State Sovereignty in Freeport Contract of Work Renegotiation

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Abstract: Natural resources management in Indonesia has always been related to the politics and the issue of sovereignty. Unfortunately, the legal politics related to Freeport Contract of Work has put Indonesia in an unprofitable position since New Order era. New Order regime's legal and political frameworks are devoid of the concept of state sovereignty in terms of natural resources management. Mineral resources management was handed over to the private company with equal position to the government, resulting in a huge private financial gain. The implementation of Law Number 4 of 2009 on mineral and coal mining did not automatically enforce state sovereignty in natural resources management. This study examines the policy of Indonesian government under President Joko Widodo using legal politics approach in renegotiating the contract of work for Freeport. The policy succeeded in finishing the contract of work negotiation with 51 percent share divestment from Freeport to Indonesia. However, this policy is still unable to return the rights and enforce state sovereignty in natural resources management since Freeport still has the control over the management. This negotiation was done in order to minimize social and political turmoil in Papua if the government failed to prolong the Freeport contract of work, resulting in Freeport ceasing their operation.

1 INTRODUCTION

Natural resource management in Indonesia is still regarded as a serious matter due to the powerful political and economic interests of the ruling regime so that national interests are neglected to pursue foreign investment which is detrimental to state sovereignty. Mining management at Freeport in Mimika, Papua (Indonesia) was seen as a state policy that did not prioritize national interests and abandoned state sovereignty.

A number of studies have shown that Freeport mining in Papua contradicts the constitution due to foreign intervention that erodes state sovereignty. In fact, Denise Leith called the Freeport mining as a political power of the New Order regime, supported by military power to force political control over Papua. Furthermore, Chris Ballard discovered violations of indigenous peoples' rights by PT Freeport Indonesia in Papua using military force, which resulted in the people having to relocate and lose their livelihoods that could be categorized as international violations. On the contrary, Rifai-Hasan actually sees Freeport mining in Papua as contributing to sustainable development and poverty reduction instead in which Freeport mining operations contribute to a multiplier effect in moving the economy in Papua.

This study will analyze Freeport's Contract of Work renegotiation in the period of 2016-2018, focusing on the aspects of state sovereignty related to natural resource policies. This study was done using political legal analysis that links the direction of state policy in renegotiating Freeport's Contract of Work under Joko Widodo's administration.

This study will analyze Freeport's Contract of Work renegotiation using sovereignty theory which is then linked to legal politics. Thus, the sovereignty theory does not stand alone in explaining the phenomenon of the Freeport's Contract of Work renegotiation since it will be viewed within the framework of law and political interests. State sovereignty theory always deals with two characteristics: (1) internal supremacy, which is the supremacy inherent to the territory and (2) external independence, which is the independence over international relations with other countries. Charles G. Fenwick called it an undivided authority for everyone and was independent from the control of other countries.

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Therefore, based on its sovereignty, the state exercised its authority to manage its territories and to deal in relationship with other countries. The state authority in carrying out its sovereignty still refers to laws/regulations and public interests. Thus, the state sovereignty in exercising its authority is subject to state compliance on laws/regulations, both national and international law and the public interest of a nation. The interaction between compliance on law and the realization of public interests will test the way state sovereignty carried out its policies. This is the theory that will explain the Freeport's Contract of Work renegotiation in two dilemmatic positions, namely submitting to the contract as an international agreement or pursuing the aspirations toward public interest of the Indonesian people in managing their natural resources.

2 HISTORICAL BACKGROUND

Since the colonial era, natural resources management in Indonesia actually has a close relationship with law and politics, which is then called as "mining management legal politics" that is closely related to foreign investment. In the history of Nusantara archipelago, foreign traders are flooding in from China, Arabic, Portuguese, and Dutch, carrying out international trade in traditional means. Only in the period of colonialism did the Dutch forego trade politics by modernizing commercial law through Wetboek van Koophandel (Commercial Code), introducing business entities and unions as a basis for Dutch legal politics to fully control the developing capital in the archipelago. Unfortunately, these investments ceased during the Japanese occupation. In fact, Japan prohibited the export of raw materials on a large scale so that there were no investment activities.

