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Nationalization of Share by Divestment in Indonesia

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Abstract: *Divestment that has occurred in Sudan and America can be considered privatized because the State as the owner of capital reduces ownership of capital in their business ventures by divesting their shares. In Indonesia, the divestment is carried out for nationalized shares in foreign companies in the mineral and coal mining sector. This research aims to find the nationalization of shares by divestment in Indonesia. The results of the research show that mineral and coal mining natural resources are in state power which is not only recognized in Indonesian National Law but also in international law. Nationalization in the investment law of Indonesia is further regulated in the Act, while the Law on Indonesia's Mineral and Coal Mining has required foreign capital to divest. Dealing with this, foreign investment companies with ownership of shares in the company more than fifty percent are required to divest to the Indonesian side.*

Keywords: Mining, Divestment, Indonesia, Mineral, Nationalization

Introduction

Divestment is a company's decision to increase the important value of the company's assets, which aims to increase the company's power in changing the asset structure and allocation of resources. Divestment which is targeted to increase the value of the company so that it sells its business unit is certainly different from other business strategies such as Mergers and Acquisitions. Mergers and acquisitions have an impact on the size of the company, so divestment will result in a smaller company size due to the separation or sale of some business units (Flickinger, 2009).

The difference between divestment and acquisition is very significant. The differences have an impact on important aspects of the divestment process. The differences in the process are: the psychology of the transaction, the need for intense planning and rapid implementation of the separation of the organization from the entity being sold, the need for preparation and staging of the transaction, or the presence of substantial communication and management challenges (Gole & Hilger, 2008).

Divestment also requires preparation, namely building capacity, forming a team during the divestment process, requiring advisors, and other resources. In addition, several factors affect it, namely low labor productivity, liquidity disorders, too much debt, inefficient production processes which result in low product quality, inexperienced sales force, unfavorable macroeconomic and social conditions, changes in consumer tastes, strong competitor threats, and the emergence of new entrants to the industry thus limiting the company's space to compete (Moin, 2004).

The main measure of success for the seller is to close the transaction at a price that includes a premium over the retention value of the property. To achieve the above potential, it is presented to the market on a risk-free basis in a credible manner as reserve calculations are interpretive and the buyer takes the asset's risk differently. In general, an aggressive interpretation of the data shows that sales get a good deal (Haag, 2005).

Divestment which is believed to be a company's business strategy is considered to be healthy for the company if the sale gets a fairly high offer price. It requires a series of preparations for the company's management. Preparation for this divestment has several steps, namely building capabilities, forming a team during the divestment process, requiring advisors, and resources from other companies (Frankel & Forman, 2017).

Divestment as one of the company's business strategies can actively take steps to better position itself to achieve its goals. Thus, the criteria for the divestment decision depend on the specific business situation, goals, and strategy of the company (Sewing, 2010). This particular business situation can be interpreted as a divestment motive. The divestment motive has several reasons, including geographic location which is no

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longer attractive, assets held against its financial metrics that are undervalued (high lifting costs or low-profit margins), properties for sale that no longer fit into the company's portfolio, scheduled capital expenditures that do not have the desired profitability, and reserve recovery that is in jeopardy (Haag, 2005).

Regarding the divestment motive, Salim distinguishes it into two types of divestment motives, namely voluntary divestment, and involuntary divestment. Voluntary divestment can be used as a way to return or save investment, while voluntary divestment can be carried out by private legal entities, such as Limited Liability Companies, Firms, and Limited Liability Companies but can also be carried out by public legal entities such as the State, for example, the Indonesian Government divests shares of State-Owned Enterprises to a Singapore legal entity, namely Singapore Technology Private Ltd. The State-Owned Enterprise is Indosat, which was considered by the Government to cover the needs of the 2002 State Budget, which had experienced a deficit in 2002 (HS & Nurbani, 2013).

