Jurnal IUS Kajian Hukum dan Keadilan
Volume 14 Issue 1, April 2026, E-ISSN 2477-815X, P-ISSN 2303-3827
Indexing: Scopus, DOAJ, Sinta 1, open access at : https://jurnalius.ac.id/

State Control over Gross Split Contracts in Indonesia's Upstream Oil and Gas Sector

Syaifudin Zuchri[1], Indah Dwi Qurbani[2], Pan Moh. Faiz[3], Adi Kusumaningrum[4]
[1]Doctoral Program in Law, Faculty of Law, Brawijaya University, Malang, Indonesia, email: szuchri@student.ub.ac.id
[2]Faculty of Law, Brawijaya University, Malang, Indonesia, email: indah.qurbani80@ub.ac.id
[3]Faculty of Law, Brawijaya University, Malang, Indonesia. email: faiz@mkri.id
[4]Faculty of Law, Brawijaya University, Malang, Indonesia. email: adi_ningrum@ub.ac.id

Abstract

Historically, upstream oil and gas business activities in Indonesia have relied on the Cost Recovery-based Production Sharing Contract (PSC) scheme. However, this scheme has often been criticized for its efficiency and contribution to fluctuations in non-tax state revenue (PNBP) amidst the challenges of declining national production. Responding to these dynamics, the Government introduced the Gross Split scheme through Minister of Energy and Mineral Resources (ESDM) Regulation Number 08 of 2017 regarding Production Sharing Contract Gross Split and several amendments made, most recently with Minister of ESDM Regulation Number 13 of 2024 concerning Production Sharing Contract Gross Split as an effort to simplify governance and increase investment attractiveness. This article presents a normative review of the reconception of the State's Right to Control (HMN) in the paradigm transition. Through the constitutional lens of Article 33 of the 1945 Constitution, this article examines indications of a reduction in the role of the state from an active manager to an administrative authority that tends to be passive. The focus of the argumentation is directed at the problems of formal and material legality, where the use of Ministerial Regulation instruments to change the national oil and gas fiscal fundamentals is seen as less in line with the principle of exceptional discretion mandated by the laws and regulations above and the use of the gross split scheme shifts the authority and flexibility of upstream oil and gas operations management to contractors. The author argues that this shift in management sovereignty requires a stronger legitimization foundation at the statutory level in order to maintain the integration of management (bestuursdaad) and management (beheersdaad) functions by the state. In conclusion, the reconception of HMN must be placed in the corridor of intact energy sovereignty to ensure that every discretionary policy remains oriented towards ensuring legal certainty and protecting the public interest as well as substantively fulfilling the constitutional mandate.

Keywords:* *Cost Recovery; Gross Split; Indonesian Oil and Gas Law; Production Sharing Contract; SKK Migas; State Control over Natural Resources; Upstream Oil and Gas.

1. INTRODUCTION

As a country that has received a huge wealth in the form of natural resources ("SDA"), it is appropriate to make Indonesia's natural resources an important capital in carrying out national development. One of the natural resources owned by the Indonesian nation is the potential of petroleum and natural gas ("Oil and Gas") resources.

 DOI: http://dx.doi.org/10.29303/ius.v14i1.2064

Oil and gas is actually one of the largest sources of state revenue that is highly relied on to be the main catalyst in the implementation of development for the realization of the welfare of the Indonesian people.[1] As a strategic non-renewable natural resource controlled by the state and is a vital commodity that controls the livelihood of many people, oil and gas has an important role in the national economy so that its management must be able to maximize the prosperity and welfare of the people.

The management of oil and gas natural resources is a central issue in Indonesian economic law and policy because it is directly related to the country's constitutional mandate to realize public welfare through the control of important production branches and control the livelihoods of the people.[2] Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution of the Republic of Indonesia") emphasizes that state control over natural resources includes the authority to regulate, manage, manage, and supervise their use for the greatest prosperity of the people.[3] This norm serves as a control tool for lower legal norms in all oil and gas management policies, including the form of Cooperation Contracts ("PSCs") used by the state.[4]

The history of the management of Indonesia's oil and gas natural resources has gone through a fairly long road and uses various forms of cooperation models. For decades, the *Production Sharing Contract* ("PSC") has been carried out with *a cost recovery* scheme, since the birth of Law No. 44 Prp. of 1960 concerning Oil and Gas Mining, and Law No. 8 of 1971 concerning State Oil and Gas Mining Companies. Although the scheme is widely adopted in various oil and gas producing countries in the world, its implementation in Indonesia, its own country of birth, has received a lot of criticism attributed to issues about the discovery of oil and gas reserves and production for too long, long bureaucracy, and alleged indications of inefficient oil and gas operating costs, as well as burdening the state's finances.

