



Economic analysis of law on domestic market obligation policy and its impact on the public interest

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Abstract

Domestic market obligations (DMO) is a policy issued by the Ministry of Energy and Mineral Resources (ESDM) of Indonesia in order to charge coal mining entrepreneurs to supply their production to fulfill domestic market for Government needs by 25% of their total production. The main discussion of this research is the consequences of the public interest in terms of protecting the basic rights possessed by citizens such as electricity for the benefit of Indonesia in performing development in order to become a welfare state. And how to analyze the Domestic Market Bond policy in terms of the theory of economic analysis of the law. The research method used by the authors is included in the type of normative juridical research, namely an approach by examining legislation and legal theory in Indonesia, Source the data used includes primary and secondary, primary data is a source of data that is directly related to the object of research, namely the law the Decree of the Minister of Energy and Mineral Resources No. 139.K/HK.02/MEM.B/2021 about Domestic Market Obligation, secondary data is a source data describing primary legal materials which are the result of legal expert thought, namely books, scientific works, literature to electronic data sources. The data collection method in this study uses library research techniques. The data analysis used was descriptive qualitative. The results of this study are firstly, DMO policy which has similarities with the practice of monopsony (concentration of activities) is performed by Indonesia in for coal as the fuel to produce electrical energy. Then coal is a production material that concerns the livelihood of people. DMO policy has big consequences for State that is to maintain the stability of people's lives, and even increasing people economic activities and to build people's living standards at a level that is more prosperous than before. Secondly, Posner's analysis in the form of a positive economic analysis aspect, it is concluded that the DMO policy is an effort by the Government to optimize the costs, in this case coal as a raw material to produce electrical energy at affordable prices and can be enjoyed by Indonesia people, especially with the occurrence of energy scarcity due to rising prices of coal in global market.

Keywords: domestic market obligation, public interest, analysis economic to law

Introduction

Started since 2021 several states suffered the energy crisis that is caused by the lack of energy supply such as coal. To solve such problem, Indonesia Government throught it's Minister of Energy and Mineral Resources issued the Decree of the Minister of Energy and Mineral Resources (ESDM) Number 139.K/HK.02/MEM.B/2021 about the Fulfillment of Domestic Needs of Coal that issued by on 29th December 2020. It is stated in the Chapter of General Consideration of this decree that to keep the public need for energy, Indonesia Government determined the minimum percentage for Domestic Market Obligation (DMO) of coal sales for domestic purposes toward the business actors who hold Mining Business Permits in the Coal Production Operation stage, to provide and sell 25% from amount of coal production in 2021 as approved by Indonesia Government to PT. *Perusahaan Listrik Negara* (PLN) as State Electricity Company to fulfill the public need for energy. The price is set at maximum price of 70 USD per ton. However, this policy is considered less effective due to the lack of coal supply which should be deposited to PLN. According to the Minister of Energy and Mineral Resources Arifin Tasrif, he stated that There were only 47 companies out of a total of 587 coal mining companies which were fulfilled their Domestic Market Obligations.

Ironically, Indonesia has dependency for the use of coal for energy and electricity. So Domestic Market Obligation is needed for public's interest in Indonesia. Indonesia through PT. PLN is demanded to supply electricity to Indonesia people as appropriate with people's economic standard. And to serve it, Domestic Market Obligation policy obliged the business actors to sell 25% of from their total production with fixed price amount 70 \$ USD. In fact in on 1 January 2021, the global price of coal was amount of 200 \$ USD. It caused business actors sold their coal production to global market to avoid the domestic market obligation.

Based on explanation above, the Domestic Market Obligation policy has similarities with monopsony practices, there are; a. There is price set for coal, Minister of Energy and Mineral Resources (ESDM) be the price setter of coal and the business actor must sell their product to ESDM, b. There is legal barrier in form of regulation for business entity to sell their product in global market. Based on this explanation, there are two basic problems

from DMO policy for the sale of coal. *Firstly*, Indonesia Government determined PLN as the first purchaser for business entity to fulfill people welfare and prosperity. The need for cheap electricity is the obligation of Government to its people. So Indonesia Government must govern the domestic need for coal as the sources of electricity, especially when the cost of sale for coal is highly increase. the DMO policy is established by Indonesia

Secondly, the price that is set by Indonesia Government in the DMO policy has a large gap with price in the global market. In addition, the DMO policy requires coal mining entrepreneurs to sell 25% of their total production to Indonesia Government through PLN, resulting in a reduction in their income. Especially with the scarcity of energy which makes coal prices increase. This is why many coal entrepreneurs are absent from DMO obligations to Government. This resulted in the non-fulfillment of the DMO target threat. Therefore, Indonesia Government is faced with the dilemma of its obligation to fulfill the public interest or to follow the need and demand of coal mining entrepreneurs. Therefore, researchers are interested in researching the consequences of the public interest in terms of protecting the basic rights possessed by citizens such as electricity for the benefit of Indonesia in performing development in order to become a welfare state. And how to analyze the Domestic Market Bond policy in terms of the theory of economic analysis of law.

