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JURIDIS IMPLICATION OF GOVERNMENT REGULATION NO. 1 OF 2017 ON MINERAL AND COAL MINING BUSINESS ACTIVITY BY FOREIGN INVESTOR

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Abstract
The purpose of this research is to know and understand the regulation of mineral and coal mining business implementation conducted by foreign investors before the birth of Rule Number 1 Year 2017 and to know and understand the implication of the birth of Regulation No. 1 of 2017 is hurt with the aim of the state. In this research, to reach the objective, normative research method with regulatory approach is applied by reviewing the laws and regulations related to research and case approach related to the divestment of mining business by foreign investors. The conclusion yields two conclusions. The first conclusion is the regulation of the implementation of mineral and coal business activities prior to the issuance of Government Regulation No. 1 of 2017 is regulated in several laws and regulations which have two weak points. The first concerns the regulation of inconsistent divestment shares and both mechanisms of work contracts that are detrimental to the Government of Indonesia. the second conclusion, the issuance of Government Regulation No. 1 of 2017 confirms the number of divestment shares and changes in working contract patterns to mining business permits maximizing the realization of welfare for all Indonesian people.

Keywords: Implication, Divestment, Rights to Control Country

I. INTRODUCTION

Foreign investment in Indonesia is essentially complementary that when the state is able to manage the mining business independently, the management of the mining business must move to other countries and/or national participants. Foreign investors who invest their capital in Indonesia in the mining field must (obligate) release their shares or popularly called divestment to the state. Divestment is a major branch of industry or commerce from private to state ownership control (H. Salim HS and Erlien Setiana Nurbani, 2013: 124). Then Article 1 point 8 of Government Regulation Number 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities provides a more operational understanding of "Divestment of shares is the number of foreign shares that must be offered for sale to participants of Indonesia".

Constitution No 25, Article 7 Paragraph (1) of 2007 stipulates that "the government shall not take any nationalization action or the acquisition of ownership rights of investors, except by law". Although there is no compulsory word in the arrangement, the government is given the opportunity to take nationalization actions against foreign investors in the mining field. Under the regulation, then the government gave birth to several statutory regulations containing the word to divest for every foreign investor investing in Indonesia to the national participants, the provisions include: Article 112 of Law Number 4 Year 2009 on Mineral Mining and Coal using the words are required to divest the shares; Article 97 of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities shall use the word of obligation to divest its shares.

The nature of foreign investors as a complement is not supported by responsive legislation. As Government Regulation, Article 97 No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities which only requires foreign investors investing in mining and coal business activity to divest shares to the state and/or national participants of at least 20% of shares. The regulation of the minimum amount of divestment of 20% is also contrary to the spirit of the regulation of Law No. 4 of 2009 on Mineral and Coal Mining which is the Indonesian mineral and coal mining minis- ter regulation. General explanation of Law Number 4 Year 2009 on Mineral and Coal Mining explains that mining business must provide the greatest economic and social benefit for the welfare of the Indonesian people. Mine management conducted by foreign investors orientation only profit, so to be able to realize the welfare of the people of Indonesia must be controlled by the state.

In 2017 Government Regulation No. 1 of 2017 on the amendment of Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities in the framework of the implementation of increasing the added value of metallic minerals through the processing and purification of metal minerals as referred to in Law Number 4 Year 2009 on Mineral and Coal Mining was established. The issuance of government regulation on the amendment of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business activity becomes interesting to be studied about the implication to the activities of mineral and coal mining business conducted by foreign investors in Indonesia. Particularly the implications of Government Regulation No. 1 of 2017 concerning Amendment to Government Regulation No. 23 of 2010 concerning the Implementation of Mining and Coal Mining Business Activities on the number of shares and cooperation schemes used between the Government and foreign investors are linked to the purpose of the state. This becomes urgent to be studied because the divestment of shares conducted by foreign investors becomes one of the alternatives to maintain the viability of the Indonesian economy.

Based on the above background, the purpose of this study is to know and understand the regulation of mineral and coal business implementation conducted by foreign investors before the birth of Rule Number 1 Year 2017 and to know and understand the implications of the birth of Law Number 1 Year 2017 is associated with the purpose of the country.

II. DISCUSSION

A. Implementation of Mining and Coal Mining Business Activities Conducted by Foreign Investors Prior to the issuance of Government Regulation No. 1 of 2017

Management of the mining sector has been regulated in Chapter XIV of the National Economy and Social Welfare of Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that: "production branches that are important to the state and which affect the livelihood of the masses are controlled by the state "then" earth and water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people ". The Constitution empowers the state (government) to control the areas related to the livelihood of the people used to bring prosperity to the people of Indonesia. In this case the government acts in carrying out the public function of realizing the common prosperity.

