PANCASILA JUSTICE PRINCIPLES IN OIL AND GAS COST RECOVERY POLICY IN INDONESIA

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ABSTRACT

In managing natural resources, there are three models of government relations with business actors in natural resource management. The third model is the state domiciled as a licensor (concession) to contractors and business actors. This is known as the permit regime as adopted in the Mineral and Coal Law. In the permit regime, the position of the state as the licensor is higher than that of the business actor. The state is in the vertical position above, not horizontally. In the contract system, equality between the parties, including the state, is a prerequisite considering the contract requires agreement. Thus, conceptually, the political politics of national natural resource management can be formulated as the direction of legal policies set by the state administrators to realize the welfare of the Indonesian people through strengthening economic democracy, in addition to political democracy contained in the 1945 constitution.

Keywords: Justice Principle, Pancasila, Policy, Cost Recovery, Oil and Gas

A. INTRODUCTION

The basic conception of oil and gas mining in Indonesia is Article 33 paragraph 3 of the 1945 Constitution stated: "The earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people." State authority is further stated in Article 2 paragraph (2) Law Number 5 of 1960 concerning Agrarian Principles (UUPA), which includes:

a. Regulate and carry out the designation, use, supply and maintenance of the earth, water and space.
b. Determine and regulate legal relations between people and the earth, water and space.
c. Determine and regulate legal relations between people and legal actions concerning earth, water and space.
Article 2 paragraph (3) of the LoGA states that the authority derived from the State's Ruling Right in paragraph (2) of this Article is used to achieve the greatest prosperity of the people in the sense of nationality, welfare and independence in the Indonesian sovereign and independent legal community and state[1].
Article 33 of the 1945 Constitution becomes the basis for the exploitation of natural resources in Indonesia. The context of the "Right to Control the State" is the basis for the state to have full power to manage Indonesian resources. Oil and gas as an important production branch for the state and control the livelihoods of people many include natural resources controlled by the state. State control over oil and gas resources is reaffirmed in Article 4 of the Oil and Gas Law, namely "oil and natural gas are non-renewable strategic natural resources contained in the Indonesian mining jurisdiction which are national assets controlled by the state".

B. THEORETICAL BASIS

The implementation of Oil and Gas business activities is based on the provisions of the Oil and Gas Law, precisely in Article 2, based on social economy, integration, benefits, justice, balance, equity, mutual prosperity and the welfare of the people, security, safety and legal certainty as well as being environmentally sound.The rationale for managing Oil and Gas in Indonesia has actually been designed with the idea of Production Sharring Contracts (KPS)[2] or profit sharing. The originator of the production sharing contract idea was Bung Karno. The idea is based on practices that apply in agricultural management in Java. Most farmers (Marhaen) are not owners of rice fields. Farmers get income from profit sharing (paron). Management is in the hands of ownership.

Based on aspects of contractual relations and ownership of mineral resources (including oil and gas), actually there are only 2 (two) forms of agreement between the above models, namely:

a. Is concessionary, which includes this form is the concession. This means that the concessionaire is not a contractor from the state in undertaking oil and gas mining, but runs his own oil and gas mining rights and controls his production based on the concessions (licenses) he obtained.
b. Contractual. Contract production sharing, risk service contracts and service contracts are contractual in nature, whereby the company signing the agreement is a contractor from a state or state company that runs oil and gas mining business according to the agreement signed under state or state control. The status of the contractor carries the consequence that the production results remain in the country.