After independence, the Indonesian government needed foreign capital for national development. It gave way to the Law No.78 of 1958 on Foreign Investments, which was later amended by the Government Regulation in Lieu of Laws of the Republic of Indonesia No.15 of 1960 concerning Amendments to Law No.78 of 1958 on Foreign Investments. Afterwards, the Law No.37/Prp of 1960 was issued concerning Mining which affirmed that the state was an authority that needs to be involved in mining business activities as a form of national wealth controlled by the state. Legal politics at this time implements the principle of state sovereignty over natural resources where the state becomes the entity that carries out mining business.

After Sukarno was succeeded by Soeharto, the New Order government enacted Law No.1 of 1967 on Foreign Investments. The New Order's legal policy then changed from the previous direction by allowing total foreign investments (Article 6 (1)) as well as putting the state's position in line with foreign private entities in the form of a Contract of Work (Article 8 (1)). Furthermore, a policy in the form of joint venture scheme was issued as stipulated in the Government Regulation No.17 of 1992 and the Presidential Decree No.32, 33, and 34 of 1992. This is the fundamental weakness of the Law of 1967 on Foreign Investments since it actually contained a number of problems, namely the imbalance in profit sharing, imbalance in bargaining position, the issue of manipulation, abuse of office and corruption in contract making, power/regime changes, environmental damage, and community objections.

In April 1967, exactly 3 months after the enactment of the Law of 1967 on Foreign Investments, Freeport McMoran, a foreign company established and subject to the State of Delaware, United States, entered into a Contract of Work with the Government of Indonesia, represented by the Minister of Mines and Energy. Armed with this Contract of Work, Freeport became the exclusive contractor of the Ertsberg mine in Papua, covering over an area of 10 square kilometers, which was later expanded in 1989 to 61 thousand hectares for the period 1967-1991. Contract of work between Indonesian government and Freeport was established in the Decree of the Cabinet Presidium Number 82/EK/KEP/4/1967 on April 7, 1967. From the perspective of international business, this Freeport Contract of Work with the Indonesian government is a form of international business contract. Ironically, a few months after the Contract of Work was signed, specifically on December 1967, Law Number 11 of 1967 concerning the Basic Provisions of Mining was ratified. Moreover, in 1970, Law Number 11 of 1970 concerning Amendments and Supplements to Law Number 1 of 1967 on Foreign Investments was issued that regulates the leeway for taxation from foreign investments.

In December 1991, PT Freeport Indonesia (PTFI) signed acontract of work extension with a validity period of 30 years with an option to extend twice for ten years. Thus, Freeport Contract of Work will end in 2021. In the extended contract of work, Indonesian government has succeeded in obtaining a stock share of PTFI with the inclusion of an article asserting that PTFI has an obligation to divest its shares in two stages until the national ownership of

its share reaches 51 percent. The illustration is that, Freeport was obliged to release 9.36 percent of its shares in the first phase to the Indonesian government in the first 10 years since 1991. The second phase then began in 2001 where Freeport had to release 2 percent of its shares every year until national ownership reached 51 percent. Unfortunately, this continued divestment was not carried out by PTFI because the New Order Government issued Government Regulation Number 20 of 1994 concerning Share Ownership in Companies Set Up in the Framework of Foreign Investment (Article 2 (1) b), stating that foreign investment can be done directly, meaning that all of its capital is owned by foreign citizens and/or legal entities. This implies that foreign shares ownership in Indonesia can be owned up to 100 percent. This makes Freeport McMoran bought back Indocooper shares that has been released previously.

The direction of Indonesia's legal politics seems to be devoid of the principle of state sovereignty over natural resources. Mining management was left to foreign private companies with a position equal to the Government, resulting in huge private financial gains. It is not surprising that the Law of 1967 on Foreign Investments invited public criticism because it contained a number of problems, namely an imbalance in profits sharing, imbalance of bargaining position, the issue of manipulation, abuse of office and corruption in contract making, power/regime changes, environmental damage, and community objections. In other words, legal policy corruption is evident in the Freeport Contract of Work under the Law of 1967 on Foreign Investments.

