

CHAPTER I

INTRODUCTION

A. Background

Indonesia is blessed with abundant of natural resources and energy¹. The natural resources can be divided into two main categories: renewable and un-renewable. Among un-renewable natural resources are copper, silver, coal, diamond and others. In the Government regulations and various libraries they are called the mineral and coal². Meanwhile, the living sources, such as forests and wildlife are once considered renewable resources because of the ability of these resources to regenerate through reproduction.

Nowadays, the development of the mining activity is more rapid and useful. Yet, the natural resources production still cannot fulfill the national interest of Indonesia. Each country, however, should put its national interest (the goal of the State) in every part of their activities. The goal of Indonesia is stated in the fourth paragraph of the Introduction of the 1945 Constitution which stated *“in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to*

¹ Andika Putra *et al*, 2014, “Optimization of Law Enforcement on Reclamation Process in Indonesia”, (Unpublished paper, International Conference on Sustainable Innovation, Universitas Muhammadiyah Yogyakarta), p.1

² Salim HS, 2012, *Hukum Pertambangan: Mineral dan Batubara*, Mataram: Sinar Grafika, p.36

develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice”³.

To realize the goal of the state, the Government has tried to develop every sector. One of the important sectors is the economic sector with the mining as one of the main activities. The management of the mining sector has been set forth in Chapter XIV on National Economy and Social Welfare in Article 33 of the 1945 Constitution, which states that:

- a. The economy shall be organized as a common endeavor based upon the principles of the family system.
- b. Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.
- c. The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.
- d. The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficient⁴.

Thus, the management has to be done optimally, efficiently and transparently and equitable in order to obtain the maximum benefit from the prosperity of the people in a sustainable development. Moreover, mining is

³ See Preamble of 1945 Constitution

⁴ See Article 33 of 1945 Constitution

one of the businesses priorities from the Government before and after the enactment of Investment Act. Indonesia realizes that it is limited in term of funding and technology in the exploration and exploitation of natural resources. Therefore, to run the activities, Indonesia needs to cooperate with foreign parties, because in running a natural resources management it is required a huge capital, advanced technology, experts and there is a high risk as well.

Consequently, for solving that issue, in 1967 Suharto's New Order government introduced Law 1/1967 on Foreign Investment and Law 11/1967 on the Basic Provisions of Mining. The political rationale behind these laws was to lay the foundation for a recovery from the chaos of the mid-1960s and to achieve accelerated economic development on which the legitimacy of the new government could be built⁵

This is the legal basis for Contract of works (*kontrak karya*) between Indonesia with several foreign companies in the exploration of natural resources. By the reason, there are so many foreign companies which explore the natural resources in Indonesia, for instance, Freeport-McMoRan, Newmont, Vale, and others. In the case of Freeport-McMoRan Copper and Gold, as an American transnational mining company, they have been

⁵ Kosim Gandataruna and Kirsty Haymon, "A dream denied? Mining legislation and the Constitution in Indonesia", *Bulletin of Indonesian Economic Studies*, 47:2, (July, 2011), p. 221

operating the largest gold mine on Earth in West Papua, Indonesia since 1973⁶.

In fact, most of the shares in the business of mining activities were owned by the foreign parties. Furthermore, most of the contract of works between Indonesia and foreign companies are a contract over a long-term period, which means, the contracts in mining business were running more than thirty years and even they may extend the period of exploration. However, this exploration has not given more income for Indonesia, because the number of shares that owned by Indonesia are less than the shares of foreign companies.

After the promulgation of Law No. 25 of 2007 on Investment, the contract of works between Indonesia and some foreign companies are still applicable; it is based on Article 35 of Law No. 25 of 2007 about the capital investment to the effect that international treaties either bilateral, regional or multilateral investment in areas that have been approved by the Government of Indonesia before this Act applied, remain valid until the expiry of the agreements.