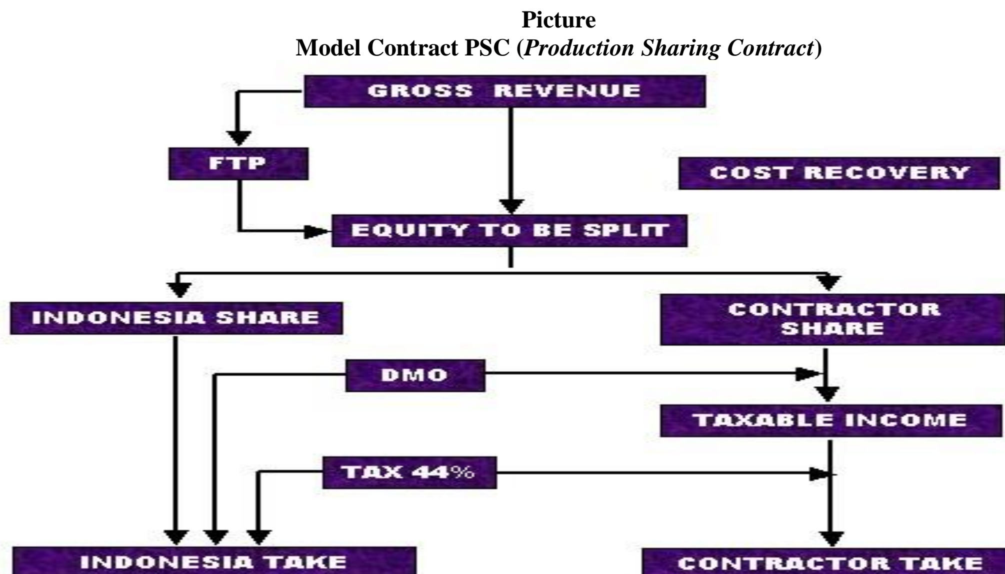
[1] Furthermore Article 2 and Article 3 stipulate that the control by the state is held by the government as the holder of mining authority by forming an Implementing Body.
[2]Widjajono Partowidagdo, ***Pengantar Produksi Investasi dan Kemampuan Nasional Hukum Migas***, CIDES, Jakarta, 2008, hlm.1.

The following is a business upstream operation scheme, namely:

Production sharing contract is a model developed from the concept of profit sharing agreement which is known in Indonesian customary law. The concept of profit sharing agreements known in law exists which was developed from the concept of profit sharing agreements known in Indonesian customary law. Production sharing contract is a model developed from the concept of profit sharing agreement known in Indonesian customary law. The concept of production sharing agreements known in customary law has been codified in Law Number 2 of 1960.

Production sharing contract in oil and gas mining business is designed in such a way as to overcome the problem of limited capital, technology and human resources.

Picture
Model Contract PSC (*Production Sharing Contract*)



The basic principles of the PSC, namely:

1) SKK Migas acts as KPS operational management;
2) KPS is responsible for SKK Migas for operational implementation in accordance with the approved work program;
3) KPS provides all funds and technical assistance needed to carry out petroleum operations;
4) 4) KPS bears the risk of operating costs (operating costs), so that it has an economic interest (economic interest or working interest) in developing oil and gas reserves in the Mining Work Area (WKP)
5) The term of the contract is 30 years with an exploration period of between 6 to 10 years. The contract will automatically expire if after the exploration period ends does not reach the stage of commercial production;
6) KPS is obliged to partially relinquish part of the Work Area (relinquishment) to SKK Migas during the Contract period;
7) KPS submits an annual Work Program & Budget (WP&B) plan to obtain SKK Migas approval;
8) All equipment purchased by KPS becomes the property of SKK Migas if it has entered Indonesian territory;
9) Procurement of goods & services must follow SKK Migas Regulations;
10) SKK Migas holds the rights to all data obtained from operations;
11) Production remaining after being reduced by operating costs is divided between SKK Migas and KPS;
12) KPS is required to surrender a portion of its production oil for domestic needs (DMO or Domestic Market Obligation);
13) KPS is required to pay a bonus (signature bonus, production bonus, education bonus) to SKK Migas;
14) After commercial production begins, Pertamina can request that 10% of undivided interest (ie rights & obligations not be broken down, meaning Pertamina (other parties) must participate in accordance with its shares of all budgets or expenditures in one Work Area) in the Contract offered to Pertamina or another Indonesian legal entity;
15) Parties in KPS in one WK may submit certain% of their economic interest / working interest to third parties, after obtaining SKK Migas approval.

