. 23 of 2010, concerning the Implementation of Mineral and Coal Mining Business Activities; Government Regulation No. 24 of 2012, concerning Implementation of Mineral and Coal Mining Business Activities; Government Regulation No. 1 of 2014, concerning Implementation of Mineral and Coal Mining Business Activities; and Government Regulation No. 77 of 2014, concerning the Implementation of Mineral and Coal Mining Business Activities.

Law No. 1 of 1967, Law No. 4 of 2009, as well as the Government Regulations mentioned above all have divestment regulations in place; however, they are insufficient to handle all divestment concerns. Due to the enormous number of present legislations, legal dualism may develop. Moreover, the current rules do not clearly limit divestment because some components are not covered.[25]

In Article 15 of Government Regulation No. 9 of 2017, KK and PKP2B holders who intend to divest of their shares must comply with the requirements provided therein. Briefly, among other divestment requirements, this regulation presents a schedule for gradual divestment of shares as follows: minimum of 20% of total shares divested in the 6th year after production, 30% in the 7th year, 37% in the 8th year, 44% in the 9th year, and 51% in the 10th year. In addition, the procedure for determining the price of divested shares is determined based on a fair market price without taking into account the mineral or coal reserves at the time of the offer of the divested shares.

The divestment arrangements for several mining companies holding KK/PKP2B contracts cannot entirely be determined from the contents of their contracts. Nevertheless, the background to the exploitation of KK and PKP2B holders is found in the legal basis for their entry into Indonesia, namely Article 10 of Law No. 11 of 1967 and Article 8 of Law No. 1 of 1967, which existed before the issuance of Law No. 4 In 2009. Hence, the arrangement for divestment of foreign shares of for example, two KK/PKP2B companies, PT Asmin Koalindo Tuhup and PT Koba Tin, will follow the provisions stipulated before the issuance of Law No. 4 of 2009.

According to Article 15 of Government Regulation No. 9 of 2017, after the issuance of Law No. 4 of 2009, foreign companies holding KK and PKP2B, where divestment arrangements are stipulated in their contracts, are required to follow the provisions of said Government Regulation No. 9 of 2017. Thereafter, contract-type companies will gradually switch to licensing systems, such as IUP and IUPK".[26] Meanwhile, the guarantee of the continuity of contract extensions for foreign mineral and coal mining companies became weaker with the Decision of the Constitutional Court of the Republic of Indonesia Number 64/PUU-XVIII/2020, ruling that the phrase "provided a guarantee" is contrary to the 1945 Constitution of the Republic of Indonesia, and consequently amending the phrase "provided a guarantee" to "can.[27]

Thus, despite the right of foreign investors to certainty on divestments as stipulated in their contracts, the Government of Indonesia is forced to follow the new rules promulgated after the issuance of Law No. 4 of 2009, such as Article 15 of Government Regulation No. 9 of 2017.[28] The divestiture arrangement is now governed by Ministry of Energy and Mineral Resources Decree No. 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, which must be followed for calculating the disposal share price for KK and PKP2B contract holder business entities. The rationale, according to Ministerial Decree No. 84 K/32/MEM/2020,is as follows:[29]

"If the KK and PKP2B provisions establish the way of calculating the divestment share price, the KK and PKP2B holders can calculate the divestment share price using the method specified in the Contract of Work or Agreement. Coal mining is profitable as long as it is profitable for the government".

The statement “calculating the divestment share price to the extent that it benefits the Indonesian side” can be interpreted as if it is not profitable for the Indonesian government, the stipulations in the contract on the calculation of the divestment share price may be violated by the Indonesian party.

According to Article 1313 of the Civil Code of the Republic of Indonesia (hereinafter called KUHPer), an agreement is an act in which one or more persons bind themselves to another person. One of the essential rules requiring all subjects of international law to exercise their rights and obligations in good faith is based on the principle that agreement commitments must be performed in good faith. This basic premise can be understood as an expression of states' demand for an international legal system that can guarantee international order and prohibit arbitrary behavior and anarchy in the socio-political realm.[30]

KK and PKP2B as contracts entered into by the Government of Indonesia with mining contractors create rights and obligations for both parties. Through the divestment arrangement, the Government of Indonesia requires foreign companies to comply with the divestment provisions in accordance with the newly made or ratified regulations, even though the stipulations contained in the KK and PKP2B are incomplete or the calculation of the divestment share price does not benefit the Indonesian participant, and thus has the potential of not obtaining a contract extension.

