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LEGAL CERTAINTY FOR FOREIGN INVESTORS IN COAL MINING IN INDONESIA

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Abstract

Since 2009, there have been significant regulatory changes in coal mining in Indonesia, beginning with the enactment of Law No.4 of 2009 concerning Mineral and Coal Mining, which replaced the prior system of contracts and mining authorizations (Kuasa Pertambangan; KP) with mining business permits (Ijin Usaha Pertambangan; IUP). There are two types of IUP: exploration and production operation. Then, the mechanism of Clean and Clear was created to reduce the large numbers of overlapping licenses. This article explores Indonesian regulatory changes and court rulings in coal mining and clarifies share divestment requirements for foreign investors in Indonesian coal-mining operations, which should not be classified as indirect expropriations.

Keywords: coal mining, foreign investment, IUP, Indonesia, clean and clear, divestment.

Abstrak

Sejak 2009, telah terjadi perubahan signifikan dalam peraturan pertambangan batubara di Indonesia, dimulai dengan diberlakukannya Undang-Undang Nomor 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara, yang menggantikan sistem kontrak sebelumnya dan Kuasa Pertambangan (KP) dengan Ijin Usaha Pertambangan (IUP). Ada dua jenis IUP: eksplorasi dan operasi produksi. Kemudian, mekanisme *clean and clear* dibentuk untuk mengatasi tumpang tindih perizinan. Artikel ini membahas perubahan peraturan Indonesia dan putusan pengadilan dalam pertambangan batubara dan menjelaskan persyaratan divestasi saham untuk investor asing dalam operasi pertambangan batu bara di Indonesia, yang tidak boleh diklasifikasikan sebagai pengambilalihan tidak langsung.

Kata Kunci: pertambangan batubara, penanaman modal asing, IUP, Indonesia, *clean and clear*, divestasi.

I. INTRODUCTION

Mining regulations in Indonesia have developed significantly from the Dutch Indie regime until the present. The *Indische Mijnswet* of 1899—the law on mining under Dutch governance—marked the beginning of discriminatory mining regulations that favored Dutch investors, but treated groups of native peoples as societies of lower worth; this treatment was clearly disadvantageous to the Indonesian people. After Indonesia's declaration of independence in 1945, it began to introduce mining regulations that reflected the provisions of Article 33 paragraph (3) of the Indonesian Constitution (UUD 45).¹

The first action undertaken by the Indonesian Government to reduce anti-native bias in mining legislation was to issue Government Regulation in Lieu of Law No. 37 of 1960 concerning Mining, preventing foreign investors from investing in the mining sector. However, when Law No. 1 of 1967 concerning Foreign Investment was enacted, opportunities opened up for foreign investment in Indonesia; this led to the enactment of the new Law No. 11 of 1967 concerning the Basic Provisions of Mining, the main principle of which was to centralize authority over mining in the central government.² According to Article 4 (1) of that Law, mining authorization for Type A and Type B minerals was under the authority of the central government.

During the period of reformation, which saw increased regional autonomy, the centralization paradigm of Law No. 11 of 1967 was no longer suitable. The enactment of Law No. 22 of 1999 concerning Regional Governance commenced the principle of regional autonomy.³ This brought fundamental changes to governance in Indonesia⁴ and transferred most administrative authority over mining to the regional governments, at least in theory.⁵

The Indonesian Government issued Government Regulation No. 75 of 2001 concerning the Second Amendment on Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning the Basic Provisions of Mining. This regulation was issued to accommodate the spirit of regional autonomy as intended by Law No. 22 of 1999 concerning Regional

¹ Tri HAYATI, "Authority for Mineral and Coal Management in the Era of Regional Autonomy and Its Implications in view of Article 33 paragraph (3) of the 1945 Constitution" (2014) 4 *Indonesia Law Review* 2 p.254.

² *Ibid.*

³ Law No. 22/1999 concerning Regional Governance was revoked by Law No. 32/2004 concerning Regional Governance. Law No. 32/2004 concerning Regional Governance was then amended several times, and it was ultimately repealed in 2014 by Law No. 23/2014 concerning Regional Governance.

⁴ Gabriel Almond and Bingham Powell claim that a system starts and ends somewhere; for its part, Indonesia experienced a total reformation (*reformasi*) of its political system in 1998. It was started by the resignation of President Suharto, which ended the New Order Leadership. See Budi WINARNO, *Sistem Politik Indonesia Era Reformasi [The Political System of Indonesia in the Era of Reformation]* (Yogyakarta: Media Pressindo, 2007) pp.6–7. This reformation significantly changed Indonesia's governance paradigm from centralized to decentralized; therefore, most of the authority of the central government has been transferred to regencies and municipalities. See Kurniasih, Implementasi Undang-Undang No. 23 Tahun 2014 tentang Pemerintahan Daerah (The Implementation of Law No. 23 of 2014 concerning Regional Governance), pp.3–5, 10 at <https://www.slideshare.net/AksiSETAPAK/dirjen-otdakemendagriimplementasiuu23tahun2014>, accessed September 19, 2019, at 08.37 am of Western Indonesian Time.

⁵ HAYATI, *supra* note 1 pp.254–255.

Governance. Under Government Regulation No. 75 of 2001, mining authorizations (*kuasa pertambangan*; KP) were granted by the regents, mayors, governors, and ministers in accordance with their respective authorities.⁶

In Indonesia, a Government Regulation has lower-level than an Act.⁷ Law No. 11 of 1967 clearly regulated that the central government granted all the mining authorizations. Government Regulation No. 75 of 2001, on the basis of Law No. 22 of 1999, regulated that mining authorizations were granted by the minister, governor, regents, and mayors in accordance with their authorities, respectively. Government Regulation No.75 of 2001 raised the significant legal issue as to whether a lower-level regulation could override a higher-level regulation, and this will be discussed further below.⁸

Many inconsistencies regarding the administration of mining authorities remained until the enactment of Law No. 4 of 2009 concerning Mineral and Coal Mining,⁹ which resulted in significant regulatory changes for the management of coal mining. The old mining law, Law No. 11 of 1967, was based on a system of contracts and mining authorization (KP); however, Law No. 4 of 2009 is based on two types of mining business permits (*Ijin Usaha Pertambangan*; IUP), one for exploration and one for production operation.

