

Perspective of Cooperation in the Port Based on the Principle of Salus Populi Suprema Lex

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Abstract: *State companies must not be inferior to private companies or foreign companies that live and develop in Indonesia. But the inevitability of State-Owned Enterprises (SOEs) in Indonesia so far will likely end if Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter abbreviated to SOE Act is truly implemented in earnest and what is expected and the ideals of the establishment of this Law were not “betrayed by the Director of the State-Owned Enterprises (SOEs)”. State-owned enterprises (SOEs) as one of the agents of economic activity in the national economy have an important role in bringing about the welfare of society. This SOE Act desires to optimize the implementation of the role of State-owned Enterprises (SOEs) in the national economy in order to realize the welfare of the community. The optimization of the role of SOEs is done professionally. The agreement between PT Pelabuhan Indonesia II Persero and HUTCHISON in the Jakarta International Container Terminal (JICT) has been no longer appropriate it violates the provisions Shipping Law and Port Law because PT. Pelabuhan Indonesia II in this case is not a regulator but an operator. So any form of contract or extension, whether foreign or local, must first coordinate with the Ministry of Transportation as a port regulator and there is also a reference from the SOE ministry, because there is a PNPB which is the country’s rights and authority.*

Key words: Ports, state enterprises, cooperation, JICT, SOEs

INTRODUCTION

Ports are all matters relating to the implementation of port functions to support the smooth, secure and orderly flow of ships, passengers and/or goods, safety and security of sailing, places of intra and/or intermodal movement as well as to encourage the national and regional economy by continuing to pay attention to the regional layout. Implementation of port functions to support smooth operation, passenger health security, legal status of ships, safety management (Alderton and Saieva, 2013; Gunawan, 2019). Ports are generally in the form of terminals and berths which are equipped with shipping safety and security facilities and other supporting port activities (Putra and Djalante, 2016; Gultom, 2017; Romadhon, 2018).

Article 2 Government Regulation No. 61/2007 concerning Ports Stating that: “This Government Regulation regulates the National Ports Order, Port Master Plans and the Working Environment and Regional Areas of Interest of the port, the implementation of activities at the port, construction and operation of ports,

special terminals and terminals for self-interest, tariffs, ports and special terminals open to foreign trade and port information systems”.

Abuse of authority occurs when authority is used for purposes that are contrary or not in accordance with the purpose of the authority given or determined by law.

Principle of legal certainty: The principle of legal certainty is a principle in the rule of law that prioritizes the basis of the laws and regulations, decisions and justice in every State administration policy.

Principle of public interest: The principle of public interest is the principle that puts public welfare first in an aspirational, accommodative and collective way.

The principle of openness: Openness is opening up to the right of people to obtain true, honest and non-discriminatory information against State administrators while still paying attention to the protection of personal, class and state secrets.

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Principle of proportionality: Proportionality is prioritizing the balance between the rights and obligations of the State administrators.

The principle of professionalism: The professionalism principle is a principle that prioritizes expertise based on a code of ethics and the provisions of the applicable laws and regulations.

Principle of accountability: The principle of accountability is a principle that determines that each activity and the final results of the activities of State administration must be accountable to the public or the people as holders of the highest sovereignty of the State in accordance with the provisions of the applicable laws and regulations.

What is needed now is the existence of a clear legal umbrella regarding the authority of port management, as well as the various implications that arise from such management. For example, if a port is managed by a region, profit sharing between the center and the regions must be guaranteed as well as between regions that control the port and other regions that use the port's services. At the same time, it also takes good faith from the parties to the dispute to sit together to find the best solution. "War of the proposition" which aims narrowly to seek personal victory and defeat the other party, it's time to throw away. Because, the safety and welfare of the people is the highest law (*salus populi suprema lex*) and that is what must be fought for together. The old habit of our officials to protect in the name of the interests of the community, but in fact there are other hidden interests, should be left far away.

In the context of port management, it does not matter who holds the role of regulator or operator, as long as it can produce mutual benefits.

