ANALYSIS ON THE EFFECTIVENESS OF “UNBUNDLING” AND “OPEN ACCESS” IN INDONESIAN GAS BUSINESS SECTOR

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ANALYSIS ON THE EFFECTIVENESS OF “UNBUNDLING” AND “OPEN ACCESS” IN INDONESIAN GAS BUSINESS SECTOR

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Abstract

Natural gas is a very important non-renewable natural resource that controls the lives of many people. Therefore, the exploitation and utilization of natural gas must be carried out wisely and for the greatest prosperity of the people. This is mandated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia that "Earth, water and the natural resources contained therein are controlled by country and used for the greatest prosperity of the people". With the promulgation of Law Number 22 the Year 2001 concerning Oil and Gas, there has been restructuring in the implementation of natural gas exploitation through pipelines in Indonesia. The law provides more space for private entities to engage in gas exploitation with the purpose to create healthy competition, transparency, improving national development, efficiency in exploiting natural gas and to develop competitive price so that the end consumer can enjoy the benefits. By its implementing regulations, namely, the Regulation of the Minister of Energy and Mineral Resources Number 19 of 2009, natural gas exploitation through pipelines is carried out through an “unbundling” and “open access” mechanism.

Keywords: Competition Law, Natural Gas, Open Access.

Abstrak

Gas alam adalah sumber daya alam tidak terbarukan yang sangat penting yang mengendalikan kehidupan banyak orang. Karena itu, eksploitasi dan pemanfaatan gas bumi harus dilakukan secara bijak dan untuk kemakmuran terbesar rakyat. Hal ini diamanatkan dalam Pasal 33 ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 bahwa "Bumi, air dan sumber daya alam yang terkandung di dalamnya dikendalikan oleh negara dan digunakan untuk kemakmuran terbesar rakyat". Dengan diberlakukannya Undang-Undang Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi, telah terjadi restrukturisasi dalam pelaksanaan eksploitasi gas bumi melalui jaringan pipa di Indonesia. Undang-undang ini memberikan lebih banyak ruang bagi entitas swasta untuk terlibat dalam eksploitasi gas dengan tujuan untuk menciptakan persaingan yang sehat, transparansi, meningkatkan pembangunan nasional, efisiensi dalam mengeksploitasi gas alam dan menciptakan harga yang kompetitif sehingga konsumen akhir dapat menikmati manfaatnya. Dengan peraturan pelaksanaanya, yaitu Peraturan Menteri Energi dan Sumber Daya Mineral Nomor 19 tahun 2009 tentang eksploitasi gas bumi melalui jaringan pipa dilakukan melalui mekanisme “Unbundling” dan “Open Access”.

Kata kunci: Hukum Persaingan, Monopoli Alamiah, Gas Bumi, Unbundling, Open Access.

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I. INTRODUCTION

Natural gas is a very important non-renewable natural resource that controls the lives of many people and is one of the most demanded natural resources in the world society because of its environmental friendly characteristic. Natural gas is an environmentally friendly, clean-burning fuel, offering important environmental benefits compared to other fossil fuels. It is also a remarkably safe source of energy when transported, stored, and used. Therefore, gas usage surely will increase worldwide in the coming years.\(^1\) Indonesia is a country that is blessed with an abundant amount of natural gas. According to BP Statistical Review of World Energy 2018, Indonesia’s total natural gas proved reserves in 2018 amounted to 102 TSCF (Trillion Standard Cubic Feet) or about 1.5% (one and a half percent) of the world’s natural gas reserves.\(^2\) reserve is sufficient for the next forty years with the same level of production, viewed from the Reserve to Production ratio. When compared with oil, Indonesia’s total oil proved reserves in 2018 amounted to only 3.3 billion barrels,\(^3\) this reserve will only last for the next 12 years with the same level of production, viewed from Reserve to Production ratio. With total natural gas proved reserves amounted to 102 TSCF in 2018, Indonesia is currently the 14th position of the world's largest reserve owner.

Based on the above statistic, the role of natural gas, as a commodity, will be more important because, in addition to being a source of energy (fuel) and industrial materials, natural gas can also be relied upon as a source of state revenue in line with the rising of world oil prices which have an impact on increasing demand for natural gas as a substitute energy source. Besides, it is very important to note that natural gas is a non-renewable energy source. Therefore, the exploitation and utilization of natural gas must be carried out wisely for the greatest prosperity of the people. This is mandated in Article 33 Paragraph (3) of the Constitution of the Republic of Indonesia in 1945 that "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people".

