

The Urgency of Guarantee Off Takers in Increasing Investment Oil and Gas Mining

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Article	Abstract
<p>Keywords: Investment; Guarantee off Taker; Oil and Gas</p> <p>Article History Received: Nov 07, 2022; Reviewed: Nov 22, 2022; Accepted: Nov 25, 2022; Published: Nov 28, 2022;</p>	<p>The investment climate for oil and gas mining since 2000 has continued to decline until now. This can be attributed to various factors, one of which is the lack of certainty regarding buyers of oil and gas at the downstream stage. This will certainly have an impact on the development of oil and gas mining, so that it can have a wider impact on welfare aspects. This study will discuss the urgency and reasons for the inclusion of a guarantee off taker as one of the clauses in an oil and gas contract. This study uses a normative method with a statutory and conceptual approach. This study found that there are at least 3 dimensions of urgency and reasons for the inclusion of an off takers guarantee clause, namely the dimension of people's livelihood based on Article 33 paragraph (3) of the 1945 Constitution which mandates efforts for people's welfare because through large investments people's welfare should also increase. Next is the dimension of the oil and gas business which has a high risk that requires certainty in selling oil and natural gas. The last dimension is the investment dimension.</p>



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Introduction

The mandate of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia indicates a necessity for the natural resources contained in the earth to be controlled by the state and used for the greatest prosperity of the people (Nurmardiansyah, 2014). The provision is the existence of a welfare state paradigm that requires the control of the means of production as a vital object related to the livelihood of the wider community (Qurbani, Rafiqi, 2022). One of the vital objects controlled by the state is oil and gas resources.

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The reason for the existence of special arrangements related to oil and gas resources is that national development must be directed to the realization of people's welfare by carrying out reforms in all aspects of national and state life based on the Pancasila and the 1945 Constitution (Rafiqi, 2021b). Thus, we can see that Indonesia's strategy is for non-renewable natural resources to contribute in creating business activities, further boosting job-creation (Rafiqi, 2021a). Oil and gas that is independent, reliable, transparent, empowered, competitive, and an environmentally friendly industry, which encourages national and potential development whilst also providing a legal basis legal basis for regulatory and structuring steps for the operation of oil and gas (Qurbani, 2012). As a resource strategy, the state's control over the natural wealth of oil and gas contributes to the country's economic growth in addition to taxes. In 2020, non-tax state revenues from the natural resources sector reached Rp. 79.1 Trillion and the achievement of Rp. 104.1 Trillion by 2021.

However, the oil and gas industry faces several challenges. The value of state revenues in the oil and gas sector in 2020 decreased by 40.47% when compared to 2019. The decline in state revenues was due to a decrease in upstream oil and gas investment. In 2020, upstream oil and gas investment was US\$10.52 billion, a decrease of 10.54% from 2019 which was US\$11.76 billion. Likewise, oil and gas production has also decreased. In 2020, national oil and condensate production was 708.33 thousand barrels of oil per day (Mbopd) which decreased by 4.94% compared to 2019 which was 745.14 Mbopd. Meanwhile, national gas production in 2020 is 6,679 million standard cubic feet per day (MMscfd), which has decreased by 7.68% compared to 2019, which was 7,235 MMscfd (Umah, 2021a). In fact, the government targets oil production to reach 1 million barrels per day and gas as much as 12 billion cubic feet per day by 2030 (Ridwan, 2021).

The decline in oil and gas production resulted in a decrease in sales of oil and gas production. Domestic oil sales in 2020 were recorded at US\$569.45 million or about 28% lower than sales from 2019. Meanwhile, natural gas sales in 2021 were recorded at US\$2.26 billion or 17.8% lower when compared to 2019 (Umah, 2021b). If you look closely, this fact is correlated with a decrease in the level of investment as indicated by several oil and gas contractor companies leaving Indonesia. The contractors argued that the oil and gas investment climate in Indonesia was no longer attractive. In connection with the discourse of reducing investment above, apart from overlapping regulations to the complexity of the licensing process, it is also caused by the absence of guaranteed purchases of oil and gas products in the downstream sector (Firwan Aprizal, et.al., 2013).