In addition to voluntary divestment, there is also involuntary divestment. The reason for this involuntary divestment is because there is coercion on companies caused by the existence of laws and regulations, such as companies in the United States, namely American Telephone & Telegraph (AT&T) and Microsoft which were once considered monopolies and had to be split into two companies so that there was no unfair competition (Moin, 2004). The divestment that took place in the State of Sudan aims to authorize the State and Local Governments to dispose of assets in companies conducting business operations in Sudan. It is set in Point b, sec. 3., Sudan Accountability and Divestment Act of 2007.

The divestment in America against AT&T and the divestment in Sudan were carried out by state-owned companies. This case can be called privatization. This is different from what happened in Indonesia in the mineral and coal mining sector. The companies PT Newmont Nusa Tenggara and PT Kaltim Prima Coal had disputes at the UNCITRAL International Arbitration Institute (United Nations Commission on International Trade Law) Batubara & Purba (2013) proposed, and ICSID (The International Center For Settlement of Investment Disputes) in divesting their shares to the Regional Government of East Kalimantan and the Government of Indonesia (International Centre for Settlement of Investment Disputes Washington, D.C. in the proceeding between government of the Province of East Kalimantan (Claimant) v. PT Kaltim Prima Coal Rio Tinto plc bp p.l.c. pacific resources investments limited bp interna, 2009).

The description above leads to a question about how to nationalize foreign shares in Indonesia by divestment. The background of involuntary divestments caused by the laws and regulations that occurred in the United States and Sudan can be considered privatization because of selling or reducing state-owned companies. On the other hand, the divestment that occurred in the mineral and coal mining sector in Indonesia was nationalized because of the companies that divest their shares to the Indonesian side.

Consequent Results and Discussion

The State's Right to Control Natural Resources in National and International Law

The State's right to control natural resources in international legal documents can be such as the United Nations General Assembly Resolution of December 21, 1952, concerning the principle of self-determination in the economic field of each country (economic self-determination) which affirms the right of every country to utilize the natural resources freely Starke JG (1989) proposed, the United Nations General Assembly Resolution of 1974 and the Declaration on the establishment of a New Indonesian Economic System and the 1974 Charter of Economic Rights and Duties of State reaffirmed the state's right to control natural resources to increase economic growth (Parry et al., 1986).

State sovereignty over other natural resources is also regulated in the Covenant on Economic, Social, and Cultural Rights (Article 1) and the Covenant and Civil Political Rights (Article 1) on December 16, 1966, affirming the right of a country to utilize its natural resources freely (Kuswadi, 2015). The statement can completely be seen from United Nations Resolution 1803 (XVII) on December 14, 1962, concerning "Permanent Sovereignty over Natural Resources", which briefly explains (Botchway, 2006):

a. The rights of the people and the nation to permanent sovereignty over their natural wealth and resources must be conducted in the interest of national development and the welfare of the people of the country concerned.

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b. The exploration, development, and disposition of these resources, as well as the import of foreign capital required for this purpose, must be in accordance with the rules and conditions deemed necessary or desirable by the people and the state freely.

c. In cases where authorization is granted, the imported capital and income from that capital will be governed by its requirements, applicable national legislation, and by international law.

d. Nationalization, expropriation, or re-demand must be based on reasons or reasons for public utility, security, or national interests recognized as a pure individual or private interests, both domestic and foreign. In such cases, the owner must be paid appropriate compensation, in accordance with applicable regulations in the State taking such action in the implementation of its sovereignty and in accordance with international law in any case where the issue of compensation is controversial. Hence, the national jurisdiction of the State taking such action shall be exhausted. However, with the consent of the sovereign State and other interested parties, dispute resolution must be carried out through international arbitration or adjudication.

Based on the above principles, sovereignty over natural resources is also linked to the country's relations with other countries or foreign companies in terms of cooperation in natural resource management, for example in Point 'd' which allows for the nationalization or expropriation of private, domestic, or foreign property rights by the host country.

The consequence of United Nations Resolution 1803 is that every country has the sovereign right to freely trade with other countries and is free to dispose of its natural resources (Hobe, 2015). United Nations Resolution 1803 is an international agreement between developed countries and developing countries in the country's economic policies, especially in terms of natural resources. The international agreement of United Nations Resolution 1803 is the protection of natural resources for countries whose natural wealth has been explored, especially countries receiving capital because they are unable to cultivate them, as well as legal protection for countries providing capital both business entities and their citizens who have made concessions to the policy of the country that owns natural resources (Adolf, 2015).

