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RENEGOTIATION MINING CONTRACT: LEGAL PARADIGM RECONSTRUCTION EFFORTS

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ABSTRACT

Renegotiation contract mining is not a priori notion that was born but is driven by the fact that empirical Work Contract (KK) and coal mining concessions of the Works Agreement (Cca) that are valid for this resulted in profits which are not comparable between countries with investors (domestic and foreign). In addition, Law No. 4 of 2009 about Mineral and Coal Mining (minerba) through article 169 have been injected that though the mining contracts during the validity of this, still respected until the end, however, if the implementation of these contracts give rise to distortions for the national interest, then the Government must encourage the investors to do Renegotiation against existing contracts to comply with legislation minerba forever within a period of one year since the enactment of the legislation this minerba. Renegotiation mining contracts that have been approved on the fact of the matter is simply an attempt to reconstruct the ruling paradigm, so with that paradigm shift, both parties can reach the intersection for the benefit of both parties, i.e. the parties proportionately Indonesia suffered no losses on the one hand, and the benefit of the domestic and foreign investors remain in reasonable limits on the other.

Keywords: Renegotiation Contract, Legal Paradigm Reconstruction

INTRODUCTION

Since 2010 Renegotiation mining contracts have been attempted as Government implementation of the Law on Mineral and coal the number 4 in 2009, but until 2014, the Renegotiation now still a lot to reach the intersection. Tim renegosiator the Government set 6 things that become important points for Renegotiation that is, concerning: an area of exploration, a period, the amount of the royalties, the construction of the Smelter, the use of the service in the country, and divestitures. Of the six that there are three things that allegedly very difficult to reach the intersection to this day that the problem area, time period, and royalties. Third it is becoming difficult to achieve due to the intersection of each party hang on to different positions, namely the national interests in pursuit of Indonesia while the investor retains the principle of legal certainty of the contract. And whether the Government can impose this Renegotiation based on the principles of Justice that mandated the Constitution and means of nationalization of foreign companies? Certainly it is a serious consideration for both parties.

Though everyone recognized that in the law of there is a part that is forced, as well other parts are not the least bit set. The question is then whether the contracts are on a field which is forcing or on a field that is set up? This question is answered before stepping on whether

efforts to Renegotiation mining contracts can reach the intersection between the two sides, without neglecting the principle of legal certainty applicable contract as a juridical basis must be respected. The principle of legal certainty for mining contracts dealing with substantial justice i.e. proportional justice, in which the country suffered a lot of losses, while the foreign and domestic investors scooped up profits galore. Even the mining contracts in question implicates direct towards social justice, economic justice and sustainability of the mine's potential with the support of exploration investment is not a little.

Presumably, these areas of law of civil liability which is forcing can also be renegotiated GATS agreement if the paradigm of law each party oriented to justice which benefit both parties proportionally and the paradigm of humanization contract whereby the law (contracts) devoted solely for the benefit of humanity, as disclosed that the law was not Satjipto Rahardjo a final scheme (scheme finite), but is constantly moving, changing, following the dynamics of human life. Therefore, the law should continue to be dissected and dug through the progressive efforts for reaching a bright light of truth within the reach of Justice.

Satjipto Rahardjo further revealed that the Government as a major and important actors behind the life of law (contracts), not only being sued are able to create and run the law (making the law), but also the courage to break and tore it down (breaking the law) while the law was not able to bring the spirit and substance of its existence, namely the Justice Society creating prosperity. In fact, Satjipto Rahardjo was about to say that when a real mining contracts-the real cause of injustice, then the contracts dissected and reconstructed towards the paradigm of law that prefer the advantages of both sides.

DISCUSSION

Legal Basis Renegotiation

The 1945 Constitution through article 33 paragraph (3) emphasized that the management of Earth and water and the rest of the wealth contained therein should be controlled by the State and the results should be provided to people's prosperity. That is, the stuff of mine that is one of the economic potential that ruled his life many people must be under the control of the State, even its management must be owned by the State, since only thus, the results obtained from it can be utilized to enhance the prosperity and well-being of all the people of Indonesia, not vice versa that the wealth of mines controlled by foreign investors and domestic (private) solely for the sake of his interests. Thus, the Constitution does not justify the paradigm when there are certain parties in addition to State control and exploring the mine goods regardless of the interests of all the people of Indonesia.The empirical conditions showed that the exploration of the mining operations conducted by medium-sized companies to explore minerals and coal details consisting of as many as 72 Contract works (KK) and as much as 74 coal mining concessions of the Works Agreement (Cca). The mining companies in the mining, exploration and pursuit of alleged detrimental to the State in an amount not less. Results of the study the corruption eradication Commission (KPK) revealed that Renegotiation beginning with the promulgation the law No. 4 of 2009, supposed to be completed on 12 January 2010, but until 2014 is not causing the country to

complete also suffered losses of Tax Revenue the State not the difference (PNBP) just as much as US $ 169, 06 million per year from a single large company Contract Work. Thus, it can be estimated how much the losses borne by the country from the difference of the accumulated losses PNBP by 71 KK and 74 other Cca.