In fact, the national leadership since the reformation era failed to take care of PT Freeport Indonesia regarding the issue of state sovereignty over natural resource management. Even though, based on the Constitutional Court Decision Number 002/PUU-I/2003, the form of natural resource management through licensing is in accordance with Article 33 of the 1945 Constitution and is not a civil contract. This is reinforced by the Constitutional Court Decision Number 36/PUU- X/2012 concerning the judicial review of Law Number 22 of 2001 on Oil and Gas, stating that the contract regime contained in the Cooperation Contract in which the Oil and Gas Regulatory Agency represents the Indonesian government, placed the government in civil relations position which is equal with the company so that the state loses discretion to make regulations for the benefit of the people, who in turn lose their sovereignty in managing natural resources. According to the Constitutional Court, the relationship between the state and private institution is not a civil relationship, but a public relationship in the form of giving permission. On this basis, Freeport Contract of Work actually contradicts Article 33 of the 1945 Constitution of the Republic of Indonesia because it is a civil contract that is not in accordance with the right of state to control resources. The state is bound to the Contract of Work which means that it has degraded state sovereignty to manage natural resources. >>>Your paper will be part of the conference proceedings therefore we ask that authors follow the guidelines explained in this example and in the file «FormatContentsForAuthors.pdf» also on the zip file, in order to achieve the highest quality possible.

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3 FREEPORT CONTRACT OF WORK AFTER THE ENACTMENT OF LAW OF 2009 ON MINERAL AND COAL MINING

After the enactment of Law Number 4 of 2009 on Mineral and Coal Mining, the Contract of Work system is no longer used by mining companies and was replaced with a mining business permit system. This means that the regime used is the licensing regime rather than the contract regime. This legal policy brings important changes, such as: (1) from the aspect of legal relations, it is a public relationship since it uses the instrument of state administrative law, not civil law; (2) from the aspect of law enforcement, it is carried out by the government, not both parties; (3) the choice of law does not apply; (4) the dispute is submitted to the Administrative Court and not to the international arbitration; (5) the rights and obligations of the Indonesian government are greater; (6) the source comes from legislation, not contracts, and; (7) the consequences are unilateral, not the agreement of both parties.

The Law of 2009 on Mineral and Coal Mining gives a clear direction for the position of contract of work. Article 169 states: (a) that the existing Contract of Work prior to the enactment of this Law is still in force until the expiration of the contract/agreement, and; (b) the provisions

contained in the article of the Contract of Work are adjusted no later than 1 year after this Law is promulgated. The provisions of Article 169 above are in accordance with Article 1338 of The Civil Code which states that the agreement must not have a conflict with law, decency and propriety. In the opposite sense, if it is contradictory, then the agreement becomes null and void.

However, by using the principle of pacta sunt servanda, Indonesian government is subject to "the principle of binding agreement", in which the Indonesian government cannot unilaterally impose to amend the Freeport Contract of Work with a Special Mining Business License, included in some strategic issues within this Law are:

1. The area is limited to a maximum of 100,000 hectares and a maximum of 25,000 hectares for area of operation (Article 83).
2. Contract extension is 20 years maximum and can be extended for 10 years each. The holder of the production operation permits that has been granted an extension for 2 times must return the area of operations to the Indonesian government (Article 83).
3. State revenues in the form of royalty amounted to 4 percent for copper, 3.75 percent for gold, and 3.25 percent for silver from the selling price.
4. The obligation for divestment takes effect after the company has been in production for 5 years to the central government, regional government, State-Owned Enterprises (BUMN), Regional-Owned Enterprises (BUMD), or national private enterprises (Article 79 and 112).
5. Obligation of processing and refining domestically by building smelters to increase the added value of mineral resources in the implementation of mining, processing, refining, and mineral utilizations (Article 79, 102, 103, 104, and 124).
6. Obligation to use domestic goods and services (Article 141).