Though significant, these changes did not resolve all the existing legal problems, including overlapping licenses. Furthermore, the clean and clear (CnC) mechanism was created by the government of Indonesia because of the large number of overlapping licenses. In relation with the overlapping licenses, the question ultimately remains: how does the Indonesian Court make decisions concerning overlapping licenses? Then, Law No. 4 of 2009 and the regulations implementing it raised a new legal issue because it requires divestiture of shares for foreign investment in mining; however, the percentage of shares to be divested is regulated by the implementing regulations. This raises the question of whether the percentage of the obligatory divestment, which is not regulated by the Act, could be classified as an indirect expropriation.

⁶ The government of Indonesia is divided into the following levels: (a) the central government, led by the President; (b) the provinces, headed by governors, divided into regencies (*kabupaten*), municipalities (*kotamadya*), and special areas (*kawasan khusus*); (c) the regencies, headed by regents (*bupati*), divided into districts (*kecamatan*), villages (*desa*), special areas (*kawasan khusus*), and urban areas (*kawasan perkotaan*); (d) the municipalities, headed by mayors (*walikota*), divided into districts (*kecamatan*) ; (e) the districts (*kecamatan*), headed by district heads (*camat*), divided into sub-districts (*kelurahan*)/ villages (*desa*); (f) the sub-districts (*kelurahan*), headed by sub-district chiefs (*lurah*); (g) villages (*desa*), headed by village chiefs (*kepala desa*) and (e) four regions that possess special status and are granted special autonomy. See Andrew I. SRIRO, *Sriro's Desk Reference of Indonesian Law* (Jakarta: Sriro, 2011) pp.442–443.

⁷ Under Article 7 paragraph (1) of Law No. 12/2011 concerning Making Rules, existing hierarchy of laws and regulations in Indonesia is as follows: (i) The 1945 Constitution of the Republic of Indonesia (*Undang-Undang Dasar 1945*); (ii) Resolutions of People's Consultative Assembly (*Ketetapan Majelis Permusyawaratan Rakyat*); (iii) Laws (*Undang-Undang*) or Government Regulations in Lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang*); (iv) Government Regulations (*Peraturan Pemerintah*); (v) Presidential Regulations (*Peraturan Presiden*); (vi) Provincial Regional Regulations (*Peraturan Daerah Provinsi*); and (vii) Regencies/Municipalities Regional Regulations (*Peraturan Daerah Kabupaten/ Kota*). Article 7 paragraph (2) of Law No. 12/2011 concerning Making Rules provides that the power of rules is in line with the hierarchy as regulated in paragraph (1).

⁸ Many issues have been raised because of the enactment of Law No. 22/1999 because it was a guiding law and, therefore, more detailed regulations were required to regulate its implementation.

⁹ HAYATI, *supra* note 1 p.255.

This paper uses a doctrinal legal method, which aims to “...clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary source.” One of its assumptions is that “the character of legal scholarship is derived from law itself.”¹⁰ This paper clarifies the regulatory changes that have an impact on legal certainty for foreign investors in the coal-mining industry. The primary legal materials used include Law No. 4 of 2009 concerning Mineral and Coal Mining; Law No. 23 of 2014 concerning Regional Governance which was amended several times and amended most recently by Law No.9 of 2015; Law No. 25 of 2007 concerning Investment; Law No. 41 of 1999 concerning Forestry; Government Regulation No. 22 of 2010 concerning Mining Area; Government Regulation No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, as amended many times and amended most recently by Government Regulation No.8 of 2018; Regulation of the Minister of Energy and Mineral Resources No. 43 of 2015 concerning the Procedures of Evaluation on the Issuance of Mineral and Coal Permits; and the Regulation of the Minister of Trade No.39/M-Dag/Per/7/2014 concerning Export of Coal and the Products of Coal as amended several times and as amended most recently by the Regulation of the Minister of Trade No.95 of 2018. In addition, this paper considers secondary legal materials, such as books, journals, and research papers, along with a dictionary as a tertiary legal reference.

II. ANALYSIS

Under Law No. 11 of 1967 concerning the Basic Provisions of Mining, the central government was given authority over and control of strategic and vital extractive materials such as coal, while regional governments had authority over and control of non-strategic and non-vital mineral extractive materials.¹¹ The mining authorizations (*kuasa pertambangan*, KP) were divided into KPs for general surveys, KPs for exploration, and KPs for exploitation. These KPs could only be granted to government institutions such as state-owned enterprises and region-owned enterprises or private legal entities established under the law of Indonesia, with domiciles in Indonesia, and with the objective to undertake business in the field of mining, managed by Indonesian citizens residing in Indonesia.¹² The central government held all the KPs for all the mining areas in Indonesia; therefore, the central government had the sole power over mining activities.

The central government could appoint a contractor when the mining activities could not be carried out by any Indonesian participant. An agreement between the contractor and the central government could be entered into, provided the central government consulted with the House of People’s Representatives (*Dewan Perwakilan Rakyat*, DPR) beforehand.¹³ Under Article 8 paragraph (1) of Law No. 1 of 1967 concerning Foreign Investment, as amended by Law No. 11 of 1970, foreign

¹⁰ E.L. Rubin, “Law and the Methodology of Law” (1997) *Winconsin Law Review*, at 525 at Mike McConville dan Wing Hong Chui (eds), *Research Methods for Law*, (Edinburgh: Edinburgh University Press Ltd, 1988), pp.3-4.

¹¹ Article 4 paragraphs (1) and (2) of Law No. 11/1967 concerning the Basic Provisions of Mining.

¹² Articles 6, 7, and 12(1) of Law No. 11/1967 concerning the Basic Provisions of Mining.

¹³ Article 10 of Law No. 11/1967 concerning Basic Provisions of Mining.

investment in mining should be founded on cooperation with the government on the basis of a work contract (*kontrak karya*) or other form in accordance with the applicable laws and regulations. As regulated in Ministerial Decree No. 1641 of 2004 concerning the Guidelines for Processing Applications of Work Contracts and Coal Cooperation Agreements in the Framework of Foreign Investment, the other form was a Coal Cooperation Agreement (*Perjanjian Karya Pengusahaan Pertambangan Batubara*; PKP2B). Article 1 of this Decree stipulated that work contracts should be employed when the mining activities were not for coal, oil, gas, geothermal, or radioactive resources; this means that agreements with foreign investors concerning coal mining should be in the form of a PKP2B.