One of the important functions of government in realizing prosperity for the community is as a regulator. In carrying out its functions as a regulator, the government is authorized by the constitution to enact legislation requiring every foreign investor investing in mining in Indonesia to divest its shares to the government. It is intended that every field related to the livelihood of many people such as mines remain controlled by the state to bring prosperity to the people of Indonesia. This means that in essence, foreign capital entering Indonesia only as a complement in the development process in Indonesia.

In carrying out its function, then born the legislation which became the basis of juridical implementation of divestment in the field of mining in Indonesia which is the public choice (public choice) Indonesia itself, the legislation includes: Law Number 1 Year 1967 on Investment Foreign is the first public policy that regulates the obligation of divestment. Foreign investors can invest up to 100% and can also be a combination of foreign capital and Indonesian capital. Although foreigners can invest 100% in capital but in this law requires every investor who invests in Indonesia to divest their shares to the Government of Indonesia, Indonesian citizen or Indonesian legal entity. In Article 27 of Law Number 1 Year 1967 concerning Foreign Investment, it is mentioned that: The Company referred to in Article 3 whose capital is capital is foreign capital shall provide the opportunity for participation of national capital effectively after a certain period of time and according to the counterpart applied by the Government.

Then was born Government Regulation No. 20 of 1994 on Ownership of Shares in companies Established in the framework of Foreign Investment. In Article 7 of Government Regulation No. 20/1994 concerning Share Ownership in a Company Established in the framework of Foreign Investment is further explained on the divestment of shares by a foreign investor, the said Article stipulates that the incorporated Company as referred to in Article 2 paragraph (1) letter b, within a maximum period of fifteen years from the date of commercial production, sells a portion of its shares to Indonesian citizens and/or Indonesian legal entities through direct ownership or through the domestic capital market. The transfer of shares as referred to in paragraph (1) and paragraph (2) shall not alter the status of the company.

On April 26, 2007 Law No. 1 Year 1967 concerning Foreign Investment including Law Number 6 Year 1968 concerning Domestic Investment was replaced by Law Number 25 Year 2007 regarding Capital Investment. The establishment of Law Number 25 Year 2007 regarding Investment is based on the spirit to create a conducive investment climate. In addition, Indonesia is one of the WTO member countries which created an obligation to harmonize the legislation with international trade obligations that have been agreed. The WTO Agreements require that each WTO country adopt the same National Treatment and Most Favorions principles among its WTO countries. On the basis of the enactment of Law Number 25 in 2007 regarding Investment.

The regulation on the divestment of Law Number 25 Year 2007 on Capital Investment is only 1 (one) article, namely Article 7 consisting of 2 (two) paragraphs, namely: The Government shall not take any nationalization action or the acquisition of ownership rights of investors, except by law; In the event that the government takes nationalization action or the acquisition of ownership rights as referred to in paragraph (1), the government will provide compensation in the amount determined based on market price.

The limitations of the regulation on divestment in this law are then supplemented by all the provisions of laws and regulations which are the implementing regulations of Law Number 1 Year 1967 concerning Foreign Investment as amended by Act Number 11 of 1970 on Amendment and Supplement to Law -Undonesia Number 1 Year 1967 concerning Foreign Capital Investment as long as it is not contradictory and has not been regulated by the new implementation regulation.

In 1967, Law Number 11 Year 1967 was issued concerning Basic Provisions of Mining in order to regulate the mining sector. The birth of Law Number 11 Year 1967 on Basic Provisions of Mining after the birth of Law No. 1 of 1967 on Foreign Investment marks the opening of foreign investment doors in Indonesia, especially investment in the field of mining.

After the reform era Law No. 11 of 1967 on Basic Provisions of Mining is considered unresponsive to accommodate the economic and political developments in Indonesia. So that in 2009 the enactment of Law No. 4 of 2009 on Mineral and Coal Mining is a substitute of the Law which replaces Law Number 11 Year 1967 on the Basic Law of Mining. In the new law there are two divestment arrangements, namely Article 79 and Article 112. Article 79 states that divestment is one of the things that must be contained in IUPK Production Operation. Then in Article 112 regulate after five years of production foreign investors are obliged to divest the shares to the government, local government, state-owned enterprises (SOE), National Private Enterprise. Then in paragraph (2) it is determined that the divestment of shares will be regulated in government regulation, which to date have not been determined by the government.