Regarding the management of the legal umbrella port (Umbrella Act) is Law No. 17 of 2008 concerning Shipping. Where in Law Number 17 of 2008 concerning Sailing Article 5 paragraph (1) and paragraph (2) states that the Guidance for Shipping is controlled by the state and the guidance is carried out by the Government. Sailing Development as referred to in paragraph (1) includes: arrangements; control; and supervision carried out by the regulator in this case is the Ministry of Transportation of the Republic of Indonesia not the Director of the Indonesian Port II (Persero), because PT. Pelindo II (Persero) is in the territory of the Ministry of Transportation of the Republic of Indonesia. because the existence of the port is under the authority of the Republic of Indonesia Ministry of Transportation (Regulator), as stated in Article 72 paragraph (1) of Law Number 17 of 2008 concerning Shipping, stating the use of certain land and water areas as port locations is determined by the Minister in accordance with the Master Plan National Port.

Government Activities at the Port Article 80 of Law Number 17 of 2008 concerning Shipping, it is stated that Government activities at the port as referred to in Article 79 sub (a) and paragraph (3) include: regulating and guiding, controlling and supervising port activities and the guidance, control and supervision of port activities as referred to in paragraph (1) letter a shall be carried out by the port operator.

In Article 81 paragraph (1) sub (a) and sub (b) of Law Number 17 of 2008 concerning Shipping, it is clearly stated that the Port Operator as referred to in Article 80 paragraph (3) consists of the Port Authority or Port Operator Unit. And Article 82 of the Port Authority as referred to in Article 81 paragraph (1) letter (a) of Law Number 17 of 2008 concerning Shipping, is formed by and is responsible to the Minister. The Port Operator Unit as referred to in Article 81 paragraph (1) letter b is formed and reports to the Minister for the Government Port Operator Unit.

DISCUSSION

In connection with the agreement between the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (HPH) and PT. Pelabuhan Indonesia II (Persero) is no longer appropriate, because it violates the provisions of the Port Law Number 17 Year 2008 and Government Regulation Number 61 Year 2009 Port Law, because PT. Pelabuhan Indonesia II (Persero) in this case is not a regulator but an operator.

So any form of contract or renewal, whether foreign or local, must first coordinate with the Ministry of Transportation as a regulator where Shipping Guidance includes regulation, control and supervision carried out by the regulator in this case the Ministry of Transportation of the Republic of Indonesia, not the Director of the Indonesian Port II (Persero), because PT. Pelindo II (Persero) is in the territory of the Ministry of Transportation of the Republic of Indonesia. because the existence of the port is under the authority of the Republic of Indonesia Ministry of Transportation (Regulator).

Extension of cooperation between Hutchison Port Holdings (HPH) Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero) the legal basis is the Legal Opinion (Legal Opinion) of the Attorney General for the Civil and Civil Administration Director of the Recovery and Protection of the Attorney General's Right of the Republic of Indonesia Number: B-069/G/Gph.1/03/2014, dated March 17, 2014 related to PT. Pelabuhan Indonesia II (Persero) Extension of the Cooperation Agreement between PT. Port of Indonesia II (Persero) with the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (HPH) which will expire on March 27, 2019 based on article 20 of the Regulation of the Minister of State Enterprises Number:

PER-06? MBU/2011 dated December 30, 2011 concerning the Guidelines Utilization of BUMN Fixed Assets in conjunction with Article 26 and Article 32 of the Agreement in conjunction with Article 1338 of the Civil Code is true, Memorandum of Understanding (MoU) is and includes an agreement made by 2 (two) interested parties for it. Article 1338 of the Civil Code states that all treaties made legally apply as a law for those who make them.

Therefore an MoU made between 2 (two) parties will bind both parties. Both parties must comply with all the provisions as stated in the clauses contained in the MoU. This means that if one of the parties bound in the MoU violates the MoU, the other party can prosecute in the Court.

But on the other hand according to the Civil Code ("Civil Code") Based on Article 1320 of the Civil Code ("Civil Code"), the terms of validity of the agreement are as follows: terms of validity of agreement (terms of subjective):

- Agreement of the parties in the agreement
- The ability of the parties in the agreement

Terms of validity of agreement (terms of objective):

- A certain thing
- Halal

If an agreement does not meet the subjective conditions, then the agreement can be canceled. Meanwhile, if an agreement does not meet objective conditions, then the agreement is null and void.

The objective conditions here (for certain things and for halal reasons) are that the agreement violates as stipulated in Law Number 17 Year 2008 concerning shipping as stated in Article 344, paragraph (1) and paragraph (2), which states that "At the time this Law comes into force, the Government, regional governments and State-Owned Enterprises that operate ports continue to operate concessions at ports based on this Law. Within a maximum period of 3 years since this law comes into force, port business activities carried out by the Government, regional governments and State-Owned Enterprises as referred to in paragraph (1) must be adjusted to the provisions as regulated in this Law".

