

Weak Constitutional Obedience Regarding the Extension of PT Freeport Indonesia's Business License with the United States in 2023

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Abstract: *The statement outlines the chronology and implications of PT Freeport Indonesia's business license extension in the context of the Indonesian constitution. In 2017, the government issued a Special Mining Business License (IUPK) to PT Freeport, replacing the Contract of Work, with the aim of enabling continued mining operations in Papua. However, this extension raises questions about compatibility with the constitution, particularly in terms of state sovereignty over natural resources and environmental protection. Discussions also covered the legal consequences related to divestment of shares and the timing of the license extension. The meeting between President Jokowi and Freeport's CEO was also highlighted, highlighting potential rule violations related to the license extension. This statement emphasizes the importance of considering constitutional principles, including state sovereignty, environmental protection, and community welfare, in the regulation of PT Freeport's business license extension.*

PENDAHULUAN

PT Freeport Indonesia (PT FI) is one of the subsidiaries of Freeport McMoran Copper & Gold Inc. which conducts mining, processing, exploration and marketing of concentrates containing copper, gold and silver throughout the world. These activities are carried out at two large mines owned by Indonesia, namely the Ertsberg mine (copper mine) on Mount Ertsberg and the Grasberg mine on Mount Grasberg. Both mines are located in Tembagapura District, Mimika Regency, Papua. PTFI in conducting its mining business is based on a cooperation contract between it and the Government of Indonesia which of course must comply with existing procedures, namely the constitution.

Adherence to the constitution is the main foundation for a just and sustainable functioning rule of law. In reality, however, complex challenges often stand in the way of such adherence, especially when political and economic interests collide with the constitutional principles upheld. One clear example of this dynamic occurred in the extension of PT Freeport Indonesia's business license with the United States to 2023.

PT Freeport Indonesia, as one of the largest mining companies in Indonesia, has become an integral part of the national economy. However, in carrying out its operations, there is often a conflict between strong economic interests and the national economy. constitutional principles that set standards for justice, environmental sustainability, and national sovereignty.

METHODS

The research writing method for this writing uses normative juridical research type. The sources of legal research can be divided into research sources in the form of primary legal materials (primary sources or authorities) and secondary legal materials (secondary sources or authorities). Primary legal materials are legal materials that are authoritative, which means they have an authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation. Secondary legal materials are mainly literature, including journals both national and international journals, articles, internet, and scientific papers, containing developments or actual issues regarding certain fields of law. These secondary legal materials must also be relevant to the research topic.

RESULT AND DISCUSSION

The Constitutionality of Freeport's Activities in Indonesia

As we know, the first mining contract between the Indonesian government and PT McMoran Copper & Gold Inc, which later became PT Freeport Indonesia, was signed four months after the enactment of Law Number 1 of 1967 on Foreign Investment. Then the form of Mining Concession Work Agreement (PKP2B) was regulated based on Presidential Decree Number 75 of 1996. This contract is often referred to as the first generation work contract and became the first milestone for the development of mining investment work contracts in Indonesia.

Basically, PT Freeport Indonesia is the one who designed the model of the work contract, which was initially prepared in relation to foreign petroleum contracts, which were prepared during the Soekarno administration and offered to PT Freeport in relation to the concept of profit sharing, of course it was also sourced from the guidelines for the implementation of foreign petroleum contracts. Because the benefits have been felt by Freeport, the previously agreed upon one work contract was extended into a second work contract, which is the second generation work contract which is the fifth generation contra work which of course was carried out on December 30, 1991 by the government of the Republic of Indonesia with PT Freeport Indonesia. In 2021, it can be said to be the year the contract of work 2 period ends and there is a possibility of two extensions until 2041, which means for 20 years.

These two laws became the legal basis that initiated the existence of the Contract of Work in Indonesia. On January 12, 2009, Law Number 4 of 2009 on Mineral and Coal Mining was passed and promulgated to replace Law Number 11 of 1967.

Law No. 4/2009 on Mineral and Coal Mining, enacted on January 12, 2009, introduced significant changes in the legal regulation of mineral and coal mining in Indonesia. One of the most striking changes was the abolition of the Contract of Work as the primary mechanism for mine management by foreign companies. With the enactment of Law No. 4/2009, the entry point for foreign investors in the mineral and coal mining industry is no longer through the Contract of Work, but through a new licensing system. Through the licensing mechanism, the government holds a stronger position in regulating and supervising mining activities, with the aim of ensuring that national interests and environmental sustainability are better secured.