Research Methods

This research is included in the category of normative juridical research, namely research conducted by studying and reviewing legislation and legal theory in Indonesia to examine research in accordance with the problems to be studied. The data collection method used by the library research method is that this research is carried out by the author by reading, summarizing, and reviewing library materials related to research in the form of literature, relevant laws, regulations, and directly related to the object of research that is studied and used as a theoretical basis. Then the data is processed qualitatively and then presented descriptively by explaining, defining, and describing according to the problems that are closely related to this research.

Research Results and Discussion

Domestic Market Obligation and Monopsony Practices

Monopsony can be described as a condition when a business actor or consumer controls the receipt of inventory or becomes the sole consumer (buyer) of goods and services in a commodity market. The monopsony market practice is carried out by a business actor by reducing his purchases at the input and cost, and it results the price falling below the competitive level. Usually this single purchaser will sell in a monopoly way or at a high price. In this condition, the potential for public losses will arise because purchaser should have to buy the goods with market price but he can pay it with price below the market, and there is also the potential for unfair business competition.

The economic impact of a monopsony depends on the position of the monopsonist as a purchaser and seller in the relevant market. If the monopsonist is also a monopolist in the relevant market, the restriction on the purchase of goods will result in increasing the price that must be borne by the other buyer in the lower position, but if the monopsonist does not have the ability to influence the price in the market, then the monopsonist behavior that restricts purchases is useless. This is because a monopsonist has the power of "purchaser power" in the form of a position to dominate the purchase or he has high bargaining position as a purchaser. So the purchaser as the monopsonist has the power to set a favorable price for himself. The characteristics of a monopsony market are as follows

1. There is only one buyer in the market.
2. Buyers are not consumers but traders/producers.
3. The goods sold are raw materials.
4. The price is determined by the buyer.

While the elements of monopsony are

1. There are business actors
2. There is Mastery
3. The existence of goods and services
4. The existence of monopolistic practices
5. There is unfair business competition

Domestic market obligations (DMO) is a policy issued by the Ministry of Energy and Mineral Resources (ESDM) of Indonesia through the Decree of the Minister of Energy and Mineral Resources No. 139.K/HK.02/MEM.B/2021 about Domestic Market Obligation. In the Ministerial Decree, coal entrepreneurs are have to supply their production to fulfill domestic market for Government needs by 25% of their total production. The DMO policy stipulates that coal must be supplied to Government through PT. PLN with maximum price of 70\$ USD per tonne. Conceptually, the DMO policy that is decided by the Minister of Energy and Mineral Resources of Indonesia has characteristics similar to the behavior of monopsony such as a market has a purchaser and several producers. In DMO policy, PT. PLN is a purchaser appointed by the Government as a consumer/purchaser to purchase coal. As the purchaser, PT. PLN as State Electricity Company is also ordered to acts as a produce electricity and it must be distributed to the people as its consumers. Coal is the raw material

that becomes the fuel to activate the Steam Power Plant (PLTU) and it is used to generate electricity for the people's consumption. In purchasing coal, there is a price fixing that does not refer to the global market price. Theoretically, monopsony market practice is performed by the Government through PT. PLN as a purchaser by reducing its purchase at the input cost of raw goods in the form of coal, subsequently resulting in a decrease in prices with prices that have been regulated (price set) below the competitive level.

Although there are conceptual similarities between practice in DMO policy and the practice of monopsony, but there are some exceptions in Indonesia Law No. 5 of 1999 on Business Competition. In Article 51 which is resulted that DMO policy can still be implemented by Indonesia Government. The consideration of the exceptional practice of monopsony is about object of the DMO policy which has similarities with the practice of monopsony (concentration of activities) is performed by the state in the form of coal as the fuel for PLTU to produce electricity. So that in principle the coal is a production material concerns the livelihood of many people. Because coal is raw material as fuel for electricity, so coal is natural resources that are needed and controlled by the state to meet the people's interest for electricity. The coal has characteristic 'allocation', which means coal is a raw material will be used to produce electricity, then it will be distributed to Indonesia people. Therefore, the function of the coal is to maintain a stable energy supply to the Indonesia people. So the need for domestic coal must be regulated by special regulations.

