EFFECTIVENESS AND SUPERVISION OF PARTICIPATING INTEREST BY THE BPMA: A LEGAL ANALYSIS

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ABSTRACT

Participating Interest policy (PI) is a new policy in oil and gas working areas; however, the implementation is not optimal. So there needs to be a study on effectiveness and supervision. This paper aims to discuss the formulation of the problem of the effectiveness of the implementation of PI and supervision by the Aceh Oil and Gas Management Agency (BPMA). This is a pure legal research meaning that it only requires data from relevant laws and analyses them descriptively. The Regulation of the Minister of Energy and Mineral Resources Number 37 of 2016 concerning Provisions for Offering 10% of PI in Oil and Gas Working Areas is an implementing regulation. In addition, the Contractors’ Cooperation Contract is required to offer PI to regions. However, there is no sanction for ignoring it which causes ineffectiveness. The Supreme Audit Agency reveals that Aceh had not yet received PIs from several working areas although the BPMA is entitled to do supervision.

Keywords: Aceh oil and gas management agency; effective; regional autonomy; participating interests; supervision.

INTRODUCTION

Indonesia has made a rapid progress in the administration of state in the ambit of regional autonomy. Great opportunities are given to regions to manage and take care of their household affairs, which are accurate, broad, and responsible. Its realization is carried out through the principle of decentralization which is considered a means of implementing regional autonomy (Husni, 2017). Regional autonomy aims to improve community welfare, public services, and regional
competitiveness. There are 6 (six) powers that are not given to local governments, including foreign policy, defense and security, judiciary, national monetary and fiscal, and religion.

The central government gives the authority to manage finances to the regions included in the Regional Revenue and Expenditure Budget (APBD) following Law Number 33 of 2004 concerning the Financial Balance of the Central Government and Regional Governments. The balancing fund consists of profit-sharing, general allocation, and special allocation funds. The establishment of this regulation is intended to support the funding of regional affairs to reduce the funding gap between regions and the center as well as between provincial governments. Regional revenues can only cover 20% of local government expenditures (Gie, 1995). The Constitution also regulates the distribution of revenue-sharing funds for oil and gas mining areas between regional and central governments. However, there have been various protests of disapproval, especially by producing regions rich in natural resources (Constitutional Court, 2020). Regions consider that the share of profit sharing is detrimental to their interests (Hukum Online, 2012).

In the early stages of regional oil and gas management, they are encouraged to play an active role in exploitation needs in the form of administrative, security, physical and material needs, including equipment warehouses, processing, storage of results and water needs, supply, and transit terminals. Of all these activities, the most affected areas are exposed to social damage and environmental pollution risk, so the scheme for the completion and division of the upstream oil and gas sector needs to be reorganized by placing the producing area as an essential factor (Deny Hidayati, 2005).

To avoid prolonged conflicts, the central government provides opportunities for regions to participate in oil and gas management through Participating Interest (PI). PI is the proportion of production and exploration ownership of an oil and gas working area with a business-to-business mechanism through Regional Owned Enterprises (hereinafter referred to as BUMD) after obtaining approval from the
Minister of Energy and Mineral Resources (Risman, 2019). Producing regions have the same opportunities, including Aceh.

The implementation of Aceh's regional autonomy is based on asymmetric decentralization which gets special treatment from the central government. Starting with Law Number 11 of 2006 concerning the Government of Aceh (UUPA) is enforced. Glancing at history, this enforcement was given because of the Aceh factor, which had gone through a phase of prolonged conflict and heated political upheaval. All of this has a significant impact on the economy and development. So that special autonomy is a middle way to uphold the integrity of the Unitary State of the Republic of Indonesia (NKRI).