Initially, based on Law Number 44 Prp of 1960 concerning Oil and Gas Mining, oil, and natural gas exploitation in Indonesia was carried out in a monopoly manner by State Enterprises (BUMN).\(^4\) Oil and gas businesses at that time were still adopting the “bundling” mechanism, namely: exploration, exploitation, refining/processing, transportation, and sales. In its development, based on Law Number 8, the year 1971, concerning the State Oil and Gas Mining Company Perusahaan Pertambangan Minyak dan Gas Bumi Negara or “Pertamina” was established.\(^5\) In addition to Pertamina, there are other state companies which, based on laws and regulations, are granted monopoly authority, especially in conducting natural gas operations through pipelines, namely the State Gas Company (PGN).

With the enactment of Law Number 22 the Year 2001 concerning Oil and Gas (after this referred to as “UU Migas’/Oil and Gas Law), there has been a fundamental

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\(^1\) Saeid Mokhatab, William A. Poe, and John Y. Mak, Handbook og Natural Gas Transmission and Processing: Principles and Practices (Oxford, United Kingdom:Gulf Professional Publishing, 2015), p.1, accessed October 25, 2019
\(^2\) BP statistical Review of World Energy 2018, p.26
\(^3\) Ibid., p. 12
\(^4\) Indonesia, Regulation Number 44 Year 1960 About Oil Mining and Gas (LN Year 1960 Number133; TLN Number 2070), Article 3 Part (2)
\(^5\) Indonesia, Regulation Number 8 Year 1971 About Oil Mining and Gas Company (LN Year 1971 Number 76; TLN Number 2971), Article 2
restructuring of the oil and gas business. The Oil and Gas Law Number 22 the Year 2001 revoked Law Number 44 Prp of 1960 and Law Number 8 of 1971. The restructuring has changed the structure of the energy industry, which was originally vertically integrated (dominated/monopolized by state-owned companies) into a fragmented structure (unbundled) by fostering competition, establishing BPH Migas, restructuring government functions and establishing legislation that supports the implementation of the restructuring.\(^6\) This can be seen in the objectives of the implementation of Oil and Gas business activities regulated in the Oil and Gas Law, among others:

1. Guarantee the effectiveness of the implementation and control of exploration and exploitation activities in an efficient, effective and highly competitive and sustainable manner on strategic and non-renewable state-owned oil and gas through an open and transparent mechanism;
2. Guarantee the effectiveness of the accountable implementation, control, storage, and commercial processing carried out through fair, healthy, and transparent business competition mechanisms.\(^7\)

In the regulation of natural gas governance, especially regarding the downstream sector, it is still a problem because of the inconsistency of laws and regulations related to the meaning of open access schemes. The Oil and Gas Law generally adheres to a common carriage system, but in implementing regulations, it is inclined to open access systems, which are considered full of the values of liberalism in them. Open access itself will automatically be followed by the implementation of unbundling, especially in the downstream sector. Open access is proven to have extended the business chain, thus leading to an increase in the selling price of natural gas, which according to academics, does not reflect the ultimate goal of the constitution, namely "for the greatest prosperity of the people". Besides, from the experience of countries that adopt open access, in general, there is a higher price of natural gas than countries that do not implement it.

II. RESEARCH QUESTION

Based on the background outlined above, this research seeks to find out the answers of some topic-related questions have arisen as follows:

1. What is the inconsistency of open access and unbundling arrangements in the legislation related to natural gas governance in Indonesia?
2. Do open access and unbundling arrangements in the legislation related to natural gas governance of Indonesia already fulfill the “certainty” and “efficacy” principle?
3. How is the concept of open access and unbundling in natural gas governance reviewed from a people’s economic perspective?

III. RESEARCH METHOD

\(^6\) Hanan Nugroho, “Deregulasi Setengah Hati: Tinjauan Terhadap Restrukturisasi Energi di Indonesia”, (Paper Published on 16 Economic Year Academic Seminar, Pasca Sarjana Ekonomi Universitas Indonesia & Ikatan Sarjana Ekonomi Indonesia, Jakarta, 8-9 December 2004), p. 1.