With the enactment of the Law of 2009 on Mineral and Coal Mining, Freeport Contract of Work must be adjusted. In other words, in 2010, as mandated by the Law, Freeport Contract of Work should have been adjusted to avoid conflicts with the Law of 2009 on Mineral and Coal Mining

4 THE ROAD TO RENEGOTIATION

Adjustment of the Contract of Work is the mandate of Law Number 4 of 2009 on Mineral and Coal Mining. Freeport, which holds the 1991 Contract of Work, was affected by the enactment of this Law. Unfortunately however, Freeport still refuses to make adjustments and asks the Indonesian government to be consistent with the previously agreed contract of work. As Stated in Article 21 (1) of the Contract of Work, if there was a dispute, it can be pursued by means of peace or arbitration. The peace path will take place in accordance with The United Nations Commission on International Trade Law (UNCITRAL) peace regulations, while the arbitration route will be carried out according to UNCITRAL arbitration regulations.

This could become a deadlock if there was no agreement between the two parties. To make it even worse, the 1991 Contract of Work did not regulate the provisions regarding contract changes, which makes it difficult for the government to impose adjustment over Freeport based on the Law of 2009 on Mineral and Coal Mining.

If Freeport refused to make adjustments, then one of the parties to the 1991 Contract of Work can bring the dispute toward arbitration as the chosen clause provisoire and agreed upon by the parties in Article 21 of the Contract of Work concerning dispute resolution. Unfortunately, the clause provisiore in the 1991 Contract of Work does not specify an ad hoc arbitration or institutional arbitration and also which arbitration body agreed that will resolve the dispute so as to allow a new agreement outside the contract, which is called a clause compromisoire. However, Article 154 of the Law of 2009 on Mineral and Coal.

Mining states that "any dispute that arises in the implementation of a Mining Business License, or a Special Mining Business License is settled through a court and domestic arbitration in accordance with the provisions of the legislation". This could be the basis that the arbitration used in resolving the dispute over 1991 Contract of Work is a national arbitration body.

The choice of law used was also not regulated in the 1991 Contract of Work so that a clause compromisoire outside the contract to choose Indonesian law was needed. In principle, the choice of law is the freedom given to the parties to choose which law to be used to resolve their contract disputes. If not stated in the contract, then the theories of the International Civil Law can be used.

The lex loci contractus theory states that the law that applies to an international contract is the law in which the agreement or contract was made. As a development of this theory, the lex loci solutionis theory emerged, which states that the law that applies to a contract is the place where the contract is carried out. On the other hand, The Proper Law of The Contract theory states that the proper law of a contract is a legal system that is desired by the parties, or if the will is not stated or not known from the circumstances, the proper law for the contract is a legal system that has the closest and most tangible connection to the transactions that occured. There is also the theory of The Most Characteristic Connection which asserts that if the parties to an international contract did not determine their choice of law, then the law of the country in which the contract is concerned will show the most characteristic connection, which is a large, strong and has specific achievement will be applied.

If the lex loci contractus and lex loci solutionis theories were used, Indonesian law will be used to resolve the disputes. However, if The Proper Law of The Contract theory was used, then both parties must agree to make a choice of law or use a legal system that has the closest and most tangible relations with the transactions that occured. If The Most Characteristic Connection theory was used, it is necessary to decide which country related to the contract in question has a large, strong, and specific achievement.

5 LEGAL CONSIDERATIONS IN THE DISPUTES OF 1991 CONTRACT OF WORK

There were a number of legal considerations in explaining the disputes over Freeport Contract of Work after the enactment of Law of 2009 on Mineral and Coal Mining. First, based on the principle of pacta sunt servanda, Freeport could not be forced to change the Contract of Work into a Special Mining Business License for reasons such as the enactment of the Law of 2009 on Mineral and Coal Mining. However, the question remains regarding whether or not the principle of pacta sunt servanda is absolute that the Indonesian government is forced to subject itself to the Contract of Work. The answer is no, since this principle can be limited by exceptions given by law. The limitation of this principle is reinforced by the doctrine of rebus sic stantibus, which states that the obligation in an agreement will end (or be adjusted) if conditions change, especially if it was a large-scale contract and covering a long time.