That reason, in our opinion, does not meet the elements of strong legal provisions and is not to become the benchmark for the legal umbrella (Umbrella Act), because: Legal opinion is not a legal product, as is the 1945 Constitution, Laws, Government regulations, Regulations, Instructions, Presidential Decrees and not even Judicial decisions (MA, MK and Courts) that have provisions strong law, as regulated in Chapter III Article 7 paragraph (1) of Law Number 12 of 2011

concerning types, hierarchies and material content of legislation, which states that the types and hierarchy of legislation comprise Laws The 1945 Constitution of the Republic of Indonesia, Stipulation of the People's Consultative Assembly, Government Acts/Regulations in lieu of Laws, Government Regulations, Presidential Regulations, Provincial Regulations and Regency/City Regional Regulations and Article 8 paragraph (1) and paragraph (2), Law No. 12 of 2011 regulates institutions (not only state institutions), which are authorized to form other laws and regulations, as follows: "Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations established by the People's Consultative Assembly, The House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, Ministers, bodies, institutions or commissions of the same level formed by Law or Government by order of the Law, the Council Provincial Regional People's Representative, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent".

Article 8 paragraph (2) of Law No. 12 of 2011 further stipulates that: "Legislation as referred to in paragraph (1) is recognized and has binding legal force insofar as it is ordered by higher regulations or formed based on authority". Regulations established by institutions as referred to in Article 8 paragraph (1) of Law No. 12 of 2011 with the condition "as long as ordered by higher legislation" can be said to be statutory regulation on the basis of delegation (Lex Superior Derogat Legi Inferiori. The higher law paralyzes the lower law).

Law number 17 of 2008 concerning Shipping and Government Regulation Number 61 of 2009 is stronger than the Decree of the Director of PT. Pelindo II (Persero). Vide Article 7 paragraph (1) and Article 8 paragraph (1) and paragraph (2) of Law No.12/2011.

Because in this case the Ministry of Transportation is a regulator based on Act Number 17 of 2008 and Government Regulation Number 61 of 2009 concerning Ports, while Regulators are required by the state to contribute to non-tax state revenue as regulated in Act Number 20 of 1997 concerning Non-Tax State Revenue (UU PNBP) jo Government Regulation Number 11 Year 2015 concerning the types and rates of types of tax revenue that apply to the ministry of transportation (PP PNBP).

Should be the Operations Director of PT. Pelindo II (Persero) must first discuss the concession with the Ministry of Transportation (Regulator) in accordance with the conditional permission of shareholders in this case the Ministry of BUMN in accordance with the letter of the Minister of State Enterprises No. S.316/MBU/2015 dated

9 June 2015 grants conditional permits instead of 100% absolute conditions on condition that the extension of the JICC concession must involve a port regulator (the Indonesian Ministry of Transportation) (Vide Article 82 paragraph (4) and paragraph (5) of Law No. 17/2008) But ironically the Director of PT. Pelabuhan Indonesia II (Persero) does not heed the Minister of Transportation of the Republic of Indonesia, which in fact is a regulator of Ports throughout Indonesia and continues to extend the contract with the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (HPH) with PT. Pelabuhan Indonesia II (Persero) without consulting the Ministry of Transportation before making a decision. This is for the sake of safety and success in making decisions even in the business world directors are asked to make quick business judgments.

This is clearly mistaken. Besides ignoring the Ministry of Transportation (Regulator) President Director of PT. Pelindo II (Persero) also does not care about the Letter No. S-318/MBU/6/2015 dated 9 June 2015 The SOE Minister did not necessarily approve the principle permit for the extension of the JICT concession but with the following requirements, first, pay attention to the letter of the Minister of Transportation Number HK.201/3/4 Phb 2014 related to the separation of the regulator and operator processes JICT concession extension is carried out in accordance with applicable laws and good corporate governance.