When Law No. 22 of 1999 concerning Regional Governance was issued, the authority over the mines shifted to the regional governments. In adjusting the provisions of Law No. 22 of 1999, Government Regulation No. 75 of 2001 concerning the Second Amendment on Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning the Basic Provisions of Mining was issued; this stated that regents, mayors, governors, and ministers granted KPs in accordance with their respective authorities as follows:¹⁴

- a) a regent or mayor, provided the location of the mining area was within the territory of regency or municipality;
- b) a governor, provided the location of the mining area was across the territory of several regencies or municipalities; or
- c) the minister, provided the location of the mining area was across the territory of several provinces and/or in a sea territory beyond twelve nautical miles.

A. Legal Framework of Foreign Investment in Coal Mining

On April 26, 2007, Law No. 25 of 2007 concerning Investment was enacted, under which a foreign investor is defined as a foreign individual, legal entity, and/or foreign government that carries out investment in Indonesia.¹⁵ This investment may consist either entirely of foreign capital or as a joint venture with a domestic investor.¹⁶ Nevertheless, according to Law No. 25 of 2007, an investment in Indonesia is classified as a domestic investment when the activity is conducted by domestic investors using domestic capital;¹⁷ therefore, investment activity cannot be classified as a domestic investment if not all of the investors are domestic investors or if foreign capital is being used. Even if only one of the investors in a group of many is foreign or even if only a small proportion of foreign capital is used, according to this law, the investment must be classified as foreign.

The provisions regarding the scope of foreign investment and domestic investment were different from those under the previous regulations. Under Article 3 paragraph (1) of Law No. 6 of 1968 concerning Domestic Investment, an investment was considered domestic when a minimum of 75% of the shares were owned by domestic investors; investments that did not fulfill this requirement were considered

¹⁴ Article 1 of Government Regulation No. 75/2001 concerning the Second Amendment on Government Regulation No. 32/1969 concerning the Implementation of Law No. 11/1967 concerning Basic Provisions of Mining.

¹⁵ Article 1 number 6 of Law No. 25/2007 concerning Investment.

¹⁶ Article 1 number 3 of Law No. 25/2007 concerning Investment.

¹⁷ Article 1 number 2 of Law No. 25/2007 concerning Investment.

foreign investments.¹⁸ According to Article 2 of Law No. 25 of 2007, the provisions of this law apply to investments in all sectors in the territory of the Republic of Indonesia, but this means direct investment only, and does not include indirect investment and portfolios.

Foreign investment is obliged to be in the form of a limited liability company pursuant to Indonesian law (*perseroan terbatas* (PT)), and such a company must be domiciled in the territory of the Republic of Indonesia, unless stipulated otherwise by a law.¹⁹ Investments via limited liability companies are carried out in the following way:²⁰

- a) Subscribing shares when the company is established,
- b) Acquiring shares, and
- c) Other methods pursuant to the prevailing regulations.

Thus, foreign foreign investors are shareholders of the PT according to Article 5 of Law No. 25 of 2007. Nevertheless, it should be based on direct share purchase only. Investors purchasing shares indirectly or through the capital market are not classified as foreign investors.

When investing via a limited liability company, the investors shall not make any agreement and/or statement declaring that shareholding in the limited liability company is for the benefit and on behalf of another person.²¹ Even if such an agreement is made, it is null and void.²²

On January 12, 2009, Law No. 4 of 2009 concerning Mineral and Coal Mining was enacted and created a system of IUPs to replace the system of KPs. In spite of the creation of a new system, any existing PKP2Bs were still enforceable and valid until their termination date.²³ IUPs consist of an exploration IUP (IUP *Eksplorasi*), which includes the activities of general surveys, explorations, and feasibility studies, and a production operation IUP (IUP *Operasi Produksi*), which includes the activities of construction, mines, processing and refining, and transportation and sales.²⁴

An IUP may be granted to a business entity (*badan usaha*), a cooperative (*koperasi*), or a sole proprietorship (*perseorangan*),²⁵ and IUPs are granted by Regents/Mayors/Governors/Ministers, in accordance with their respective authorities, as detailed above.²⁶ Under Article 93 paragraph (1) of Law No. 4 of 2009 concerning Mineral and Coal Mining, a holder of an IUP and IUPK may not transfer these permits to other parties. According to paragraph (2) of Article 93, the transfer of ownership and/or shares in an Indonesian exchange can only occur after reaching a certain stage of exploration, and only so long as it does not contravene the regulations. Prior to transfer of shares or ownership, the relevant minister, governor, regent, or mayor must be notified.²⁷

If such changes alter the company status from domestic to foreign investment, approval must be obtained from *Badan Koordinasi Penanaman Modal* (Capital

¹⁸ Article 3 paragraph (2) of Law No. 6/1968 concerning Domestic Investment.

¹⁹ Article 5 paragraph (2) of Law No. 25/2007 concerning Investment.

²⁰ Article 5 paragraph (3) of Law No. 25/2007 concerning Investment.

²¹ Article 33 paragraph (1) of Law No. 25/2007 concerning Investment.

²² Article 33 paragraph (1) of Law No. 25/2007 concerning Investment.

²³ Article 169 of Law No. 4/2009 concerning Mineral and Coal Mining.

²⁴ Article 36 paragraph (1) of Law No. 4/2009 concerning Mineral and Coal Mining.

²⁵ Article 38 of Law No.4 of 2009 concerning Mineral and Coal Mining.

²⁶ Article 37 of Law No. 4/2009 concerning Mineral and Coal Mining

²⁷ Article 93 paragraph (1) of Law No. 4/2009 concerning Mineral and Coal Mining.

Investment Coordinating Board, BKPM) of the Republic of Indonesia, along with the legalization of the Articles of Association from the Minister of Law and Human Rights. Within one month of the date of the legalization of the Articles of Association, the holder of the IUP must submit a copy of the agreement and legalization to the Minister of Energy and Mineral Resources through the Director General to ensure the processing of the status change for the IUP or IUPK.²⁸

B. Overlapping Licenses and Permits in Coal Mining Investment and CnC Status

Consideration letter A of Law No. 4 of 2009 states that mineral and coal contained within the Indonesian mining jurisdiction are non-renewable natural resources that have an important role in fulfilling the needs of people at large. Therefore, the administration of these natural resources must be controlled by the State to provide added value to the national economy to promote the general prosperity and welfare by exercising the principles of justice. In spite of this clear regulation, overlapping coal-mining licenses or permits are a common and widely known problem in Indonesia. This has been a problem since the regents were responsible for issuing the previous mining licenses, the KPs; often, the regents failed to follow correct procedures to avoid overlapping licenses, and their lack of experience in administering mining licenses and compliance issues led to significant criticism from the public and the press.²⁹