To address criticisms of the traditional cost recovery-based PSC, particularly concerns over lengthy approval procedures, uncertainty in recoverable costs, and the need to improve operational efficiency, the Government of Indonesia introduced the Gross Split PSC through Minister of Energy and Mineral Resources Regulation Number 08 of 2017 concerning Gross Split Production Sharing Contracts. Unlike the cost recovery scheme, the Gross Split PSC determines the production sharing percentage at the beginning of the contract and eliminates the reimbursement of operating costs by the state. This regulatory framework has undergone several amendments and was most recently updated through Minister of Energy and Mineral Resources Regulation Number 13 of 2024 concerning Gross Split Production Sharing Contracts. The policy objective of this scheme is to simplify upstream oil and gas governance, provide greater certainty in project economics, encourage contractors to operate more efficiently, and improve the attractiveness of upstream oil and gas investment in Indonesia. However, this regulatory shift also raises a fundamental legal question concerning whether the change in the fiscal and operational structure of PSCs can be adequately established through ministerial

1 Fajri, Muhammad (2020) "Legal Analysis of the Gross Split Contract Scheme on the Increase in Upstream Oil and Gas Investment," Journal of Law & Development: Vol. 50: No. 1, Article 4. Page 55, DOI: http://dx.doi.org/10.21143/jhp.vol50.no1.2482

2 Indah Dwi Qurbani, *The Legal Politics of Oil and Gas Management in Indonesia*, Legal Arena, Vol. 6 No. 2 (2012), p. 115.

3 Constitutional Court Decision *No. 001-021-022/PUU-I/2003*, concerning the Testing of Law No. 22 of 2001 concerning Oil and Gas. Constitutional Court of the Republic of Indonesia, p. 314.

4 Tri Hayati, The State's Right of Control over Natural Resources and Its Implications for the Form of Mining Business, Journal of Law & Development, Vol. 49 No. 3 (2019), p. 769.

regulation, particularly when it affects the distribution of operational control between SKK Migas and contractors.[5]

Along the way, this new form of profit-sharing contract has also received challenges and criticism, especially related to its effectiveness in attracting upstream oil and gas investments, *economic issues*, and guarantees for a larger part of the state.[6] Since its implementation, the *gross split scheme* has actually raised various problems, both from the legal aspect and the management practices of the upstream oil and gas industry, namely: inconsistent regulations, less attractive tax incentives, and the absence of special regulations on *gross splits* related to the environmental and land sectors.[7]

From a legal perspective, the issue of *the gross split* scheme cannot be separated from the issue of rule-making authority. The *gross split scheme* was born referring to the definition of a profit-sharing contract or other form of cooperation in Law Number 22 of 2001 concerning Oil and Gas ("Oil and Gas Law 2001"). The phrase "other forms of cooperation" in the 2001 Oil and Gas Law is what prompted the government to give birth to a new format that is adapted to the development of the investment climate in the upstream oil and gas sector in Indonesia.[8]

The implementation of the gross split scheme through Minister of Energy and Mineral Resources Regulation Number 08 of 2017 and its subsequent amendments has significant implications for the way the state exercises its administrative management function (*bestuursdaad*) and state management function (*beheersdaad*) over upstream oil and gas resources. Under the cost recovery-based PSC regime, the state, through SKK Migas, maintains operational management control by approving the Work Program and Budget (WP&B), the Plan of Development (POD), and other operational plans submitted by contractors.[9] This mechanism allows SKK Migas to supervise not only the technical implementation of upstream oil and gas activities, but also the reasonableness, efficiency, and accountability of operational expenditures.

By contrast, the gross split scheme eliminates the reimbursement of operating costs and transfers greater cost responsibility and operational flexibility to the contractor. As a consequence, SKK Migas' control over budgetary planning and procurement is no longer as extensive as under the cost recovery scheme.[10] Although the state formally remains the holder of control over natural resources, the reduction of ex ante budgetary control may weaken the effectiveness of state supervision in practice. This shift raises an important legal question: whether the gross split mechanism still fully reflects the requirement under Article 6 of the Oil and Gas Law that operational management control must remain in the hands of the executive agency, or whether it gradually transforms

5 Rastri Paramita, Problems and Challenges of Increasing Investment in the Upstream Oil and Gas Industry, in Budget Journal Vol. 7 Edition 2, 2022 - Center for Budget Studies. Center for Budget Studies, Expertise Body of the House of Representatives of the Republic of Indonesia, p. 190.

6 Madjedi Hasan: Potential Problems of the Gross Split Profit Sharing Contract Scheme Page 2", https://katadata.co.id/indepth/opini/5e9a56246d03f/potensi-permasalahan-skema-kontrak-bagi-hasil-gross-split?page=2, Editor: Madjedi Hasal, Editor Arnold Sirait.

7 Nostalgia, Flowers. (2021). Legal Certainty for the Management of the Oil and Gas Sector with Cross-Sector Split Profit Sharing Contracts and Its Implementation on Investment Growth in the Upstream Oil and Gas Sector. Journal of Dharmasisya, Vol 1, No. 1, pp. 69-85.

8 Rastri Paramita.

9 Ahmad Redi, *Natural Resources Law in the Oil and Gas Sector*, Jakarta, Sinar Grafika, 2017, p. 95

10 Article 6 of the 2001 Oil and Gas Law states that the Upstream Oil and Gas Cooperation Contract must contain the requirements a. ownership of natural resources remains in the hands of the Government until the point of handover; b. control of operation management is in the Executive Agency; c. capital and risks are entirely borne by the Business Entity or Permanent Establishment. Meanwhile, what is meant by point b Operation management control is the approval of work plans and budgets (WP&B), field development plans (POD) and supervision of the realization of these plans.

the state's role from an active operational controller into a more administrative and supervisory authority.[11]

In the administrative law of the state, the establishment of regulations by governmental organs must be based on legitimate authority and must not go beyond the delegation granted by higher regulations. If a regulation is formed without a clear basis of authority, then the regulation has the potential to contain the risk of legal defect of authority (*ultra vires*).[12] The regulation of gross *split profit sharing contracts* through ministerial level regulations should be critically tested from formal and material legal aspects. One of the impacts that occur in the *gross split scheme*, namely the control of the budget aspect and the management of the procurement of goods and services, tends to decrease, thus raising questions about the consistency of this scheme with the mandate of the law.