One of the specifics contained in the LoGA is the participation of the Aceh government in the management of Oil and Gas (Migas) in its territory. The administration is carried out by the Aceh Oil and Gas Management Agency (hereinafter referred to as the BPMA), which the Indonesian and Acehnese governments jointly manage. As an institution under the Ministry of Energy and Mineral Resources (ESDM) and a replacement for the Special Task Force for Upstream Oil and Gas Business Activities (SKK MIGAS). Its duties include implementing, controlling, and supervising the upstream business activity cooperation contract. Concerning the Agreement for new work areas produced, the cooperation contractor is obliged to offer PI to Aceh. The Contractor provides the statutory provisions using the phrase "mandatory".

Minister of Energy and Mineral Resources Regulation Number 37 of 2016 concerning Provisions for Offering 10% PI in Oil and Gas Working Areas as an implementing regulation. However, the regulation does not include sanctions if the offer is late or is not implemented. Currently, only 2 (two) regions have implemented PI, namely West Java and East Kalimantan (Jabarprov, 2021). Even though almost all regions in Indonesia have oil and gas areas. The problem point in Aceh lies in the Supreme Audit Agency (BPK) finding in 2020 that several working areas should have received a PI in Aceh. However, it has not been realized (News Now, 2021).
PI has been discussed in Junaidi Albab Setiawan's article on participating interest in the Masela working area (block) and Risman Sarifuddin on the regional government's authority to manage to participate interest (PI) in the oil and gas sector. The two articles discuss the process of implementing PI in the regions. So it differs from the discussion of this journal article which focuses on implementing PI management institutions.

This raises the issue of the extent to which the effective enforcement of the law in society and the supervision of state institutions such as the BPMA that can have an impact on justice for the people of Aceh over the management of PI in their territory. So that it has an effect on improving the economy of the Acehnese people, who are currently still the poorest province in Sumatra (BPS, 2021).

RESEARCH METHOD

This article uses a normative juridical research method by examining several favorable laws from applicable regulations, including Law Number 11 of 2006 concerning the Government of Aceh, Law Number 21 of 2002 concerning Oil and Gas, and other laws and regulations are further analyzed in detail descriptive so that it provides an overview of legal problems and phenomena in society. In addition, this writer uses a literature study of books and journal sources related to participatory interests.

RESEARCH OUTCOME AND DISCUSSION

1. Enforcing Participating Interest in Oil and Gas Management in Aceh

Indonesia is a member of the Extractive Industry Transparency Initiative (hereinafter referred to as the EITI), a global standard that encourages transparency in the extractive sector, including oil, natural gas, minerals, and coal. The joining of Indonesia began with a statement of support from the Minister of Finance in 2007, and further discussions were under the Ministry of Energy and Mineral Resources. The EITI has been valid since Presidential Regulation 26 of 2010.
concerning Transparency of State Revenues and Regional Revenues obtained from Extractive Industries (EITI, 2020).

Stakeholders participate actively because the implementation in the form of the government must have a high commitment to publicizing all taxes, royalties, and fees obtained by the oil, gas and mining sectors. Since joining, Indonesia has published several reports covering state revenues and extractive industries. The government includes the implementation of PI in the report (Coordinating Ministry of Economy, 2019).

The laws and regulations do not specifically explain the meaning of PI comparison can be found in the Code of Federal Regulations of the United States of America, Title 17, Commodity and Securities Exchange, which describes that the PI is:

"The right of participation in the oil or gas or the proceeds from the sale of oil or gas, produced from a specified track or tracts, or well(s), which right is limited in duration to the terms of an existing lease and is subject to any portion of expense or development, operation, or maintenance (Code of Federal Regulations of the United States of America). in duration to the terms of an existing lease and is subject to any portion of expense or development, operation, or maintenance (Code of Federal Regulations of the United States of America)."

According to the Oilfield Glossary, "The proportion of exploration and production costs each party will bear and the proportion of production each party will receive, as set out in an operating agreement."

Definition of PI confirmed in a denser description by Charlotte J. Wright and Rebecca A. Gallun that: Participating Interest means the percentage of the costs and risks of conducting an operation under the Agreement that the party agrees to or is otherwise obligated to pay and bear (Charlotte J. Wright and Rebecca A. Galun, 2018).