The implementing regulations of Law Number 4 Year 2009 regarding Mineral and Coal Mining related to the divestment are only stipulated in Government Regulation Number 23 of 2010 concerning the Implementation of Mining and Mineral Mining Business Activities which is amended by Government Regulation Number 24 of 2012 on Amendment Government Regulation No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities and Government Regulation Number 77 of 2014 on Third Amendment to Government Regulation No. 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities.

B. Implementation of Mining and Coal Mining Business Activities Conducted by Foreign Investors Post-Birth Regulation No. 1 of 2017 Related to State Objectives

1. Number of Divestment Share

The regulation of the number of shares to be divested by foreign investors to the state or national partner in the mining sector is inconsistent. Here are some arrangements for the amount of stock divestment that must be done by foreign investors in the mining sector. Article 7 of Government Regulation No. 20/1994 concerning Share Ownership in Companies Established in the Framework of Foreign Investment regulates the number of shares that must be offered is partially (50%). The 50% share of the shares is strong enough but not enough to provide a strategic position to the government in making various decisions of the company because foreign investors can have the maximum amount of shares equal to the number of shares owned by the government.

Article 97 of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business shall regulate the number of shares which must be offered by foreign penanammodal by 20%. The rule is contrary to the background of the entry of foreign capital into Indonesia that is only as a complement in the national development process. The birth of the regulation will cause foreign investors to control the majority share of 60% -80%, so that the control of the company remains in the hands of majority shareholders (foreigners).

Here are some views of experts related to the 20% divestment as stipulated in Government Regulation Number 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities:

A. Tjatur Sapto Edy

"Divestment amounts limited to 20% (twenty percent) are not in accordance with the spirit of Law No. 4 of 2009 on Mineral and Coal Mining. The psychotherapy that occurs when Article 112 Paragraph (1) of Law No. 4 of 2009 concerning Mining Mining requires the national ownership of SOE, regional-owned enterprise (ROE), and the private sector in the majority. So before this law wants to bang on SOEs raised. If it is limited to 20% (twenty percent) and offers only, it means the government has no intention of fighting for mine control."

B. Aviliani

"The divestment of shares in the mining sector is better directed to SOEs or BUMDs. It is to avoid the use of APBN or APBD funds as a source of financing of the shares. In addition, the purchase of divestment shares by the

Government of Central Government or Pemeirntah Daerah can be dangerous because there may be intervention and political elements in it.

C. Pri Agung Rakhmanto

"Despite the responsibility, the 20% (twenty percent) amount is seen to be rational if it is based solely on the purpose of owning and obtaining acceptance for the Indonesian side. However, if the purpose of divestment more on the national control of natural wealth is relatively small magnitude. If it's only to increase revenue, 20% (twenty percent) makes sense. However, if the goal is to become a national property one day more than 20% (twenty percent). "(H. Salim HS and Erlies Septiana, 2013: 124-125)

Arrangement of 20% of shares to be divested by foreign investors in the mining sector by Government Regulation No. 23/2010 concerning the Implementation of Mineral and Coal Mining Business activities is contradictory with the purpose of the state to realize the welfare for the community.

The 20% provision is changed to 51% owned by Indonesian participants by Article 97 paragraph (1) of Government Regulation No. 24/2012 on Amendment to Government Regulation No. 23/2010 concerning Implementation of Mineral and Coal Mining Business Activities. After the issuance of Government Regulation No. 24/2012 on the Amendment of Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, the provisions on the number of divestment shares is strengthened by Article 2 paragraph (1) Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 27 Year 2013 on Procedures and Stipulation of Share Divestment Price and Changes of Investment in Mineral and Coal Mining Business Sector. The Article stipulates that the holder of Production Operation IUP and Production Operation IUP after 5 (five) years of production shall be obliged to divest the shares in stages, so that in the tenth year shares of at least 51% owned by the participants of Indonesia.

In the Year 2014 was born Government Regulation Number 77 of 2014 on Third Amendment to Government Regulation Number 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities. Article 97 of Government Regulation Number 77 of 2014 concerning the Third Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities also requires foreign investors to divest shares after 5 (five) years of production which are carried out gradually until the minimum number of shares the number of shares in the tenth year amounted to 51%.