In 2006, 369 Mining Authorizations overlapped with forest areas and water resources.³⁰ These overlapping issues were reported by March 2007.³¹ The official website of the Provincial Council and Municipal Council of Kutai Kartanegara reported that in the Kutai Kartanegara Regency, there were two Exploration KPs for two different mining companies for the same mining area and several cooperatives (*koperasi*) had also been granted 100 ha rights by the regents.³² On March 2009, it was reported that four companies had overlapping mining permits in Block 9 of Tabang and Kembang Janggut.³³ Such overlaps are not limited to mining permits; there have also been overlaps between mining authorizations and other land management, such as plantations. For example, in August 2008, the mining area IUP PT of Adaro Energy Tbk for coal overlapped with 7,163 ha of plantation land held by PT Cakung Permata Nusa dan PT Cakradenta Agung Pertiwi.³⁴

²⁸ Article 21 Regulation of Minister of Energy and Mineral Resources No. 27/2013 concerning Procedures and Divestiture Price Fixing, and the Change on Capital Investment in the Field of Mineral and Coal Mining.

²⁹ The president of a production company with less than US\$50M in revenue said, "In Indonesia, disputes between local and federal government have in several cases given two different companies access to the same ground." The president of an exploration company observed that "Indonesia stands out in my experience as a country that has lost its way in the management of its natural resources. They are being exploited but in many cases in a way that is dependent on graft rather than a legislative framework." See Fred MCMAHON and Miguel CERVANTES, eds. *Annual Survey of Mining Companies 2008/2009* (Canada: Fraser Institute, 2009) p.34.

³¹ *Banjir Akibat Kerusakan Lingkungan [Flood due to Environmental Damage]*, Radar Banjarmasin, July 16, 2006.

³² <http://www.dprdkutaiartanegara.go.id/bacawarta.php?id=866> as accessed on September 19, 2019 at 08.30 am of Western Indonesian Time.

³³ <http://www.suarapembaruan.com/index.php?modul=news&detail=true&id=6060> as accessed on September 19, 2019 at 09.00 am of Indonesian Western Time.

³⁴ Consolidated Financial Statements of PT Adaro Energy Tbk and Subsidiaries of December 31, 2010 and 2009, p.66.

Since 2010, these overlaps have become a matter of national importance. The Director General of Mineral and Coal of the Ministry of Energy and Mineral Resources explained that these issues had been discussed in a forum held between the Director General of Mineral and Coal of the Ministry of Energy and Mineral Resources and Commission VII of the House of Representatives. According to the Director General, because many mining areas are located in conservation land, are generally forested areas, these overlaps are inevitable.³⁵

Therefore, before investing in coal mining, potential investors should consider whether the mining area is in a forested area; if it is, the potential investors have to confirm with both the Ministry of Environment and Forestry and the local Regency Forestry office that an IUP can be obtained and used for the proposed mining project. This is dependent on the nature of the forested land in question. According to Article 6 of Law No. 41 of 1999 concerning Forestry, in Indonesia, forests have three functions:

- a. Production (*hutan produksi*): A production forest is forested area the main function of which is to produce forest products such as timber (Article 1[7]);
- b. Protection (*hutan lindung*): A protected forest is a forested area set aside as an environmental support system to promote good water management, prevent floods, control erosion, prevent sea water intrusion, and maintain land fertility (Article 1 [8]); and
- c. Conservation (*hutan konservasi*): A conservation forest has natural certain characteristics and its main function is to preserve the diversity of its entire ecosystem (Article 1 [9]).

An investor cannot open a mining area and conduct any exploration activities if the proposed mining area overlaps with any area of a protected or conservation forest. According to Article 38 (1) Law No. 41 of 1999 concerning Forestry, the use of forest areas for development purposes outside of forestry activities may only be carried out within production and protected forest areas. Conservation forests are wholly protected from any form of development.

Under Article 38 (3) of Law No. 41 of 1999 concerning Forestry, the use of forest area for mining shall be conducted through the granting of a borrow-to-use forestry permit from the Minister of Environment and Forestry, taking into account the broad constraints mentioned above, as well as the period of time and environmental sustainability. Exploration mining activity in any production forest may be carried out when the investor holds such a borrow-to-use forestry permit. Therefore, potential investors must conduct research at the Ministry of Environment and Forestry and local Regency office as to whether the coal mining area is within conservation, protected, or production forest.

Often, infrastructure projects are necessary for coal mining. To carry out construction, several permits are required, including location and environmental permits. Prior to construction, the investor has to apply for a borrow-to-use forestry permit from the Ministry of Forestry before carrying out any construction or development in overlapping forested areas. Before submitting the application for this

³⁵ <http://esdm.go.id/index.php/post/view/land-overlapping-unavoidable> as accessed on March 8, 2018, at 6.55 pm of Western Indonesian Time. Until this year, overlapping is still happening. See "Aturan Tumpang Tindih, Nasib 8 Perusahaan Batu Bara belum Jelas" [Overlapping Rules, The Fate of 8 Coal Companies is not Clear], <https://kumparan.com/kumparanbisnis/aturan-tumpang-tindih-nasib-8-perusahaan-batu-bara-belum-jelas-1rRgWAj4Q6w> 4/8 as accessed on November 23, 2019, at 01.00 pm of Western Indonesian Time.

permit, it is essential that the applicant ascertain that “the intended forest area for utilization and the compensation area are clean and clear,” since many forest areas are not.³⁶

This may be complicated by lack of clarity about territorial boundaries. For example, in April 2011, it was reported in a local Banjarmasin newspaper that the province of South Kalimantan and the province of Central Kalimantan had a boundary conflict. Although the boundary of the two provinces had been stipulated by the Minister of Home Affairs, this stipulation had not been disseminated with any coordinates, leaving some uncertainty.³⁷

To resolve such uncertainties for mining projects, in May 2011 the Ministry of Energy and Mineral Resources started to reconcile all IUPs issued by regional governments. In 2010, while implementing the regulations of Law No. 4 of 2009 concerning Mining, the Government of Indonesia issued Government Regulation No. 22 of 2010 concerning Mining Area and Government Regulation No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities. Then, the Government of Indonesia also enacted Government Regulation No. 55 of 2010 concerning the Improvement and the Supervision of the Management Undertaking and the Implementation of Mineral and Coal Mining Business. These regulations provided the Ministry of Energy and Mineral Resources with oversight of mining operations.