In essence, based on the above, PI is the right to participate in producing oil and gas, which is managed in a working area. Furthermore, from these activities, they are entitled to profit from oil and gas sales transactions on the condition that

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they are obliged to bear the risk of operation, development and maintenance following the rights. However, all rights are limited by the time and the agreed terms (Junaidi, 2016). The application is given to the producing area or the area where the work area is located. The local government will also receive a Revenue Sharing Fund (DBH) for the producing district and other districts included in the province where the well is located. The region will get a share of the percentage it owns.

PI is an excellent opportunity for the regions because it invites producing regions to play their role in the oil and gas sector. In line with this, in the Middle East and Africa, is known as Local Content Requirements (LCRs). Rules and policies are made for foreign companies to prioritize and invite the participation of national and domestic companies in petroleum operations (Heum et al., 2011). LCRs aim to increase profits for local areas (M Levett and A Chandler, 2012)

The systematic implementation of PI has an impact on:

a. opportunity to actively participate through the form of rights granted with a time limit
b. there is a requirement to pay a down payment for participation or bring with an agreed amount
c. bound by the master contract
d. risk borne
e. get a profit in accordance with the portion of ownership (Audrey, 2012).

The legal basis is contained in Government Regulation 35 of 2004 concerning Upstream Oil and Gas Business Activities. Article 34 states; "Since the approval of the field development plan which will first be produced from a work area, the contractor is obliged to offer a participating interest 10% (ten percent) to the Regional-Owned Enterprises."

The percentage value of 10% (ten percent) is the value of BUMD's share ownership in the working area. Equity participation in cash or nominal currency needs to be made by BUMD. On average, BUMDs have limited capital because their capital involvement comes from the APBD (Energy Room, 2020). Therefore,
it makes it difficult for regions to take a role in the management of oil and gas (Pushep, 2019).

Understanding this condition, the government uses a "carrying" system. This means that the KKKS will provide participatory financing first. The return is taken from the share of the BUMD managing PI 10% (ten percent) of the production without incurring interest. The amount of the return each year is carried out in a typical business manner while still ensuring that there is a certain amount of revenue sharing for oil and gas production for BUMD or BUMD Subsidiaries (ESDM, 2021).

Since the issuance of Government Regulation Number 35 of 2004, the implementation of PI has not found a bright spot because it has not clearly and in detail the mechanism. The Ministry of Energy and Mineral Resources issued Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 37 of 2016 concerning Provisions for Offering 10% PI in Oil and Gas Working Areas as an implementing regulation.

The bidding obligation by the Contractor is reaffirmed in this regulation as stated in Article 12:
"Since the approval of the development plan for the first field that will be produced on land and offshore waters up to 12 (twelve) nautical miles in a working area, contractors are required to offer a 10% PI to regional-owned enterprises."

Bearing that the regulation only mentions the offer of a working area for the first time, it creates confusion for the region because most of the work areas had already started production before the regulation was enacted. In this case, the producing area gets a golden share of the functional working area. In addition to the field development plan, which will first be produced from a work area, producing areas or BUMDs can also be given priority bids for work areas that are not extended (Sihite, 2016).

KKKS and BUMD are legal subjects clearly and explicitly stated in the implementing regulations. The law regulates social relations that give legal issues the right to demand or do something that has been required in that right (Soeroso,
2011). KKKS and BUMD both have a legal relationship so that the rights and obligations of each party face each other because the implementation of rights and responsibilities is guaranteed by law.

The delay or failure to implement BUMD rights by KKKS obligations is caused by the regulation of the sanctions chapter in article 22, which consists of 5 (five) paragraphs in the implementing rules that do not regulate the imposition of sanctions for KKKS (Kontan, 2021). Even though the regulations use the phrase "obligation."

The language of the legislation is subject to the rules of Indonesian grammar, word formation, sentence structure, writing techniques, and spelling (Ahmad Redi: 2018). According to the Indonesian dictionary, "mandatory" means that it must be done; it must not be carried out.

