

Conference Paper

The Constitutional Relationships Mandate Regarding the Implementation of Oil and Gas Investments in Indonesia

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Abstract.

The meeting of interests between the Government of Indonesia (cq. The Unitary State of the Republic of Indonesia) and investors in the field of oil and gas investment in Indonesia is a meeting with relatively different final objectives, but business cooperation that complements each other creates synergies, and is mutually beneficial for each other's interests, according to a mutually agreed-upon agreement or contract. This study will investigate the relationship between Indonesian constitutional mandates and the implementation of oil and gas investments. According to the 1945 Constitution of the Republic of Indonesia and Pancasila, the study demonstrates that natural resources (SDA) are capital for national economic development. Based on Pancasila and the 1945 Constitution of the Republic of Indonesia, the development of the national economy is a part of the endeavor to realize the just and prosperous welfare of the people.

Keywords: constitution, national economy, oil, gas

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1. INTRODUCTION

In the Preamble of the 1945 Constitution, the founding fathers of the Unitary State of the Republic of Indonesia inscribed the noble accord of the Indonesian nation to work together to realize the nation's ideals and the welfare and prosperity of the people's lives. It appears that the Constitution's mandate that the state be responsible for the welfare and prosperity of the people is unambiguous.[1]

Two crucial passages in Article 33, Preamble to the 1945 Constitution, First, state that Article 33 paragraph (3): "Earth, water, and Natural Resources contained therein are controlled by the State and used as much as possible for the Prosperity of the People." [2] Indonesia is extremely appreciative to God Almighty, who has provided abundant natural resources (SDA) both on the earth's surface and in its interior. In order to meet the requirements of the larger community, the state must manage, develop,

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and utilize these vital natural resources.[3] It is anticipated that by implementing sound business governance, these natural resources will have a positive impact and add value to the economy of the country.[4] This includes natural resources in the form of oil and natural gas, which in the last five (five) decades have become the backbone of the country's economy in supplying national energy and its derivative products, so that following the constitutional mandate that the State must control the management of these natural resources for the prosperity of the people.[5]

Utilization of a country's natural resources should, in theory, generate substantial economic value and have a positive impact on employment opportunities; however, in a National Oil and Gas Investment Activity, be it the PSC Cost Recovery system or the PSC Gross Spill Scheme, there are still aspects that do not adhere to the Constitution and the interests of investment actors (cooperation partners).[6]

Furthermore, this occurred at multiple points throughout the cooperation process; there was tension between the Government (State) and the cooperation partner actors, who had different objectives from the outset. This distinction can be described broadly from the perspective of the government, which is charged with maximizing the state's welfare for the benefit of the prosperity of the people. For the benefit of investors, cooperation partners are demanded to the greatest extent feasible.[7]

In Indonesia, the constitutional mandate for the management of natural resources, particularly oil and gas, has a lengthy history. Obviously, in the course of management cooperation between the State and Investors, there have been many tugs-of-war between competing interests, so it is hoped that the application of the Constitution to the laws and regulations under it, as well as the policies and implementation of national oil and gas management, will provide a sense of fairness for all parties.[8] On the basis of the preceding description, this paper will discuss some of the problems that arise, including whether the Message of the Constitutional Mandate reaches Investment Implementation and how to ensure that the Constitutional Mandate operates according to its Target and provides prosperity for the people.

2. RESULTS AND DISCUSSIONS

Natural Resources (SDA) in a country are a gift from God Almighty; naturally, the type, variety, and nature of SDA varies from country to country, and SDA is devoted and intended for the requirements of the nation that occupies it; similarly, with the Unitary State of the Republic of Indonesia (NKRI). Oil and Gas (Oil and Gas) is a very beneficial natural resource for the Unitary State of the Republic of Indonesia. The message of

Article 33 paragraph 3 of the Constitution of 1945 is unambiguous: “Earth, water, and the natural resources contained therein are controlled by the State and used as much as possible for the prosperity of the people.” The focus of this paragraph derives from the following constitutional mandate.[9]

First are Natural Resources (in this case, SDA Migas), second is State Dominance, and third is People’s Prosperity. In accordance with the Constitutional mandate, the structure of the National Economy is based on three pillars: joint enterprise, democracy, and a sustainable economy. The state is only partially independent in administering the economic ideals in the oil and gas sector mandated by the 1945 Constitution, so cooperation that is mutually beneficial is still required. Because oil and gas management in any region of the globe has always allowed for cooperation up until this point.[10] This is due to the fact that oil and gas management always poses a significant risk (High Risk), that the costs required to reach the stage of handing over oil and gas production are enormous (High Capital), and that Three Appropriate Technologies are required to simplify, accelerate, and precisely complete the Exploration, Development, and Production processes (High Technology).[11]

Indonesia has mandated cooperation with other parties, including the potential for technology transfer, for all three. These three tasks should be performed by the nation in the future so that future cooperation will be highly selective and national capacity and capability development can be revived as soon as feasible.[12] The national energy independence encompasses not only natural resources, but also management and dependable human resources, so that value creation will increase in accordance with future national requirements.