Previous studies on the Gross Split PSC have predominantly examined the scheme from the perspectives of fiscal efficiency, investment attractiveness, economic incentives, and the practical challenges of upstream oil and gas governance. These studies have generally assessed whether the gross split mechanism can improve efficiency, reduce state budget burdens, and create a more competitive investment climate.[13] However, they have not sufficiently examined whether the establishment of the Gross Split PSC through ministerial regulation satisfies the requirements of formal legality under the hierarchy of laws and regulations. Existing legal studies also remain largely descriptive and have not critically assessed the material legality of the scheme, particularly its implications for the requirement that operational management control must remain in the hands of the state through SKK Migas.

This article fills that gap by examining the Gross Split PSC not merely as a fiscal or contractual innovation, but as a legal mechanism that affects the constitutional distribution of control over upstream oil and gas management. The novelty of this article lies in its analysis of the Gross Split PSC from the dual perspectives of formal and material legality. Formally, this article questions whether a ministerial regulation is an adequate legal basis for establishing a contractual regime that substantially changes the structure of upstream oil and gas governance. Materially, this article examines whether the reduction of SKK Migas' control over budgetary planning, procurement, and operational supervision is consistent with Article 6 of the Oil and Gas Law and the constitutional doctrine of the State's Right to Control under Article 33 of the 1945 Constitution.

This research uses a type of normative legal research (*Legal Research*), which is research focused on examining the application of rules or norms in positive law, namely legal norms in laws and regulations related to the legal aspects of the PSC gross *split* scheme which relies on the analysis of legal problems by comparing with the PSC cost *recovery* schemein the management of upstream oil and gas activities, as well as synchronizing laws and regulations related to applicable upstream oil and gas business activities.[14] The approach methods used in this study are *the statue approach* and the *conceptual approach*. To answer the legal problems in this legal article by analyzing research sources in the form of primary legal materials and secondary legal materials. Primary legal material is

11 Ridwan HR, *State Administrative Law*, Jakarta, RajaGrafindo Persada, 2014, p. 210.

12 Philipus M. Hadjon, *Introduction to Indonesian Administrative Law*, Yogyakarta, UGM Press, 2015, p. 89

13 Muhammad Fajri, *Legal Analysis of the Gross Split Contract Scheme on Increasing Upstream Oil and Gas Investment*, Journal of Law & Development: Vol. 50: No. 1, 2020, Article 4. DOI: http://dx.doi.org/10.21143/jhp.vol50.no1.2482.

14 Indah Dwi Qurbani, Raphael J. Heffron, and Arrial Thoriq Setyo Rifano, 'Justice and Critical Mineral Development in Indonesia and across ASEAN', The Extractive Industries and Society 8, no. 1 (March 2021): 355–62, https://doi.org/10.1016/j.exis.2020.11.017.

the main legal material that is authoritative, namely legal material that has authority, including in the form of laws and regulations and any official document that contains legal provisions. Meanwhile, secondary legal materials are in the form of publications about law that are not included as official documents, in the form of textbooks, legal magazines, legal articles, legal journals, and research scientific papers written in papers.[15]

2. ANALYSIS AND DISCUSSION

2.1. *Production Sharing Contract* in the Management of Indonesia's Upstream Oil and Gas: History, Philosophy, and Characteristics.

The oil and gas industry in various countries is a strategic sector that operates within the framework of a *profit-centric* business culture *system*, where investors seek to meet global energy demand for maximum profits. As a crucial international trade commodity, oil and gas is not only influenced by pure market mechanisms, but is also at the intersection of dominance of political and economic interactions. These dynamics fundamentally determine the direction of investment, price policy, production volume, and international trade patterns.[16]

To maximize the benefits for the country, governments in various countries that own natural resources implement various business models, policies, and legal frameworks to achieve optimal levels of operational efficiency and effectiveness. This triggered the birth of various regulatory instruments that include fiscal *terms*, tax regimes, and *legal terms* in upstream oil and gas industry transactions. The main goal is to create an acceptable investment ecosystem, which is able to balance the interests of investors, the government, and the community in a *win-win solution*. In formulating policies to maximize state revenue, each country that owns natural resources adopts a different approach. This strategy is highly dependent on national priorities, the country's strategic interests, and the urgency to maintain the attractiveness of *foreign direct investment* in the midst of global competition.[17]

In Indonesia, where oil and gas resources are national wealth, oil and gas is a strategic non-renewable natural resource controlled by the state and is a vital commodity that controls the livelihood of many people and has an important role in the national economy so that its management must be able to provide maximum prosperity and welfare for the people.[18] In order to exercise the right of state control over oil and gas natural resources, the Government's position as the holder of oil and gas mining power contains the authority to regulate and control oil and gas companies in a cooperation contract. The Oil and Gas Law 2001 in Article 6 paragraph (1) stipulates that Upstream Oil and Gas Business Activities are carried out and controlled through Cooperation Contracts, namely Profit Sharing Contracts or other forms of cooperation contracts in Exploration and Exploitation activities that are more beneficial to the State and the results are used for the greatest possible prosperity of the people.