\(^7\) Indonesia, Regulation Number 22 Year 2001 About Oil and Gas (LN Year 2001 Number 136; TLN Number 4152), Article 3 word a and word b
This research is a normative juridical legal research that is legal research that refers to the rules or norms contained in the legislation. While the approach method used is the statute approach. The type and source of data that the author uses in this study are in the form of secondary data consisting of: first, primary legal material, namely in the form of materials that have binding strength, such as legislation and related Constitutional Court Decisions. Second, secondary legal materials, in the form of materials that explain primary legal materials and their contents, are not binding. Third, tertiary legal material. The data collection method is by Document Study. While the method of managing and analyzing legal materials is done by editing, namely, the management of legal materials by rearranging, researching, and examining legal materials that have been obtained so that they can be arranged systematically.

1. Conceptual Framework

Some terminologies need further definition and explanation to provide a clearer understanding of the research to prevent misunderstanding of concepts which are:

1) Monopoly: Monopoly is a situation of the market where only one producer or seller controls supply of a good or service, dominates over the whole majority of the market, and where the entry of new producers is prevented or highly restricted.

2) Pipeline Gas Transportation: A transmission or distribution of gasified natural gas through a very large tube, often underground, through which gas can flow for long distances.

3) Natural Monopoly: Natural monopoly is a practice that comes from the nature of the market, not by the intention of a firm. A natural monopoly is a type of monopoly that exists due to the high fixed or start-up costs of conducting business in a specific industry. Additionally, natural monopolies can arise in industries that require unique raw materials, technology, or similar factors to operate, often the first supplier in a market, an overwhelming advantage over potential competitors. This frequently occurs in industries where capital costs predominate, creating economies of scale that are large in relation to the size of the market, examples include public utilities such as water services and electricity.\(^8\)

4) Open Access: Historically, open access comes from the concept of transporting natural gas through a pipeline that starts from the "principle of joint use" of transportation facilities. In international practice, there are four common utilization schemes, namely:

a. Negotiated Access

A business entity voluntarily divides the utilization of facilities with other parties through a business to a business scheme based on an agreement, without any regulation requiring the facility owner to divide utilization with other business entities. So, in this scheme, the facility owner has the right to decide to divide/not use his facility to another party and there is no sanction if he does not do it.

b. Third-party Access

Where there is a regulation that requires business entities that have transportation facilities to share utilization with other parties; if there is still

\(^8\) Richard Posner, “Natural Monopoly and its regulations” 30th anniversary editions with new preface by the author (Washington: Cato Institute, 1999) p. 1.
more capacity that can be used by other parties. In other words, joint utilization is limited by the amount of facility capacity that is still available. Joint utilization can be done if there is agreement from the facility owner, user, and regulator.

c. Common Carriage
Where pipe facilities are required to be accessible to all users without capacity restrictions. Basic use through adjusting user capacity allocation, so the principle is that all must be able to use through capacity adjustments. In other words, anyone who meets the requirements has the right to get access to using the facility with the consequence of reducing the allocation of facilities usage by other parties.

d. Open access
Where the facilities built by a Business Entity are utilized together with the principle of first come first serve. The regulation requires the owner of the transportation facility to divide the utilization of the facility as long as it is within the maximum capacity limit. This scheme also separates the facility manager (Transponder) and the user (Shipper).

5) Unbundling
Basically, the concept of open access is always followed by unbundling. The basic concept of unbundling is separation or "spin-off" scheme, in this case between commercial activities (supply) and infrastructure (transport) activities of natural gas (non-horizontal integration). Although it cannot be said that unbundling is a spin-off, in general, the concept is the separation of companies. The purpose of a spin-off is to achieve transparency, independence, and fair competition. In the practice of natural gas management in Europe, there are four forms of Unbundling, namely: (Ibid)

a. Account unbundling, wherein the finances of infrastructure activities must be separate from the finances of supply activities,

b. Functional unbundling, where financial and management of infrastructure activities must be separated from supply activities.

c. Legal Unbundling, where infrastructure activities and supply activities are each under the banner of a different legal entity. However, it can still be in the structure of the parent company, so the holding company still has ownership.

d. Ownership Unbundling, where infrastructure and supply activities must be carried out and owned by different entities and each of these entities must not have ownership at the same time both activities.