3. DIVESTMENT OBLIGATIONS TO SEVERAL CONTRACT HOLDERS

Mineral and coal mining companies can be divided into 5 forms of businesses based on their form of business, as provided for in Law No. 3 of 2020, namely IUP, IPR, IUPK, KK, and PKP2B. Based on the types of permits for mining companies in Indonesia in 2021 issued by the Ministry of Energy and Mineral Resources, there are 5290 IUPs, 4 IUPKs, 99 IPRs, and 99 Mining Business Permits; Special Production Transportation totaling 1590, Mining Business Permits for Purification Special Production Operations totaling 85, Mining Services Business Permits totaling 693, KK totaling 33, and PKP2B totaling 66.

PT Kaltim Prima Coal (PT KPC) is one of the coal companies holding a PKP2B. The obligation of PT KPC to offer shares, as stipulated in the PKP2B, is to divest up to 51% of its total shares in the tenth year after production begins. Article 26.1.1 in the PKP2B provides that the shares to be offered to Indonesian participants each year after the end of the calendar year indicated may not be less than the following percentages: on the 5th year, 15%;on the 6th year, 8%; on the 7th year, 7%; on the 8th year, 7%; on the 9th year, 7%; on the 10th year, 7%. The implementation schedule for the divestment obligation began in 1996 until the tenth year in 2001, with the hope that 51% could be controlled by Indonesian participants.[31]

One of the arguments of the defendants in the Central Jakarta District Court explicitly reads, “The Plaintiff is part of the Government of the Republic of Indonesia which is united and under the Central Government.”In other words, according to the defendant, the State Administrative Court (hereafter called PTUN), is incompetent because it acts as a state administrator in the divestment process. The plaintiff filed an appeal with the Supreme Court on July 19, 2006. On December 13, 2007, the Supreme Court of Indonesia rejected the appeal due to lack of jurisdiction; specifically, the rights of PT Tambang Batubara Bukit Asam (Persero) were already transferred on October 7, 1997.

After the dispute at the PTUN, an attorney from the Provincial Government of East Kalimantan filed a lawsuit at the International Center for Settlement of Investment Disputes (ICSID) Arbitration Institute. The ICSID International Arbitration Tribunal for the PT KPC share divestment dispute case stated that the jurisdictional requirements stipulated by Article 25 of the ICSID Convention were not met and did not have jurisdiction over the PT KPC share divestment dispute with the East Kalimantan Government as the Indonesian party.[32]

In the divestment of the foreign shares of PT KPC, which was the subject of a dispute with the East Kalimantan Regional Government at the ICSID Arbitration Institute, the share offering also brought abouta dispute between the Central Government and the Regional Government. The arguments of

the parties in the dispute between the Central Government and the Regional Government were as follows:[33]

a. The Government has the right to negotiate the divestment of PT KPC, and the Government does not agree with PT KPC's interpretation that the Indonesian party is anyone who meets the qualifications of an Indonesian party, including the Regional Government;
b. The Regional Government's arguments include: the Regional Government is the party most entitled to the PT KPC divestment shares; the enactment of Law Number 22 of 1999 concerning Regional Government, and Law Number 25 of 2000 concerning the Balance of Government and Regional Government Finances is a momentum for decentralization of natural resource management, including mining.

In efforts to settle, the East District Government filed a lawsuit against the ICSID to fight for the divestment rights of 51% of the divested shares. The ICSID decision states that the East Kutai Government is not a party that can file a lawsuit because it is not a party representing the Government of the Republic of Indonesia. Moreover, according to ICSID, four conditions must be met in filing the lawsuit, namely the dispute must be between signatory countries or representatives of the signatory countries, the parties must submit written approval for the ICSID to resolve the matter, the dispute is a legal dispute and must be directly related to divestment.

Another case is the obligatory divestment of PT Newmont Nusa Tenggara (PT NNT). PT NNT operates under a KK license, which was signed on December 2, 1986, and started production on March 1, 2000. The initial contract area of PT NNT was 1,127,134 Ha but only 87,540 Ha have been operating. Before the divestment, PT NNT's shareholdings were Sumitomo (35%), Newmont Mining Corp (45%), and the remaining 20% owned by PT Pukuafu Indah. Article 8 of PT NNT's Articles of Association regarding the transfer of shares reads “no shares may be granted, charged as collateral, pledged or used as collateral, to any party other than to other shareholders, without prior written permission from the Board of Directors”.[34]

According to Article 24 paragraph (3) of the KK agreement, PT NNT must ensure that the shares owned by foreign investors would be offered for sale or issuance, first to the government, and then to the public if the government does not accept or reject the offer. It will be made available to Indonesian citizens or Indonesian enterprises owned by Indonesian citizens within 30 days after the offer. An offer to the Indonesian government or a citizen will be referred to as an offer to an Indonesian participant.[35]