Figure 1: Foundation of the Constitutional Trust in the Management of Oil and Gas Natural Resources and Development of the National Economy.

The figure above shows the decisions that the Constitutional Court has taken in reviewing laws related to 3 (three) Decisions on Cases regarding Natural Resources (SDA) management activities, namely: the Oil and Gas Law, the Electricity Law, and the Water Resources Law (UU SDA), in 2012 that the Constitutional Court of the Republic of Indonesia (MKRI) interpreted “State control rights (HMN)” not only in the meaning of the State Owns, but in the sense that the State only formulates policies (*beleid*), administers (*regeelIndaad*), managing (*bestuursdaad*), managing (*beheersdaad*), and supervising (*toezichthoudendaad*).

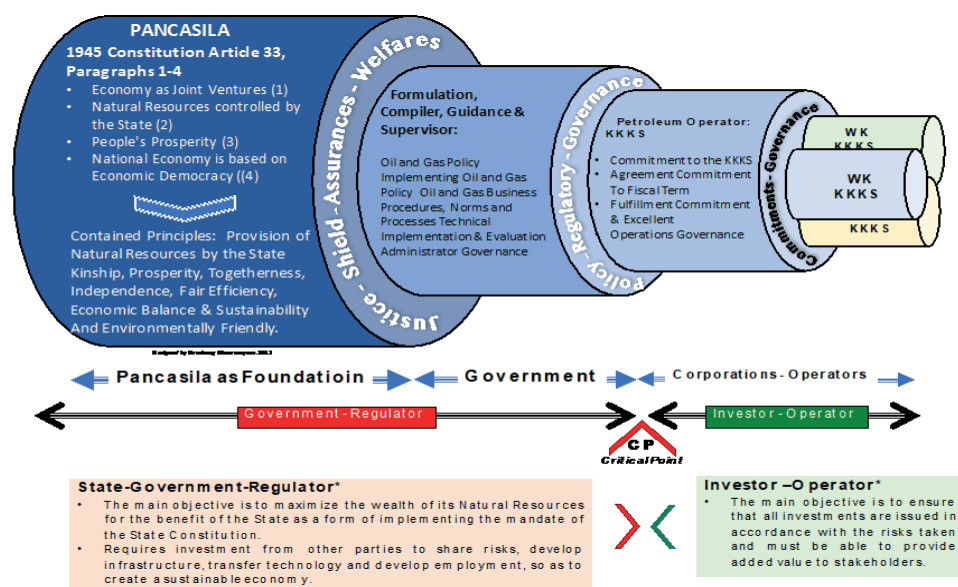


Figure 2: Shows the Legal Existence of the relationship between the State Foundation, the Constitutional Mandate of the Unitary State of the Republic of Indonesia for the Government and Oil and Gas Business Actors in Indonesia.

The picture above illustrates how the Government and Business Actors can realize the legal relationship when translating the 1945 Constitutional Mandate at the Operational level. It is evident that on the left side is the realization of the State represented by the Government as the principle of State Control, which provides legal and economic policy values as part of realizing Indonesia’s economic growth for the Prosperity of the People. On the right side is the part of the Business Actor that represents the interests of the capital owner. Purpose Business actors have the principle that every allocation of funds must provide added value to their business and can even be multiplied by the status of their business, in this case, the oil and gas business. Here a point will appear called a critical Point, where there is a tug-of-war of interests between the State and Business Actors.[13]

The meeting point is needed where both feel a sense of justice, significant changes in the fiscal terms of investment in oil and gas in Indonesia have taken place since the

promulgation of Ministerial Regulation No. 08 of 2017 concerning the form of cooperation in Production Sharing Contracts with the Gross Split scheme (PSC Gross Split). This regulation replaces the old scheme in the form of a Cost Recovery Production Sharing Contract (PSC Cost Recovery). The Minister of Energy and Mineral Resources stated that this Ministerial Regulation stipulates the form and main provisions of Production Sharing Contracts, which include the following requirements: ownership of natural resources remains in the hands of the Government until the point of delivery; the Contractor bears all capital and risks; and operational management control lies with *SKK Migas*.^[14]