The number of shares 51% regulated by Article 97 of Government Regulation Number 77 of 2014 on Third Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities has several criteria, namely:

1) Liability for the divestment of shares by foreign investors who own the processing and / or refining activities, after the end of the fifth year of production of at least 20% in the sixth year; 30% in the tenth year; and 40% in the fifteenth year.
2) Liabilities of divestment of shares by foreign investors engaged in mining activities using underground mining methods, after the end of the fifth year of producing at least the following: 20% in the sixth year; 25% in the tenth year; and 40% in the fifteenth year.
3) Obligation of divestment of shares by foreign investors engaged in mining activities under the method of underground mining and open pit mining, after the end of the fifth year of producing at least as follows: 20% in the sixth year; 25% in the eighth year; and 30% in the tenth stage

Government Regulation Number 1 of 2017 concerning Fourth Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities has the same arrangement with Government Regulation Number 77 Year 2014 concerning Third Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mining Business Activity Mineral and Coal, the number of shares to be divested after 5 (five) years from the date of production shall be gradually divested of its shares, so that the tenth year of its shares shall be at least 51% (fifty percent) owned by the Indonesian participant. Ownership of Indonesian participants in each year after the end of the fifth year of production shall not be less than the following percentage:

- 20% in the sixth year;
- 30% in the seventh year;
- 37% in the eighth year;
- 44% in the ninth year;
- 51% in Year 10, of the total number of shares.

The divestment of shares shall be conducted to a national participant consisting of the Government, Provincial

Government, or Regency / Municipal Government, State-Owned Enterprises, BUMD or national private enterprise. In the event that the Government is unwilling to buy shares it is offered to the provincial or district / city government. If the provincial government or district / municipal government is unwilling to buy shares, it is offered to state-owned enterprises and local enterprises. If BUMN and BUMD are unwilling to buy maja shares, they will be offered to national private enterprises. The offering of shares shall be conducted within 90 (ninety) calendar days since 5 (five) years after the issuance of production operation license for mining stage.

The regulation of the obligation to divest foreign investors was not only applied by Indonesia, Malaysia required the approved joint venture companies before January 1, 1972 to propose their plan for national inclusion to be 70% by 1990 (including 30% ownership by indigenous people Malaysia). Philippines also determines that foreign investment in non-pioneer companies shall not exceed 40%, except where full capacity has not yet been executed by a foreign party. Pioneer companies may own 100% foreign ownership in the case that insufficient local capital is available. However, these companies are required to move their shares so that the majority of the Philippines will be 60% within 30 years (or 40 years), when 70% of the production plan has been achieved. (Erman Radjaguguk)

In South America, the Peruvian industrial law determines that after 10 years, the Government must purchase at least two thirds of the basic industries and sell them to Peruvian national employers. In addition, in a short time foreign investors in other industries must transfer their shares to the national party, so that foreign participation in the industry concerned exceeds 25%. Employees will be the majority owners, in which each company must set aside 15% of its profits annually in the form of purchasing shares for its employees up to 51%. In Venezuela, the reinsurance law in the country has to be majority owned by socedades anomies. Minimum 51% of the shares of insurance companies must be owned by Venezuelan national entrepreneurs. In addition, the Board of Directors of these companies must be at least five persons and of which the majority must be held by Venezuelans. A similar situation exists in some advanced countries. (Erman Radjaguguk)

The Government of Canada determines that 50% of the Industry engaged in oil and gas must be owned by the Canadian Government or Canadian citizens by 1990. The policy to limit foreign participation is also shared by the Japanese. Japanese Government is more Meyukai Jiwa Foreign investors own only 50% or less of shares in joint venture companies in the country (Erman Radjaguguk, 2006: 183-184)

The Sudanese government has established the act or law related to the divestment. The Act is called Sudan Acountability and the Divestment Act of 2007. The Act regulates the authority of states and local governments to divest the assets of companies conducting business in Sudan. In Section 3 letter d of the Sudan Acountability and Divestment Act of 2007 4 (four) types of business activities can be divested in Sudan. The four types of activities, including:

- Production of electricity
- Mineral Mining
- Oil, or
- Production of military equipment (H Salim HS and Erlies Septiana Nurbani, 2013: 130)

The field of business required by law of each country is certainly not the same, it depends on the potential of natural resources owned by the country. Natural resources to be selected are usually natural resources that are considered rare or non-renewable in the country. The number of shares to be divested is also not necessarily the same between countries with one another, but the purpose of divesting the shares have similarities between the countries with one another that is for foreign capital in the development of a country only as a permanent complement.

Indonesia does not yet have a legislation that specifically regulates the resources that must be controlled by the state in order to maximize the welfare for the community. This is important because there are several laws and regulations related to natural resources that are due for review because they are contrary to the purpose of the state. Because it is deemed to be contradictory to the 1945 Constitution of 1945 the electricity and water law laws shall be subject to judicial review, following the Decision of the Constitutional Court concerning the law on electricity and water resources:

1) Constitution Number 20 in 2002 on Electricity

The State shall retain its position as the decisive party in the process of making a decision and determining the policy related to the business of electricity. electric power can not be interpreted, equated and treated as economic commodities like other goods, electric power should be considered as an infrastructure that needs to be subsidized. The meaning of competition and equal treatment to every business actor regulated in Article 16, 17 paragraph (1) and 21 paragraph (3) of Law Number 20 Year 2002 on Electricity is unacceptable, because with such understanding the meaning of state control including regulation, management, management, and supervision will

be reduced when the principle of equality in the competition system with national private entities and foreign enterprise.

