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Critical Analysis of Indonesia- EU CEPA Negotiations, Learning From Vietnam

Foreign Private Monopoly Efforts To the Electricity Supply of New & Renewable Energy

Introduction

Jokowi's Government proclaimed for economic growth of 7% to 2019. An ambitious target in the midst of weakening world economy. Naturally, the economic growth is based on trading and investment activities. In order to increase the investment and export-import activities, bilateral and multilateral trade or bilateral trade agreements should be the means to be taken, including encouraging cooperation with the EU under the Comprehensive Economic Partnership Agreement (CEPA) scheme.

In the energy sector, the contribution of economic growth is expected come from the electrification target ratio. The electrification ratio of 90% is expected occur in 2019. In pursuit of the electrification target, Jokowi's government thrusting a 35,000 MW power plant program. An ambitious project which expected to be completed in 2019, the largest contribution of

coal at 24,000 MW, remains coming from Gas, Hydro, Geothermal, Wind and Solar.

The cooperation between Indonesia and the European Union in CEPA will promote a deeper liberalization, especially in the energy sector. Moreover, the renewable energy agenda as one of the issues that particularly become a great concern in the negotiation process. Reflecting to the Vietnam-EU CEPA, which has a special chapter on Non-Tariff Barriers to Trade and Investment in Renewable Energy Generations.

The intimate liberalization of the renewable energy sector within Indonesia-EU CEPA, particularly in electrification, would have a direct impact on the people's economy. Thus, this paper will address the issue of "Liberalization of Investment and Market Access of Renewable Energy Sector Sector In IEU CEPA", in order to observe the potential impact that will occur not only on the people's economy but also

on governance of the renewable energy sector in Indonesia, through taking studies from the agreement text of Vietnam-EU CEPA.

A. New Agenda of the Renewable Energy in Indonesia

National Energy Policy on 2005-2025 of The Government of Indonesia are based on the Presidential Decree No.5 of 2006 on National Energy Policy. The Presidential Decree has regulates the target of the Indonesian energy policy to reduces significantly the use of oil below 20% and replace it with energy of coal, natural gas (geothermal), biofuel and other renewable energy. Through Government Regulation No. 79 of 2014 on National Energy Policy the Government finally issued a new stance, namely boosting the utilization of New and Renewable Energy (EBT), and reducing the use of fossil energy sources. In the policy, the EBT mix target in 2020 is around 17%. Meanwhile, in 2025, the utilization of EBT is expected to 23%.¹

There are five steps of EBT development which has been prepared by the Ministry of Energy and Mineral Resources (ESDM) through the Directorate of Renewable Energy & Energy Conservation (EBTKE), namely: **First**, increasing the capacity of generating energy production, especially hydroelectricity (PLTA) and geothermal power plant (PLTP); **Second**, increasing an access to modern energy for isolated areas, especially rural energy development with micro-hydro, solar, biomass and biogas; **Third**, reducing fuel subsidy costs, where substitution of diesel power plants with EBT generators might reduce subsidies; **Fourth**, reducing greenhouse gas emissions; and **Fifth** a massive energy savings.²

The utilization of EBT is an effort to increase the electrification ratio in Indonesia, and to accelerate the diversification of energy for power generation to non-BBM, optimizing the utilization of geothermal and hydroelectric potentials, as well as to fulfill the increasing demand for electricity. In the construction of a 35,000 MW plant project, the ESDM Ministry features the construction of a power plant using Renewable Energy (EBT) fuel. This is in accordance with the proposed revision of RUPTL 2016-2025 from the Ministry of ESDM which gives a large portion on

the role of EBT. Capacity 35.000 MW divided into 50% coal power plant, 25% gas, and 25% EBT³. Indonesia's electricity investment target in 2015 has been realized at US \$ 11.2 billion and expected to increase in 2019 to US \$ 15.9 billion, mainly due to the construction of the 35,000 MW Electricity Program.

EU Investment Interests in the Renewable Energy Sector

In the last of 10 years, global investment in renewable energy sector has increasing and the EU is noted as a country with many activities in the world sector with an investment value of US \$ 52 billion⁴. In Indonesia, the Investment Coordinating Board (BKPM) claimed that there is an increase investment from the EU in this sector to US \$ 370 million for the construction of power plants derived from geothermal energy, hydropower and waste processing technology. Some countries are interested in investing such as Germany, Netherlands, Belgium, France, and Sweden⁵.