State sovereignty over its natural wealth according to Huala Adolf is that a country has rights to use and utilize its natural resources freely and independently, the freedom to determine and supervise potential exploration developments, exploitation, utilization, and marketing of its natural resources, management, and conversion of natural resources in accordance with national development policies and its environment, investment arrangements including regulation of the entry of foreign investment, the activities of investors including the outflow of their investment, the right to nationalize or expropriate property, whether belonging to its citizens or foreign nationals by providing compensation (Adolf, Hukum Ekonomi Internasional Suatu Pengantar, 2015).

In addition to the State having the right to control natural resources, the State also has several responsibilities, such as the responsibility to utilize its natural resources for the welfare of its citizens, to respect the rights and interests of indigenous people, to cooperate with other countries for international development, especially by paying attention to developing countries, to preserve the environment and the sustainable use of natural resources and resources, and to share equitably with natural resources located in areas that are subject to more than one country. For example, oil, gas, water, and other assets, it is the responsibility of the state to treat foreign investors fairly, especially investors who invest in natural resources.

The Indonesian National Economy is regulated in the 1945 Constitution of the Republic of Indonesia, as the highest source of law in Indonesia. In Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it is explained that earth, water, and natural resources contained therein shall be controlled by the State and used for the greatest prosperity of the people. With this respect, Indonesia already has sovereignty over its natural resources in its economic system which is contained in Article 33 of the 1945 Constitution of the Republic of Indonesia.

Sri Edi Swasono in Tri Hayati describes that the word 'controlled' does not have to be interpreted as being owned. The government can control through regulations and economic policies without having to own. Being controlled by the state provides direct instructions that the market mechanism or free price mechanism

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may not apply in the economy. The most important and the main objective is to safeguard the interests of the state and the interests of the people at large (Hayati, 2015). Mohammad Hatta as a proclamation figure as well as an Indonesian economic thinker, posited on the control and exploitation of Indonesia's natural resources as follows (Hatta, 1979):

> "Controlled by the state in Article 33 of the 1945 Constitution does not mean that the state itself becomes an entrepreneur. It is more accurate to say that the power of the State lies in making regulations to smooth the way of the economy, regulations that also prohibit the 'exploitation' of the weak by other people with capital… The ideals embedded in Article 33 of the 1945 Constitution are the maximum production done by the Government… Mainly driven by weak Indonesian workers by way of Cooperatives. Furthermore, the private sector is allowed to direct workers and national capital. If foreign nations are not willing to lend their capital, then they are allowed to invest their capital in our homeland with conditions determined by the Indonesian government itself… the opportunity opened for foreign nations to invest their capital in Indonesia so that they can participate in developing the prosperity of our people, the Indonesian people".

According to Mohammad Hatta, the principle of state authority does not mean that the state is the entrepreneur. However, it can also be managed by national private companies and even foreign companies. The state is given the power to regulate the economy and prohibit the exploitation of the weak by other people with capital. The state as a regulator that has the power must make strict rules against foreign investment when it comes to the interests of the state for the welfare of the people and make rules that are friendly to foreign investment. This means that the interests of the people to obtain the maximum benefit from the exploitation of natural resources must be a priority in opening foreign investment so that foreign investment is only a means to realize the prosperity of the people.

The people as connoisseurs of the results of the utilization of natural resources through the management and exploitation of these natural resources are the main parties in obtaining public welfare as stipulated in the preamble to the 1945 Constitution of the Republic of Indonesia. The people as referred to in Article 33 Paragraph (3) of the Constitution the Republic of Indonesia 1945 can be classified into several groups, namely groups of people as individuals who are autonomous and have rights and obligations specified in the constitution of a country, groups of people as groups or classes which means that people in the understanding of sovereignty are not the people as individuals but the people as a whole which includes various groups in society, and the last, groups of people who ignore the dichotomy based on individuals and groups (Redi, 2014).