The regulation of unbundling with different business actors will also make SOEs slumped, which leads to the non-guaranteed supply of electricity to all levels of society, both commercial and non-commercial, thus harming the interests of the people, the nation and the state. It has happened in Europe, Latin America, Korea, Meksio, the application of unbundling system is not profitable and not always efficient, and even become a heavy burden for the country (Ida Bagus Radendra Suastama, 2012: 334).

Therefore, in the end, the Electricity Constitution of 2002 was decided not to be in accordance with or contradictory to Article 33 of the 1945 Constitution of 1945 for encouraging the privatization of electricity as a production branch considered important and controlling the livelihood of the people which should be controlled by the state (Article 33 paragraph (2) , would undermine the constitutional rights of citizens, and the undbunling policy is a privatization effort of electric power and make electricity as a market commodity which means no longer protecting the majority of people who have not been able to enjoy electricity (Constitutional Court Decision Number *001/PUU- I/2003* on the Tests of Law Number 20 Year 2002 on Electricity of the 1945 Constitution of the Republic of Indonesia, December 15, 2004).

2) Law Number 7 Year 2004 regarding Water Resources

Water resources are also areas related to the livelihood of many people. As an element that controls the livelihood of the people, in accordance with Article 33 paragraph (2) and paragraph (3) must be controlled by the state. In water concession there must be strict restriction as effort to preserve and availability of water for life.

In Articles 40, 41, and 45 of Law No. 7 of 2004 on Water Resources that enable private involvement in the provision of water resources, which will encourage increased private role. Private involvement is not only in the form of water supply, but also the management of water resources and the provision of raw water for agricultural irrigation. Added in the regulation of this law does not impose limits on private ownership, especially foreign private in water management. This will reduce the state's role in water management so that it is contradictory to Article 33 of the 1945 Constitution of the Republic of Indonesia.

On the basis of the Act number 7 of 2004 on Water Resources finally applied for judicial review in the Constitutional Court. Here are 5 water resources management restriction points:

a) Any water enterprise shall not interfere with and exclude the rights of the people. You see, in addition to controlled by the state, water is aimed for the greatest prosperity of the people.
b) The State shall fulfill the people's right to water as one of the human rights, based on Article 28I paragraph (4) of the Constitution shall be the responsibility of the government.
c) Water management must also take into account environmental sustainability.
d) As an important production branch and controlling the livelihood of water people according to Article 33 paragraph 2 of the 1945 Constitution shall be under the supervision and control by the state absolutely.
e) Absolute water management rights belong to the state, then the main priority given by the exploitation of water is the state-owned enterprises (SOE or ROE).

Law No. 7 of 2004 on Water Resources is contradictory to Article 33 of the 1945 Constitution and has no binding legal force, so Law No. 11 of 1974 on Irrigation is re-enacted to prevent legal vacuum (Decision of the Constitutional Court Number 85 / PUU-XI / 2013 concerning Tests of Law Number 7 of 2004 on Water Resources against the 1945 Constitution of the Republic of Indonesia, February 18, 2013).

Mining has similarities to electricity and water resources as a field related to the livelihood of many people. The mining laws and regulations govern the obligation of foreign investors to divest their shares to national participants by prioritizing the government. Mining is a very potential field of generating huge profits for additional revenue for the country so as to maximize the welfare of the people. Mining is also close to environmental issues, mining management conducted by the government and/or other national participants will minimize environmental damage caused by mining activities. Based on the above matters, mining is a field related to the livelihood of the public so that it must be controlled by the state or at least by other national participants.

The fourth paragraph of the Preamble of the Constitution of the Republic of Indonesia argues that one of the goals of our country is the general welfare. Achievers of these goals in accordance with the principles and basic and philosophy of the state described in the concept of economic democracy and manifest in the national economic system. Economic democracy provides a fair opportunity for every economic actor to achieve his goal. This means that all the people of Indonesia get the same opportunity in the economy.

Economic democracy does not apply to areas related to the livelihood of many people. Article 33 Paragraph (2) of the The State of Indonesian Constitution has stipulated that important branches for the state and related to the

livelihood of the public must be controlled by the state. Fields relating to the livelihood of the masses shall be controlled by the state, but for fields that are not related to the livelihood of the people are allowed to be controlled by all the people of Indonesia and organized based on the motivation to earn profit.