Based on Government Regulation Number 67 of 2002 concerning Regulatory Agency for the Supply and Distribution of Oil Fuel and Business Activities of Transportation of Natural Gas Through Pipes, the Downstream Oil and Gas Regulatory Agency (BPH Migas) functions in supervising the implementation of supply and distribution of fuel oil and gas through the earth so that the availability and distribution of fuel oil can be guaranteed throughout Indonesia (Prananingtyas, et.al., 2021).

However, the regulation does not regulate the authority to guarantee the purchase of oil and gas products. In fact, the authority of BPH Migas in guaranteeing this purchase is quite important to provide certainty for the sale of production to investors. The legal vacuum of this purchase guarantee is not only detrimental to investors but will also harm the government as the mining authority and the owner of

oil and gas natural resources. Moreover, this reality is exacerbated by exploration and exploitation activities that require large operational costs for a long period of time so that it can be said that the oil and gas business is a business that has a high business risk. Based on this phenomenon, in this article, the author will review the problems of upstream oil and gas investment. In addition, this paper will also show the legal vacuum regarding the guarantee of appointment of oil and gas buyers in the downstream sector. It is hoped that this article will provide a breakthrough for legislators to formulate normative provisions to overcome the problems of oil and gas investment that occurred thus far.

Method

This research uses normative research methods also known as doctrinal legal research (Marzuki, 2009). This study will identify the urgency of implementing a guarantee off taker in Indonesia. The approach used in this research is a statutory approach and a conceptual approach. The search for legal materials uses a literature study through a study of books and other scientific papers related to the guarantee off taker in oil and gas.

Result and Discussion

1. Status Quo: Oil and Gas Investment

As a source of energy and raw materials, the oil and gas industry play an important role in industrial growth in Indonesia. Coordinating Minister for Economic Affairs, Airlangga Hartanto said that the oil and gas industry contributes an investment of US\$10 billion per year, on the other hand, the oil and gas sector also provides a multiplier effect factor that can reach 1.6 times with a fairly high absorption of labor (Ridwan, 2020). According to the Executive Director of Reforminer, Komaidi Notonegoro, the oil and gas industry affects 40 percent of people's livelihoods nationally and 67 percent globally (Solehudin, 2016). In 2017, state revenues from the oil and gas sub-sector reached Rp138 trillion from the 117 percent target of the 2017 Revised State Budget of Rp118.7 trillion. In 2020, Secretary General of the Indonesian Energy Council (DAN), Djoko Siswanto, saw the realization of the national energy policy (KEN) and Indonesia's general national energy plan (RUEN) in 2020, the oil and gas sector was still the majority at 50.8 percent (Embu, 2018).

In addition, if you look at the KEN and RUEN targets in 2025, the utilization of oil and gas is still at 47 percent, which is still higher than coal, which is targeted at 30 percent in 2025. On the other hand, the contribution target for new and renewable energy (EBT) is 23 percent in 2025, meaning that the oil and gas sector will still dominate domestic energy production. Moreover, for the 2025 target, oil and gas are expected to still contribute 44 percent, coal 25 percent, and NRE 31 percent. This means that oil and gas are still the mainstay to meet domestic energy needs (Akbar & Prasetya, 2021).

In addition to margin in the form of calculated value, the oil and gas industry also provides other benefits such as being able to be used as fuel; source of liquefied gas; chemical industry production materials; source of polymer production; source of fiber material production; source of polyurethane material; source of a kitchen instrument material; source of a car production materials; source of fertilizer

processing; source of power generation; components of medicinal ingredients; and solar electric propulsion (Weir, 2015). In terms of employment and resources, the oil and gas industry has a role in moving other industrial sectors or derivatives of the oil and gas industry and creating jobs. This is in accordance with the opinion of Salim HS who said that mining can bring better development and increased welfare (Salim, 2014).

Based on the record of national average oil and gas production per day in the first quarter of 2021, there were 679,500 barrels of oil equivalent per day (BOPD) of petroleum and 5,539 million standard cubic feet per day of gas (MMSCFD) of natural gas. In the hope of increasing achievements in the second quarter of 2021, the Special Task Force for Upstream Oil and Gas Activities (SKK Migas) seeks several things to achieve lifting and production targets in 2021, including well maintenance and an increase in workover well drilling programs (Rahma, 2021).