In the context of the EU Security against access to energy and raw materials, the EU Trade Agenda as outlined in the "EU Trade for All" document has intended to promote its safeguard strategy through energy and trade efficiency in the renewable energy sector and to reduce the monopoly of BUMN (the State Owned Entities/SOEs). As a form of the implementation of the Framework of the European Energy Union. This strategy will be regulated in every Free Trade Agreement (FTA) which made by EU through forming its arrangements in a special chapter⁶.

The EU's commitment to increase renewable energy sources will be the subject of discussion. Primarily concerning the trade in goods and renewable energy technologies. Access to markets should be opened as entrance of the equipment or personnel (the experts), in order to increase the use of renewable energy. Definitely, the tariff and non-tariff issues will not oblivious as the main subject. The heavy equipment or renewable energy technologies of EU's product will be an option in the development of renewable infrastructure energy.

1. JURNAL ENERGI Media Communication Ministry of Energy and Mineral Resources, Edition 02/2016, pg.10

2 Ibid

3. JURNAL ENERGI Media Communication Ministry of Energy and Mineral Resources, Edition 02/2016, pg. 67

4. <https://finance.detik.com/energi/3396365/dunia-berlomba-kembangkan-energi-terbarukan>

5. <http://www.bkpm.go.id/id/publikasi/detail/berita-investasi/eropa-minati-sektor-energi-terbarukan> and <http://www.kursksalvage.com/negara-eropa-incar-proyek-energi-baru-terbarukan/>

6. EU Trade For All, 2015, pg. 14

Vietnam - EU CEPA: "EU's Target Mirror Towards Indonesia"

Vietnam is the second country in ASEAN that has completed FTA negotiations with the EU after Singapore. However, compared to Singapore, the situation of Vietnam has in common with Indonesia. In fact, the EU will use Vietnam-EU CEPA as a template of its negotiations with ASEAN countries, such as the Philippines, Indonesia and Thailand, which are currently negotiating.

Concerning the energy issue, the Vietnam-EU CEPA document establishes the renewable energy as the focus of the agreement, excluding other energy sources such as oil, gas or coal. It has reasonable because Vietnam is a large country which using the renewable energy. As of 2006, 46% of Vietnam's energy production comes from hydroelectric power (Hydropower). Although in 2015, the percentage decreased to 34%, but in 2017 would increase 473 of hydro power plants. The EU sees the magnitude of renewable energy production in Vietnam as a huge potential for trade, services and investment. In Vietnam's long way to the use of renewable energy, experience, technology and resources are certainly available.

In the CEPA Vietnam-EU text document, there are 3 chapters that related govern concerning the liberalization of the energy sector, namely Chapter on services and investment, chapter on SOEs, and chapter on non-tariff barriers in trade and investment activities in the renewable energy sector.

Chapter of the Elimination of Non-Tariff Barriers in Trade & Investment in the renewable energy sector

The purpose of this chapter arrangement is to facilitate trade and investment by eliminating non-tariff barriers through the application of regional and international standards.

In its arrangement, this chapter accommodate the basic principles as a guidance in its implementation which contains several obligations for Vietnam and the EU. These obligations are⁷ : **First**, the parties are required not to apply any local content requirements (TKDN) or other requirements such as the use of

local suppliers, transfer technology, on the grounds of encouraging regional development.

Second, no requirements to the establishment of partnership with a local company, except for technical reasons at the request of one of the parties to the agreement; **Third**, prohibits the application of discriminatory acts in relation to the application of the policy of authorization, certification and licensing procedures, in particular to the related equipment, plant and transmission network infrastructure; and **Fourth**, prohibits applying discriminatory measures in the application of reservations on conditions and procedures for connection and access to power transmission lines.

The requirements for the prohibition of Local content requirement (TKDN) and the necessity of cooperation with local companies are regulated in the chapter of services, in particular in relation to market access governing modes 3, namely commercial presence, and chapter of investment on the application of performance requirements.

Afterwards, the EU has made a lot of red notes on the Indonesian policy, especially related to the investment. For example, related to the restrictions on foreign equity cap listed for foreign investors. For the electricity services sector, Presidential Regulation No.44 of 2016, regulates foreign ownership in the electricity sector for the field of power generation, transmission and distribution business is quite diverse, the lowest is 49%, 67%, to 95% - 100% with the provision of PPPs (public-private partnerships).

For the EU, restrictions on foreign equity caps require foreign investors to be partnered with local companies, and sometimes it has difficult because it is not easy to find local partners that meet the needs of investors. Thus, the EU desires to allow foreigners to own 100% unconditional ownership. In addition, BKPM implements the requirement for foreign investors to have minimum assets of US \$ 1 billion.