According to the classification of the people, either individually, in class groups, or without a dichotomy in the life of the nation and state, the people have the right to obtain their rights as mandated in the 1945 Constitution of the Republic of Indonesia which are regulated in Article 28 letter A to Article 28 letter J, as well as the rights implicitly regulated in Article 33 paragraph (3) regarding the phrase people's prosperity. A phrase that can mean the right of the people to benefit from the wealth contained in the earth and the natural wealth contained therein is controlled by the state. The rights of the people can be fulfilled if the State controls these natural resources and manages and exploits them in accordance with the principle of state sovereignty so that the rights of the people to be prosperous by the State can be realized (Redi, 2014).

The definition of controlled in Article 33 of the 1945 Constitution of the Republic of Indonesia does not stop until Bagir Manan formulates the scope of being controlled by the state or the right of state control as follows (Manan, 1977):

> “Control is a kind of ownership by the state, meaning that the state through the government is the only authority holder to determine the right of authority over it, including the earth, water, and natural resources contained therein, regulate and supervise the use and utilization, and investment in capital and the form of a state company for certain endeavors”.

In contrast to Bagir Manan, Mohammad Hatta formulated the notion of being controlled by the state which does not mean that the state itself becomes an entrepreneur. More precisely, it is said that the power of the state lies in making regulations for the smooth running of the economy, regulations that prohibit the exploitation of the weak by people with capital.

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In the end, the interpretation of state control over natural resources is in accordance with Article 33 of the 1945 Constitution of the Republic of Indonesia. The Constitutional Court in its Decision Number 001-021-022/PUU-I/2003 has interpreted the phrase state control over its natural resources, namely:

> "...that the earth and water and natural resources contained within the jurisdiction of the state are essentially the public property of all the people collectively who are mandated by the state to control them to be used for the greatest possible prosperity. The people collectively were constructed by the 1945 Constitution giving a mandate to the state to carry out policies (beleid) and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad) and supervision (toezichthoudensdaad) for the purpose of the greatest prosperity of the people. The management function (bestuursdaad) by the state is carried out by the government with its authority to issue and revoke licensing facilities (vergunning), licenses (licentie), and concessions (concessie). The regulatory function by the state (regelendaad) is carried out through the legislative authority by the People's Representative Council (hereafter called DPR) together with the government, and regulation by the government (executive). The management function (beheersdaad) is carried out through a shareholding mechanism and/or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as institutional instruments through which the state c.q. the government utilizes its control over the resources to be used for the great prosperity of the people. Likewise, the state supervision function (toezichthoudensdaad) is carried out by the state c.q. the government in the context of supervising and controlling so that the implementation of control by the state over important production branches and/or which controls the livelihood of the people is truly carried out for the greatest prosperity of the entire people."

The state's power over natural resources provides five functions which consist of the state having policies (beleid), the state having management actions (bestuursdaad), the state having regulation (regelendaad), the state having management (beheersdaad), and the state having supervision (toezichthoudensdaad). The policy function is carried out directly by the state, such as setting policies in oil and gas management. The management function carried out by the State as carried out by the government through its authority to issue authority in terms of licensing facilities, licenses, and concessions and at the same time can revoke these rights. Regulatory functions are carried out by the State such as the main authority of the state which is carried out through legislative authority through the House of Representatives with the Government and government regulations so that through regulation they can carry out their functions to improve people's welfare. The management function can be carried out through a share ownership mechanism, so that the government can be involved in the management of the company through a State-Owned Enterprise. In addition, the supervisory function can be carried out by the State or the government to supervise or control it, such as production branches which are important for controlling the livelihood of many people. created for the benefit of the people.

State sovereignty in national law, the phrase sovereignty which has been interpreted in the decision of the Constitutional Court Decision Number 001-021-022/PUU-I/2003, which means that the State has policies, management, regulation, management, and supervision as state sovereignty belonging to Indonesia can have a wide range which is broad and not limited to what will be done to its natural resources. This is contradictory with state sovereignty as regulated in United Nations Resolution 1803 (XVII). The State's sovereignty over its natural resources in United Nations Resolution 1803 (XVII) regulates the State's actions against expropriation of foreign property rights/Nationalization, with the provision of providing reasonable compensation.