Several processes have been strengthened and improved, investment in the oil and gas sector until the second quarter of 2021 has only reached US\$ 9.07 billion or 53.95% of the target earlier this year, which was US\$ 16.81 billion (Agung, 2021). Director of Oil and Gas Program Development at the Ministry of Energy and Mineral Resources (ESDM), Dwi Anggoro Ismukurnianto, revealed that the current total oil and gas realization figure is supported an upstream of US\$ 7.65 billion and a downstream of US\$ 1.42 billion, whereas the initial target for oil and gas investment in 2021 consisted of an upstream of US \$ 12.38 billion and a downstream of US \$ 4.43 billion. The realization of this investment is still minimal due to delays in ongoing oil and gas projects, especially in the downstream sector, which occurred for the Refinery Development Master Plant (RDMP) and Grass Root Refinery (GRR) projects.

Comparatively, the domestic increase in national oil and gas investment has a different ratio with international oil and gas investment. The Energy Information Administration (EIA) through a June 2021 report estimated that global oil demand will return to an increasing level of 5.4 million BOPD in 2021 and 3.1 million BOPD in 2022. This is also supported by the report of the Organization of the Petroleum Exporting Countries (OPEC) in June 2021, which stated that global crude oil demand in Q2-2021 increased by 14.4% or 11.99 million BOPD when compared to Q2-2021. which has succeeded in increasing world economic growth by 5.5% in 2021 (U.S. Energy Information Administration, 2022).

Oil and Gas Management in Indonesia is regulated by Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, where oil and gas reserves must be managed and controlled by the state for the prosperity of the people, which includes the upstream to downstream oil and gas sector (Partamayasa, Anjarmara, 2020). Thus, if the management of oil and gas is vertically integrated with the status of holding and subholding, so long as the management aims to provide maximum prosperity for the state and people, it will still be aligned with the Indonesian Constitution. In 2017 there was a change in the management of oil and gas in Indonesia, where there was a change in the fiscal system from Production Sharing Cost (PSC) cost recovery to gross split (Marroli, 2017).

Gross Split Scheme is a calculation scheme for the results of the management of oil and gas working areas between the Government and oil and gas contractors calculated in advance, where the State will receive oil and gas revenue sharing and taxes from exploration and exploitation activities so that State revenues become more certain and the state will not lose control due to the determination of the territory

(Nadzir, 2017). employment, production and lifting capacity, as well as profit sharing are still in the hands of the State. Therefore, the implementation of this scheme is believed to be better than the previous profit-sharing scheme (Marroli, 2017).

The Ministry of Energy and Mineral Resources (ESDM) has issued Ministerial Regulation Number 08 of 2017 concerning gross split profit sharing contracts, which specifies the format and terms of the production sharing contract (Asmaul Husna, et.al., 2017). The terms that must be included are: i) ownership of natural resources remain in the hands of the Government until the point of delivery; ii) the capital and risks are entirely to be borne by the Contractor; and iii) the control of operations management lies with SKK Migas. This eliminates concerns about the diminishing role of SKK Migas after the implementation of the gross split profit sharing contract as SKK Migas will still oversee the submission of the Plan of Development (POD), increasing oil and gas lifting, oil and gas work safety, including the level of domestic content (TKDN) and supervision of the workforce and assets (Marroli, 2017).

Unlike Indonesia, several other countries have different ways of managing oil and gas. In Malaysia, there is a regulation which stipulates that efforts that hinder the management of oil and gas will violate the law and be punished by sanctions, the existence of this sanction significantly improves the efficiency of the Malaysian Government in managing its oil and gas resources (Lanawaang, 2020). This is one of the significant differences between oil and gas management in Indonesia and Malaysia. On the other hand, Saudi Arabia uses a two-legged policy of oil and gas governance system, namely by combining the regulatory and business functions of oil and gas governance. Another support that exists in Saudi Arabia is the government which is cooperative in supporting oil and gas exploration and production financially and non-financially, regardless of whether or not there is a separation of the three business functions, regulations, and policies.