However, the language of laws and regulations has its style. It is characterized by clarity or clarity of understanding, straightforwardness, standardization, harmony, and adherence to principles by legal requirements, both in the formulation and writing methods. To express the existence of an obligation that has been determined, use the word "mandatory". If they are not fulfilled, they will be penalized. Behavior that violates a commitment must be followed by strict sanctions so that the behavior does not occur again.

On the other hand, the regulation only regulates the imposition of sanctions on BUMD. Hamid Attamimi includes equal treatment in law as one of the principles in forming legislation (A. Hamid Attamimi, 1990). Legal principles provide guidelines and guidance for pouring the contents of the regulations into an appropriate form and structure, for formation with the suitable methods, processes and procedures for construction. Therefore, the sanctions for KKKS should also be regulated.

Obligations not accompanied by sanctions and the imposition of sanctions on only one party has resulted in ineffectiveness in implementing PI. Yet the effectiveness of the rules is significant. Hans Kelsen states in his theory the efficacy of law is related to the validity of the law. Legal norms are binding, so their
Effectiveness can be seen by how much they are applied and obeyed (Nazaruddin Latif, 2017).

There are 3 (three) approaches to what extent the law is effective; first, validity and binding strength; second, compliance and behavior of the rules; third, the impact or outcome of the regulation (Maria, 2018). In addition, the relationship between law in the book and direction in action is different in legal reality and legal ideals, because these two things should be compared to find legal effectiveness (Soleman, 1993).

The effectiveness of the law described by Marcus Priyo Gunarto is based on the views of Clerence J Dias, one of which is the awareness of the administrative apparatus to involve themselves and community participation in the mobilization of regulations so that their effectiveness can be achieved (Salim, 2013). The involvement of regulatory agencies to regulate and supervise must be actively involved.

2. Monitoring of PI by the BPMA Aceh Oil and Gas Management Agency

Peace negotiations between the Indonesian government and the Free Aceh Movement (hereinafter referred to as GAM) were carried out in 5 (five) rounds in 2005 from January-April. Through these negotiations, GAM agreed to lay down arms and stop demands for independence from Indonesia. The results of this Agreement were later confirmed in the form of Law Number 11 of 2006 concerning the Government of Aceh (UUPA).

The Agreement to jointly manage oil and gas in Aceh is one of the results of the negotiations in Helsinki, Finland. It is contained in Article 160 of the UUPA:


2) In order to carry out the management as referred to in paragraph (1), the Government and the Aceh Government may appoint or establish an implementing agency that is determined jointly.

The Indonesian government issued the implementing regulations for joint management in 2015 while establishing the BPMA as a collective management agency.
agency. However, this determination can be said to be too long from the Memorandum of Understanding (MOU) agreement. The presence of BPMA is a new chapter in Aceh'. Aceh had to bear losses for many years because it had not yet received a share of the proceeds. In addition, leadership is still relatively weak because the community has not fully felt the benefits. PT Arun LNG, for example, from its initial establishment 36 (thirty-six) years ago until operational activities have been discontinued. Now the assets are state property (LMAN, 2018). The conflict of interest between the central, regional and community governments has not been resolved (Unsyiah, 2015)

From this joint management, Aceh gets a share, including the distribution of Non-Tax State Revenue (PNBP) of 30% (thirty percent), a Production Sharing Contract (PSC) signing bonus, and a 50% (fifty percent) production bonus received as a result of achieving the production target.

Joint management is carried out in the land and sea areas under the authority of Aceh. The sea authority distance is 12 (twelve)-200 (two hundred) miles. Authority comes from laws and regulations obtained from attribution, delegation, and mandates that give rise to rights and obligations (Bagir Manan, 2000). There are two delegations to the BPMA regarding contracts. First, attribution; is authority derived directly from the law to sign new contracts. Second, delegation; is transferring the old contract from SKK oil and gas to the BPMA.