As described above, the basic concept of unbundling is a spin-off scheme. The spin-off legal construction, even though it has long been known as one of the restructuring mechanisms of the company, but only got legislative recognition in Law No. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPT). (Mulhadi, 2010)

IV. ANALYSIS & DISCUSSION

1. Inconsistency of Open Access and Unbundling Arrangements in Laws and Regulations related to Natural Gas Management in Indonesia
A. Inconsistency in Open Access Arrangements
Arrangements regarding natural gas governance are generally regulated in the Oil and Gas Law, and a number of related implementing rules are under it. Related to open access, it should be underlined that there is no single phrase in the Oil and Gas Law, which states the open access mechanism. The Oil and Gas Law, especially in Article 8 paragraph (3) only regulates "open utilization". Article 8 paragraph (3) stated: "The business of transporting natural gas through pipes involving public interest, the operation is regulated so that its utilization is open to all users".9

In international practice, there are 4 (four) open utilization. As explained in the previous section, that the four forms of open utilization are: first, Negotiated Access, a business entity voluntarily shares the use of facilities with other parties through a business-to-business scheme based on an agreement, without any regulation requiring facility owners to share utilization with other business entities. Second, Third-party Access, where there are regulations that require business entities owning transportation facilities to share utilization with other parties, if there is still more capacity that can be used by other parties. Third, Common Carriage, where pipeline facilities are required to be accessible to all users without capacity constraints. Fourth, Open access, where facilities built by a Business Entity are shared with the principle of first come first serve. The regulation requires owners of transportation facilities to share the utilization of facilities as long as they are within the maximum capacity limit. This scheme also separates between facility managers (Transponder) and users (Shipper).

If the provisions of Article 8 paragraph (3) of the Oil and Gas Law are related to in connection with the four forms of open utilization, it can be concluded that Article 8 paragraph (3) The Oil and Gas Law is leaning on a type of Common Carriage, where pipeline facilities are required to be accessible to all users without limitation of capacity.

So, what about the implementing regulations of the Oil and Gas Law regarding this matter? There are a number of laws and regulations that regulate further provisions regarding this open utilization scheme. Among others are:

a. Government Regulation Number 67 of 2002 concerning the Regulatory Agency for the Supply and Distribution of Oil Fuels and Business Activities of Transporting Natural Gas through Pipes. The provisions in this PP General Explanation read "... natural gas transportation activities so that their utilization is open to all users". If analyzed, it can be concluded that this PP adheres to the scheme of utilizing the open Common Carriage.

b. Government Regulation Number 36 of 2004 concerning Downstream Oil and Gas Business Activities. There is an explanation in the Elucidation of Article 31 paragraph (1), which reads: "...towards Pipeline Transportation facilities that have more capacity to be utilized by other parties without interfering with the operational activities of the owner ... other parties who will utilize the facility must consider the economic interests of the facility owner, among others, the rate of return ". The word "can be utilized by others" concludes that the concept of an open utilization scheme adopted by this PP is Third-party Access.

c. The ESDM Minister's Decree Number 1321K/20/MEM/2005 explicitly uses an open access utilization scheme.

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9 Indonesia, Regulation Number 44 Year 1960 Mining Oil and Gas (LN Year 1960 Number 133; TLN Number 2070), Article 3 part (2)
d. BPH Migas Regulation Number 11 of 2007 explicitly uses an open access utilization scheme.

e. BPH Migas Regulation Number 15 of 2008 explicitly uses the scheme of open access utilization.

f. ESDM Minister Regulation Number 19 of 2009 concerning Natural Gas Business Activities through Pipes using an open utilization scheme in the form of open access, unless it can be in the form of dedicated downstream, (self-use) for Business Entities that cannot utilize Transmission Pipes and/or Distribution Pipes together in one Certain Commerce Areas due to technical and economic constraints. This is clearly explained in Article 9 and Article 10 paragraph (1) and (2).

B. Inconsistency in Unbundling

If we look at the Oil and Gas Law, specifically Article 23 paragraph (3), which reads: "Every Business Entity can be given more than 1 (one) Business Permit so far as it does not conflict with the provisions of the applicable legislation". This means that the Oil and Gas Law is not an imperative or facultative choice in applying to unbundle. Textually there is no obligation to separate commercial and transportation businesses, and there is no article that prohibits bundled schemes (prohibited norm).