In the practice of the global upstream oil and gas industry, there are four fundamental contractual instruments that are the basis of the legal relationship between the country

15 Indah Dwi Qurbani et al., Politik Hukum dalam Teori dan Praktek Empiris (CV. Gita Lentera, 2024).

16 Hello. Victor D., Amadi, Azubuike H., Okeke, Raphael and Okafor, Paul O., ***Comparative Analysis of Negaria and Malaysia's Production Sharing Contract***, *European Journal of Business and Management Research*, www.ejbmr.org, p. 11.

17 Hello. Victor D.

18 Indah Dwi Qurbani.

that owns the resource and the investor, namely the Concession System (*Concessions*), Joint Ventures, Service *Contracts*, and *Production Sharing Contracts (PSCs)*.[19] Among these models, PSC has a unique position because its philosophy is firmly rooted in Indonesian *local wisdom*. The term *production sharing* began to be formally introduced in the early 1960s, when Indonesia, as a pioneering oil and gas producing country in Southeast Asia, adopted this model to replace the colonial concession system that was considered less favorable to state sovereignty.[20]

The basic philosophy of the Production Sharing Contract developed in Indonesia was rooted in the need to overcome the state's limitations in capital, technology, and human resources without relinquishing sovereignty over oil and gas resources. Historically, the Indonesian PSC was not designed merely as a commercial arrangement for distributing production, but as a legal instrument to ensure that the state remained the principal holder of operational control.[21] This idea is commonly traced to the *paron* system in Javanese agrarian practice, where the landowner and cultivator share the harvest, while control over the land remains with the owner. In the oil and gas sector, this logic was transformed into a contractual model in which foreign or private contractors may provide capital, technology, and operational capacity, but the ownership of resources and the ultimate control over their exploitation remain vested in the state.

This philosophy was later associated with the early development of Indonesia's oil and gas policy under President Soekarno and the institutional role of Ibnu Sutowo through Permina and subsequently Pertamina. The essential idea was that what is shared under a PSC is the physical production of oil and gas, not ownership or control over the natural resources themselves. Therefore, the historical origin of the PSC demonstrates that Indonesia's production sharing model was built upon the principle of being "master in its own house": contractors may conduct exploration and exploitation at their own capital and risk, but operational management control must remain under the state.[22] This historical and philosophical foundation is consistent with the constitutional mandate of Article 33 of the 1945 Constitution and with the later statutory formulation in Article 6 of the Oil and Gas Law, which requires that ownership of natural resources remains with the government until the point of delivery and that operational management control is exercised by the executive agency. *The Role of Oil in State Resilience* (1970), he emphasized that what is shared between the government and contractors is the commodity (physical oil), not the monetary value. This philosophy of sovereignty is reflected in Ibn Sutowo's phenomenal statement:

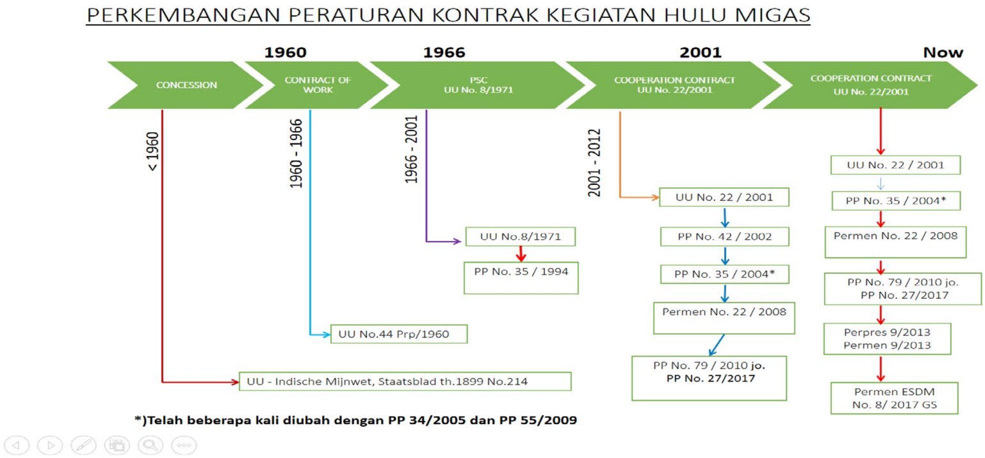
> *"Regarding this oil, it is up to ourselves; Whether we want to barter, process it ourselves (refine), or sell it independently. We also have the option to ask for the help of partners (contractors) to sell it for our benefit." — (Excerpted from Anderson G. Bartlett, Pertamina: Indonesian National Oil, 1972).*

19 Tienhaara, Kyla., ***Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses.*** Sustainable Development Law & Policy 11, no. 3 (2011), pp. 15-20, 39-40.

20 Hello. Victor D., p. 12.

21 Widjajono Partowidagdo, *Introduction to Investment Production and National Capabilities of Oil and Gas Law*, (CIDES 2008) p. 1, in Muhammad Luthfan Hadi Darus, '***Constitutionality In Production Sharing Contracts: Legal Policy on Petroleum and Natural Gas*** , Vol 1 (2) *Prophetic Law Review 97*., 2020, p. 86.