The Government carried out the first national IUP data reconciliation at 3-6 May 2011 in Jakarta to coordinate, verify, and synchronize all IUPs in Indonesia. Representatives from each region submitted data concerning IUP grants along with the attached requirements. The central government requested input from all governors, regents, and mayors, of whom 279 attended the national reconciliation.

Based on this reconciliation, there were 3971 CnC IUPs and 4504 that were not CnC.³⁸ This reconciliation was the first time the term CnC was introduced. In the Press Release of the Ministry of Energy and Mineral Resources No. 33/Humas KESDM/2011 dated 27 May 2011, the term CnC was announced publicly but was not explained. Thereafter, the Ministry of Energy and Mineral Resources began a communications campaign to clarify the mechanism of compiling and assessing CnC status.³⁹

On June 30, 2011, the first list of CnCs was issued by the Ministry of Energy and Mineral Resources on its website, along with an announcement of the criteria and process.⁴⁰ The announcement stated that a license could be included in the CnC list provided it was issued before 1 May 2010 and did not overlap with another license. In addition, the ministry stated that if the holder of an IUP would like its IUP to be listed

³⁶ Disputes about forest areas are often inevitable. From 2006 to 2012, there were 232 documented natural resources and agrarian disputes on 2,043,287 ha land across Indonesia. The forestry sector formed a major proportion of these, with 72 cases on 1.2 million ha area. See Coordinating Ministry for Economic Affairs of the Republic of Indonesia, *Investor Guideline: Dispute Settlement Mechanism in Forest Area*, 2012, p.3.

³⁷ “Tapal Batas Kalsel-Kalteng Masih Bermasalah”, *Banjarmasin Post*, April 7, 2011.

³⁸ Press Conference of the Ministry of Energy and Mineral Resources No.33/Humas KESDM/2011 dated May 27, 2011.

³⁹ Nelyanti Siregar, the process and verification of CnC mining business license, Directorate of Fostering of Coal Business made socialization at Jakarta Convention Center in Jakarta, October 10, 2012.

⁴⁰ <http://prokum.esdm.go.id/Lain-lain/pengumuman%20IUP.pdf> as accessed on May 17, 2018, at 6.55 pm.

in the CnC list, the IUP holder must submit the petition to the issuer of the IUP, copying the Director General of Minerals and Coal.

In addition to this reconciliation process that provided greater legal clarity for coal-mining investors, the Government of Indonesia tried to ensure that IUPs fulfilled all administrative requirements and did not overlap with other licenses. The evaluation was conducted by the General Director of Mineral and Coal of the Ministry of Energy and Mineral Resources or the governor in accordance with their respective authorities. The evaluation procedure was regulated by Government Regulation No. 43 of 2015 concerning the Procedures of the Evaluation on the Issuance of IUP.⁴¹ Under this regulation, the governor or the Minister of Energy and Mineral Resources evaluate existing IUPs to identify whether the IUP could be granted CnC status.⁴²

The time period for evaluation by the governors was regulated further by Circular Letter No. 01.E/30/DJB/2016 concerning the Implementation of the Evaluation on the Issuance of Mineral and Coal IUP. Under Points 5, 6, 7, and 8 of this letter, the evaluation results must be submitted within ninety working days of document submission. If the evaluation result is not submitted within the required period, the General Director of Mineral and Coal of the Ministry of Energy and Mineral Resources on behalf of the Minister of Energy and Mineral Resources will announce that the status of the IUP in question is not a CnC.⁴³

IUPs complying with all the administrative requirements and not overlapping with any other permits were declared clean and clear, and this status was announced to the public. Once CnC is verified, it is essential to obtain a CnC certificate.⁴⁴

Pursuant to Regulation of Minister of Energy and Mineral Resources No. 43 of 2015 concerning the Procedures of the Evaluation on the Issuance of IUP, CnC status is granted based on the results of the evaluation of the administrative and regional requirements of the IUP.⁴⁵ Meanwhile, the CnC certificate for an IUP is issued based on the results of evaluation of the technical, environmental, and financial requirements of the IUP.⁴⁶ The CnC itself is not a permit. Without a CnC status, an IUP may be employed as long as there are no objections to it from any party in any form. Mining

⁴¹ Before the Regulation of the Minister of Energy and Mineral Resources No. 43/2015 concerning the Procedure of the Evaluation on the Issuance of Mineral and Coal IUP, the Ministry of Energy and Mineral Resources had a Standard Operational Procedure for deciding the CnC status of an IUP as stipulated by the Instruction of General Director of Mineral and Coal No. 19.Ins/30/DJB/2012 dated 12 September 2012. This procedure guided the making of Regulation of General Director of Mineral and Coal No. 215K.DJB/2014 concerning the Determination of the Standard of Services to Type of Permit Services at the General Directorate of Mineral and Coal, in which CnC status was regulated at a higher level through the Regulation of Minister of Energy and Mineral Resources No. 32/2013 concerning the Procedures of Granting Special Permits in the Field of Mineral and Coal. The Regulation of Minister of Energy and Mineral Resources No.32/2013 concerning the Procedures of Granting Special Permits in the Field of Mineral and Coal was then amended by The Regulation of Minister of Energy and Mineral Resources No.32/2015.

⁴² Article 4 of the Regulation of Minister of Energy and Mineral Resources No. 43/2015 concerning the Procedures of the Evaluation on the Issuance of IUP.

⁴³ Point 10 of Circular Letter No. 01.E/30/DJB/2016 concerning the Implementation of the Evaluation on the Issuance of Mineral and Coal IUP.

⁴⁴ The CnC Certificate was introduced and regulated for the first time in March 2012, which was in the Regulation of Minister of Energy and Mineral Resources No. 7/2012 concerning the Increasing of Added Value of Mineral through the Activities of Formulating and Purifying Mineral, which concerns mineral mining activities, not coal mining activities.

⁴⁵ Article 21 paragraph (2) and Article 22 of Regulation of Minister of Energy and Mineral Resources No. 43/2015 concerning the Procedures of the Evaluation on the Issuance of IUP.

⁴⁶ Article 21 paragraph (2) and Article 24 of Regulation of Minister of Energy and Mineral Resources No. 43/2015 concerning the Procedures of the Evaluation on the Issuance of IUP.

activities can still be undertaken by the non-CnC IUP holder, provided there are no objections from any party with an overlapping license.