As such, this change marks a paradigm shift in the regulation of the mining industry in Indonesia, where the government has a more dominant role in regulating the country's natural resources and setting the rules of the game for foreign investors. It also reflects the government's commitment to enhance control and more effective management of the mining sector, taking into account important aspects such as environmental, social and economic.

The government realizes that the change from a Contract of Work regime to a licensing regime requires an adjustment period, hence Article 169 of Law No. 4/2009 stipulates: "When this

Law comes into force:

1. Contracts of Work and coal mining concession work agreements that have existed prior to the enactment of this Law shall remain in effect until the expiration of the contract/agreement.
2. The provisions contained in the article of the contract of work and coal mining concession work agreement as referred to in letter a shall be adjusted no later than 1 (one) year after this Law is enacted except regarding state revenue.
3. Exceptions to state revenue as referred to in letter b are efforts to increase state revenue."

The regime of Law Number 4 of 2009 no longer recognizes the contract regime as in Law Number 11 of 1967. Law No. 4/2009 only recognizes the permit regime, namely in the form of a Mining Business License, hereinafter referred to as IU. Mining Business License must be owned by every business actor who will carry out mining activities in a mining area in Indonesia.

Based on the press release of the Ministry of Energy and Mineral Resources Number 00115.Prs/04/SJI/2017, dated August 29, 2017 on the Final Agreement of Negotiations Between the Government and PT Freeport Indonesia, the following matters were produced:

1. The legal basis governing the relationship between the Government and PT Freeport Indonesia will be a Special Mining Business License (IUPK), not a Contract of Work (CoW).
2. Divestment of PT Freeport Indonesia shares by 51% for Indonesian National ownership. Technical matters related to divestment stages and implementation time will be discussed by a team from the Government and PT Freeport Indonesia.
3. PT Freeport Indonesia builds a processing and refining facility or smelter for 5 years, or at the latest it must be completed in 2022, unless there are force majeure conditions.
4. Stability of State Revenue. Aggregate state revenues are greater than those received under the Contract of Work to date, supported by documented fiscal and legal guarantees for PT Freeport Indonesia.
5. After PT Freeport Indonesia agrees to the 4 points above, as stipulated in the IUPK, PT Freeport Indonesia will get a maximum extension of the operating period of 2x10 years until 2041.

With the issuance of PP No. 1/2017, the Government requires divestment of 51% or greater than the minimum 30% as mandated by PP No. 77/2014, after more than 50 years of the giant company extracting the mining wealth of Papua Island, Indonesia. Freeport's status, which was originally in the form of a Contract of Work (KK) and has the same position as the government, has now changed to a Special Mining Business License (IUPK) where the State as the licensor has a higher position than the company holding the license. In addition to the above, with fiscal and legal guarantees, the state revenue received will be greater when compared to KK. This proves that the successful completion of negotiations with PT Freeport shows that the policies issued by the government are for the government's benefit. maintaining the sovereignty of Indonesia's mineral resources. PT Freeport Indonesia has obtained a Special Mining Business License (IUPK) valid for 8 months, which took effect on February 10, 2017 until October 10, 2017. With the temporary IUPK, Freeport can export concentrates again until October 10, 2017.

Concept of PT Freeport Indonesia's Business License Extension

The new breakthrough of the Government of Indonesia in regulating the operation of activities in the mining sector, especially minerals and coal, on February 10, 2017 the Minister of Energy and Mineral Resources Ignasius Jonan, issued a Special Mining Business License (IUPK). Related to Production IUPK for PT Freeport Indonesia. The IUPK was granted so that PT Freeport Indonesia can continue its operations and production activities at the Grasberg Mine in Papua. This is because, based on Article 170 of Law No. 4/2009 on Mineral and Coal (Minerba Law), Contract

of Work holders are required to conduct mineral refining within 5 years of the law being issued, meaning in 2014. So, by norm, there are legal consequences that must be adhered to, meaning that PT Freeport Indonesia as a Contract of Work holder can no longer export copper concentrate, only refined products can be exported. The understanding of the basic difference between the Contract of Work and the Special Mining Business License lies in the meaning that the status of the agreement, KK is "Contract" and IUPK is "License". In the provisions of the Contract of Work, PT Freeport Indonesia and the Government of Indonesia are two contracting parties, so their positions are equal. While the IUPK itself positions the State as a licensor whose position is above the company, in this position the company is the license holder. Clearly, Law No. 4/2009 on Minerba and its implementing regulation Government Regulation No. 1/2017 mention various rights and obligations for IUPK holders, which are certainly different from the rights and obligations in the Contract of Work regime.