Although there are differences in state sovereignty over natural resources, both nationally and internationally, the State can take nationalization actions because it is regulated in international law. Sovereignty in national law is broader in scope and can more freely use its functions which consist of supervision, management, administration, policies, and settings that have the same purpose.

Nationalization in Mining and Investment Law

Investment in Indonesian law is currently regulated in the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, along with its amendments which are part of the Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation. Investment law regulated after the issuance of Law

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of the Republic of Indonesia Number 25 of 2007 concerning Investment, the legal policy on investment is better because it no longer distinguishes between capital originating from abroad and capital originating from within the country.

The amendment to the Indonesian investment law which is part of the work copyright law has made it better because the considerations contained in the Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation has described the purpose, one of which is related to the sound of the point 'c'. It supports job creation that it is necessary to adjust various regulatory aspects related to the convenience, protection, and empowerment of cooperatives and micro, small and medium enterprises, and improvement of the investment ecosystem.

The investment law has been changed after the issuance of Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation. The existence of investment is increasingly being supported as a tool or goal of the state to realize the welfare of its people. The objectives are to ensure that every citizen gets a job, fair and proper remuneration and treatment in an employment relationship, as well as to make adjustments to various aspects of the arrangement relating to alignments, strengthening. Besides, it is also to make adjustments to various aspects of the arrangement related to improving the investment ecosystem, facilitating and accelerating national strategic projects oriented to national interests based on national science and technology guided by the ideology of Pancasila, contained in Article 3 of the Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation.

Then, related to the objectives referred above, the Government of Indonesia regulates the strategic job creation policy in achieving its goals, which includes improving the investment ecosystem and employment business activities, ease of doing business, research and innovation support, land acquisition, economic zones, and central government investment to accelerate national strategic projects. The improvement of the investment ecosystem and business activities includes the application of risk-based Business Licensing, simplification of the basic requirements for Business Licensing, simplification of sector Business Licensing and simplification of investment requirements.

After the changes in the investment law were made, 14 business fields were open to foreign investment which was previously closed. The business fields referred to are lifting of valuable objects from sinking shiploads, the manufacture of Chlor Alkali with Mercury, pesticide active ingredient industry, alcoholic beverage industry, wine-based alcoholic beverage industry, malt-containing beverage industry, operation of land transport passenger terminals, implementation of motorized vehicle weighing, the operation of shipping navigation facilities, and the Vessel Traffic Information System (VTIS), the operation of flight navigation services, the operation of motor vehicle type testing services and the operation of the radio frequency spectrum and orbital monitoring stations, as well as the operation of historical and ancient heritage tourism services (Alika, 2020).

The Law of the Republic of Indonesia Number 25 of 2007 concerning Investments that are currently valid explains the policies or efforts of the state in realizing the welfare of its people. This has been regulated in the body or regulated in the sound of the articles. In one of the articles, namely Article 7 of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, the Government's policy will not take nationalization actions or take over investors' ownership rights, except by law, which means that it is possible to carry out nationalization, with the issue other laws and regulations.

The law on mineral and coal mining as regulated in laws and regulations such as the Law of the Republic of Indonesia Number 3 of 2020 concerning amendments to the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining in considering letter a briefly states that other than being controlled by the state is used to provide real added value to the national economy to achieve prosperity and welfare of the people in a just manner. The welfare of the Indonesian people is pursued by the Government through laws and regulations. Then, in laws and regulations such as those contained in the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining can be seen in its body which regulates several things.

The principles of mineral and coal mining are managed based on benefits, justice, balance and partiality to the interests of the nation, participatory, transparent, accountable, sustainable, and environmentally sound. Furthermore, the objectives include ensuring the effectiveness of the implementation and control of mining

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business activities in an efficient, effective, and efficient competitive manner, ensuring the benefits of mineral and coal mining in a sustainable and environmentally friendly manner, ensuring the availability of minerals and coal as raw materials and/or as a source of energy for domestic needs, support and develop national capabilities so that they are more able to compete at the national, regional level, and international.