Second, pacta sunt servanda is also not absolute as seen in Article 1338 (2) and 1339 of the Civil Code which states that the contract can be withdrawn if there are sufficient reasons according to the law and the agreement must be based on propriety, customs, and/or law. Thus, if the adjustment to 1991 Contract of Work has sufficient grounds based on the law (ie not contrary to the law as stated in Article 1339 of the Civil Code), then the adjustment to the Contract of Work does not violate the principle of pacta sunt servanda, so PT Freeport Indonesia cannot relied on the Contract of Work because it has been contradicted the Law of 2009 on Mineral and

Coal Mining. This is the reason the Law of 2009 on Mineral and Coal Mining is a valid legal basis for doing adjustments to the 1991 Contract of Work. Similarly, other laws and regulations also support this, such as the Government Regulation No.9 of 2012 regarding the Classification and Tariffs upon Non-Tax Revenue.

6 NATIONAL INTEREST IN THE CONTRACT OF WORK

The Contract of Work between the government of the Republic of Indonesia and PTFI always experiences dynamics, so much so that it becomes the subject of discussion and discourses both at the domestic and international levels. In July 2018, the Indonesian government has officially signed a Head of Agreement (HoA) with Freeport as the road to share divestment. Later on, The Indonesian government encourages PT Inalum as a red plate mining holdings to divest Freeport shares. Head of Agreement is a basic agreement related to cooperation and transactions. Head of Agreement is equivalent to the term Heads of Terms or Letter of Intent. The Head of Agreement is the first step from the many steps taken in the next agreements that will legally bind the relevant parties in order to control the majority of share ownership up to 51 percent, which later will legally bind the parties through the purchase of Rio Tinto shares with the worth of USD 3.85 billion. The capital will be used to purchase Rio Tinto’s Participating Interest and 100 percent of FCX shares at PT Indocopper Investama. Rio Tinto's Participating Interest at PTFI was 40 percent, while Indocopper's shares were 9.36 percent.

The Indonesian government has a very strong desire to be the controlling party of the Freeport mining company which is among the largest mineral producers in the world, specifically for copper and gold. By having a majority share of up to 51 percent, Indonesia will have the flexibility and authority to manage natural resources. In other words, Indonesia will achieve sovereignty in mining management that has an economic value of millions of billions of dollars so that all profits obtained could be used to the maximum extent for the prosperity of its people as mandated by Article 33 of the 1945 Constitution. Currently, Indonesian government only has 9.36 percent shares.

The HoA itself is actually a follow-up to the tough negotiations carried out recently for almost 4 years. There are six main issues that continue to be discussed at the negotiating table, which is the narrowing of the mining area that Freeport is working on, including exploration blocks, state revenues (taxes and royalties), share divestments, use of domestic goods and services, contract extension, and construction of smelters (refineries).

Within the business framework, each party is very eager in getting the maximum economic value considering that for almost 50 years, the mining products produced by Freeport produce billions of dollars. This will be crucial when the term of the Contract of Work expires in 2021, which is only a few years away. Freeport wants certainty in investing, while the Indonesian government has a target of getting added value that can provide significant income to the state revenues.