C. RESEARCH METHODS

This research was conducted using doctrinal legal research, which is a process of discovering philosophical, legal theories, which are the legal ratios of regulations and legal facts regarding the PSC's fiscal term model. This research is prescriptive in nature. The study will describe and describe the legal symptoms or legal events that arise in the study based on applicable laws and

regulations and the legal theory taken in this study. The study will describe and describe the legal symptoms or legal events that arise in the study based on applicable laws and regulations and the legal theory taken in this study.

D. DISCUSSION

If examined from various variations of the Production Sharing Contract, there are a number of main features that are visible, namely[3]:

1. Management is in the hands of the State (state company).

In the form of a production sharing contract, the general state is represented by state companies such as in Indonesia Pertamina and Petronas in Malaysia with the exception of Guatemala. Guatemala uses a production sharing contract without forming a State company to represent the State in carrying out its business functions. The formation of a State company to represent the State in the form of a production sharing contract is motivated by the consideration of business law, that is to say, by establishing a State company with operational management involvement, which is certainly a relatively unpredictable and unlimited business risk, it can be transferred to a state company. In addition, the State as an institution of sovereignty has natural limitations to be directly involved in business operations.Management in the hands of the State means that the State actively participates in overseeing the operations while still giving authority to the contractor to act as the operator and carry out operations under his supervision. The state is directly involved in the operational decision-making process which is usually carried out with an approval mechanism. At the heart of the problem is the extent to which state approval or state enterprise is needed in the decision making process.This provision is closely related to the juridical-political nuance. With such provisions in place, the State as the owner or holder of the oil and gas mining authority does not relinquish its control over the implementation of mining tenure rights. What happens is the delegation and derivation of authority, while the original right must not change and not be transferred at all. Specifically for Indonesia, this provision is a constitutional requirement of article 33 of the 1945 Constitution.

2. Reimbursement of operating costs (operating cost recovery).

Reimbursement of operating costs incurred by the contractor in the production sharing contract implies that the contractor has an obligation to bail out in advance the necessary operating costs, which are then reimbursed from the sale or by taking part of the oil and gas produced. If in a certain calendar year, the contractor does not get reimbursed for full operating costs because it turns out the production or sales results are below operating costs, then the shortfall will be calculated in the following year. The amount of reimbursement of operating costs does not have to always be full replacement (full recovery), the bias is only partly dependent on the results of negotiations.

3. Production sharing (production split).

The division of production after deducting operating costs and other obligations is the profit gained by the contractor and income from the country side. The magnitude of the division of production results varies between one country with another country, and also differs from one production sharing contract with each other in one country depending on various related factors such as the remoteness factor, the more remote it will certainly not attractive to investors, so various incentives should be given that might be in the form of reduced tax burdens, smaller production bonuses and so on.

4. Tax

What is meant by taxes are all taxes that are imposed by law on contractor's operational activities in a certain State, especially corporate income tax. The imposition of corporate income tax is closely related to the large share of production between the State and the contractor. Generally, in a production sharing contractor the contract is not subject to land tax (surfacetax) as is usually the case in concessions.

5. Ownership of assets in the state (state company)[4].

Production sharing contracts in Indonesia have been gaining popularity since they were first introduced in 1960 in Venezuela by Ibnu Sutowo. Ibnu Sutowo introduced the production sharing contract with the thought that Indonesia at that time was a country that had abundant oil and gas content, but Indonesia did not have strong financial capacity to invest in upstream oil and gas business activities. In addition, Indonesia at that time did not have adequate technology to carry out these upstream oil and gas business activities, and finally Indonesia did not have a competent workforce to carry out these upstream business activities.