Decision of the Supreme Court of the Republic of Indonesia, Number 1516/Pdt.G/2009/PN.Jkt.Sel, PT Pakuafu Indah vs PT Newmont Indonesia Limited and Nusa Tenggara Mining Corporation. The percentage and implementation obligations of PT NNT's divestment offer to PT Pakuafu Indah as the Indonesian party are as follows: 3% of shares to be divested in 2006, 7% of shares to be divested in 2007, 7% of shares to be divested in 2008, 7% of shares to be divested in 2009, and 7% shares to be divested in 2010.[36]

The divestment obligation that should have been carried out by PT NNT, with a total of 31% shares that could be controlled by PT Pakuafu Indah, was not implemented. The refusal of PT NNT to sell its foreign shares eventually led PT Pakuafu Indah to sue them at the South Jakarta District Court. The lawsuit was met with resistance, and the dispute resolution went to the Singapore International Arbitration Center.

Dispute on the Authority to Purchase PT Newmont's Shares. PT NNT to divest foreign shares to PT Pakuafu Indah, which was settled at the South Jakarta District Court, is a case of an inter-company dispute. However, additionally, it turned out that PT NNT's obligation to divest foreign shares also caused a dispute over authority between State Institutions in Indonesia, namely the President versus the Audit Board (BPK) and the House of Representatives (DPR).[37]

Based on page 8 to page 14 of Decision Number 2/SKLN-X/2012 issued by the Constitutional Court, the President believes that the implementation of the purchase of 7% divestment shares in PT NNT in 2010 is with constitutional authority within the field of state financial management.

According to the BPK and the DPR based on page 95 to page 100 of Decision Number 2 /SKLN-X/2012 issued by the Constitutional Court, the Status of Purchase of 7% of PT NNT shares by the

Government the divestment of PT NNT shares which will be purchased by the governmentisan exercise of the right to purchase shares by Indonesian participants. This is the context of Article 24 of the mining KK, which provides that the shares owned by foreign investors will be offered for sale or issuance, first of all to the Government, and secondly if the Government does not accept/approve the offer within 30 days from the date of the offer to Indonesian citizens or Indonesian companies controlled by Indonesian citizens.

In the dispute between the President of the Republic of Indonesia and the DPR and BPK, the DPR and BPK prevailed, with the ruling that the purchase of 7% of PT NNT shares by the Government Investment Center cannot be classified other than as direct investment or equity participation. Thus, it must be discussed and approved in advance by the DPR before being implemented.[38]

This leads to implications for the investment climate. The steps taken by the DPR and BPK to question the government's purchase of PT NNT's divestment shares sets a bad precedent for investors in Indonesia, especially when entering the divestment period, because of the increased role of the legislature and the state audit authority in the feasibility of the share divestment.

Generally because PT NNT's freedom to enter into divestment transactions is limited by the substance of the KK entered into by the Indonesian government with it. Thus, PT NNT is not free to offer its shares to other parties. It must offer the shares to parties listed in the contract, which includes the Indonesian government, Indonesian citizens, or Indonesian legal entities.[39]

The last case is the obligation of PT Kideco Jaya Agung (PT KJA) to divest shares, under the PKP2B it holds. Article 26.1 of PT KJA's PKP2B, related to Participation and Promotion of the National Interest, states that PT KJA is obliged to guarantee/ensure that its shares owned by foreign investors are offered either for sale or issuance to the Government or individual Indonesian citizens or Indonesian companies controlled by an individual Indonesian citizen (an Indonesian participant) every year after the end of the fourth full calendar year after the start of the Operational Period.[40]

Article 26.1.1 then expounds that the divestment of PT KJA is an offering of shares to Indonesian participants every year after the end of the fourth full calendar year, which must be not less than the following percentages of the total number of shares after the acceptance of the offering:onthe 5th year, 15%; on the 6th year, 8%; on the 7th year, 7%; on the 8th year, 7%; on the 9th year 7%; on the 10th year,7%.[41]

PT KJA was sued by the Indonesian participants, in this case, the East Kalimantan Government and The East Regency Government, for not fulfilling its divestment obligations, even though they have sent a letter of willingness to buy PT KJA divestment shares. Thus, the East Kalimantan Government and The East Regency Government on the divestment of PT KJA feels a loss of USD 377,000,000.00.[42]

In the PT KJA divestment case, the judge ruled that the PKP2B PT KJA is an agreement between the State Coal Mining Company (Government of the Republic of Indonesia)—in this case, the Minister of Energy and Mineral Resources—and PT KJA. The Regency of Timur and the Government of East Kalimantan were deemed to be not parties to the agreement; thus, they are not bound because the agreement only applies as law between the parties who entered into it. The appeal of the East Regency Government and the East Kalimantan Government, who were not parties to the PKP2B, was therefore rejected.