Losses – losses that plagued the country as a result of mining contracts that run for this is in addition to the benefits for countries that are not comparable, as well as the people living around the mining area has never budged from the poverty line, as was the case in Riau and Papua. For that it takes Renegotiation to prevent the occurrence of social conflict due to the advantages of not worth. Likewise, Joko Purwanto reveals that the much-needed Renegotiation so that the country does not become a commodity importers petrol products mineral actually comes from Indonesia, while Earth left for the people is a severe environmental degradation, poverty, disease, and death. Because contracts made during it's much profitable financiers/investors, foreign and domestic.

This condition should encourage and spur the Government invites investors do Renegotiation mining contracts, oriented on the basis of comparable advantages in order, justice, and humanity. Mutual benefit is a benefit intended abound on the part of investors (domestic and foreign) adjusted or with losses that plagued the country, along with a note not operation of their company. Only with such considerations can embody fairness proportionate, cultivate attitudes of humanization contract while keeping sustainability activity of foreign companies to operate on the mining sector in Indonesia with a reasonable profit (comparable).

In addition to these considerations, the Government can also make use of the provisions of the agreement/contract changes each KK and Cca have been mutually agreed, article 1338 Civil Liability, and article 171, paragraph (1) and paragraph (2) of Law No. 4 of 2009 about Mineral and Coal Mining as the Foundation of the law (legality) Renegotiation. Article 1338 subsection (2) is expressly affirmed that "agreements (contracts) is irrevocable (renegotiated GATS agreement) in addition to the agreed both sides and because of the reasons stated by law sufficient to it". An important Point in the Article 1338 subsection (2) is mines contracts can be renegotiated GATS agreement on ' the approval of both parties ' and or ' reasons stated by law sufficient to ' hold Renegotiation.

The first Point to be a very strong legal basis for the Government to invite the investors holding K.K. and Cca to sit together holding Renegotiation mining contract for this alleged harm the State. This first Point is reinforced by the second point ' of the reasons stated by law sufficient to ' hold Renegotiation. The intended reasons, one of which is a pretty fundamental is the country suffered not a bit on the one hand and a generous profit for the investor on the other side. This gap shows the injustice should be reconstructed through a proportional means of Renegotiation.

Then, specifically regarding the area of KK and Cca can also be renegotiated GATS agreement based on Article 171 Law No. 4 of 2009 that subsection (1) the holder of the KK and Cca as stipulated in article 169 that have done the stages of exploration activities, feasibility study, construction, or production operations at the latest one year after the enactment of this legislation should deliver a plan of activities in all areas of the contract until the expiration of the contract period to get government approval; Subsection (2) in respect of the provisions referred to in subsection (1) are not met, the mining area which has been given to the holders of KK and Cca is adapted to this Act. A few examples of some of the items concerned contracts can be renegotiated GATS agreement as expressed Syahrir AB is:

1. The total area that can be renegotiated GATS agreement is if an area of KK and Cca approved the Government based on the proposals the company holder KK and Cca is based on the economic feasibility of various activities such as: exploration, mining, processing and refining, rehabilitation after mine, Corporate Social Responsibility (CSR), the construction of infrastructure in remote areas of the mine, the mining operations area based on these considerations the Government agreed a 70,000, then the area can be renegotiated GATS agreement due to the violation of article 53 Law No. 4 of 2009 which sets out to mining mineral acres only 25,000 ha, and section 62 for the coal mining area of 15,000 ha.
2. Increase the acceptance of the State such as the increase in royalty can be performed Renegotiation within the framework of the review of legislation in a comprehensive manner, as it has been specified in the contract that the Tax Agency Company holder KK and Cca are lex speciales determined by 35% while law No. 36 Year 2008 about income tax is 28% and it can be 25%. When the tax agency KK holding Corporation and Cca remains 35% while the royalty imposed increased to 3.75% of the companies make it difficult to follow him. More profit (above normal) that earned the company the holders of KK and Cca as innately high commodity prices far above mine is normal can be regulated through legislation by the Government so that a portion of the profit received by State.
3. Contract period that can be renegotiated GATS agreement to guarantee the economic feasibility of various activities such as: exploration, mining, processing and refining, rehabilitation after mine, Corporate Social Responsibility (CSR), the construction of infrastructure in remote areas of the mine. Extra time KK and Cca for 2 times 10 years in the form of Licences are those powers on the Bupati/Walikota has ascertained cannot guarantee the certainty of the breadth and duration of the company operating the mine. For that, it needs to be renegotiated GATS agreement certainty businesses extra time KK and Cca for 2 times 10 years changed the shape of the Licences be in the form of HH and Cca.

A. The Power Of The Government In The Contract Mining Renegotiation

Ichsanuddin Noorsy, founder of the associated Political economy of Indonesia (AEPI) in a seminar/discussion hosted by the National Law Commission (KHN) reveals the power of Indonesia's position in the conduct Renegotiation mining contracts that in capitalist economics thesis applies the formula "human existent depend on the property". The property depend on the land, the water, the ocean has been recognized by the world that the existence of the nation and the Government of Indonesia in international relations. Thus, the area of mining (on land or water) which is located in the region of the sovereignty of Indonesia property that is contracted out to investors (foreign or domestic) within a certain period. Contracts that have been agreed upon should not be contrary to the norms of the Constitution, the principle of propriety, and must be created and implemented in good faith.