Using grammatical interpretation, Article 23 paragraph (3) of the Oil and Gas Law cannot be interpreted as the absolute spin-off, mainly to be applied to businesses that were previously integrated but then required to be separated. Systematically, the phrase "can be given" in regards to the location of sub chapter this article which is in the licensing arrangement, the intended article is interpreted as permission-based on fulfilling permit prerequisites while not contradicting other relevant laws and regulations, for example with practice law monopoly and unfair business competition. Based on that, it can be concluded that Article 23 paragraph (3) is not intended as a prohibition; and not to give birth to lower regulations that prohibit bundled integration.

However, this is very different from the arrangements contained in Ministerial Regulation Number 19 the Year 2009 contained in the articles contained in the "Second Part" concerning Natural Gas Transportation Business Activities through Pipes, which regulate unbundling as mandatory or obligation for all business entities in the downstream sector. Also in the Explanation of Article 14 PP 36/04 paragraph (1) letter b regulates the principle of separate business (unbundling) for the business of transporting through a pipe. To conclude the provisions of unbundling in the explanation of PP 36/04 and Ministerial Regulation Number 19 the Year 2009 are considered as Juridical defects because its substance is contradictory with Oil and Gas Law, therefore other derivative regulations based on the PP 36/04 are material defects.

As mentioned by Hans Kelsen in his Stufenbau Theory:

"that the legal system is a system of stairs with tiered rules in which the lowest legal norms must hold to higher legal norms, and the highest legal norms (such as the constitution) must hold to the most basic legal norms (grundnorm)".

As explained in the previous section, there are 4 (four) types of unbundling systems, namely: Account unbundling, Functional unbundling, Legal Unbundling, and Unbundling Ownership. Of the four types of Unbundling, Indonesia uses the Unbundling Ownership, where infrastructure activities and supply activities must be

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10 Maria Farida, 2007, Ilmu Perundang-undangan, Kanisius, Yogyakarta, p.53
11 Maria Farida, 2007, Ilmu Perundang-undangan, Kanisius, Yogyakarta, p. 37
carried out and owned by different entities, and each of these entities may not have ownership in both activities.

The Oil and Gas business is divided into 2 (two), namely: first, Upstream Business Activities which include exploration and exploitation, and secondly, Downstream Business Activities which include processing, transportation, storage, and trading. This aims to avoid vertical integration from upstream to downstream. Based on this, the Business Entity conducting oil and gas exploitation in the upstream sector is prohibited from conducting oil and gas exploitation in the downstream sector, and otherwise, the Business Entity that engages in oil and gas business in the downstream sector is prohibited from conducting oil and gas exploitation in the upstream sector.

Robert Priddle as Executive Director of the International Energy Agency (IEA) in the Journal in 1998, that:

"Gas and sold like any other goods, but transportation in most cases is a natural monopoly; it is generally inefficient to build competing networks - particularly for local distribution - because of economies of scale, although some aspects may not be monopolistic, e.g., mastering. Thus, the supply of gas to end-users in most cases always involves the element of monopoly - even in a competitive market”.

With that being said Even though the Oil and Gas Law requires the creation of fair competition in the operation of natural gas through pipelines, however, there are natural monopoly characteristics in the activities of transporting natural gas through transmission pipes and distribution pipes. Priddle argues that natural gas commodities can be traded like other trade commodities, but there is a natural monopoly characteristic in transportation through transmission pipes and/or distribution pipes. In principle, it is not profitable to build a competitive pipeline, especially for local distribution pipelines, given the small scale of the business. So, from the explanation, it can be seen that there is a collision between the provisions of the legislation that regulates oil and gas governance. One of the most highlighted is the provision of Permen Number 19 of 2009, which substantially collides with the provisions contained in the Oil and Gas Law itself.

2. The problem towards “Efficacy” and “Certainty” principle in the arrangements of the Open Access system and Unbundling system

From the explanation, it can be seen that the existing implementing regulations have different interpretations of the open utilization scheme adopted by Article 8 paragraph (3) of the Oil and Gas Law. Confusion in this meaning certainly has a significant influence on the implementation of natural gas governance in Indonesia. Efficacy refers to the final goal, namely the Act is adhered to. For this reason, the Law must be certain and does not open opportunities for other interpretations (certainty principle) so that it is easy to operate.