Almost all of the mechanisms for implementing PI contained in the Minister of Energy and Mineral Resources Number 27 of 2016 regulate the rights and obligations of BUMD, KKKS and SKK Migas/BMPA. However, this regulation does not explicitly mention the BPMA as a legal subject in it. However, the organizational structure of the BPMA is under the Ministry of Energy and Mineral Resources, which is responsible to the Governor and the Minister of Energy and Mineral Resources, as well as the similarity of regulated substances.

Concept PI is offered when a field development plan is approved, which will first be produced from a work area, which implies that the BPMA will play an active role in knowing whether or not there is a standard PI clause when the contract is
signed. It is enough to emphasize that BPMA must follow the regulation and the entire agreement is under its supervision.

Supervision is known as one of its elements in the management of oil and gas activities. The Constitutional Court decided that supervision (toezichthoudensdaad) is one of the collective elements of state control which the 1945 Constitution constructs. Supervision activities are carried out to compare the process of existing conditions with what should have occurred from the initial planning.

Henry Fayol said, "control consists in verifying weather occurs in conformity with the plan adopted, the instruction issued and principle established. It has for object to point out weaknesses in error to rectify them and prevent recurrence". Management of activities requires supervision to ensure that something goes according to what is determined (Usman, 2014).

The subsequent opinion was expressed by Newman that "control is assurance that the conformity plan". So that the focus of business supervision can be described to ensure activities or tasks go according to plan (Muchsan, 2000). The results of management can at least find out whether they are suitable or not and find out the causes. One of the benchmarks is through performance appraisal (Metzger and Gillian, 2015).

That supervision can be juridical (law) if the purpose is juridical or legal enforcement (Prajudi, 1981). Juridically leadership by the BPMA is stated in Article 13 of Government Regulation of the Republic of Indonesia Number 23 of 2015 concerning Joint Management of Resources Natural Oil and Gas in Aceh. This is to guarantee and ensure the implementation of Oil and gas exploration and exploitation shall be managed for the interests and welfare of the Acehnese people. Under Article 33 Paragraph 3 of the 1945 Constitution, oil and gas management shall be carried out for the greatest prosperity.

Regarding PI, there are several supervisions carried out by the BPMA through its role. The role of BPMA contained in the implementing regulation is crucial because it aims to bring significant benefits to Aceh. On the other hand,
measuring and calculating added value is difficult without establishing mechanisms for effective monitoring and enforcement (Damilola, 2018). So the success of implementing PI depends on how BPMA plays its role.

At least several roles are carried out, including:
1) Bridging the bidding process between BUMD and Contractors
2) Connecting the transfer application to the Minister
3) Considering the transfer of 10% (ten percent) from the Contractor to the BUMD so that it gets the approval of the Minister.

The findings of the BPK must reflect for the BPMA that the three roles mentioned above have not been fully implemented. The rebuttal that the PI is delayed or not implemented by the KKKKS is since it has not been regulated in the regulations is too early.

Not stipulating sanctions for KKKKS in the regulation is not the end of state institutions (the BPMA) for not being able to intervene in KKKKS delays in submitting the implementation of the PI because supervision aims to prevent the emergence of all forms of deviation from government duties from the things that have been given and take action or correct variations that occur (Marbun, 2004).

In addition to the ineffectiveness of the implementation of PT due to the absence of sanctions for KKKKS, the weak supervision by the BPMA also resulted in the performance of PI in Aceh not running effectively. Therefore, the need for introspection of the BPMA that their existence is "co-management" means that no one party feels the loss for Aceh and Indonesia.

CONCLUSION

In conclusion, the implementation of participating interests in the oil and gas working area, which is carried out jointly between the central government and Aceh through the BPMA, is still not running effectively and optimally. This is caused by 2 (two) factors. Firstly, the Ministerial Regulation that regulates the implementation mechanism has not provided sanctions for KKKKS that do not or are late in implementing it. Secondly, the BPMA, as a regulatory agency that oversees the
implementation of participating interests, has still not carried out its duties properly even though the BPMA, as a state institution, has a significant role in contributing to the smooth implementation.

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