DMO as a Facility for Realizing Development and Social Welfare

The implementation of the concept of state monopsony as described above is a derivative of idea program regarding the state's right to control and manage all existing State resources. For this right, the State can take necessary actions as long as these actions are aimed to ensure the implementation of the protection of the public interest. The ideal vision of what is contained in the idea of the state's right to control is to put State as a central position in conducting regulations related to activities for utilizing various state resources for the greatest prosperity of the people. Furthermore, as previously explained, the idea of the state's right to control is also based on the principle of protecting the public interest which is one of the ideals of the majority of modern States, including Indonesia.

The public interest is commonly interpreted as both the people interest and the development interest. The people interest is a concept that tends to perceive the State as a guardian of the stability for the rights held by citizens, for example the right to life, property rights, the right to give opinion, and the right to own basic needs for a decent life such as electricity. Meanwhile, the interest of development puts State as being in charge to run the principle of welfare State, where the must help it's citizens to a better, prosperous life through improving the standard of living regardless of all rights that have been performed citizens. Therefore, the logical consequence of the public interest is that if in terms of protecting the basic rights carried by its citizens, such as to fulfill livelihood of people such as electricity. If State is unable to perform it, it is difficult to judge that the State is able to carry out development towards the ideals of a Welfare State. These consequences will have implications for the trust of the social community towards the State and State administrators.

Theo Huijbers defined that the public interest (*bonum commune*) is the overall context of protecting the rights for every individual citizens and its is related with the maintenance of public services. On a similar side, Van Poelje defined public interest as the interest which must be realized by the Government through Government policies. Furthermore, Imam Koeswahyono stated that public interest is an effort to fulfill the needs that are intended for the sake of the community. Meanwhile, Schenk explained that the principle of public interest is an interest that produces greater benefits than losses. And according to Julius Stone, the principle of public interest is a balance between the interests of the state, rulers, society, and individuals. As for Van Wijk, he interpreted the public interest as a legal claim for citizens that must be realized by the Government for the welfare of people's lives.

From some of the descriptions above, it can be found that the public interest is actually the responsibility of the State or Government to perform the sovereign will of its people through the policies in order to realize the welfare or prosperity of the people as much as possible. So in the context of the development of the Indonesia, the functions of State sovereignty have a very large role in playing a role as a representation of the will of the Indonesian people before the international community in seeking agreements that can include strengthening Indonesia's economic development for welfare or prosperity of Indonesia people as much as possible, as stated in the provisions of Article 33 of the Constitution of 1945. Article 33 (3) of the Constitution of 1945 stated that "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.", this includes the supply of energy for the public interest. So based on Article 33 of the Constitution of 1945 explained that the economic system adopted by the Indonesi is based on a people's economy or 'economic democracy' which aims to realize the welfare and prosperity of the people as economic development goals.

In the context of development in the era of modernization, increasing economic activity has become important for people. Because human's needs must be obtained and used to maintain their life. However, economic activity in the midst of social life must be defined, considering the needs of each individual in society are very diverse and complex. Therefore, almost of modern countries run on a "track" called as Constitution which comes from the will of the people and contains rules for living together in State, including regulating economic activities. Even State is charged with the responsibility to guarantee and ensure the distribution of rights for economic

activities can be carried by every citizen through legal provisions that can be issued at a later date, and in condition that these provisions are based on the Constitution.

Directly or indirectly, all economic activities both in micro and macro level must be in line with Constitution and under the supervision or management of State through its Government organs. This is intended solely to guarantee and protect the rights of all citizens for their life and prosperity. Minerals and coal are contained in the soil of a State and become the sources of State wealth. It has important value for economic activity. The economic potential of coal is very large. This potential will not only help in terms of sustaining human life. But it also has potential can be used for the purpose of increasing the standard of human life to a more prosperous life.

So, coal as fuel for power plants has a very vital position for the public interest. Because electricity in this modern development period has become the livelihood of many people. This is where the importance of the law begins to exist and to ensure the livelihood of people. Indonesia already stipulated it into the provisions of its Constitution in Article 33 of Constitution 1945. In line with explanation from Ismail Saleh, he explained that the economy is the backbone of the people's welfare, but it cannot be denied that the law is an institution that ultimately determines how this welfare can be enjoyed and realized in social life. So it is clear that the management of coal energy State with its set of regulations is very much needed for increasing national energy security and supporting sustainable national development.