22 Anderson G Bartlett, ***Pertamina: Indonesia National Oil*** , New York: Tulsa Amerasian Ltd., 1972, p. 6.



The majority of oil and gas-producing developing countries tend to adopt the *Production Sharing Contract* (PSC) scheme in regulating their upstream operational activities. The selection of this legal instrument is based on the urgency of manifesting state sovereignty over strategic and non-renewable natural resources.[23] The PSC scheme is seen as providing significant added value for the *host state*, because the state's position is not reduced only as a passive income recipient, but still holds the opportunity and control over the management of its natural resource management operations on its own.[24]

The implementation of state control rights in the upstream oil and gas sector is realized through the control of upstream oil and gas business activities with the KKS instrument. Article 1 number 19 of the 2001 Oil and Gas Law defines KKS as a legal relationship between the Government, through the Implementing Agency currently run by SKK Migas, and Business Entities or Permanent Business Forms in the implementation of exploration and exploitation activities. In line with the interpretation of the Constitutional Court, the PSC in the form of a Profit Sharing Contract (PSC) reflects the state's control that is functional and effective, because the state retains managerial control and strategic decision-making, while financing and operational risks are charged to contractors, so that state sovereignty over oil and gas natural resources is maintained.[25] The implementation of Profit Sharing Contracts within the framework of the 2001 Oil and Gas Law not only focuses on commercial aspects, but also as a means of state managerial control over non-renewable resources. Through this mechanism, the state ensures that the exploitation of natural resources is carried out by paying attention to the principles of energy sovereignty and legal certainty. Thus, the legal relationship between the Government and the Contractor in the PSC is positioned as a strategic partnership relationship that still guarantees the state's exclusive right to the ownership of natural resources up to the point of delivery of production products.[26]

2.2. The Right to Control the State as the Philosophical and Constitutional Foundation for Upstream Oil and Gas Management

23 Ahmad Redi, *Mining Law: Getting to Know the Mining Contract Regime in Indonesia*, Jakarta, Sinar Grafika, 2016) p. 45.

24 Didik Sasono Setyadi, March 6, 2024, Normandy War and the PSC Scheme, Kelana Rubric, Daily Disway

25 Salim H.S., *Mining Law in Indonesia*, Jakarta, Rajawali Press, 2012, p. 142.

26 Constitutional Court Decision No. 36/PUU-X/2012 regarding the material testing of Law No. 22 of 2001, p. 102

The legal foundation of upstream oil and gas management in Indonesia must be traced from Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia. These provisions place the state in an active constitutional position to control important branches of production and natural resources that affect the livelihood of the people. The phrase "controlled by the state" does not merely refer to civil ownership, but to public authority exercised by the state to formulate policies, regulate, administer, manage, and supervise natural resources for the greatest prosperity of the people.[27] This interpretation has been affirmed by the Constitutional Court, which conceptualizes the State's Right to Control as consisting of five interrelated functions: policy-making (*beleid*), administration (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*).

Within the statutory framework, Article 4 of Law Number 22 of 2001 concerning Oil and Gas provides that oil and gas as strategic non-renewable natural resources are controlled by the state and managed by the Government as the holder of mining authority. This constitutional mandate is further operationalized through Article 6 of the Oil and Gas Law, which requires upstream oil and gas business activities to be carried out and controlled through Cooperation Contracts, including Production Sharing Contracts or other forms of cooperation that are more beneficial to the state. Article 6 also sets out three essential requirements: ownership of natural resources remains with the Government until the point of delivery; operational management control is vested in the implementing agency; and capital and operational risks are borne entirely by the contractor.

This normative structure demonstrates that a PSC is not merely a private commercial contract between the state and a contractor. Rather, it is a constitutional and statutory instrument through which the state exercises control over upstream oil and gas operations. SKK Migas, as the institution currently performing the implementing agency function, represents the state's operational control in the PSC regime. Its authority to approve work programs, budgets, plans of development, and to supervise the realization of upstream oil and gas activities constitutes a concrete manifestation of the State's Right to Control. Therefore, any modification to the PSC mechanism, including the transition from cost recovery to gross split, must be assessed not only from the perspective of fiscal efficiency, but also from its consistency with the constitutional and statutory requirement that operational management control remains in the hands of the state.

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that the earth, water, and natural resources contained in it are controlled by the state and used for the greatest possible prosperity of the people. This provision cannot be interpreted narrowly as state ownership in a civil sense, but rather as a constitutional mandate that gives birth to the state's public authority to regulate, manage, manage, and supervise the use of natural resources. The Constitutional Court in Decision No. 36/ PUU-X/2012 emphasized that the right to state control includes five main functions, namely policy functions (*beleid*), management (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*).[28]

In the context of upstream oil and gas management, the implementation of state control rights is realized through the establishment of a legal framework that places the state as the main controller of exploration and exploitation activities. The 2001 Oil and

27 Jimly Asshiddiqie, *Economic Constitution*, (Jakarta: Kompas, 2016), p. 45.
28 Constitutional Court of the Republic of Indonesia, Decision No. 36/PUU-X/2012, legal considerations [3.12].