And also PT. Indonesian Port II (Persero) must follow and pay attention to the review conducted by the Director of BPKP No. LAP697/D502/2/2012 and strengthened by the oversight committee formed by the Director of PT. Pelindo II mentioned that the process of extending the JICT concession must be carried out by an open tender in order to achieve an optimal price (Best Value) as well as to avoid the risk of a bid bid claim claim attached to the tender in early 1999 but in reality after the amendment of the contract extension was signed by PT. Pelindo II (Persero) and HPH on August 5, 2014 Director of PT. Pelindo II (Persero) argued that it had shown the contract offer and challenged the offer better than other global operators such as DP World, APM Maersk Line, PSA and China Merchan Group which were fait accomply.

Director of PT. Pelindo II claims that the extension process has been reviewed by Jamdatun. The lies and closeness of the Director of PT. Pelindo II (Persero) answered by the Head of the Attorney General's Office, said that the AGO had never heard of the opinion of the Attorney General's Office. Unfortunately this Jamdatun opinion wants to be pitted with the Shipping Law and the PP of the Seaport (Minister of Transportation of the Republic of Indonesia).

The state loss from the financial aspect of the low sales of only USD 215 million compared to 1999

amounted to USD 243 million which should be at a price of USD 215 Hutchison Port Holdings (HPH only has a stake of 25.2% instead of 49%, all of this has not been added to State Revenue Non-Tax as regulated in Act Number 20 of 1997 concerning Non-Tax State Revenues in conjunction with Government Regulation Number 11 of 2015 concerning types and tariffs for types of non-tax state revenue Article 1 paragraph (1) and paragraph (2) which states that: Non-Tax State Revenues applicable to the Ministry of Transportation include receipts from: land transportation services, railway transportation services, sea transportation services, air transportation services, education and training services and facilities and infrastructure use services and administrative fines for all non-tax State Revenues that are applicable to the Ministry of Transportation must be deposited directly as soon as possible to the Head of Office s State.

Likewise in contracting or extending cooperation with both foreign companies and local companies, the Director of PT. Pelabuhan Indonesia II (Persero) must have a soul that reflects the characteristics of professionalism, honesty, integrity and high loyalty in forming high moral and ethical organizations, especially with regulators (the Ministry of Transportation).

Because after all the Ministry of Transportation has the authority and authority at the port it is contained in Law No. 17/2008 on Shipping and Government Regulation No. 61 concerning Ports so that there is no misunderstanding free from the influence of conflict of interest.

The question: Who has the right to determine whether or not the contract is extended with Hutchison Port Holdings (HPH) at the Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero), let us examine based on the law of the Indonesian Port, based on Article 1 paragraph (14) of Law Number 17 of 2008 concerning Shipping, it is stated expressly that "Portage is everything related to the implementation of the function of the port to support the smooth operation, security and order flow of ship traffic, passengers and/or goods, sailing safety and security, intra and/or intermodal moving places and to encourage national and regional economies while still paying attention to regional spatial planning.

From the question who is more entitled to determine the extended or non-renewed employment contract with Hutchison Port Holdings (HPH) at the Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero). Then the answer is: the ones entitled are the Ministry of Transportation of the Republic of Indonesia as Regulator, not the Director of PT. Pelindo II (Persero), based on the legal basis (Law Number 17 of 2008 concerning Shipping and Government Regulation Number 61 of 2009 concerning Ports).

Which determines the contract extension between the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (HPH) and PT. Pelabuhan Indonesia II (Persero) is the Ministry of Transportation as stipulated in Act Number 17 of 2008 concerning Shipping (Vide Article 80 paragraph (2) jo Article paragraph (1) paragraph (2) sub (a) of Law No.17 / 2008).

Solution and action: In this case, the Ministry of Transportation of the Republic of Indonesia (Regulator) can take the following actions (Action of standing):