Other provisions adjusted from the 1991 Contract of Work II agreement are then made more detailed in Law No. 4 of 2009. Regarding Divestment obligations. Foreign companies holding IUPK are obliged to divest shares to the Indonesian government up to 51% in stages since carrying out mining production activities. In this case PT Freeport still holds a KK, so if it switches to IUPK, juridically PT Freeport must immediately release 51% of its shares because it has been producing for decades. Substantively this is regulated in article 97 of Government Regulation number 1 of 2017. Regarding exceptions, the government then took consensus on matters considered to be intensive for PT. Then related to the matter of contract extension as desired by PT Freeport Indonesia, IUPK actually provides space for PT Freeport to immediately obtain a license to extend mining operations until 2041. Article 72 of Government Regulation number 1 of 2017 provides an incentive that allows IUPK to be extended five years before the expiration of the IUPK period. Limitatively, the Contract of Work expires in 2021 if PT Freeport wants to change the KK into an IUPK, then according to the agreement between PT Freeport and the Government of Indonesia as stated in the press release of the Ministry of Energy and Mineral Resources Number 00115.Prs/04 / SJI / 2017.45 In one of the points of the agreement that the legal basis governing the relationship between the Government and PT Freeport Indonesia will be a Special Mining Business License (IUPK), not in the form of a Contract of Work (KK). So that it provides an open space for PT Freeport to extend its mining operation license, that it can be agreed in 2017 with two times ten years, meaning until 2041 because of the basis of understanding related to the transfer of the KK regime to IUPK.

On Tuesday, November 14, 2023, President Joko Widodo met with the Chairman and Chief Executive Officer of Freeport-McMoRan Inc, Richard Adkerson, at the Waldorf

Astoria Hotel, Washington DC. The meeting reportedly discussed the extension of PT Freeport Indonesia's business license, which will expire on December 30, 2041, meaning 18 more years. If it is true that President Jokowi wants to extend the business license, then this violates the rules described above, that the extension of a new license can be carried out every 5 (five) years or no later than 1 (one) year before the business license expires in accordance with Government Regulation (PP) No. 96 of 2021. Therefore, extending the validity period of Freeport's business license, which will only expire in 18 years, December 30, 2041, clearly violates Article 109 paragraph (4) of the PP.

Not only that, based on the PP, Freeport's business license can only be extended no earlier than December 30, 2036, by the President at that time, namely the President for the 2034-2039 period. Therefore, if Jokowi extends Freeport's business license, which should be done by the President of the 2034-2039 period, then Jokowi violates, and usurps, the authority of the President to come and the extension of the mining business license (IUPK) can only be done 2 (two) times,

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10 (ten) years each. Thus, extending the IUPK for a total of 20 (twenty) years, from 2041 to 2061, clearly violates Article 109 paragraph (1) letter a of PP No. 96/2021, and also Article 83 letter f of Law No. 3/2020 concerning Minerba. Quoted from the DPRD.go.id website, President Jokowi's action is suspected of having a political element that encourages elections in the extension of the business license. And the mining company is in default performance related to the commitment to build a smelter.

What we must both understand is that the concept of extending PT Freeport Indonesia's business license must be carefully considered in accordance with the principles of the Indonesian constitution. The Indonesian Constitution affirms state sovereignty over natural resources. In the context of PT Freeport's business license extension, the government must ensure that the extension decision takes into account national interests and does not compromise the state's sovereignty over its natural resources. In addition, the Indonesian Constitution also emphasizes environmental protection as a human right that must be upheld. In considering the extension of PT Freeport's business license, the government must ensure that the company's operations comply with strict environmental standards and do not harm the environment and surrounding communities and the government must ensure that profits from the company's operations are fairly distributed to local communities and contribute to inclusive economic development.

With these constitutional principles in mind, the concept of PT Freeport's business license extension must be implemented in a transparent, fair and sustainable manner. The government must ensure that the decision to extend the license is based on a thorough consideration of its impact on state sovereignty, the environment, and community welfare. In addition, the business license extension process must involve adequate public participation to ensure accountability and responsiveness to community aspirations. Thus, the concept of PT Freeport's business license extension can be implemented in accordance with the constitutional principles underlying state governance and sustainable development.

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