Does the open access arrangements in the Oil and Gas Law fulfill the certainty principle? Article 8 paragraph (3) which says "The business of transporting natural gas through pipelines involving public interest, its operations are regulated so that its utilization is open to all users” from here there are two interpretations, namely:

1. Open utilization is required by the Law because it is based on the relevance of the business closed with the public interest.

2. Open utilization is required by law, as long as there are related public interests.

The consequences of the differences in the two interpretations:
If the second meaning is referred to, then open access is facultative, so it is not binding because its applicability refers to the presence or absence of public interest that must be held. Conversely, if the first meaning is referred to, open access is imperative. Using the method of systematic interpretation, it is not the first meaning meant by the formator of the Oil and Gas Law. Referring to the explanation that says "Because the Natural Gas pipeline contains natural monopoly, its utilization needs to be regulated and monitored to guarantee the same treatment of service to the users". In conclusion, judging from the construction of the downstream business arrangements in the Oil and Gas Law, the scheme of open utilization cannot be declared as an imperative norm. Moreover, in law theory, there are always sanctions that always follow the enforceability of imperative norms, but not so with open utilization arrangement where there are no articles to enforce these provisions.

3. How is the concept of open access and unbundling in natural gas governance reviewed from a people's economic perspective?

Indonesia is a materiel reechstaat (Welfare State), because in the 1945 Constitution, it emphasizes the obligation of the government inherent in the welfare state, namely promoting public welfare, educating the nation's life, and realizing social justice for all people. (Moh. Mahfud MD, 2000). Natural gas as a strategic commodity in the 1945 Constitution of the Republic of Indonesia (after this referred to as the 1945 Constitution) is regulated in Chapter IV concerning the National Economy and Social Welfare, especially in Article 33 paragraph (2) and (3). Article 33 of the 1945 Constitution paragraph (2) reads: "Production branches which are important to the State and which control the livelihood of many people are controlled by the State." While paragraph (3) reads: "earth, water, and natural resources contained in it, controlled by the State and used for the greatest prosperity of the people".

The Constitutional Court stated that the definition of "controlled by the state" must be interpreted as control by the state in the broadest sense derived from and derived from the conception of the sovereignty of the Indonesian people over the source of wealth "earth, water and natural wealth contained in it" including the definition of public ownership by the collectivity of the sources of wealth. The people collectively are constructed by the 1945 Constitution giving a mandate to the state to hold 5 (five) types of authority, namely: first, policy (beleid), second, management actions (bestuurdaad), third, regulation (regelendaad), fourth, management (beheersdaad), and fifth, supervision (toezichthoudensdaad) for the maximum purpose of prosperity people. And it should be noted that the five provisions constitute a unity that cannot be separated from each other. From this interpretation, it can be concluded that basically the concept of State control contained in Article 33 of the 1945 Constitution consists of 2 (two) main points, namely: first, natural resource management is controlled by the State through the 5 (five) types of authority, and second, the results of the management of natural resources are used as much as possible for the prosperity of the people. If we connect with the potential of natural gas found on Indonesia, then the obligation of the Government to guarantee the availability, smooth distribution, and affordability of prices for the people of Indonesia, by using 5 (five) authorities as mentioned above, which leads to the prosperity of the people as a whole.

12 Constitutional Court Decision Number 36/PUU-X/2012
Historically, the birth of the Oil and Gas Law was influenced by the requirements contained in the Letter of Intent (LOI), when in 1997, Indonesia was in a monetary crisis and had to obtain loans from the World Bank and the IMF. LOI relies on the principle of capitalism that wants liberalization in the management of the national economy. Its implementation is through the deregulation of financial institutions, investment, including provisions on oil and gas. The impact is the necessity of legislation in the economic field to be adjusted to the requirements of the LOI, so that the provisions of Article 33 of the 1945 Constitution are only formalities, but do not become spirits in the substance contained in those articles of legislation.