In addition, this chapter provides a standards that can be used as reference for implementation, such as ISO (International Organization for Standards) or IEC (International Electrotechnical Commission). Moreover, in the context of supplier declarations, it is prohibited to apply the requirement to conduct tests which are considered as a burden to the service supplier.

In the context of standardization, EU often complained with the obligate application of SNI certification

7. Article 4, Chapter on Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation, Vietnam-EU CEPA Text.

through the Government of Indonesia. There has a reason, the application of SNI raises an uncertainty for investors and its become a burden. Since the SNI certification process and its testing are considered to be time consuming and becoming a burden of the production cost. Moreover, the imposition of severe sanctions for non-compliance with SNI has considered excessive. Thus, SNI is considered as non-tariff barriers in trade for the EU which must be eliminated through the use of relevant international standards.

The most interesting is although this chapter does not explicitly make specific articles on disputes or sanctions, but in the context of violations in the application of the chapter, the parties are permitted to perform certain enforcement actions in order to save the production process of energy and energy supply. This article seems subjective and very flexible, thus it can be used arbitrarily by either party. And it could be happened that one of the aggrieved parties brought the case to a disputes settlement mechanism, for example under the Dispute Settlement Body of WTO or in international arbitration under the investor-state dispute settlement (ISDS) mechanism.

Chapter of the Foreign Investment Protection

One more important point in the Vietnam-EU CEPA document is on the dispute settlement or dispute between Investor and State or known as the Investor-State Dispute Settlement (ISDS) mechanism. If the protection of investment or trade is dominantly regulated in a CEPA document, the people outside the capital vortex that should savour or otherwise be victimized by the investment would not get the protection and space to have the right of liability, as well as the company or investor.

Through the introduction of ISDS mechanisms within the EU CEPA, Indonesia has potential to deal with foreign investors in International Arbitration. Moreover, the development of infrastructure in the electricity sector is being upgraded and with the unstable political and legal situation in Indonesia. According to a report from ICSID, the case in the electricity sector is on the first ranks with 31% of the total lawsuit, second, 27% of the oil and gas and mining sectors, and the remaining of 8% in the infrastructure sector⁸.

Furthermore, based on UNCTAD Report of 2017, it has stated that from all kind of cases that come to the international arbitration institution, at 60% of cases has won by Investors. While the amount that has to be paid by the government of the defendant could reach US \$ 545 Million not including the trial fee in the International Arbitration that achieved a hundreds of millions dollars for the attorney fees. Along with Indonesia itself has experienced as many as 8 times lawsuit by multinational investment.

Chapter of the BUMN (SOEs) Provision

State enterprises have recognized and mentioned as having a special rights and privileges including monopoly. However, a public company might also have special and privileges right, such rights granted by the parties to the agreement. Nevertheless, those designated companies are restricted from doing business or investing in national defense, security and order, including some services that become the governmental authorities.

Special rights and privileges of state enterprise or designated enterprises are not applicable, if within 3 years the company's income has less than 200 million of Special Drawing Rights (SDR). If it has converted to rupiah at current exchange rate, the income limit is at around 3.7 trillion IDR. It is quite high enough rate of income which showed that the state companies are encouraged to serve more commercially. A commercial action is encouraged by the text of Vietnam-EU CEPA. The activity of goods or services trading must be in accordance with the market and accessible markets, and giving space for the occurrence of monopoly.

Giving the monopoly rights to public companies mentioned in Chapter 10, notwithstanding for what has contained in chapter 8 in section 1, on investment liberalization. Monopoly is generally a state enterprise which contrary to a liberal system. But then, nearly all bilateral and multilateral trade agreements are involving the private sector. Not unless EU CEPA which would be involving the private to invest.

As well as the business type of public corporations that obtain the special rights and privileges, restrictions as well as apply to areas which not covered by investment liberalization, including mining, manufacturing, processing of nuclear material, weapons and air transport services. Especially for mineral mining, EU member countries - especially after the UK is out of EU membership - not many of them investing directly in Southeast Asia. They insert

8. ICSID Report 2015.

more emphasis on trading the mining product itself or called raw material.

In the investment chapter contains the obligations of the parties, the state-owned or designated enterprises have special rights and privileges to comply with the applicable rules to each party. It is mentioned that the company should not violate the rules which mentioned in the agreement document. Well – known as the rules stated in the CEPA document, it has higher position.