Ichsnuddin Noorsy intent is that mining contracts that have been approved and are being applied now, it could be alleged if the renegotiated GATS agreement contrary to the norms of the Constitution and the principle of propriety as well as contracts are made and carried out the alleged bad faith of foreign investors or domestic parties in the form of the State has been harmed while benefitting investors are not worth the State's acceptance, then the investors do not ignore it. In fact, according to the author, even if the law number 25 of 2007 about Investing has been the whole sectors of the economy and investments so that these sectors are guaranteed not to be nationalized as a strong guarantee for foreign investors, but according to the author can still renegotiated GATS agreement if those contracts turned out to have an impact to the State's losses, because the purpose of foreign investment in the form of contract mining is to meet the demands of the Constitution for the sake of the prosperity and well-being of most people.

One of the concrete sample of how great the losses experienced by the country as a result of the contract during this run is the contract works between Indonesia and PT. Freefort in the form of royalties are given by PT. Freeport to the Government only amounted to 1%, and this value is not proportional to the profits earned by the PT. Freeport. The can be outlined that in the year 2010 alone PT. Freeport sold 1.2 billion pounds of copper at an average US $ 3,69 per pound or with the exchange rate of Rp 9,000, meaning equivalent to IDR 39,42 trillion. Later, the PT. Freeport also sold 1.8 million ounces of gold with an average price of US $ 1,271 per ounce with an exchange rate of Rp 9,000, meaning the equivalent of 20, 59 trillion, so that total sales of PT. Freeport in 2010 reached Rp. 60, 01 trillion. So, if only 1% of State revenues from Rp 60, 01 trillion, and then it's certainly happened between acceptances of the country with the profits gained PT. Freeport, when fortunes this gold mine of Indonesia, while State-owned PT. Freeport is just a contractor.

B. Renegotiation Contract Is The Legal Paradigm Reconstruction

Contracting (mining) is one manifestation of positivistic paradigm of building law-dogmatic that basing the legitimacy of Justice in society is contractual products as developed

by Hans Kelsen. Adherents of the teachings of this pure law separates the concept of Justice in non-clear value. The essence of his teachings are of Justice was released from the interpretation of Justice that uses a wide range of legitimacy such as moral, ethical, humanitarian, and political. Thus, Hans Kelsen was only recognize one kind of Justice, that justice is born from positive law set by humans based on the norms of positive law comes into force. Thus, only justice is defined by a contract as a product of man (the parties) use as a giver of Justice for the parties that make it. Out of contract there is no justice, so the legal paradigm contract into power on behalf of foreign investors and domestic refuse to hold a Renegotiation contract, though neglected in the form of substantial justice advantages between countries with investors.

Hans Kelsen's law paradigm by several parties, among others, that has a view that Rasjidi nature's law is based on the idea of Justice and moral force. This view was reaffirmed by Satjipto Rahardjo that notion of Justice is always related to the law, because in talking about the law, clearly or vaguely always is the talk about justice. Satjipto Rahardjo even better expresses again that fundamental paradigms of law is upholding the morals, values, and justice.

Presumably, the positivistic paradigm of legal-oriented to the achievement of the dogmatic legal certainty as referred to the law of contract is no longer able to solve problems that arise from mining contracts, due to the implementation of in preventing many new legal issues together with the appearance of new symptoms in the community. Positivism paradigm meant inability because of his inability to explain, let alone find solution to the phenomenon of chaos (chaos) that ravaged the economy of Indonesia, so according to Achmad Ali, should we leave the paradigm of positivism and get more realistic to use the theories are more actual and factual.

Founders and adherents of the paradigm of positivism-a very legalistic formalistic dogmatic in law, forget that the establishment and legal works are always based on normal conditions, so that when circumstances change become abnormal, then the law must have been exposed to a difficult the situation. Thus, to anticipate the occurrence of circumstances are not always normal, the law has provided the doors to get out of a pinch. Basing on the view Satjipto, then it can be said that a State of emergency that does not normally occur in mining contracts are profits earned the country with domestic and foreign investors. By the mining contracts are required to be held Renegotiation in order to reconstruct a positivistic-law paradigm dogmatic contained therein become a legal paradigm refers to the real interests of Indonesia, namely the proportionality constant profits between countries with foreign investor expresses prosperity and well-being for the sake of all the people of Indonesia.

CONCLUSION

Renegotiation mining contracts in fact constitutes a reconstruction law that positivistic paradigm – the paradigm of legal nature to dogmatic that refers to the real conditions that

plagued the country in terms of mining. Reconstruction of law like this paradigm in the form of Renegotiation also be legal because it is based on the emergency doors which have been provided by contracts and legislation in force. In addition, the purpose of the law (contract mining) made between the parties in Indonesia with foreign and domestic investors, is none other than for the sake of profit in a balanced way between the two sides. To that end, the author encourages the Government of Indonesia to urge foreign and domestic investors sat down with renegotiation mining contracts that hurt Indonesia.

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