Mohammad Hatta argues that the most important is that the mastery can be guaranteed the implementation of the welfare of society either realized in the form of state participation directly or submitted to the private sector (Aminuddin Ilmar: 2012, 53). Based on that the meaning of controlling the state is the state does not become the owner (eigenaar) objects that belong to the public. In some rules mentioned that the public domain is only controlled by the state, not owned by the state as in Article 33 paragraph (2) and (3) of the 1945 Constitution mentioned that the state only controlled. Then, Article 2 and Article 2 Paragraph (2) of Law Number 5 of 1960 on the Basic Agrarian Law also states that the state can not be referred to as eigenaar over objects of agrarian objects. In Indonesia there is no recognition of state ownership of the agrarian public domain, Indonesian law only recognizes the "right of control". But in the end the areas related to the livelihood of the people must be managed by the government because the government is not tied to the market mechanism and can improvise in realizing the welfare for the people of Indonesia.

Historically, in the draft amendment of Article 33 of the 1945 Constitution was adopted at the 3 rd meeting of BP 4 June 2002, all factions agreed unanimously that Article 33 Paragraphs (1), (2), and (3) were not changed and accepted as the inheritance of the founding father . Changes only to the title CHAPTER XIV of the National Economy and Social Welfare and added 2 (two) paragraphs in Article 33 paragraph (4) and (5). This Agreement continues to be upheld and set forth in the text of the Fourth Amendment of the 1945 Constitution which was ratified in the MPR-RI Plenary Session on August 9, 2002.

Article 33 of the 1945 Constitution is the basis of Indonesian economic politics, the principle of joint effort based on the principle of kinship emphasizes the importance of cooperation (cooperation), while efficiency emphasizes the importance of competition (competition). If it is only emphasized on the principle of cooperation, the individuality of society will be immersed in forced collectivity, as well as overemphasizing the principle of competition, everyone will destroy the order because it will eat each other to meet their own needs. In the life of the state can not only prioritize the principle of competition alone but also must implement the principle of cooperation, and vice versa to create a balance in the life of the state. Both principles in Article 33 paragraph (4) of the 1945 Constitution is called the principle of "fair efficiency". (Made Gde Subha Karma Resen, 2015: 365)

Here are some expert opinions regarding fair efficiency, according to Tim Howard "we seem to be facing two contradictiory imperative: avodid the needless waste that is 'efficiency', but make sure that the wealth is at least somewhat evenly spread. "According to Tim Howard, on the one hand we must avoid inefficiency, but on the other hand we must also ensure that wealth is distributed in a fair and equitable manner. We need a way to develop in order for our economy to be efficient, yet equally fair. That is why, in Article 33 Paragraph (4) of the 1945 Constitution of the Republic of Indonesia, the word efficiency is coupled in one breath with justice, which is fair efficiency. (Made Gde Subha Karma Resen, 2015: 367).

According to Sri Edi Swasonoikno additional words "fair" behind the word "efficiency", so that "fair efficiency" gives macro dimension meaning and is a political demands for the formation of social welfare. Then, according to Hendrawan Supratikno economic efficiency is not merely a derivative function of the market structure. It is the resultant of various economic and social factors, including the factors of legal authority, bureaucratic quality, work ethic, and social discipline (Made Gde Subha Karma Resen, 2015: 368).

Based on the expert opinion above to keep the balance between cooperation and competition in terms of management of fields related to the livelihood of the public must be controlled by the state. The meaning of control by the state is the state does not become the owner (eigenaar) objects that belong to the public. In some rules mentioned that the public domain is only controlled by the state, not owned by the state as in Article 33 paragraph (2) and (3) of the 1945 Constitution mentioned that the state only controlled. Then, Article 2 and Article 2 paragraph (2) of Law No. 5 of 1960 on the Basic Agrarian Law also states that the state can not be called eigenaar over objects of agrarian objects. In Indonesia there is no recognition of state ownership of the agrarian public domain, Indonesian law only recognizes the "right of control". (use your own language and add an analysis of expert opinions and explain the basics of fair efficiency).

Based on the analogy to the decision of the Constitutional Court above, mining which is also a field related to the livelihood of the people can not be left to the free market mechanism, because in free market mechanisms that only benefit the manager (investor) so that people will lose their right to enjoy the results of its natural resources. As ordered by the constitution that the state in running the government can not only prioritize the principle of efficiency alone, but must realize a fair efficiency for the people of Indonesia because justice becomes a economic standard of a public policy so as to maintain the balance in realizing the welfare for the community for the field associated with the intent other people's lives must be controlled by the state.