Regarding to market access, the chapter 8 and chapter 10 on investment liberalization and state enterprises, both of mention how markets should be an indispensable part of all trading activities, services or investments themselves. Withal an encourage to eliminating limits that detain the market access. Such as quota restrictions, monopolies, capital participation or stock ownership, especially regarding tariffs and non-tariffs.

Potential Impact of Indonesia-EU CEPA Towards the Development Direction of Nawacita

a. Conflict with Local Content Requirement Agenda of the Government of Indonesia & The Threat of Investor Lawsuit

The prohibition of the application of local content levels (TKDN) in the provisions of non-tariff trade barriers in the power plants sector of renewable energy in the EU CEPA will certainly contradict with the development spirit of Nawacita which has been established by the Government of Indonesia, especially in the context of strengthening the domestic industry.

In the national development agenda, the Government of Indonesia intends to increase the use of domestic products in all sectors, particularly in the construction of electricity infrastructure of 35,000 MW plants and 46,000 KM of transmission lines. The direction of this policy is regulated in Presidential Decree No.4 of 2016 on Accelerating of Development of Electricity Infrastructures⁹.

Regarding the obligations of TKDN, the Ministry of Industry of Indonesia acknowledges that the policy could encourage and stimulate the domestic industry. The target of Ministry of Industry for the implementation of TKDN in 35.000 MW project has TKDN average

expectation value of 32%. The government will boost the increase of TKDN in the electricity sector whose expectations can be compared to the TKDN in the mining sector which has TKDN average value of 70%.

Moreover, chapter of the non-tariff barriers in the renewable energy sector also prohibits discriminatory action between local products and imported products. Hence, that the procurement of government goods and services (government procurement) will be an obstacle in the implementation of TKDN liabilities.

Another threat is, if the Government of Indonesia remains consistent with the implementation of TKDN for the national industry, then Indonesia must be ready to deal with the two dispute mechanisms set out in the EU CEPA. Furthermore, it has possibility that there are foreign investors who could sued the Government in international arbitration because they feel aggrieved over the implementation of TKDN liability policy in this sector.

b. Monopoly of Knowledge and Technology by Foreign Corporations

Green technology investment in new and renewable energy sectors is inexpensive. Moreover, the technological innovation is not owned by Indonesia. As a result, Indonesia needs enormous foreign investment to realize Indonesia's renewable energy target of 25% to 2025.

The prohibition of requiring technology transfer in the chapter of non-tariff barriers of the renewable energy sector within the EU CEPA will certainly prevent Indonesia from participating in developing national research and knowledge for the public good. Evenless, this ban will make Indonesia continuously dependent with foreigners. Not only that, but also the monopoly of knowledge will also encourage the monopoly of production, distribution, and price. Thus, due to the foreign monopoly, the Government can not determine the basic electricity tariff which in line with the economic value of the people, but must adjust to the investor's economic value (read: tariff to return the investor's profit).

Definitely, the prohibition of technology transfer will be contrary to the purpose of investment in Indonesia as mentioned in Article 3 of the Investment Law No.25 of 2007, which states that one of the purposes of the implementation of investment is to increase the capacity and capability of national technology and to improve the welfare of the people.

9. <http://mediaindonesia.com/news/read/101224/pemerintah-genjot-penggunaan-komponen-lokal-di-infrastruktur-listrik/2017-04-18>

c. Legislation Transformation

Reflecting with the Vietnam-EU CEPA document about the renewable energy, the renewable energy development in Indonesia is slightly. The budget which provided by the APBN (state budget) is an under budget or well said as low budget, otherwise the selling price is always made an expensive. Moreover, the management or utilization is under state control. Definitely, according to the Vietnam – CEPA document it will changes due to harmonization actions against national regulations.

Indonesia has a wealth of the renewable energy sources, such as geothermal, wind, sun, water, ocean waves. For the new renewable energy sources can be produced from the type of rare earth mining. Through those types of renewable energy sources, Indonesia solely has a geothermal regulatory legislation. While other sources of renewable energy, generally contained in Law No. 30 of 2007 on Energy and Government Regulation (PP) No. 79 of 2014 on National Energy Policy (“KEN”).

The EU's mission to develop renewable energy is an accordance with the Energy and KEN Law. The renewable energy serving in the KEN in 2025, should achieve 23% of national electricity supply. In addition, Law no. 21 of 2014 on Geothermal, the absence of regulation on solar energy, water, wind and ocean waves, will not encounter any obstacles in the discussion of Indonesia-EU agreement. Precisely, it is possible that the rules will be made refer to the outcome of the agreement documents which has been negotiated by the parties.