DMO (Domestic Market Obligation) policies is implemented for goods and or services related to people's livelihoods such as coal. In principle, the DMO concept is used by Indonesia to help maintain the stability of the supply of products for domestic consumption. Including coal which is an fuel or power generation to produce electricity, so in order to maintain the stability of all economic activities of citizens for electrical energy, DMO is considered very helpful. Several vital determination have been set, namely: 1) requiring coal mining companies to sell their coal production to domestic coal users in a predetermined amount, 2) determining the amount domestic coal demand, 3) determining the Minimum Percentage of Domestic Coal Sales (PMPBDN) for coal production from each coal mining company, 4) prohibiting coal mining companies from selling their coal for export if they do not meet the amount of sales to domestic coal users.

After seeing the main content of the DMO provisions, it is understandable that this regulation has big consequences for Indonesia. The consequence of this regulation, it charged Indonesia Government in maintaining the stability of people's lives, and It must be responsible in increasing people economic activities in order to help people build their living standards at a level that is more prosperous than before. As the opinion of Leonard J. Theberge, that the main factor for law to play a role in economic development is the ability of law to create stability, predictability, and fairness.

The Relationship of Domestic Market Obligation (DMO) Policy to Economic and Social Development in The Perspective of Economic Analysis of Law

Basically Law and Economy are two different variables and disciplines, having different paradigms and scientific traditions. According to Adam Smith (1723-1790) in his book *The Wealth of Nations*, he defined that economics is a study to learn human efforts to improve and meet the needs of their life in society. Meanwhile, according to Utrechts, law is a set of rules (orders and prohibitions) that govern the order of a society and therefore must be obeyed by that society.

These two variables are different but related to each other. One of legal studies that uses economics and law approach is economic analysis o law. Basically this study is based on the basis of belief that economics can also be a very powerful tool to be used in analyzing legal issues with a very broad scope. Like the economy, the legal system is also closely related to administrative matters that can be treated rationally. From this explanation, it can be understood that law with all of its complexity can be analyzed with considerations of economics approach. Then, economic analysis of law is an interdisciplinary science that tries to see the existence of law from economic principles. This is because economics is the science of rational choice, and the task of economics in law is to explain implication from an assumption that human are rational maximizers of their desires in the form of self-satisfaction.

Economic analysis of law or economic approach to law is a legal study which is written by Richard A. Posner who entitled his book as *Economic Analysis of Law*. The model of economic analysis of law developed by Posner derived from the concept of utilitarian that has been initiated by Jeremy Bentham. Utilitarian terminology came from the word utility (utility), which means everything that produces, profit, pleasure, happiness and evil, torment and unhappiness.

Posner then responded to this utilitarian thought by initiating the concept of economic analysis of law which based on the core of utilitarian concept from Jeremy Bentham. Humans as rational beings are always given the choice to do everything in order to get satisfaction or economic happiness which is finally achieved by increasing prosperity (wealth maximizing). Human goals originate from desires, and to determine the benchmark of a desire, Posner in the economic concept of law argued that every human desire can be measured by knowing the extent to which human efforts are made to sacrifice in order to reach their desire, either with money, actions, or other contributions which can be obtained. So to enforce law and to reach justice in law. To do so, the law must be used as an economic tool to achieve the maximization of happiness.

According to Posner, economic analysis of law has two aspects, namely the aspect of positive economic analysis and the aspect of normative economic analysis. The aspect of positive economic analysis focuses on the

importance of cost efficiency as the output of a policy as a form of public investment through state authority. In the other side, the normative economic analysis aspect views that if something is good, ideally it will also be good, it means law should be able to predict the consequences of its existence for public welfare and it does not cause unnecessary losses. It can be concluded that economic analysis of law is a legal analysis that is constructed with using economic concepts in order to be able to explain, evaluate and estimate the nature, capability and quality of legal consequences from law, therefore it can be predicted what and how to apply it.

The use of this analytical approach is prepared with economic considerations without eliminating the element of justice. Justice is an economic standard that underlies 3 basic elements, namely value, utility, and efficiency based on human rational power. According to Posner, a value can be interpreted as something meaningful or important and a desire, both it can be tangible or intangible, than the nature which attached to it is the form of interests to achieve satisfaction. While utility is used as the basis for making decisions by humans in order to obtain the expected benefits. This decision is taken by considering and distinguishing between definite profit and loss and uncertain profit and loss, thus uncertainty is a risk that must be faced.