2. Downstream Oil and Gas Management

The business process in upstream oil and gas will eventually end up in the downstream stage to commercialize oil and gas so as to generate income for the state and investors (Salinding, 2017). Downstream is a process that cannot be separated from the exploration and exploitation process because it is an interrelated continuation chain. The downstream process focuses on increasing the added value of oil and natural gas so that it has a high selling value.

The downstream process is not only related to the commercial process but also related to the processing, transportation, and storage processes. Thus, the downstream process has an important point in the oil and gas management chain. The regulation regarding downstreaming is separate from the management of upstream oil and gas due to the differences in the management bodies that exist in the upstream and downstream processes of oil and gas. This difference was later affirmed by the Constitutional Court as a constitutional matter based on the Constitutional Court Decision Number 65/PUU-X/2012 which states that the downstream management of oil and gas carried out by the Downstream Regulatory Agency (BPH) of oil and gas does not create legal uncertainty (Ramadhan, Rafiqi, 2021). The Constitutional Court considers that the oil and gas BPH is not the same in terms of the working mechanism with the oil and gas BPH so that the unconstitutional BP oil and gas cannot be the basis for the revocation of the oil and gas BPH.

In practice, the management of oil and gas has various problems, from the limitations of oil and gas infrastructure to the inability of oil refineries to accommodate the increasing demand for oil. In addition, there are limitations in the distribution pipeline amid the increasing number of gas reserves in the eastern part of Indonesia, such that it cannot be distributed to the western region (Syeirazi, 2018).

Normatively, BPH oil and gas carries out a commercial function based on Article 4 of Government Regulation Number 67 of 2002 concerning the Regulatory Agency for the Supply and Distribution of Oil Fuel and Business Activities of Transporting Natural Gas Through Pipelines are only limited to commercial nationally. This means that the management of oil and gas by BPH of oil and gas is not carried out (sale) to outside parties. This of course limits the commercial function of oil and gas BPH only nationally, even though there is a great interest in guaranteeing the purchase of oil and gas.

The function of the BPH of oil and gas is to supervise the implementation of the supply and distribution of fuel oil and transportation of natural gas through pipelines, in which they have the following duties:

- a. Regulate and determine the availability and distribution of fuel as well as national fuel reserves which are expected to implement the principles of sustainability in it. A concrete example in it is the Regulatory Agency instructing the formation of Presidential Regulation of the Republic of Indonesia Number 69 of 2021 concerning the Second Amendment to Presidential Regulation Number 191 of 2014 concerning the Supply, Distribution and Retail Selling Price of Oil Fuel, where this regulation has an impact in the form of the Regulatory Agency implementing direct appointments made by subsidiaries in the distribution of tasks to business entities as well as determining the retail selling price of certain types of fuel in the form of diesel oil at the delivery point for each liter calculated by a formula that includes the base price plus Value Added Tax minus subsidies and added Motor Vehicle Fuel Tax.
- b. Regulate the utilization of fuel transportation and storage facilities, where it is expected that fuel transportation and storage will be carried out in safe and strategic locations. One example of the direct impact of this task is that the joint utilization of fuel transportation and storage facilities in Bandung has been carried out by oil fuel business entities with a B to B (business to business) mechanism including in determining tariffs and there has been no report on the occurrence of obstacles to agreement in determining tariffs. includes the period of joint use of transportation, storage, and supporting facilities (Badan Pengatur Hilir Minyak dan Gas Bumi (BPH Migas), 2020).
- c. Determine the price of natural gas for supermarkets and natural gas distribution transmission business, where the price is adjusted to the economic conditions of the community and the state which will later determine the highest retail price with an affordable normal average. In determining the price of natural gas, the government divides several consumer groups, which include Household 1 (RT-1) covering flats and simple houses, Household 2 (RT-2) covering middle to upper class houses and luxury homes, Small Customers 1 (PK-1) includes orphanages, places of worship, and social institutions, and Small Customer 2 (PK-2) includes hotels, restaurants, shops, and private educational institutions.