The control of mineral and coal mining in the Article 4 of Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining is held by the Government and/or Regional Government. Such control can be exercised by employing controlling production and exports. In addition to the control held by the Government and/or Regional Government in the authority over mining management in Article 5 of Law Number 4 of 2009 concerning Mineral and Coal Mining, each authority is given consisting of authority over the Government, the authority of the Provincial Government, and the Authority of the Regional Government. Regency/City.

The government's authority includes the determination of national policies, the making of laws and regulations, the establishment of national standards, guidelines, and criteria, the establishment of a national mineral and coal mining permit system, the determination of mining areas that are carried out after coordinating with the regional government and consulting with the House of Representatives. People of the Republic of Indonesia, granting of Mining Business Permits, fostering, resolving community conflicts, and supervising mining businesses that are in cross-provincial areas and/or sea areas more than twelve miles from the coastline, as well as supervision of mining business production operations that are impacted direct environment Crossing the province and/or in the sea area more than twelve miles from the coastline, contained in Article 6 of the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining.

Article 7 of the Law of the Republic of Indonesia Number 4 of 2009 is concerning Mineral and Coal Mining. On the other hand, the authority of the Provincial Government includes making regional laws and regulations, issuing mining business permits, fostering, supervising, resolving community conflicts, and supervising mining businesses across districts, cities, and/or sea areas from four miles to twelve miles, as well as inventories, investigations, exploration research to obtain information in accordance with their authority, management of geological information, mining information in provincial areas, preparation of balances of coal mineral resources in provincial areas.

Article 8 of the Law of the Republic of Indonesia Number 4 of 2009 is concerning Mineral and Coal Mining. In addition, the authority of the Regency/City Government in the management of mineral and coal mining includes making regional laws and regulations, granting mining permits, fostering community conflict resolution, supervising mining businesses in regency/city areas or marine areas up to 4 four miles, taking inventory, investigation, exploration to obtain information on coal minerals, management of geological information, information on the potential of coal minerals, preparation of balances for mineral and coal resources in the district and city areas, and development of environmental sustainability, as well as the optimal development of the benefits of mining business activities.

Mineral and coal mining operations in the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining, which are classified into radioactive mineral mining, metal mineral mining, non-metal mineral mining, rock mining are carried out in the form of Mining Business Permits, People's Mining Permits and Special Mining Business Permits, and mining concession permits, apart from being temporarily suspended, may also expire for several reasons, such as being returned, revoked, expired.

Mineral and coal mining business is implemented to get income carried out by the State. It is an obligation to pay state revenue and regional income consisting of tax revenue and non-tax state revenue. Tax revenues consist of taxes under the authority of the Government and import duties and excise, while non-tax state revenues consist of fixed fees, exploration fees, production fees, compensation for information data, regional levies, and other legitimate income-based on the provisions of laws and regulations.

Article 158 of the Law of the Republic of Indonesia Number 4 of 2009 is concerning Mineral and Coal Mining. Investigations and criminal sanctions are also regulated, such as for anyone conducting a mining business without a Mining Business Permit, People's Mining Permit or Special Mining Business Permit as referred to in Article 37, Article 40 paragraph (3), Article 48, Article 67 paragraph (1), Article 74 paragraph

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(1) or paragraph (5) shall be sentenced to a maximum imprisonment of ten years and a maximum fine of Rp. 10,000,000,000.00 (ten billion rupiah).

The State's efforts to realize prosperity in the mineral and coal mining resource sector through Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining regulates the rights and obligations of entrepreneurs, especially Mining Business Permit Holders and Special Mining Business Permits. These rights include being able to carry out part or all of the stages of a mining business, both exploration activities and production operations, being able to utilize public infrastructure and facilities for mining purposes after fulfilling the provisions of laws and regulations, owning minerals including associated minerals or coal that has been produced if it meets the requirements for exploration fee or production fee, except for radioactive associated minerals, contained in Article 90-95 of the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining .

Obligations to entrepreneurs holding Mining Business Permits and Special Mining Business Permits are not allowed to transfer their permits, required to submit reclamation plans and post-mining plans, apply good mining engineering principles, manage finances in accordance with the Indonesian accounting system, increase the added value of mineral and coal resources, carry out development and empowerment of local communities, comply with the tolerance limits of environmental carrying capacity, and divestment obligations to business entities holding Mining Business Permits and Special Mining Business Permits whose shares are owned by foreigners.

The divestment obligation as regulated in Article 112 of the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining, after the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining changed with the issuance of Law of the Republic of Indonesia Number 3 of 2020 concerning Mineral and Coal Mining. The state's efforts in realizing prosperity in the mineral and coal mining sector are still being carried out, one of which is divestment.

Divestment arrangements in the Decree of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 84 K/32/MEM/2020 concerning Guidelines for the Implementation of Bidding, Evaluation, and Calculation of Divestment Share Prices in the Mineral and Coal Mining Sector

There are two parties as to the subjects of divestment of foreign shares in the mineral and coal mining sector in Indonesia. They are foreign investors who have shares of more than fifty-one percent ownership in the mineral and coal mining sector, as sellers and participating parties from Indonesia as a buyer. The first bid submission was made in stages to the Central Government, namely through the Minister, and for this first divestment submission, no time limit was given.

Holders of Mining Business Permits, Special Mining Business Permits, as well as Contracts of Work and Coal Mining Concession Work Agreements, may submit a share divestment offer to the Government through the Minister by submitting a share divestment offer letter signed on stamp duty by the board of directors of a business entity. It contains the amount of the divested shares required that will be sold and the share price is divested. Then, foreign investors who wish to divest their shares can complete the documents that have been determined, including:

a. List of the composition of the board of directors and commissioners, along with the identity and identification number of the taxpayer and/or tax identity;
b. List of shareholders up to the final beneficiary (beneficial ownership);
c. Document for calculating the price of divested shares in accordance with the offering letter as referred to in the discounted cash flow which at least contains data: approach and method of investment analysis, valuation assumptions, investment costs, mining costs, depreciation and amortization, financial projections, application of discounts and premiums;
d. Resource and reserve balance data that has been verified by a competent person;
e. Feasibility study documents that have been approved;
f. Environmental documents that have been approved; and
g. Financial statements for the last three years have been audited by a Public Accountant.

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When there is a divestment offer from a foreign investment party, the Government of Indonesia through the Minister may form a divestment team that has the task of evaluating, and reporting the results of the evaluation of the divestment share price to the Minister and appointing an independent appraiser who has a permit from the Minister of Finance based on consideration of the credibility and reputation of the prospective appraiser to be appointed as well as the efficiency and effectiveness of state finances in accordance with the provisions of laws and regulations.

The membership of the divestment team shall at least consist of representatives from the Ministry of Energy and Mineral Resources, the Ministry of Finance, the Ministry of State-Owned Enterprises, the Investment Coordinating Board, and the Government of Indonesia in evaluating and negotiating the price of the divested shares offered, given a period of no later than ninety days from the receipt of the share divestment offer.

Submission of the offer for the first time to the central government is not given a time limit. Then, if there is no answer of interest from the Central Government or a letter of response that says not interested from the Indonesian Central Government, the next submission to the Regional Government is given a time limit of seven calendar days after or thirty calendar days after the time limit for evaluating the share price expires or 120 days since the submission of the first offer is received by the Government of Indonesia. In the second submission after the Central Government is not interested in buying the divestment share price or rejects it, the divestment offer is submitted to the Regional Government. A time limit of seven days is given to submit a third divestment offer to the State-Owned Enterprises and Regional-Owned Enterprises if within thirty days there is no response or there is a rejection answer. Moreover, the third submission to State-Owned Enterprises and Regional-Owned Enterprises within a period of thirty days with no response or no response to rejection will be given a time limit of seven days to submit the fourth divestment offer, namely to the Private Business Entity National through auction.