- Coordinate first with the Prosecutor's Office whether Jampidum can make legal opinions on an official basis (although legal opinions can be done by institutions or individuals), if it turns out to be incorrect then the Attorney General can reprimand Jampidum. "That reason, in our opinion, does not meet strong legal provisions", because the legal opinion is not the 1945 Constitution, Laws, Government Regulations, Regulations, Instructions, Presidential Decrees and not even judicial decisions (MA, MK and Courts) that have strong legal provisions (Vide Article 7 paragraph (1) jo Article 8 paragraph (1) and paragraph (2) of Law No.12/2011)
- Coordinating with the Ministry of State-Owned Enterprises SOE as shareholders of State-owned Enterprises (SOEs) to follow up on the extension of cooperation between the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (JICT) and PT. Pelabuhan Indonesia II (Persero). This is in accordance with letter number S-318/MBU/6/2015 dated June 9, 2015. The Minister of SOE does not necessarily approve the principle permit for the extension of the JICT concession, but with the following requirements: first, pay attention to the Minister of Transportation's Letter Number HK.201/3/4 Phb 2014
- Coordinating with BPKP who has reviewed the letter of cooperation between PT. Pelindo (Persero) with Hutchison Port Holdings (HPH) at Jakarta International Container Terminal (JICT) No. LAP697/D502/2/2012
- Carrying out legal actions (legal action of law) both civil and criminal in related institutions (KPK/Bareskrim/prosecutors, BPK/BPKP/PPAT) to investigate, audit, trace the flow of money and detect whether there is fraud and or playing in extended the Hutchison Port Holdings (HPH) contract at Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero), because the Director of PT. Pelabuhan Indonesia II (Persero) is not a state organizer but a state-owned organ that is subject to the domain of private law

- Amend, concession and or cancel the contract extension between the Jakarta International Container Terminal (JICT) Hutchison Port Holdings (HPH) and PT. Pelabuhan Indonesia II (Persero). Because concession issues are regulated in Article 1 paragraph (30) of Government Regulation Number 61 Year 2007 concerning Ports, "Stating that the concession is the granting of rights by a port operator to a Port Business Entity to carry out certain port services and/or services within a certain period of time and certain compensation"

Because after all the Ministry of Transportation has the authority and authority at the port it is contained in Law Number 17 of 2008 concerning Shipping and Government Regulation Number 61 concerning Ports so that there is no misunderstanding free from the influence of conflict of interest, on the other hand the Minister of Transportation said the Hutchison Port Holdings (HPH) contract at the Jakarta International Container Terminal (JICT) with PT. Indonesian Port II should not be extended, but on the other hand the Director of PT. Pelabuhan Indonesia wants that the extension of the Hutchison Port Holdings (HPH) work contract in the Jakarta International Container Terminal (JICT) with PT. Indonesian Port II must be continued. For the sake of the safety and welfare of the people is the highest law (salus populi suprema lex), then the contract extension should be between the Hutchison Port Holdings (HPH) at the Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero) was canceled and that must be fought together.

CONCLUSION

Agreement between PT. Pelabuhan Indonesia II Persero and HUTCHISON at the Jakarta International Container Terminal (JICT) is no longer appropriate, it violates the provisions of the Shipping Law and the Port Law because PT. Pelabuhan Indonesia II in this case is not a regulator but an operator. So any form of contract or extension, whether foreign or local, must first coordinate with the Ministry of Transportation as a port regulator and there is also a reference from the SOE ministry, because in it there is PNBP which is the country's rights and authority. Extension of cooperation between Hutchison Port Holdings (HPH) in Jakarta International Container Terminal (JICT) and PT. Pelabuhan Indonesia II (Persero) the legal basis is the Legal Opinion (Legal Opinion) of the Attorney General for the Civil and Civil Administration Director of the Recovery and Protection of Rights Number: B-069/G/Gph.1/03/2014 dated March 17, 2014 related PT. Pelabuhan Indonesia II (Persero) Extension of the Cooperation Agreement between PT. Port of Indonesia II (Persero) and PT. Jakarta International Container Terminal with Hutchison Port Holdings (HPH) which will expire on March 27, 2019 based on Article 20

of the Regulation of the Minister of State Owned Enterprises Number: PER-06/MB /2011 dated December 30, 2011 concerning Guidelines for Utilization of BUMN Fixed Assets jo Article 26 and 32 Agreement in conjunction with article 1338 of the Civil Code is valid, Memorandum of Understanding (MoU) is and includes an agreement made by 2 interested parties for it. Article 1338 of the Civil Code states that all treaties made legally apply as a law for those who make them. Therefore an MoU made between 2 parties will bind both parties. Both parties must comply with all the provisions as stated in the clauses contained in the MoU. This means that if one of the parties bound in the MoU violates the MoU, the other party can prosecute in the Court. For the sake of the safety and welfare of the people is the highest law (*salus populi suprema lex*), then the contract extension should be between the Hutchison Port Holdings (HPH) at the Jakarta International Container Terminal (JICT) with PT. Pelabuhan Indonesia II (Persero) was canceled and that must be fought together.

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