In addition to having this function, in carrying out its duties, the Regulatory Body has the authority to, firstly, determine the obligations of business entities that will or have carried out the supply and distribution of fuel oil in Indonesia to carry out operations in areas where the market mechanism has not yet been implemented and remote areas. This authority aims to ensure equitable distribution of the utilization of the production of fuel oil and natural gas. This can be seen from the government's program in the form of One Price BBM where the government assigned Pertamina (a company which sells oil and gas) to build several fuel points in the 3T (Outermost, Frontier and Disadvantaged) areas.

Second, determine the volume of allocation of fuel oil reserves from each business entity in accordance with the business license to meet the national reserves of fuel oil set by the government. National oil and gas reserves play an important role in persevering through crises since it acts as a form of energy security which will support community production during said period. The obligations of this business entity can be seen from BPH Migas Regulation Number 9 of 2020 concerning Provision of Oil Fuel Operational Reserves where Pertamina itself has provided storage capacity for a period of up to 23 days.

Thirdly, determine the joint use of transportation and storage facilities for fuel oil and its supporting facilities owned by business entities in conditions that are urgently needed and/or support distribution optimization in remote areas. Indeed, not all business entities operating in the downstream sector have adequate transportation and storage facilities, while on the other hand, they are obligated to distribute oil and gas supplies in certain areas. Therefore, BP Migas has the authority to regulate the joint use of facilities owned by certain business entities so that other business entities can use them.

Fourth, determine tariffs for natural gas transportation through pipelines in accordance with technoeconomic principles. The principle of technoeconomics emphasizes the disclosure and calculation of the economic value contained in an engineering work plan. Even in BPH Migas Regulation No. 34 of 2019 the determination of tariffs by BPH Migas is carried out first by holding a hearing meeting with transporters and shippers as well as other stakeholders.

Fifth, determine Natural Gas for households and small customers by considering the ability and purchasing power of the community. The determination of natural gas prices is in line with the mandate of the Constitutional Court Decision Number 002/PUU-I/2003 which cancels the fixing of natural gas prices and is left to a fair and reasonable business competition mechanism. The constitution has given the responsibility to the state to control the production branches that affect the livelihood of the people through direct control over the fixing of natural gas prices. However, this provision does not intend to eliminate business competition, but to protect the interests of certain groups so as to guarantee the meaning of economic democracy in order to prevent the practice of the strong eating the weak (survival of the fittest). As can be seen recently, the government has decided to increase the price of Pertamina fuel by revoking the subsidy. However, what needs to be emphasized is that the government still considers the interests of certain groups of people by continuing to provide subsidies to Pertamina fuel whose market share is the middle to lower economic group.

Sixth, establishing and enforcing an information system on business and regulatory accounts for Business Entities conducting business activities for the transportation of Natural Gas through pipelines.

Seventh, resolving disputes that arise against the holders of special rights for the transportation of Natural Gas through pipes and/or related to the implementation of the activities of Transportation of Natural Gas through pipes. Special rights owned by business entities relate to the operation of transporting natural gas through pipes on transmission lines or distribution network areas based on auctions.

Eighth, propose to the minister of finance the amount of the contribution of business entities that have business activities in the field of supply and distribution of fuel oil and transportation of natural gas through pipelines, and stipulate fees for special rights to transport Natural Gas through pipelines. Ninth, granting special rights to transport Natural Gas through pipelines on certain sections of Natural Gas transmission through and in certain areas of the natural gas distribution network through auctions, based on the national natural gas transmission and distribution network master plan.

We can thus see that the Regulatory Agency plays an important role in carrying out its duties as the monetary party for the supply and distribution of BBM, because the Regulatory Body is the main body that has the greatest responsibility and authority for determining BBM nationally, where decisions made and determined by the Regulatory Body will have an impact to the economic and political activities of the community.

3. Guarantee Off Taker in Increasing Investment Oil and Gas Mining

The absence of a guarantee off taker in the downstreaming of oil and gas raises investor concerns in constructing the refinery. Of course, with the large costs incurred in the oil and gas mining process, the mathematical calculations will be higher in this business. With a large capital in oil and gas mining plus a large risk in conducting exploration and exploitation, it is only natural that a guarantee off taker is held in an oil and gas agreement.