The case of the mining company, PT Freeport Indonesia (PT FI), is different. PT FI was formed in 1967 as Freeport Indonesia Delaware Incorporated and is a subsidiary of PT Freeport McMoran Copper & Gold Inc., with 81.3% of shares controlled by the parent company. PT IndocopperInvestama Corporation, an Indonesian private company, owns 9.4% shares of PT FI, and the rest is owned by the Indonesian government.[43]

PT FI has been in production since 1967, and was the first mining company to enter Indonesia after Indonesia's Independence. Its business is based on the cooperation of foreign investors with the Indonesian side, through a KK. In 1997, PT FI underwent an expansion, which was funded by the parent company, PT Freeport McMoran. Thereafter, the ownership of shares of PT FI changed, resulting in PT Freeport McMoranowning 81.28%; the Indonesian government, 9.36%; and PT Indocoper Investama, 9.36%.[44]

In 2004, PT FI offered 9.36% shares to the Central Government. In its response, the letter of the Minister of Finance S-293/MK.02/2005 on July 7, 2005 said that the state's financial condition was not supportive. Then, through the Director-General of Geology and Mineral Resources, in its letter No.11R/40.00/DJG/2005 on July 18, 2005, the Government informed PT FI that they could not be involved in buying the shares due to the state's financial condition. It was then suggested that the offer be given to the Papua Provincial Government or BUMN.[45]

Hence, the shares were offered to the Papua Regional Government in PT Freport McMoran's Letter No. 136/GR. Lcl.Govt/9/2005 on September 12, 2005, with cash payment terms based on fair market value. However, until 2010, there had been no follow-up on the offer. PT FI's divestment obligation is contained in the provisions of Article 24 paragraph (2.d) of their KK, which states "if, after the signing of this agreement, the prevailing laws and regulations or the policies or actions of the Government impose provisions on the transfer of shares which are lighter than the provisions of the agreement stipulated in this article, the lighter share transfer provisions will apply to the parties to this agreement."

In the divestment of shares of PT FI, a subsidiary of PT Freeport McMoran, which has been in production since 1967, the State-Owned Enterprises did not participate in the financing.[46] Instead, the financing was obtained from foreign debt.[47] This shows that the Indonesian participants had limited capital to buy PT FI shares. PT FI's contract is an agreement that is contrary to Pancasila and the 1945 Constitution of the Republic of Indonesia. However, as this is a contractual agreement that is subject to civil law, the principle of pacta sunt servanda, upholding the sanctity of the contract, recognizes the validity of the Contract of Work of PT FI, which must be respected until the expiration of the contract.

The unclear regulation caused business actors and national participants to interpret the law according to their respective interests and resulted in legal uncertainty which led to the non-absorption of the entire percentage of divested shares. Holders of Contracts of Work, Mining Business Permits, or Special Mining Business Permits cannot be subject to sanctions as regulated by positive law because the divestment of shares was not purchased due to the fault of the permit holder, but to national participants.[48]

Several divestment disputes show that divestment arrangements have not been able to accommodate the implementation of divestment that occurred in Indonesia and it should be the duty of the Indonesian government to immediately find a solution.

CONCLUSIONS

The implications of foreign share divestment arrangements for foreign companies holding KK and PKP2B contracts has given rise to rights and obligations for both parties to the contracts. The obligation of foreign companies, which are KK and PKP2B holders, to offer shares gives rise not only toproblemsfor the companies but also between state institutions, namely the President versus BPK and the DPR, as to which party has the right to buy—such as the case of the divestment offer of PT NNT. Obligations to offer to other foreign companies with contracts that are disputed in the judicial and arbitration institutions have led to rejections for several reasons, such as the absence of the right to buy for the Indonesian side e.g., the divestment cases of PT KJA and PT KPC the absence of arrangements that provide a larger portion to buy divested shares, and limited capital e.g., the PT FI divestment case. The right of the Indonesian state to buy divested shares of foreign companies is not only constrained by the arrangements it has made but also the capital it owns. In addition to the obligation to offer shares made by foreign mineral and coal mining companies that are rejected is the right of foreign investors to obtain business certainty and great profits in business.

Based on the findings of the study, the following recommendations are proffered. As a country with sovereignty over mineral and coal mining resources, Indonesia must make changes to the foreign share divestment arrangements by no longer requiring foreign capital to be divested, when faced with obstacles related to the regulations and the capital it owns. This is because the previous experiences with the obligations of foreign contract holders of KK and PKP2B did not go well

asevidenced by the divestment disputes of PT KJA, PT NNT, and PT KPC. Additionally, foreign companies in the mineral and coal mining sectors must be prepared for disputes with the Indonesian participants if the obligation is not profitable for them.

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