Efficiency is closely related to the notion of economic value savings. Everything can be said to be efficient if the goal can be achieved with maximum production and minimal sacrifice. When it associated with law, a legal regulation can be said efficient if there are no transaction costs, such as the cost of obtaining information about the regulation (cost of acquiring information). In addition, the efficiency of legal regulations can be measured when transaction costs become endogenous to the legal system, which means that legal regulations can reduce barriers to private bargaining. In the case of DMO policy, various efforts have been taken by Indonesia to ensure the fulfillment of people needs. One of them is implementing a domestic market obligation (DMO) for coal to coal mining entrepreneurs. Hence they have to sell 25% of their total coal production to Indonesia Government through a state-owned company, namely PT. PLN so that it can be used for people welfare. However, out of 587 coal mining companies, only 47 have fulfilled their responsibility for DMO policy.

It because of due to the large price gap between the standard price of coal on the global market that is USD 200\$ per tonne in January 17, 2022 and the price determined by the Government in the DMO policy by setting a maximum price of USD 70 per tonne. According to Posner's view, human as rational beings are always given the choice to do everything in order to get economic satisfaction or happiness which is ultimately aimed for increasing their prosperity (wealth maximizing). Then, rationally, coal entrepreneurs will choose to seek the maximum profit by being absent from the DMO obligation.

However, basically the reason of Government charged the implementation of DMO to coal mining companies is to fulfill the people needs in electricity as energy. Coal is one of the raw materials that is needed as fuel to produce electrical energy from PLTU. By using Posner's analysis in the form of a positive economic analysis aspect, it is concluded that the DMO policy is an effort by the Government to optimize the costs, in this case coal as a raw material to produce electrical energy at affordable prices and can be enjoyed by Indonesia people, especially with the occurrence of energy scarcity due to rising prices of coal in global market. In the other side, according to Posner's normative economic analysis, the DMO policy can be seen as an ideal policy to fulfill people needs in order to enjoy affordable price for electricity, then DMO policy is being able to predict the consequences for the welfare of the people (maximum overall social utility). Besides it will not cause huge losses for coal mining companies because coal mining companies are only required to sell coal with the amount of 25% of their total production to Indonesia Government. So DMO policy can be charged to coal mining companies even though this policy has similarities to the practice of monopsony.

There are things that are considered very important to highlight from this DMO policy. That is the determination of sanctions in DMO policy. The sanctions are determined for coal companies which do not perform the obligation to provide at least 25% of their total production to sale to Government, the sanctions are: 1) prohibition of export activities, 2) payment of fines, and 3) compensation payments. Although this policy contains sanctions as described above, from the facts previously stated, it is revealed that the majority of mining companies do not perform their DMO obligations. This gives an understanding that most of these companies leave their obligations because their consideration is based on the ratio of positive aspect of economic analysis to the law, thus human will obey or disobey rules is based on which side is the greater benefit for himself. So it can be judged that the disobedient of coal mining companies to perform these legal obligations because the ratio of losses they will experience from sanctions is light for them compared to the profits they will receive so far.

Therefore, for the purpose of maintaining the interests of the profit ratio Indonesia should pay attention to the determination of sanctions norms in this DMO policy with based on the aspect of normative economic analysis of law such as increasing the quantity and quality of sanctions who ignore their responsibility to perform DMO policy. This is based on the normative analysis argument of economic analysis of the law which explains that a norm should influence people's behavior in seeking profit. So the estimated sanction must be heavy and it will provoke coal mining company to act in accordance to applicable regulation and not to violate them.

Conclusion

Domestic Market Obligations (DMO) is a policy that is issued by the Ministry of Energy and Mineral Resources (ESDM) of Indonesia through the Decree of the Minister of Energy and Mineral Resources No. 139.K/HK.02/MEM.B/2021 about Domestic Market Obligation. In the Ministerial decree, coal entrepreneurs are required to supply the domestic market (Government) needs by 25% of their total production. DMO policy stipulated that coal must be supplied to Indonesia Government is regulated at a price of 70\$ USD per tonne.

Although there are conceptual similarities between the DMO policy and the practice of monopsony, there are some exceptions in Law No. 5/1999 on Business Competition. This can be observed by seeing that the object of the DMO policy which has similarities with the practice of monopsony (concentration of activities) is performed by Indonesia in for coal as the fuel to produce electrical energy. Then coal is a production material that concerns the livelihood of people. DMO policy has big consequences for State that is to maintain the stability of people's lives, and even increasing people economic activities and to build people's living standards at a level that is more prosperous than before.

For the purpose of maintaining the interests of the profit ratio for State, Indonesia should pay attention to the determination of the sanction in this DMO policy based on the aspect of normative economic analysis of the law, such as in increasing the quantity and quality of sanctions ignore their responsibility to perform DMO policy. This is based on the aspect of normative economic analysis of the law which explains that a norm should influence people's behavior in seeking profit. Therefore the estimated sanction must be heavy and it will provoke coal mining company to act in accordance to applicable regulation and not to violate them.

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