Gas Law expressly states that upstream oil and gas business activities are carried out and controlled through Cooperation Contracts/Profit Sharing Contracts/PSCs.[29] The PSC system is designed so that the state remains the owner and controller of the resource, while the contractor receives a share of the output as compensation for the risks and investments invested. This conception shows that the Indonesian PSC is not only an economic instrument, but also a manifestation of the constitutional ideology of Article 33 of the 1945 Constitution.[30] This philosophy shows that the Indonesian PSC is rooted in *local wisdom* which is in line with the doctrine *of permanent sovereignty over natural resources* in international law which recognizes the right of states to freely determine how to manage their natural resources in accordance with national interests.[31] This doctrine provides international legitimacy for developing countries, including Indonesia, to implement contract models such as the PSC that put countries in a dominant position. Thus, PSC Cost Recovery can be seen as a concrete form of implementing the state's permanent sovereignty over oil and gas resources.[32]

The change in the contractual regime for upstream oil and gas management towards a *gross split scheme* raises serious questions about the consistency of the policy with the basic philosophy of Article 33 of the 1945 Constitution of the Republic of Indonesia. Efforts to replace the *cost recovery mechanism* and reduce the state's role in controlling the budget in upstream oil and gas management have the potential to shift the state's position from *a controller* to a mere *regulator*.[33] This shift should be criticized because it can weaken the state's management and supervision function over upstream oil and gas business activities. From the perspective of state administrative law, public policies related to strategic natural resource management must ensure that the state still has effective instruments to control the implementation of business activities. Philipus M. Hadjon emphasized that control is an essential element of government authority in a state of law.[34] If such control is significantly reduced through contractual design, then the policy has the potential to conflict with the principle of the rule of law and the principle of legal certainty to protect the public interest.[35]

An upstream oil and gas policy approach that overemphasizes economic efficiency without considering the constitutional dimension can lead to *a regulatory retreat*. This condition refers to the phenomenon in which the state gradually reduces its active role in the management of strategic sectors,[36] which in the context of upstream oil and gas, can have long-term implications for the decline of the state's ability to optimize revenue, strengthen domestic industries, and protect the long-term interests of the people.[37] Therefore, political changes in the upstream oil and gas management law, including the PSC arrangement of *the gross split scheme*, must be placed in a comprehensive philosophical and constitutional framework, in order to ensure that the scheme still reflects the principle of the right of Control by the State (HMN) as interpreted by Article 33 of the 1945 Constitution of the Republic of Indonesia and various related Constitutional Court decisions.

29 Indonesia, Law Number 22 of 2001 concerning Oil and Gas, Article 6 paragraph (1).

30 Indah Dwi Qurbani.

31 Kumkum Shah, ***Analysis of Doctrine of Permanent Sovereignty over Natural Resources***, SSRN, 2019.

32 Aprizal et al., ***Indonesian Upstream Oil & Gas Governance for Sustainable Innovation***, Journal of Management and Organization (JMO), Vol. 13 No. 1, March 2022, pp. 48-60, P-ISSN: 2088-9372 E-ISSN: 2527-8991.

33 Kirana Intaniasari, ***Gross Split Contract Frame Work Regulation on the Caring for People***., Journal of Governance vol 8, issue 2, December, 2020.

34 Philipus M. Hadjon, *Introduction to Indonesian Administrative Law*, (Yogyakarta: UGM Press, 2015), p. 91

35 Philipus M. Hadjon, p. 94

36 Energy Policy, ***Regulatory Certainty in Upstream Oil and Gas***, Energy Policy Journal, Vol. 156 (2021).

37 Standard & Poor's Global, ***Upstream Oil and Gas Investment Outlook*** (2023)

From the perspective of legal politics, Indah Dwi Qurbani emphasized two main urgency, namely: *first,* as a basis for legitimacy for the need for the formation of laws and regulations; and *second*, as an instrument to determine the substance of norms that will be formulated into legal sentences and become the formulation of articles. These two things are important because the existence of laws and regulations and the formulation of articles are the link between the legal politics that are determined and the implementation of the legal politics in the implementation stage of laws and regulations.[38] Without a solid political and legal foundation, changes in upstream oil and gas policy are feared to be only a short-term pragmatic response that ignores the constitutional mandate. Consistency and correlation between the political direction of the law set and the goals to be achieved are absolute requirements so that the policy does not lose its basic orientation.

Based on this description, Article 33 of the 1945 Constitution of the Republic of Indonesia is actually not only a symbolic norm, but a substantive guideline in designing upstream oil and gas management policies. Every innovation in the management of Indonesia's upstream oil and gas, including the implementation of the PSC gross *split scheme*, must be tested for validity, not only from the aspect of economic efficiency, but also from its philosophical alignment with control by the state and the guarantee of legal certainty in order to realize the greatest possible prosperity of the people. This framework of thought is an essential foundation for analyzing formal legal aspects related to authority competencies and regulatory hierarchies, as well as material legal aspects regarding management control and the repositioning of the role of SKK Migas in the implementation of the *gross split* scheme in the next section.

2.3 Evolution of the Revenue Sharing Scheme: From PSC Cost Recovery to *PSC Gross Split*

The discussion on the management of upstream oil and gas in Indonesia cannot be separated from the development of a revenue-sharing mechanism between the state and its KKS Contractors. After understanding the foundation of the PSC, it is important to examine the two main schemes that are the instruments for the implementation of the contract, namely *cost recovery* and *gross split*. The shift between these two schemes reflects the Indonesian government's ongoing efforts to find the most ideal balance between protecting the state's rights to natural resources and providing certainty for the state as the owner of natural resources and its investors.