Originally, the holders of non-CnC IUPs could not sell any coal-mining products abroad, but only in the domestic market.⁴⁷ Regulation of the Minister of Energy and Mineral Resources No.22 of 2018 concerning the amendment of Regulation of Minister of Energy and Mineral Resources No. 11 of 2018 concerning the Procedures for Granting Area, Permits, and Reports on the Business Activities of Mineral and Coal Mining, removed the requirement of having a CnC certificate to sell coal-mining products abroad. Indeed, Article 112 entirely removed the need to have CnC status for an IUP.

To avoid the overlapping permits because of boundary issues, proper due diligence is necessary and, indeed, it is compulsory for potential investors to check whether the coal mining area is within the appropriate regency or municipality. According to Article 12 paragraph (1) of the Regulation of the Minister of Energy and Mineral Resources No. 43 of 2015 concerning the Procedures of the Evaluation on the Issuance of IUP the overlapping problem shall be settled by:

- a. adjusting the IUP if the administrative boundary problem results in overlapping;
- b. reducing the mining area if the overlap only partial; and
- c. applying the principle of first come, first served if the entire mining area overlaps, while also considering the principles of advantage, transparency, equality, and both national and regional interest if the IUP overlaps with other license in other fields.

A company that holds an IUP or IUPK can take many alternative legal actions to settle problems of overlap. First, the company can pursue alternative dispute resolution through negotiation or mediation with the other parties that have an IUP or IUPK for the same coal mining area. Second, the company can institute a lawsuit against the regent in the appropriate administrative court.

Supreme Court Decision No.213K/TUN/2007 between PT Arutmin Indonesia v. Regents of Tanah Laut and PT Surya Kencana Jorong Mandiri is an interesting example of a case of overlapping coal licenses. Case chronology is as follows:

1. On May 5, 1995, a decree of the General Director of General Mining No. 198/K/2014/DDJP/1995 regarding Granting of Exploitation Mining Authorization was issued for PT Tambang Batubara Bukit Asam (Persero) (also known as Perusahaan Negara Bukit Asam), in cooperation with PT Arutmin Indonesia; this was regional code DW 322/Kalsel located in Tanah Laut and Kota Baru Regency, measured 12,473 ha, and was valid for the following thirty years.
2. On October 7, 1997, all the rights and obligations of PT Tambang Batubara Bukit Asam (Persero) were transferred to the Government of Indonesia, represented by the Minister of Mining and Energy (now known as the Minister of Energy and Mineral Resources), according to the provisions of

⁴⁷ Article 1, Article 3 and Article 4 of Regulation of Minister of Trade No. 39/M-Dag/Per/7/2014 concerning Export of Coal and the Products of Coal as amended by Regulation of Minister of Trade No.49/M-Dag/Per/8/2014. See also Article 73 and Article 75 of Regulation of Minister of Energy and Mineral Resources No. 11/2018 concerning the Procedures for Granting of Area, Permits, and Reports on the Business Activities of Mineral and Coal Mining as amended by Regulation of Minister of Energy and Mineral Resources No. 22/2018.

Presidential Decree No. 75 of 1996 concerning Basic Provisions on Coal Mining Exploitation Work Agreement.

3. Article 4 of the Minister of Mining and Energy Decree No. 680K/29/M.PE/1997 concerning the Implementation of Presidential Decree No. 75 of 1996 concerning Basic Provisions on Coal Mining Exploitation Work Agreement provided that the following obtain:
 - a. Mining Authorization for PT Tambang Batubara Bukit Asam (Persero), which was conducted by the contractor, shall be returned to the Minister within 30 days of decree enactment according to Presidential Decree No. 49 of 1981 and Presidential Decree No. 21 of 1993;
 - b. The region of mining authorization as mentioned in section (1), becomes a coal mining exploitation work agreement for the relevant contractor according to the above-mentioned ministerial decree.

Consequently, PT Arutmin Indonesia from this point began to act as the government contractor in compliance with PKP2B provisions.
4. The Decision of the Regent of Tanah Laut No. 545.3.006/PU/DPE/2004 dated 27 September 2004 regarding the Granting of Exploitation Coal Mining Authorization for PT Surya Kencana Jorong Mandiri (KW 106 TW I) located in Kintap Kecil Village and Bukit Mulia Village, Kintap, South Borneo, granted mining access measuring 203 ha and valid for three years.
5. This decision included a location called area KW 106 TW 1 located in Kintap Kecil Village and Bukit Mulia Village, Kintap, Tanah Laut measuring 203 ha, which was within the area of DW 322/Kalsel according to the Decree of General Director of General Mining No. 198/K/2014/DDJP/1995 regarding Granting of Exploitation Mining Authorization, which was issued for PT Tambang Batubara Bukit Asam (Persero) cooperation with PT Arutmin Indonesia.
6. On April 2006, PT Arutmin Indonesia had legally acquired knowledge of the Decision of the Regent of Tanah Laut No. 545.3.006/PU/DPE/2004, and PT Arutmin Indonesia filed a suit (case No.02/G/2006/PTUN.BJM) in the Administration Court in Banjarmasin.

Supreme Court Decision No. 213 K/TUN/2007 revoked the Decision of the Regent No. 545.3.006/PU/DPE/2004 dated 27 September 2004 regarding the Granting of Exploitation Coal Mining Authorization for PT Surya Kencana Jorong Mandiri; the panel of judges considered that the permit issued earlier was valid, not the later one. Therefore, more recent permits issued for the same region were declared invalid and were revoked. This decision was made on the basis of the first come, first served principle.

A second court decision regarding overlapping coal licenses was Supreme Court Decision No. 171 K/TUN/2014 between PT Multi Tambang Jaya Utama vs. the Regent of East Barito and Cooperative of (Koperasi) Tunas Dayak Gemilang. The chronology of the case is as follows:

1. On 20 November 1997, the Government of Indonesia, represented by the Minister of Mining and Energy, and PT Multi Tambang Jaya Utama entered into a PKP2B;
2. On 30 November 2012, the Decision of the Regent of East Barito No. 417 of 2012 regarding the Approval of the Upgrade of Exploration IUP into Production Operation IUP to the Cooperative Tunas Dayak Gemilang was issued;

3. The mining area for the Production Operation IUP overlapped the mining area of the 1997 PKP2B.

The Decision of Supreme Court No. 171K/TUN/2014 revoked the Decision of East Barito No. 417 of 2012 regarding the Approval of the Upgrade of Exploration IUP into Production Operation IUP to Cooperative Tunas Dayak Gemilang. The Supreme Court considered that the Regent of East Barito's Decision was not in accordance with the Circular Letter of the Minister of Energy and Mineral Resources No. 08.E/30/DJB/2012 dated March 6, 2012. Furthermore, the judges considered that the permit issued earlier was valid, again on the basis of the first come, first served principle.