2. Changes in Cooperation Pattern

The Indonesian government finds it difficult to prosecute foreign investors to divest shares from the era of Government Regulation No. 23/2010 concerning the Implementation of Mining and Coal Mining Activities which regulates at least 20% divestment until the issuance of Government Regulation Number 1 of 2017 on the Fourth Amendment to Government Regulation Number 23 Year 2010 on the Implementation of Mineral and Coal Mining Business Activities that regulate the minimum amount of divestment of 51% shall be owned by national participants. It is difficult to do because foreign investors argue that their obligations in mining management are only based on contracts of work that have been agreed and signed so that the government regulations born after the contract of work are not retroactive to the contract of work. Although in a treaty there is a freedom of contract, but on condition that the agreement should not be contrary to law, public order and morals (dwingen recht). This means that although the contract recognizes the principle of freedom of contract but the contract is limited by legislation.

Based on this, a new pattern must be formulated that will replace the work contract because it is considered will fail to achieve prosperity for the community. A new pattern that will eliminate the pattern of contract of work was born after the enactment of Law No. 4 of 2009 on Mining. In Law No. 4 of 2009 concerning Mining which replaces the pattern of work contract with licensing pattern. Mining licenses are known as Mining Business Licenses (abbreviated MBL), consisting of MBL, Production Operations MBL, and Society Mining permission.

Licensing and contract work are two different legal instruments. In the administrative law the state of licensing includes into the public legal action of the government (publiekrechthandelingen) while the contract of work belongs to the act of private law of the government (privaatrechthandelingen). (Ridwan HR: 2014, 109-110). W. Friedman termed the act of public law of the government as state as regulator whereas the act of private law was termed the state as enterpreneure (W. Friedman 1971: 3)

Contract of work is an act of private law of the government. The Government in carrying out private legal action is domiciled as a representative of a legal entity that implies the legal status of government which is not different from other legal subject (person and legal entity). The act of private law of the government is a two-tier legal action, not least the legal action of the government to create a contract of work with foreign investors in the context of cooperation in the management of mining business activities.

Chapter 1313 of the Civil Code has provided that the so-called covenant is "... an act by which one or more persons commit themselves to one or more persons". The parties to a treaty have an equal position so that a valid agreement is made in accordance with Article 1320 of the Civil Code as a law for the parties which means that the parties are bound by the rights and obligations agreed upon in the agreement.

Contract of work which is a public-dimensional contract in which not only concerns the interests of the country of destination of investment but also concerns the interests of the country of origin of the investor, so that the formulation of the contract of work can not be separated from political attractiveness in the country of destination of the investor and the country of origin of the investor.

The Contract of Work, in accordance with Article 1339, is not only subject to the substance of the Contract of Work but shall also be subject to the laws and regulations. This is difficult to implement because foreign investors have argued that several government regulations relating to mining business activities governing the issue of the new divestment are issued after the approval of the contract of work so that foreign investors are only willing to carry out their contractual obligations.

Licensing is a public legal act, meaning that the government's actions are one-sided, although some experts say that the public acts of public acts are only one-sided, but also rectangular. Two-sided public legal actions are seen from agreements governed by public law such as employment agreements that are applicable over the short-term. According to Sjachran Wet permit is a legal act of state administration with a rectangle that applies the rules in concrete terms based on the requirements and procedures as stipulated by the provisions of legislation (Ridwan HR: 2014, 109-110).

Government Regulation No. 23/2010 concerning the Implementation of Mineral and Coal Mining Business Activities with the background of the need for arrangement concerning the implementation of mineral and coal business activities as well as supporting regulations of Law Number 4 Year 2009 regarding Mining.

Changes in the pattern of cooperation from the pattern of the contract of work to the pattern of permission began when the enactment of Law No. 4 of 2009 on Mining. Furthermore, Government Regulation No. 23/2010 on the Implementation of Mineral and Coal Mining Activities also regulates the changing of cooperation contract pattern of work into licensing pattern. The regulation regarding the pattern of permits in Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities has 4 (four) times changes until the last Government Regulation Number 1 Year 2017 on Fourth Amendment Government Regulation Number 23 Year 2010 on Implementation of Mining Business Activities Minerals and Coal.

Government Regulation Number 1 Year 2017 concerning Fourth Amendment To Government Regulation

Number 23 of 2010 concerning Implementation of Mineral and Coal Mining Business activities shall change the period of IUP / IUPK renewal application at the earliest 5 years prior to the expiry of the business license period. Under this regulation, there is also a change in the amount of divestment to be made by foreign investors by 51% in stages as described above.