Conceptually, PSCs with *cost recovery schemes* are designed to answer the country's limitations in terms of capital, technology, and human resources, without having to sacrifice sovereignty over natural resources. In this scheme, the contractor bears the entire cost of exploration and exploitation upfront. If the production activities are successful, the contractor is entitled to get a refund of operating costs through a *cost recovery* mechanism before the distribution of production between the state and the contractor according to the agreed ratio.[39] The main characteristic of PSC *Cost Recovery* is the strong role of the state in controlling the management of operations. The state, through the oil and gas management institution currently run by SKK Migas in the Indonesian context, has the authority to approve work plans and budgets, field development plans (*Plan of*

38 Indah Dwi Qurbani, p. 115

39 Adam Ilyas, Fachrizal Afandi, and Indah Dwi Qurbani, 'Closing the Injustice Gap: Reconstructing Pre-Trial Proceedings as an Effective Remedy for Victims of Terminated Preliminary Inquiries: Menutup Celah Ketidakadilan: Rekonstruksi Praperadilan Sebagai Effective Remedy Bagi Korban Penghentian Penyelidikan', *Jurnal Konstitusi* 22, no. 4 (December 2025): 736–76, https://doi.org/10.31078/jk2247.

Development), and supervise the implementation of business activities through *pre-audit*, *current audit*, and *post-audit* mechanisms, which is designed to ensure that the costs charged to the state are truly efficient, reasonable, and in accordance with the national interest.[40] Thus, supervision of Oil and Gas Natural Resources Management is carried out very carefully. However, as time goes by, there is a need to simplify bureaucracy that is considered to hinder operational speed. This is the background for the birth of the *Gross Split scheme*, where the distribution of production proceeds is set at the beginning on a gross basis without a mechanism to reimburse operational costs.

The decision of the Government of the Republic of Indonesia through the Minister of Energy and Mineral Resources issued the Minister of Energy and Mineral Resources Regulation 08/2017 regarding the policy of replacing the PSC Cost *Recovery scheme* with the PSC *Gross Split scheme* recorded a new milestone in the management of the upstream oil and gas industry in Indonesia. This policy is motivated by the Non-Tax State Revenue (PNBP) from the upstream oil and gas industry which the government feels continues to decline significantly as well as the consideration of resetting the form and principal provisions of the profit-sharing contract without a mechanism for reimbursing operating costs oriented towards increasing the efficiency and effectiveness of the pattern for oil and gas production, as well as efforts to improve the upstream oil and gas investment climate.[41] The Minister of Energy and Mineral Resources Regulation 08/2017 itself has undergone several revisions. Regulation of the Minister of Energy and Mineral Resources Number 12 of 2020 concerning the Third Amendment to the Minister of Energy and Mineral Resources Regulation Number 08 of 2017 concerning Gross Split Profit Sharing Contracts ("**Regulation of Energy and Mineral Resources 12/2020**") improves it, and affirms the implementation of the form of cooperation contracts and flexibility related to profit sharing contracts, namely *cost recovery* or *gross split*. The last revision was carried out with the Minister of Energy and Mineral Resources Regulation 13/2024.

2.4 Minister's Regulation of the *PSC Gross Split* in the Perspective of Authority and Hierarchy of Laws and Regulations

The introduction of the Revenue Sharing Contract with the *gross split scheme* through the Minister of Energy and Mineral Resources Regulation 08/2017 marks a fundamental change in the management regime of upstream oil and gas business activities in Indonesia. From a legal perspective, the change is not only sectoral policy dimension, but also touches on fundamental issues regarding the authority to form regulations and the conformity of norms with the hierarchy system of laws and regulations. In the state of law, every government action, including the formation of laws and regulations, must be based on the principle of legality, namely the existence of legitimate authority derived from higher regulations. This principle is the main foundation in assessing the validity of a regulation, because without a clear basis of authority, a regulation has the potential to contain legal defects from birth (*gebrek aan bevoegdheid*).[42]

The constitutional basis for the management of oil and gas natural resources in Indonesia as stipulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, is described in Article 4 paragraph (2) of the 2001 Oil and Gas Law, which emphasizes that the control of oil and gas natural resources is carried out by the Government as the holder of the Mining Power. In this construction of the law, the

40 Rastri Paramita.
41 Rastri Paramita.
42 Philipus M. Hadjon, pp. 87-90.

state acts as the highest authority that has full authority to regulate and supervise the national natural resources for the greatest possible prosperity of the people.[43] Article 33 of the 1945 Constitution of the Republic of Indonesia, which is the philosophical basis in the management of oil and gas natural resources, is not an ordinary law, but a basic law that contains the highest / fundamental norms for the state (*staats fundamentalnorm*) and functions as a tool of control over lower legal norms. As *a legal consequence* of these basic norms, the monopoly of regulating, maintaining, using, supplying and maintaining oil and gas natural resources and regulating legal relations is in the hands of the state.[44] Therefore, the regulation of the PSC gross *split scheme* through a ministerial regulation must first be tested from the aspect of its normative authority.