In 1966 Ibnu Sutowo offered the substance of a production sharing contract to foreign contractors in the form of: (1) management control held by a State Company; (2) the contract is based on the division of production; (3) the contractor bears the risk of pre-production, and if oil is found, reimbursement is limited to a maximum of 40% per year of oil produced; (4) the remainder of the oil produced after deducting the cost of replacement will be divided into a composition of 65% for State-owned companies, and 35% for contractors; (5) the rights to all equipment purchased by the contractor will become the property of the State Company when the equipment enters Indonesia, and the cost will be covered by the 40% formula mentioned in item 3; (6)

[3] Rudi M. Simamora. 2000. *Hukum Minyak dan Gas Bumi*.Jakarta: Djambatan.
[4] Rudi M. Simamora. 2000. *Hukum Minyak dan Gas Bumi*.Jakarta: Djambatan.

Pertamina pays the contractor income tax to the Government; (7) Contractors are required to employ Indonesian workers; (8) The contractor is obliged to meet proportionally the need for domestic fuel oil, with a maximum amount of 25% of the portion. Furthermore, in the context of building national oil and gas independence, one of the factors related to Cooperation Contracts in Upstream Oil and Gas activities is the regulation of the validity of the contract period especially with foreign parties (international oil company, IOC). This arrangement is also expected to provide clarity for investors (Cooperation Contract Contractors) in relation to transparent provisions and procedures regarding contract extensions that have been complained of so far. To overcome this problem, the following steps can be made into suggestions[5]:

a. That basically the Cooperation Contract is not valid for all time and must be limited. This rationale relates to the right to control the State both on natural resources (oil and gas), as well as on production activities that are important to the lives of many people and the principle that cooperation is temporary, before the Indonesian people can do it themselves (whatever the reason).

b. The contract that succeeded in finding oil and gas reserves that can be produced commercially (within a period of no more than 10 years of exploration period), the contract is valid for 20 years of exploitation as it is valid until now does not need to be changed.

c. During the period of the 20 year production contract mentioned in point 2 above, the contractor is encouraged to produce Oil and Gas (especially petroleum) optimally including applying advanced oil recovery techniques, namely secondary and tertiary recovery, not only relying on primary recovery. In addition, while carrying out exploitation activities the contractor is encouraged to carry out exploration activities in his work area in a complete manner. Both of these are crucial factors for the Government in giving consideration (justification) when the contractor submits an extension later.

d. An application for an extension can be submitted no later than 7 years before the contract period expires and the Government will give a decision to extend or not renew the contract no later than 5 years before the contract expires. This timing is different from what is stipulated in PP No. 35/2004, which is 10 years at the latest and at the latest 2 years before the contract expires. The most recent 2 years are not realistic, given the very urgent time for the Government to conduct an analysis / evaluation before the contract expires and the tendency for the Government to give approval for extension. Whereas for Investors (contractors) without any extended decision or not in a very short period of time is an obstacle related to the problem of cost recovery and future investment plans. In considering the decision to be determined, the Government should consider whether in the contractor's working area there are already production fields that apply advanced drainage techniques, as well as whether exploration activities have found reserves that are expected to be (potentially) developed into production fields. The practice so far, there are no provisions or factors that are used as consideration, and this raises doubts for investors (contractors).

e. If in the working area there is an oil production field by applying advanced drainage techniques, then the contractor can be given a limited production contract extension only in fields that apply advanced drainage techniques for one time only for 20 years after the first 30 year contract period expires. The contractor can continue investment in these production fields with the terms / conditions of the renewed production contract, while oil producing fields with primary production techniques are returned (handed over) to the Government. Likewise, natural gas fields, without exception, must be returned to the Government. The only exception is the LNG Project which is currently or still operating by separating natural gas fields and making it a separate contract.