On the other hand, the system of management of mining in Indonesia is pluralistic. This is due to a wide range of contracts or mining permits, those are valid at this time. There is contract work that applies based on law No. 11

⁶ P. A. Rifai-Hasan, "Development, Power, and the Mining Industry in Papua: A Study of Freeport Indonesia", *Journal of Business Ethics*, 89 (Springer, 2010), p.129

of 1967 concerning the provisions of principal mining and the permission on exploring the natural resources based on Law No. 4 of 2009 about mineral and coal mining⁷. Where in Law No. 4 of 2009 set the principles⁸ and objectives⁹ formation of the act. Although in practice, concessions of mineral and coal mining have not been able to provide great benefits for the society, even to reach national interests of Indonesia.

Thus, in an effort to provide benefits to the society and achieve the national interests, the contract of works and Indonesian regulation should be able to govern divestment. The divestment of shares of mining can be defined as a number of foreign stocks that should be offered for sale to Indonesia as stated in Article 24 of the contract work between Indonesia and Newmont Company related to the promotional purposes of national interest and Article 112 of Law No. 4 of 2009 and Government Regulation No. 24 of 2012 which requires foreign companies to divest their share until 51%.

⁷ Salim HS, *op cit*, p.1

⁸ see article 2 of Law No. 4 of 2009 *Mineral and/or coal mining shall be managed under the principles of: a. benefit, justice and balance; b. being in favor of the nation's interests; c. participation, transparency, and accountability; d. sustainability and environmental soundness;*

⁹ See Article 3 of Law No. 3 of 2009 *In support of sustainable national development, management of mineral and coal shall aim the following: a. to ensure effectiveness of the conduct and control of efficient, effective and competitive mining business activities; b. to ensure the benefit of sustainable and environmentally-sound mineral and coal mining; c. to ensure the supply of mineral and coal as raw materials and/or as energy sources for domestic needs; d. to support and develop the national capability in order to better compete in national, regional, and international levels; e. to improve the income of the local community, regions, and state as well as to create job opportunities in the greatest prosperity of the people; f. to assure legal certainty in the conduct of mineral and coal business activities.*

However, a week before take off his position as president, Susilo Bambang Yudhoyono enacted Government Regulation No. 77 of 2014 on the third amendment of the Government Regulation No. 23 of 2010 regarding the Implementation of Mineral and Coal Mining Business Activities. The president enacted the regulation which requires all foreign company which conducted activities in minerals and coal mining to do divestment of shares¹⁰. The government cut the number of shares that have to be divested by foreign companies to Indonesia from 51% to 30%. It is known that the divestment of shares is a great momentum for Indonesia to manage the natural resources in Indonesia by its own.

Based on the background above, the researcher conducted a research regarding the mechanism on divestment of share and discussed further whether the current regulation on divestment is in line with Article 33 (3) of 1945 Constitution with the title “*Quo Vadis* the Regulation on Divestment of Shares: An Analysis in Indonesian Mining Sector”

A. Statement of Problem

Based on the background above, there are questions regarding the issues of the divestment of share in Indonesia, namely:

¹⁰ Dalam aturan Baru Kewajiban Divestasi saham Freeport berkurang, November 19th 2015, <http://www.hukumonline.com/berita/baca/lt5464a842b4ae1/dalam-aturan-baru-kewajiban-divestasi-saham-freeport-berkurang>, 20:50

1. How is the mechanism of the divestment of share in Indonesian mining sector according to the current regulations?
2. Are current regulations on divestment of share in Indonesian mining sector in line with the Article 33 (3) of 1945 Constitution?

B. Objectives of Research

The objectives of this research are:

1. To understand and analyze the mechanism of divestment of share in Indonesia mining sector according to the current regulation, which is Government Regulation No. 77 of 2014.
2. To understand and analyze whether current regulations on divestment of share in Indonesian mining sector in line with the Article 33 (3) of 1945 Constitution.

C. Benefits of Research

The expected benefits of this research in terms of academic and practical matter are:

1. Academic matter

This research is expected to provide the information, explanation, and conceptual contribution of science development in administrative law which dealing with the issue of natural resources

2. Practical matter

This research is expected to provide the suggestion for the Local Government and Central Government regarding the regulation related to the divestment of share in Indonesian mining sector.