Regulation of Minister of Entrepreneurship and Human Resources Number 5 Year 2017 on Increasing Mineral Added Value Through Mineral Processing and Purification Activity in Domestics confirms the change of pattern from contract of work to pattern of licensing pattern Metal metal contract work holder can only sell overseas purification result after meet the minimum restriction of purification. In order to encourage the implementation of the downstream, the government shall provide the opportunity to hold a Metal Mineral Working Contract, a Production Operation MBL , a Special Operating Production MBL, a Production Operation MBL refining, and others to sell overseas concentrate for the next 5 years since the issuance of this candy, provided that the following:

A. Change the Contract of Work into a Special Mining Operation License for Production Operations (IUPK OP)
B. Commitment of smelter development
C. Pay the maximum 10% export duties in accordance with physical progress and financial realization of smelter development.

Laws that have been responsive to accommodate the welfare of the community must be supported by good planning by the government. Government Regulation Number 1 of 2017 concerning Fourth Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities stipulates that foreign investors stipulate that foreign investors should divest their shares at least 51% to national participants. When foreign investors divest their shares up to 51% of problems arise, namely the determination of national participants who will receive the shares of the divestment.

Article 97 Paragraph (2) of Government Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities has set up national participants who can take divestment shares consisting of Central Government, provincial government, or government of regency / municipality, BUMN, BUMD, or national private enterprises. In paragraph (3) the central government is a priority in the divestment of such shares.

The divestment of mining shares must be managed by the central government because the mining business is not only regional affairs so that managed by the central government will maximize the realization of welfare for the community (wealth maximalization). Article 13 paragraph (2) and Article 14 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government affirms that the authority of mining affairs is not a "mandatory" authority undertaken by provincial and district / city governments. The field of mining affairs is included in the affairs of a "choice", which is a real affair and has the potential to improve the welfare of the community in accordance with the conditions, uniqueness and potential of the region concerned.

Constitution Number 23 Year 2014 on Regional Government was then born as a substitute of Law Number 32 Year 2004 regarding Regional Government. Based on this new law, strengthening the authority of the provincial governors and governors. One of them, the governor holds full authority related to the permit and management of mining, forest management, marine, and fisheries previously (Law Number 32 Year 2004 on Regional Government) such authority is located in the district / city government (Article 14 of Law Number 23 Year 2014 on Local Government).

Based on this, when discussing the divestment of mining shares by foreign investors is not only about the number of shares of divestment alone but required good planning from the government even before the investment cooperation is conducted between the government and foreign investors. It relates to the party who will receive the divestment shares so that there is no gag to divest such shares as experienced Nemont. Newmont failed to divest in time due to the lack of central government in preparing funds derived from state finances and / or funds from third parties.

III. CONCLUSION

Mineral and coal mining business activities before the issuance of Government Regulation no. 1 Year 2017 is regulated in several laws and regulations. These laws and regulations do not consistently regulate the number of shares that must be divested by foreign investors to the state or national participants.

Mineral and coal business activities after the issuance of Government Regulation no. 1 Year 2017 contains 2 (two) important points, namely: first, the arrangement of the number of shares that must be divested by foreign investors to the state or national participants at least 50%. Second, the change of cooperation pattern from the contract of work to the licensing pattern (mining business permit) will maximize the realization of welfare for all Indonesian people according to constitutional order.

REFERENCE

Bagus Radendra Suastama, Ida, “Asas Hukum Putusan Mahkamah Konstitusi Tentang Undang-Undang Migas dan

Ketenagalistrikan", Mimbar Hukum Universitas Gadjah Mada, Vol. 24 Nomor 2 Juni 2012.

Friedmann, W., 1971, *The State and the Rule of Law in a Mixed Economy*, Steven and Son, London.

HR, Ridwan, 2014, *Hukum Administrasi Negara,* PT. RajaGrafindo Persada, Jakarta.

HS., H.Salim dan Erlies Setiana Nurbani, 2013, *Hukum Divestasi di Indonesia* (*Pasca Putusan Mahkamah Konstitusi RI Nomor 2/SKLN-X/2012*), PT. Raja Grafindo Persada, Jakarta.

Ilmar, Aminuddin, 2012, *Hak Menguasai Negara dalam Privatisasi BUMN,* Kencana, Jakarta.

Radjaguguk, Erman, tanpa tahun, "*Joint-Venture Policy and Relationship Between Majority and Minority Shareholder*".

Resen, Made Gde Subha Karma, 2015, *Pengaturan Badan Usaha Milik Daerah Berdasarkan Good Governance dan Good Corporate Covernance (Tinjauan Yuridis Terhadap Badan Usaha Milik Daerah Sebagai Entitas Bisnis*, Disertasi, Fakultas Hukum Universitas Gadjah Mada.