7 CHALLENGES AND OPPORTUNITIES

September 27, 2018 can be considered a historic day for the Indonesian people because it is a mark where the mining company Freeport Indonesia limited (PT FI) has officially became a part of the resource of the Indonesian government by way of acquisition, even though it has not been one hundred percent acquired. Through PT Indonesia Asahan Alumunium (Inalum) as the holding company for State-owned mining company, Freeport McMoran (FM) has released most of the shares in PTFI where Inalum bought Rio Tinto's participating interest, namely the rights and obligations attached to Rio Tinto related to the operation of Freeport Indonesia, even though Rio Tinto is not a shareholder of PTFI. Thus, the share ownership of the government of the Republic of Indonesia (through Inalum) in PTFI reaches 51 percent or in other words, Inalum became the controlling shareholder through various agreement schemes including the sale and purchase agreement. This is a follow-up step after the related parties agreed on a Head of Agreement (HoA). The dream of the Indonesian people from time to time to take over PTFI could actually be realized.

After this event, the Contract of Work regime was terminated as mandated by the Law no.9 of 2009 on Mineral and Coal Mining, which gives the mandate to all mining businesses to use the scheme of license permits, placing the government in a higher position as the licensing authority. This is different from the Contract of Work regime which places the government in an equal position with the corporations or companies, making the government's position as subject to ordinary civil law. The government will issue permits through a 2x 10year permit scheme until 2021 where the Contract of Work will end.

The choice of the Indonesian government to buy shares of Rio Tinto's participation interests in PTFI can be understood naturally as a form of long-term strategic plan, compared to having to wait for the contract of work to expire in 2021. It is true that the contract of work can be handed over to the government, however if the Indonesian government did not extend the Contract of Work, the assets given by PTFI would not be considered as free to give. If the government wanted to take over the assets, the price is also considered as not cheap. Thus, the acquisition path was chosen because it was considered more efficient and profitable than having to wait for 2021 from the aspect of economic calculation.

However, despite having entered into various agreements with FM and Rio Tinto, the new agreement will be truly effective if Inalum made the payment to show the commitment and to follow-up the agreement that must be done no later than at the end of 2018. To realize its steps, Inalum needs a large amount of funding and certainly requires large and strong investors. The steps would not be realized if Inalum only relied on the financial strength of state-owned banks. Therefore, Inalum must seek strategic investors, especially foreign investors, while also remains protected and provides a greater portion to the national interests. This is because foreign investors might be concerned with the strategic interests of their countries more, especially if the companies that will provide loans are a foreign state-owned company that will certainly brings the interests of its country.

With the divestment of FM shares and ownership of Inalum shares as controllers, the government can restructure the management at any time. PTFI will later become a subsidiary of Inalum so that PTFI

will be equal to other state-owned companies such as PT Timah, PT Aneka Tambang (Antam), PT Bukti Asam, and the likes. Therefore, PTFI will be treated as a state-owned corporation. Likewise, the laws that will apply will also be bound by the laws and regulations in Indonesia, including regional regulations, state financial regulations, taxation, environmental regulations, and regulations on state-owned enterprises while PTFI can later be audited by the Audit Board of the Republic of Indonesia (Badan Pemeriksa Keuangan). PTFI's management must be very careful because if there is an error resulting from negligence, it can be subject to criminal acts related to corruption.

However, aside from the discussion related to PTFI's shares divestment by Inalum, there is another agenda that is equally important and urgent to be resolved, which is related to the environmental issues. From the records of the Ministry of Environment, there are at least 48 violations committed by PTFI against various existing regulations and policies. One of the most highlighted was the practice of PTFI waste disposal into rivers and ocean, which is very damaging to the existing ecosystem. There must be concrete and real changes so the damage would not be more broadly spread. There are also human rights issues caused by the exploration of PTFI. The violations of the rights of indigenous peoples in Papua are still becoming a serious problem, such as being expelled from their native lands and the negligence of customary rights.

8 CONCLUSIONS

For almost five decades of its journey, the Contract of Work has always experienced ups and downs because it involves great interests between the state on one side and multinational companies on the other side. The spirit of self-reliance and sovereignty over natural resources management owned by the Indonesian people have indeed strengthened in the last few decades, especially since the reformation era to reduce dependence on other parties. Freeport is considered as a benchmark to be controlled in securing national interests. By holding a majority of shares amounted to 51 percent, Indonesia will have sovereignty in mining management as mandated by Article 33 of the 1945 Constitution.

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