At least there are several reasons related to the inclusion of a guarantee off taker clause in oil and gas contracts, including that oil and gas are normatively recognized as natural resources that have an impact on the livelihood of many people as confirmed by the Constitutional Court Decision Number 002/PUU. -I/2003, the state certainly has more responsibilities and obligations in fulfilling the needs of the people. Thus, due to the limitations of the state in carrying out oil and gas mining independently, so that another party is needed in this case is a private contractor, the state must prioritize the common interest between private contractors and the people.

In terms of the interests of private contractors, apart from the ease of licensing, the state must also be ready to become the buyer party with a guarantee off taker mechanism. This is in line with the fulfillment of the people's interest in oil and gas. With a guarantee off taker mechanism, the interests between the two can be balanced. However, it is possible that the buyer who provides the guarantee is another private party, provided that there is no material or immaterial state loss from the sale. This situation is one of the reciprocal steps of the state to the private sector in optimizing oil and gas mining.

The second reason for having a guarantee off taker is because the cost of mining for oil and gas is very expensive. Thus, the state needs other parties to assist this process. This high cost must also be taken into account with great risk. This is also in line with Dhanny Jauhar who stated that large investments in oil and gas mining are needed. The large costs and risks are certainly not a good business aspect, although if

successful the profits from mining are also very large. With the high number of uncertainties in oil and gas mining, at least the state as the party that controls natural resources, at least provides relief to private contractors by guaranteeing purchases or looking for parties willing to guarantee purchases. In this way, of course, downstream oil and gas will be more certain in the future (Putri, 2021).

The third reason is to further stimulate the oil and gas investment climate in the midst of various global uncertainties. Bearing in mind also that investment in oil and gas in Indonesia continues to decline. The Special Task Force for Implementing Upstream Oil and Gas Business Activities in 2018 recorded the value of oil and gas investment in Indonesia reaching US\$2.4 billion. The investment value increased compared to 2017 which only reached US\$1.9 billion or with a growth percentage of 26.3% (Nugroho, et.al., 2018). However, this investment figure must continue to be evaluated, considering that investment in the upstream oil and gas business has decreased significantly compared to the early 2000s. Currently no more than 10 exploration wells are being drilled, whereas in the early 2000s, 150 wells were drilled. for exploration (Pudyantoro, 2019). Through this guarantee off taker, the investment climate will be better considering that this provision is one of the aspirations of private contractors in oil and gas mining.

In accommodating off taker guarantees, the state can become a buyer or intermediary to find buyers from other parties who are not parties to oil and gas mining. This is considering that there are limitations of the state in buying oil and natural gas, so other alternatives are needed, namely other parties who are able and able to buy oil and gas. With this provision, the synergy between the private sector and the state in oil and gas mining will be more solid and the investment climate can be better because the state is the guarantor to buy, and if it is unable or unwilling to buy, the state has the obligation to find other parties who are able to buy and want to buy.

With the existence of the guarantee off taker guaranteed by the state in the sale of oil and gas, this is in line with the mandate contained in Article 33 paragraph (3) of the 1945 Constitution which, when interpreted in its original intent, does not preclude foreign investment in Indonesia. The construction built in Article 33 paragraph (3) of the 1945 Constitution is to increase investment if the state is unable to manage it independently. Of course, in the case of oil and gas mining, the state is unable to manage it independently, so it requires another party to manage it, but control remains in the hands of the state. The most important thing is that the investment is used as much as possible for the prosperity of the people.

Conclusion

This study finds that one of the obstacles to the oil and gas investment climate is the absence of a guarantee off taker in the downstream oil and gas sector. This causes the growth of oil and gas investment to be more sluggish, so that a guarantee off taker is needed to complete it. The reason why the guarantee off taker must be part of the clause in the oil and gas contract is related to oil and gas which has the status as the livelihood of many people, then the costs incurred from mining oil and gas are very large along with the risks, and the last is to increase investment in oil and gas mining. This guarantee off taker can be part of the agreement clause or be regulated in the laws and regulations.

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