If the fourth submission to the National Private Business Entity is rejected or there is no response at the same time, the share offering can be made on the Indonesian stock exchange. If the submission of an offer for the divestment share price to the Indonesian party consisting of the Central Government, Regional Government, State-Owned Enterprises, Regional-Owned Enterprises, and National Private Bodies through auction is accepted, the Indonesian party is given a time limit of no later than twelve months after the date of inclusion of interest to settle its obligations related to payments.

Calculation of the Divestment Share Price, Holders of Mining Business Permits, Special Mining Business Permits, Contracts of Work and Coal Mining Concession Work Agreements, calculate the divestment share price using two types of methods as follows:

a. Discounted cash flow for economic benefits based on free cash flow during the period from the time of execution of the share divestment to the earlier of the expiration date of the Mining Business Permit, Special Mining Business Permit, Contract of Work and Coal Mining Concession Work Agreement, including the extension period or the age of the reserve in accordance with the feasibility study document that has been approved;

b. Comparison of market data (market benchmarking), in terms of the provisions of the Contract of Work and Coal Mining Concession Work Agreement, determining the method of calculating the price of divested shares, calculating the price of divested shares by holders of the Contract of Work and Coal Mining Concession Work Agreement, can be done using the method in accordance with the provisions contained in the Contract of Work and Coal Mining Concession Work Agreement, as long as it is more profitable for the Government of Indonesia.

The calculation of the divestment share price using the discounted cash flow method is carried out by considering:

a. The period from the implementation of the share divestment to the sooner between the end of the validity period of the Mining Business Permit, Special Mining Business Permit, Contract of Work and Coal Mining Concession Work Agreement, including the extension period or the age of the reserve following the approved feasibility study document;

b. Reserves that have been verified by a competent person;

c. Production amount based on technical documents that have been approved;

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d. Financial assumptions include the price in accordance with the reference mineral price or reference coal price, price escalation based on internationally recognized sources, cost escalation based on company historical data, state revenue using tariffs by the provisions of laws and regulations, or other regulated provisions. in the contract, the average exchange rate (middle rate) of bank Indonesia at the time the share divestment offer is submitted and the currency in accordance with the provisions of laws and regulations;

e. The mandatory discount rate reflects the weighted average cost of capital used to generate cash flows according to the formula;

f. The components of the weighted average cost of capital in generating cash flows are calculating the cost of equity, returns on comparable investments, debt costs classified as capital structure, industry risk, and company conditions, using market interest rate data of the average bank that carries out the financing function in determining the cost of debt, both short-term debt (working capital debt) and long-term debt (investment debt), making adjustments if there is debt financing with an interest rate that is different from the market interest rate to reflect proportional risk on the object of assessment, and calculating the weighted average cost of capital proportionally based on the weight of each type of capital structure and the cost of each type of capital structure.

Conclusion

Mineral and coal mining natural resources are under the control of the State which is not only regulated or recognized in Indonesian National Law, but also regulated in international law such as United Nations Resolution 1803 (XVII) concerning Permanent Sovereignty over Natural Resources. The legal basis for divestment is spread across various laws and regulations in Indonesia that have been regulated since 1967. The nationalization of foreign shares carried out by divestment in Indonesia is regulated in investment law and mineral and coal mining law. This is because nationalization in the Indonesian investment law is further regulated in the Act, while the Indonesian Mineral and Coal Mining Law have required foreign capital to be divested. With this respect, foreign investment companies that are the holders of Contracts of Work, Coal Mining Works, Mining Business Permits, and Special Mining Business Permits in the mineral and coal mining sector with ownership of shares in the company more than fifty percent are required to divest to the Indonesian side. The divestment obligation is offered to the Indonesian party in stages with a predetermined time limit. It can be repeated in the following year if no one is interested in buying from the Indonesian side, there are provisions for documents that need to be completed in divesting their shares, calculating the price of divested shares, the time limit for offering, the time limit for responding the offering, and other arrangements regulated in Indonesian law.

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