The geothermal law has potential to experiencing of the substantial changes. Naturally, the first is pertaining to the status of a business entity or company which manages and utilizes the geothermal. The obligations of being the Indonesian corporations and / or domicile in Indonesia are considered to be difficult for foreign investment directing to Indonesia. Those requirement, certainly will be unbind in the rules of implementing (PP), or revise the Law.

In the context of electricity supply, the monopoly which has been owned through PLN, must be revised according to CEPA rules. Including, the provision in the determination of the unit price of electricity, shall be opened in accordance with the market. Through a market or liberal system, the network monopoly (grid) for electricity distribution by PLN, naturally will be one of the material to discuss. It means, there is a needs of the substance changes of in Law No. 30 of 2009 on Electricity.

Subsequently, on pricing and national standards. In the CEPA, it is precisely driven by the growing prices in international markets and international standards that must be considered. However, it is not rigidly referred to national provisions and national standards in the geothermal law, referring to or not to the market prices and international standards. Possibly, the changes has been made to confirm the substance.

Regarding to the procurement of goods or services, the geothermal law does not mention it at all. Nevertheless, it is possible that the procurement of goods and services in this investment activity should be revised because it is prohibited to discriminate against the utilization of imported to local goods. Since, Indonesia's geothermal technology is still in import.

d. Commercialization and Commodification in the Energy Sector

Whereas is not stated directly in the CEPA Vietnam-EU document, liberalization is encouraged to the charge of electricity prices. Opening of access and connection to the power transmission network of the parties, will create price competition or electricity tariff. Naturally it must be in accordance with market price or international standard.

It has concerned that the Indonesia-EU CEPA agreement referring to Vietnam-EU CEPA, then the liberalization of electricity unit price tariff will occur. PLN as a BUMN/SOEs, will be suppressed of using market mechanisms, and released its privileges. There will be price competition from each producer, if the government is unable to control the competition of the electricity price tariff, then, the people will be the victims. The price competition could happen, whether the foreign and national private companies which investing in electricity generation are no longer required to connect their grid power to PLN (read: on-grid). Afterall, the independent power plants are obliged on grid to PLN's electricity grid or sell it to PLN.

Meanwhile, the purchasing power condition of the Indonesian people has not improved yet in case to increase the cost of living expenses. In fact, the core of energy sovereignty is the existence of an easy access for society and management of energy resources by the state. Otherwise, it is expected from the CEPA economic agreement, namely market access that put on forward.

e. Against the Constitution

The Constitutional Court decision in Case No. 111 / PUU-XIII / 2015 has reinforced the Government's position, in this case PT PLN as a state-owned company, in the provision of electricity includes business power generation, transmission, distribution and sales of electricity. Through this decision, the Constitutional Court does prohibit this article to be the basic rules that require the business of electricity generation, electricity transmission, electricity distribution, and electricity sales conducted by the company separately.

The provisions of the prohibition of discriminatory action in the application of conditions and procedures for connection and access to electricity transmission lines, in the Non-Tariff Barriers in the electricity sector of renewable energy, will surely be contrary to the Constitution as decided in the Constitutional Court's decision. The practice of unbundling in the power sector will restrain the private sector. Moreover, PT PLN as the only State company that has implemented the obligation to provide electricity to the people has been strengthened.

Therefore, Indonesia-EU CEPA will be expose the opportunities for foreign monopoly in the important sector for the life of the people, ultimately which on contrary to the Constitution.

f. Privatization of natural resources and energy

Whether the special rights and privileges are restricted and even lost, PLN is one of the BUMN that receive the most influence of its. PLN will no longer be sole distributor of electricity grids, and the independent power plants are no longer required to sell the electricity to PLN. That kind of condition has been experienced by Pertamina, since the occurrence of liberalization in the downstream sector, Pertamina is no longer the sole of provider of fuel and major regulators in the context of oil and gas licensing. Fortunately, PLN and Pertamina to nowadays are still 100% owned by the government. If the parties agreed upon the EU CEPA agreement, these two energy companies will have the same foredoom, the government's shareholding will be degraded.

Indeed, Law No. 19 of 2003 on State-Owned Enterprises (SOEs), will not be oblivious to an adjustments. Particularly regarding to privatization, the privatized business category of companies and supervisory commissions. Currently, the House of Representatives has discussing the revision of the Law on SOEs, and extroverted to the discussion process of the crucial issues which stated above as an issues that have been encouraged to be ensured in the new law.*****

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