C. The Requirement of Share Divestment for Foreign Investors in Coal Mining and Indirect Expropriation

Law No. 11 of 1967 concerning the Basic Provisions of Mining regulated that the participation of foreign parties could only be in large-scale mining projects through work contracts of coal work contract, although parties of Indonesian nationals could conduct small- and medium-scale mining projects.⁴⁸ Law No. 4 of 2009 concerning Mineral and Coal Mining set out wider possibilities for foreign investment, although it also instituted divestiture requirements to ensure that foreign shareholders in companies holding IUPs divest their shares to the Indonesian Government, regional government, state-owned enterprise, regional government owned enterprise, or national private sector company after five years of production.⁴⁹

The government works to protect local investors by limiting ownership by foreign investors.⁵⁰ Foreign companies investing in Indonesia are therefore required to divest their shares.⁵¹ According to Article 1 number 8 of Government Regulation No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, as amended by Government Regulation No. 77 of 2014, the divestment shall be the number of foreign shares that is subject to be offered for sale to Indonesian participants. Article 97 (1) of Government Regulation No. 23 of 2010 regulates that the foreign capital of IUP and IUPK holders must be divested; therefore, at least 20% of shares are owned by Indonesian participants after five years of production.

Government Regulation No. 24 of 2012 concerning the Amendment of Government Regulation No. 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, Article 97 of Government Regulation No. 23 of 2010 was amended, such that foreign investors must divest their shares gradually,

⁴⁸ Article 10 of Law No. 11/1967 concerning basic Provisions of Mining, Decision of the President of Indonesia No.75 of 1996 concerning Basic Provisions of Coal Contracts of Work.

⁴⁹ See *supra* Section A. There is no provision in Law No. 4/2009 concerning Mineral and Coal Mining that prohibits a foreign citizen or a foreign legal entity from being a shareholder in a coal mining company in Indonesia, thus, creating broad opportunities for foreign investment in coal mining activities. On divestiture, see Article 112 (2) of Law No. 4/2009 concerning Mineral and Coal Mining.

⁵⁰ Under Article 1(5) of Law No. 25/2007 concerning Investment, a foreign investor means a foreign national, a foreign business entity, and/or a foreign government that makes an investment in the territory of the state of the Republic of Indonesia.

⁵¹ Mukti FAJAR ND, “*Strategi Kebijakan Perlindungan Investor Lokal dalam Arus Bebas Asean Economic Community* [Strategic Policy on the Local Investor's Protection in Free Trade of ASEAN Economic Community]” in Nurul ELMİYAH and Rosa AGUSTINA (ed), *Erman Rajagukguk 70 Tahun Hukum Ekonomi Indonesia (Kumpulan Karangan)* (Jakarta: Badan Penerbit FHUI, 2016), p.98.

beginning after five years of production, such that in the tenth year at least 51% of its shares are owned by Indonesian participants. The provision on share divestment was amended by Government Regulation No.1 of 2017 concerning the Fourth Amendment of Government Regulation No. 23 of 2010.⁵² Article 97 (1) states that holders of production and operation IUPs and IUPKs in the framework of foreign investment shall divest their shares gradually after five years of production, and that in the tenth year at least 51% of its shares are owned by Indonesian participants. Under Article 97 (2) of Government Regulation No.1 of 2017, the share divestment by foreign investors shall be at least as follows:

- a. the sixth year shall be 20%;
- b. the seventh year shall be 30%;
- c. the eighth year shall be 37%;
- d. the ninth year shall be 44%; and
- e. the tenth year shall be 51%.

Share divestment shall be carried out by foreign investors to Indonesian participants in the following order:⁵³

- a. the central government through the minister;
- b. the provincial governments and the regency or municipality governments where the mining area located;
- c. state-owned enterprises and regional government-owned enterprises; and
- d. national private sector companies.

The foreign investor may not choose the Indonesian participant who receives the divested shares.

The requirement of share divestment is an attempt to provide protection to local investors and safeguard the national economy.⁵⁴ However, the share divestment requirement raises the significant legal issue as to whether the share divestment is an indirect expropriation. For several reasons, the Indonesian provision regarding the percentage of share divestment is not an indirect expropriation.

First, it is in accordance with the 1945 Indonesian Constitution, Article 33, which provides the following:⁵⁵

- (1) the economy shall be arranged in common effort on the basis of the principles of the family system,
- (2) production sectors that are vital for the state and affect the livelihood of the

⁵² Government Regulation No. 23/2010 concerning Implementation of Mineral and Coal Mining Business Activities was also amended by Government Regulation No. 1/2014 concerning Second Amendment of Government Regulation No. 23/2010 concerning Implementation of Mineral and Coal Mining Business Activities, but this did not amend Article 97 regarding share divestment.

⁵³ Article 4 of Regulation of Minister of Energy and Mineral Resources No. 9/2017 concerning the Procedure of Share Divestment and the Pricing Mechanism of Divested Share in the Business Activities of Mineral and Coal Mining as amended by the Regulation of the Minister of Energy and Mineral Resources No.43 of 2018.

⁵⁴ FAJAR ND, *supra* note 52, p.98.

⁵⁵ The original text is: (1) *Perekonomian disusun sebagai usaha bersama berdasar atas kekeluargaan*; (2) *Cabang-cabang produksi yang penting bagi negara dan yang menguasai hajat hidup orang banyak dikuasai oleh negara*; (3) *bumi, air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besarnya kemakmuran rakyat*; (4) *Perekonomian nasional diselenggarakan berdasar atas demokrasi ekonomi dengan prinsip kebersamaan, efisiensi berkeadilan, berkelanjutan, berwawasan lingkungan, kemandirian, serta dengan menjaga keseimbangan kemajuan dan kesatuan ekonomi nasional*; (5) *ketentuan lebih lanjut mengenai pelaksanaan pasal ini diatur dalam undang-undang*.

- people shall be ruled by the state's powers,
- (3) *lands, waters, and the natural resources within them shall be under the state's power and shall be employed to the people's greatest benefit,*
 - (4) the organization of the national economy shall be based upon economic democracy, upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, and self-sufficiency, keeping a balance regarding the progress and unity of the national economy, and
 - (5) further provisions relating to the implementation of this article shall be regulated by law.