In its journey, the Oil and Gas Law proved to be full of economic interests that were contrary to the constitution. A number of Articles contained in the Oil and Gas Law have been canceled by the Constitutional Court because they are considered contrary to the constitution, such as the provisions regarding the existence of BP Migas, provisions of Article 22 paragraph (1) concerning obligations of at most 25% of production output, to the provisions of Article 28 paragraph (2) concerning the surrender of oil and gas prices to the market mechanism. But it turns out, after the cancellation of a number of Articles in the Oil and Gas Law by the Constitutional Court, several issues related to oil and gas governance are continuing. One of them is about the problem of implementing Open Access and Unbundling systems that are loaded with liberalization values.

Actually the provisions regarding Open Access and Unbundling in the Oil and Gas Law have been judged to the Constitutional Court, but these provisions are considered not in conflict with the constitution. But uniquely, in the Constitutional Court Decision, Number 001-021-022/PUU-I/2003 canceled the unbundling system in the Electricity Law because Unbundling was considered to reduce the meaning of "controlled by the State to an important branch of production that controls the lives of many people" because it is a limitation and the narrowing of the authority or power of the State in controlling electricity as an important production branch of the State. In addition, the concept of unbundling is believed only to trigger private parties who only want to use electricity in certain fields (Free Riders).

The concern of the unbundling arrangements in oil and gas provisions from the beginning was worrying that many traders would become a free rider. Free riders refer to parties in which they are trading, but do not want to build infrastructure. This is because it is not profitable to build a competitive pipeline, especially for local distribution pipelines, given the small scale of the business, as mentioned before by Robert Priddle that Natural Gas utilization always contains Natural Monopoly characteristics. Sure enough, according to the research, Prof. Iwa Garniwa from Universitas Indonesia Research & Community Engagement stated that that the low absorption of gas supply in the country was due to the lack of gas distribution infrastructure. Meanwhile, economist and researcher at the UGM Center for People's Economic Studies, Fahmi Radhi, expressed the same thing, the limitation of the gas pipeline network became a key factor in the low absorption in the country. The problem is increasingly complicated, coupled with the rampant practice of gas traders, those who have no pipeline but have been allocated gas due to political closeness. The majority of researchers agreed that since the implementation of the unbundling system in Indonesia, infrastructure was not well developed. The implementation of unbundling in strategic commodity activities such as natural gas causes the downstream natural gas business to become a long chain, and automatically the costs will be higher, and the end of the selling price will be higher so that this does not...
reflect the objectives of the constitution, especially Article 33 for "the maximum prosperity of the people".

V. CONCLUSION

There has been an inconsistency in the Open Access and Unbundling arrangements in legislation related to natural gas governance in Indonesia. This can be seen from the contradictions of the Oil and Gas Law with the implementing regulations that are under it related to the interpretation of the open utilization scheme adopted by the Oil and Gas Law, for example, which is contained in Permen Number 19 of 2009 and PP 36/04. The concept of open access and unbundling in natural gas governance is contradictory to the objectives of the populist economy carried out in Article 33 paragraph (2) and (3) of the 1945 Constitution. The facts show that the implementation of open access unbundling turns the price up, so it does not reflect the purpose or mandate of the 1945 Constitution.

VI. SUGGESTION

The government needs to reconsider the implementation of Open Access and Unbundling system by referring back to the fact that this Open Access and Unbundling system does not fulfill the expectation to improve the infrastructure of natural gas utilization since majority of the private parties choose to become free rides in which they only want to sell the product, but they don’t want to invest on building pipe infrastructure. Open access and the Unbundling mechanism also fail to create an excellent competitive price so that the end consumer and the people can enjoy the benefits. We can use other developing countries with similar condition such as Thailand, in which they do not use open access and unbundling mechanism but they managed to improve natural gas production and infrastructure, it can be seen from the BP Statistical Review of World Energy 2018 that Thailand gas production increase, contradict to Indonesia where gas production keeps in unstable condition. In 2017, Indonesia’s natural gas production was dramatically lower than two years before, from 76.2 to 68.0, it is the lowest amount for a decade (2007-2017). There are so many inconsistency in the Open Access and Unbundling arrangements in legislation related to natural gas governance in Indonesia, and if the government continue this scheme, efforts need to be made to clarify the norms regarding "open utilization" by amending Article 8 paragraph (3) of the Oil and Gas Law to eliminate the multi-interpretation and adding the selected scheme. In this case, Third-party Access with tariff conditions is determined by the government to represent national interests better.

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