Both PSC Gross Split and PSC Cost Recovery are manifestations of the implementation of the mandate of Law No. 22 of 2001 concerning Oil and Natural Gas (Oil and Gas), which has been passed down by constitutional mandate with the message of Joint Business and SDA-Oil and Gas Management Cooperation to improve Indonesia's sustainable economy with the concept of operating effectively and efficiently, minimizing potential risks, so that all parties get value (profit). In carrying out its operations, a Cooperation Contract Contractor (KS) will always comply with the terms and conditions outlined in the KS; each activity must coordinate and obtain approval from the Special Task Force for Upstream Oil & Gas Business Activities (*SKK Migas*) in making Strategy, Planning, Operations, funding, and including the Quality Health Safety, Security, and Environmental (QHSE) program. The specific thing in oil and gas investment is that there are known risks that are constantly faced by the State as well as Investors, namely success in obtaining resources classified as high risk (high risk), speed, accuracy, and efficiency are required in operations so that it requires high technology (high technology), and of course, balanced with the risks and technological needs required, it requires financing with investment capital, which is also very high (high cost).^[15]

Profit sharing with an 85:15 share, whereas the amount of gross production deducted by First Tranche Petroleum (FTP) costs, namely oil or gas deposited by the Contractor every month of the year. Second, there are operating costs that must be borne by the government (Cost recovery), which are adjusted to the government-approved operating costs. Thirdly, the government recently completed the share of the benefits of government-contractor (investor) cooperation. Cooperation contracts executed prior to 2017 continue to utilize this agreement scheme.^[16]

In all circles, including the Government, institutions, and the field of Education, this evaluation method is the subject of discussion. Several observations pertain to the Cost Recovery scheme: Operational Costs (Cost recovery), which were initially borne by the Contractor, were ultimately incurred by the Government. The yearly increase in cost recovery demonstrates that operationally, it must implement operations that

are managed efficiently and effectively. In addition, this is reflected in the data since 2015; it comes out that the Government is shouldering Cost Recovery expenses that are becoming more significant than the revenue. The second issue is the relatively lengthy government approval process, which is caused by incomplete data, overlapping data, missing data, and insufficient data. Nonetheless, operating costs are rising, necessitating elucidation, validation, field inspection, and auditing, which become more time-consuming and complex if the system or management is altered.[17]

The Production Sharing Contract (PSC) of the Gross Split scheme for the Government is one solution to the inadequacies of the Cost Recovery PSC scheme in responding to national interests related to the maximization of profit for the prosperity of the people. This statute and rule were enacted on January 13, 2017. Article 2 of the Gross Split Production Sharing Contract expressly states: In this Gross Split Production Sharing Contract (PSC) arrangement, as outlined in Article 2 of *Permen No. 8, 2017*, the Contractor will be responsible for all operating expenses and potential operating risks (Exploration, Development, and Production). The Contractor must execute the upstream oil and gas operational phase with care to ensure cost-effectiveness. As a result of not having to reimburse the Contractor's operating expenses, this effect increases the specificity and significance of State revenue. Through its support of the new program, the government is preparing a more streamlined and effective business process.[18]

The advantages of the Gross Split scheme for contractors are that the procurement system can be carried out by the Contractor himself, the government's willingness to increase the percentage of incentives or splits if oil and gas prices fall, and if the economic value of field development results is marginal.[19] In addition, the government will focus on enhancing economic value. The release of supervision from the planning phase to the operational phase, it is anticipated that the government will no longer be able to evaluate the work at all stages. This is a topic of discussion regarding the Gross Split Scheme.[20] Some have even argued that supervision is required to regulate everything, particularly monitoring of operational costs. Improvement inputs will be ideal if the government can incorporate them in the future.[21] On the Contractor's side, some production Cooperation Contractors (KS) who initially followed the Cost Recovery scheme after switching to the Gross Split scheme appear unable to meet the Contractor's economic requirements, so incentives or even split changes are still required. On the other hand, the government must also request oil and gas production commitments from contractors.[22]

3. CONCLUSION AND RECOMMENDATION

Based on the above review, it can be concluded that a solid, natural, and coherent thread has been intertwined between the Constitutional Mandate of the Unitary State of the Republic of Indonesia (NKRI) in the 1945 Constitution and the national oil and gas governance as reflected in Law No. 22 of 2001, included in the implementation level of investment in the oil and gas sector in lower statutory regulations such as Ministerial Regulations (Permen), especially on the PSC Gross Split and PSC Cost Recovery models. However, a lot still needs to be evaluated together to get a sense of justice in implementing cooperation between the State and Investors so that it can optimally provide people's prosperity and profit value for investors. Some of the challenges in the implementation of oil and gas investment that must be sought to minimize are as follows: first, the risk of certainty in obtaining oil and gas resources (existence and size of reserves); second, business process constraints (area acquisition, procurement process, and licensing process); third, substantial funds in investing in the oil and gas sector; and fourth, technological innovation that accelerates and facilitates the implementation of oil and gas operations. To minimize the challenges above, several steps are needed, such as legal studies in an integrated Triple Helix manner between the Government, Universities, and entrepreneurs and industry, the need for adjustments to findings that can be detrimental to both parties, and immediate efforts to make fiscal adjustments and legal documents so that existing laws and regulations can be updated.

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