Coal-mining activities are under the scope of Article 33 paragraph (3) of the 1945 Indonesian Constitution because coal is a natural resource. The Court has stated in Constitutional Court Decision No. 001-021-022/PUU-I/2003 dated 15 December 2004 and Constitutional Court Decision No. 21-22/UU-V/2007 dated March 25, 2008 that the state, through the government, possesses and uses the earth, water, and all the natural resources contained therein, for the greatest benefit of the people. This ensures state control over the field of production because it is important for fulfilling the needs of the people at large.⁵⁶ This is not intended solely to provide the state power as such, but, it is following the preamble of the Constitution, "to protect all the people and the land that has been struggled for, and to improve public welfare . . . and to achieve social justice for all the people of Indonesia."⁵⁷

The definition of the phrase "to be possessed by the state" in Article 33 of the Indonesia Constitution is higher and broader than the concept of ownership in private law. It ties in with the concept of popular sovereignty, such that the people are the resource owner as well as the holder of supreme power in national life, consistent with the doctrine of government "from the people, by the people and for the people." Within this concept of supreme power is the principle of public ownership by the people collectively.⁵⁸

The phrase "possession by the state" should be interpreted to encompass both state possession in a broad sense and also ownership derived from the sovereignty of

⁵⁶ Constitutional Court Decision No. 25/PUU-VIII/2010, at 91.

⁵⁷ Mohammad Hatta, one of the founding fathers of Indonesia, interpreted possession by the state as follows: "The purpose contain in the Article 33 of Indonesia Constitution is a mass production that exercised as much as possible by the government with capital loan aided from other countries. If such a strategy is unsuccessful, *foreign investors could be given opportunities to invest capital in Indonesia, with requirements set out by the government.* . . . It was the fundamental thinking on how to develop the economy according to the Article 33 of the Indonesia Constitution . . . If the nation's strength and capital are insufficient, foreigners who are willing to give capital loans to conduct production may lend us a hand. If foreigners are unwilling to loan their capital, then the opportunity to carry out an investment in our country with certain requirements set by Indonesia Government will be given." See Constitutional Court Decision No. 001-021-022/PUU-I/2003 on judicial review of Law No. 20/2002 concerning Electrification, which is adopted in Constitutional Court Decision No. 25/PUU-VIII/2010 on the judicial review of Law No. 4/2009 concerning Mineral and Coal Mining.

⁵⁸ If possession by the state were interpreted in the same sense as ownership in private law, the mandate to "improve public welfare" and "achieve social justice for all the people of Indonesia" in the Preamble of the Indonesia Constitution would be impossible to achieve. The concept of private ownership itself nevertheless needs to be recognized as one of the logical consequences of possession by the State that encompasses collective public ownership of natural resources. See Constitutional Court Decision No. 001-021-022/PUU-I/2003 on judicial review of Law No. 20/2002 concerning Electrification, which was adopted in Constitutional Court Decision No. 25/PUU-VIII/2010 on the judicial review of Law No. 4/2009 concerning Mineral and Coal Mining.

the Indonesian people collectively over all natural resources. This gives the state a mandate to fulfil the people's needs through the following mechanisms:⁵⁹

- a. Carrying out policies (*beleid*) and conducting administration (*bestuursdaad*),
Administration by the state is conducted by the government, with an authority to grant and revoke the permits (*vergunning*), licenses (*licentie*) and concessions (*concessie*),
- b. Governing (*regelendaad*):
Governance by the state is conducted through the legislative authority of the House of Representatives together with the government and regulated by the government (executive),
- c. Management (*beheersdaad*):
Management is conducted through the shareholding mechanism and/or direct involvement in the management of state-owned enterprises or legal entities as the institutional instruments through which the state *casu quo* the government uses its possession of resources to maintain the people's welfare, and
- d. Monitoring (*toezichthoudensdaad*):
Monitoring is conducted by the State over the fields of production that are vital and or fulfill the needs of the people at large to maintain the public welfare.

Constitutional Court Decision No. 25/PUU-VIII/2010 on the judicial review of Law No. 4 of 2009 concerning Mineral and Coal Mining clearly states that the state through the government has the power to grant and revoke permits, and can thus regulate the percentage of share divestment.

Second, Article 7 paragraph (1) of Law No. 25 of 2007 concerning Investment stipulates that nationalization or taking the ownership rights of any investor shall not performed by the Government except through law. According to Paragraph (2) of this Law, compensation on the basis of market price is compulsory, meaning nationalization, expropriation or the taking of any ownership rights can only be performed through law and with compensation of the fair market value of the shares. This means that the divestment requirement for foreign investors in coal mining is in accordance with Indonesian law.

The legal basis of the divestment requirement is Law No. 4 of 2009 concerning Mineral and Coal Mining. Article 112, paragraph (2) gives ancillary provisions that the divestment of shares shall be overseen by regulation of the government, while the law as a whole authorizes share divestment. The power of the government to issue regulations, such as Government Regulation No. 23 of 2010 concerning Implementation of Mineral and Coal Mining Business Activities as amended several times and amended for the final time by Government Regulation No. 77 of 2014, is provided by Law No. 4 of 2009 concerning Mineral and Coal Mining.

Third, the pricing mechanism for divested shares is based on the fair market value, according to Article 14 (1) of the Regulation of Minister of Energy and Mineral Resources No. 9 of 2017 concerning the Procedure of Share Divestment and the

⁵⁹ Constitutional Court Decision No. 001-021-022/PUU-I/2003 on judicial review of Law No. 20/2002 concerning Electrification, which is adopted in Constitutional Court Decision No. 25/PUU-VIII/2010 on the judicial review of Law No. 4/2009 about Mineral and Coal Mining.

Pricing Mechanism of Divested Share in the Business Activities of Mineral and Coal Mining as amended by the Regulation of the Minister of Energy and Mineral Resources No.43 of 2018. Based on these three reasons, the provisions for the percentage of share divestment by government regulation is not an indirect expropriation.

III. CONCLUSION

In conclusion, several points are clear. First, overlapping coal mining licenses or permits have been a common and widely known problem in Indonesia. Therefore, conducting a proper due diligence is compulsory for potential foreign investors to carry out foreign investment in coal mining. Second, the government of Indonesia developed the CnC mechanism, which includes CnC status and CnC certification to solve the legal uncertainty of overlapping permits. Third, in judging cases of overlapping coal-mining permits, the Indonesian Courts uphold the principle of first come, first served. Fourth, based on the Indonesian Constitution, government provisions regarding requirements for share divestment by foreign investors is not an indirect expropriation, since it is legally mandated to ensure the welfare of the people of Indonesia and compensated according to fair market value.

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