In accordance with item 4 above, after the Government stipulates that the contract will not be extended, there is still 5 years for the contractor to produce the primary production fields until the contract period expires. However, if in the past 5 years the contractor will not invest (new) considering that there is not enough time to obtain refinancing (cost recovery), then to maintain production, the Government needs to take a strategic step, namely adding the article "transition period" in the Contract Cooperation and requesting the State Enterprise to accompany the contractor to carry out operations (including investments not made by the contractor) until the contract period expires. In the past 5 years, the contractor only received cost recovery without investment made by the State Company. Since the production sharing contract (KPS) is implemented in Indonesia, there is no article that regulates this transition period, therefore the position of Indonesia as the host country is always lost and as a result the contract is always extended. To continue the operations left by the contractor after the end of the contract period (final) mentioned in point 6 above, the Government has two choices, namely to hand it over to the State Company (BUMN Migas) or to the National Private Company. The government can determine the level of production that must be handled by state companies, for example at least 30 thousand barrels of oil a day. Furthermore, the selection of which National Private Company is chosen, should be selected based on its track records so far in the national petroleum industry, but its status remains as a contractor of a State Company, and if necessary with binding provisions, among others to maintain working interest not less of (for example) 51%. This arrangement is the authority of the State in order to increase the independence of the management of Upstream Oil and Gas while developing a reliable national oil and gas industry. To the contractor whose contract period is not extended because all of it is primary production, can be given privileges or can also be referred to as compensation that is continuing exploration activities in a part of its working area by signing a new Cooperation Contract without going through an auction and being exempt from paying a signature bonus. which generally applies to new work areas. However, if there is no exploration

[5] Suyitno Patmosukismo. 2011. *Migas Politik, Hukum dan Industri: Politik Hukum Pengelolaan Industri Migas Indonesia dikaitkan dengan Kemandirian dan Ketahanan Energi dalam Pembangunan Perekonomian Nasional,*Jakarta: Fikahati Aneska.

potential in the working area, then the contractor can be given privileges in other forms, namely the right to get the first choice of first right of refusal treatment in participating in the auction of the working area. By implementing the steps above, it is believed that this provision is the best solution that provides benefits for all related parties (win-win solution), both for the Government of Indonesia and for Investors (contractors). With this policy step, in one party, the Government of Indonesia obtains opportunities in addition to optimally increasing production by applying advanced drainage techniques, also accelerating the exploration activities to discover new oil and gas reserves. In addition, this policy also opens opportunities for Indonesia to develop the national oil and gas industry by involving all elements of power including National Private Company. In accordance with item 4 above, after the Government stipulates that the contract will not be extended, there is still 5 years for the contractor to produce the primary production fields until the contract period expires. However, if in the past 5 years the contractor will not invest (new) considering that there is not enough time to obtain refinancing (cost recovery), then to maintain production, the Government needs to take a strategic step, namely adding the article "transition period" in the Contract Cooperation and requesting the State Enterprise to accompany the contractor to carry out operations (including investments not made by the contractor) until the contract period expires. In the past 5 years, the contractor only received cost recovery without investment made by the State Company. Since the production sharing contract (KPS) is implemented in Indonesia, there is no article that regulates this transition period, therefore the position of Indonesia as the host country is always lost and as a result the contract is always extended.

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E. CONCLUSION

In natural resource management there are three models of government relations with business actors in natural resource management, the first model is the contractual relationship between government and business actors (government to business). The second model is the contractual relationship between business entities that are separate from the state but are under state control. In this second model, the business entity appointed by the state contracts with the contractor. Pertamina before the entry into force of the Oil and Gas Law and the existence of BP Migas is the embodiment of this model. The two models above are contract models adopted in a country for natural resource management. The final model is the state domiciled as a licensor (concession) to contractors and business actors. This is known as the permit regime as adopted in the Mineral and Coal Law. In the permit regime, the position of the state as the licensor is higher than that of the business actor. The state is in the vertical position above, not horizontally. In the contract system, equality between the parties, including the state, is a prerequisite considering the contract requires agreement. Thus, conceptually, the political politics of national natural resource management can be formulated as the direction of legal policies set by the state administrators to realize the welfare of the Indonesian people through strengthening economic democracy, in addition to political democracy contained in the 1945 constitution.

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