Article 6 of Law Number 22 of 2001 concerning Oil and Gas provides the general legal basis for upstream oil and gas business activities to be carried out and controlled through Cooperation Contracts, namely Production Sharing Contracts or other forms of cooperation contracts that are more beneficial to the state. However, this provision cannot automatically be interpreted as an open-ended delegation to the Minister of Energy and Mineral Resources to establish a new general contractual regime that substantially alters the structure of upstream oil and gas governance. Article 6 must be read together with its essential requirements, particularly that ownership of natural resources remains with the Government until the point of delivery, operational management control is vested in the implementing agency, and capital and risks are borne entirely by the contractor. Therefore, the phrase “other forms of cooperation contracts” should be understood within the limits of these statutory requirements, not as a basis for reducing the state’s operational management control.

The relationship between Article 6 and Article 22 of the Oil and Gas Law also confirms that the implementation of upstream oil and gas obligations and incentives must be placed within a regulatory framework determined by higher legal norms. Article 22 concerns the obligation of contractors to allocate part of their production to meet domestic needs, while further technical arrangements concerning the implementation of upstream oil and gas business activities are regulated through Government Regulation Number 35 of 2004. In this regard, Government Regulation Number 35 of 2004 functions as the principal implementing regulation of the Oil and Gas Law.[45] Although this regulation provides room for the Minister to determine the form and principal provisions of Cooperation Contracts for certain Working Areas, such authority should be interpreted as a limited and technical authority within the framework of the law and government regulation, not as a general mandate to create a new contractual regime applicable to the national upstream oil and gas sector.[46]

This interpretation is also consistent with the hierarchy of laws and regulations under Law Number 12 of 2011 concerning the Formation of Laws and Regulations. Ministerial regulations are recognized as valid legal instruments only when they are ordered by higher laws and regulations or formed based on legitimate authority. Consequently, a ministerial regulation may regulate technical and administrative matters within the scope of delegated authority, but it should not create new strategic norms that substantially change the distribution of rights, obligations, fiscal mechanisms, and operational control

43 Republic of Indonesia, *Law Number 22 of 2001 concerning Oil and Gas*, Article 4 paragraph (2)

44 Indah Dwi Qurbani, p. 119.

45 Indonesia, Government Regulation No. 35 of 2004 concerning Upstream Oil and Gas Business Activities.

46 Ahmad Nugroho, Aan Eko Widiarto, and Indah Dwi Qurbani, ‘Green Constitution in the Indonesian Perspective: Reconstruction of the 1945 Constitution for Sustainable Development’, Multidisciplinary Science Journal 8, no. 2 (August 2026), https://doi.org/10.31893/multiscience.2026024.

in upstream oil and gas management. From this perspective, the establishment of the Gross Split PSC through ministerial regulation raises a serious issue of formal legality, because the scheme does not merely regulate technical implementation, but modifies the fiscal structure and the pattern of operational control between the state, SKK Migas, and contractors.

Accordingly, the issue is not whether the Minister has any regulatory authority in the upstream oil and gas sector, but whether such authority is sufficiently broad to establish a general Gross Split PSC regime that affects the substance of state control over strategic natural resources. If the Gross Split PSC substantially changes the mechanism of operational management control required under Article 6 of the Oil and Gas Law, then its legal basis should ideally be strengthened at the level of law or, at minimum, government regulation.

In the context mentioned above, the regulation of the PSC *Gross Split* through the Regulation of the Minister of Energy and Mineral Resources has the potential to exceed the limits of authority provided by the 2001 Oil and Gas Law and its implementing regulations. The Regulation of the Minister of Energy and Mineral Resources not only regulates the technical aspects of contract implementation, but also establishes a new contractual regime that changes the mechanism of revenue sharing, risk allocation, and control patterns of operation management. The change is fundamental and should be the subject matter of a law or at least a government regulation, not a ministerial regulation. From the perspective of the hierarchy of laws and regulations as stipulated in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, ministerial regulations are under laws and government regulations.[47] Therefore, ministerial regulations should not conflict with the law, let alone create new norms that should be the authority of lawmakers. In this case, the Minister of Energy and Mineral Resources Regulation on *gross split* can cause a disharmony in norms if the substance is not fully in line with the 2001 Oil and Gas Law.

As mentioned earlier, the 2001 Oil and Gas Law stipulates that *petroleum operations* are carried out through a cooperation contract, namely a Profit Sharing Contract, or another form of exploration and exploitation contract that is more profitable for the state. The Oil and Gas Law does not explain in more detail, the types and other forms of contracts referred to by lawmakers. Only the implementation of provisions regarding upstream oil and gas business activities is further regulated by Government Regulations. In article 22 paragraph (1) of the 2001 Oil and Gas Law, it is explained that the Government Regulation contains the main substance, namely the condition of domestic needs, the implementation mechanism and price provisions, as well as the policy of providing incentives related to the implementation of the obligation to hand over Petroleum and/or Natural Gas to the Business Entity or Permanent Business Entity from the results of its production.

PP 35/2004 is an implementing regulatory instrument that describes the mandate of the 2001 Oil and Gas Law, and does not regulate the form of oil and gas exploration and exploitation cooperation contracts, but delegates the authority to Energy and Mineral Resources to determine the form and main provisions of the Cooperation Contract for

47 Indonesia, Law Number 12 of 2011 concerning the Establishment of Laws and Regulations.

"certain Working Areas", taking into account the level of risk, optimal benefits for the state, and compliance with applicable laws and regulations. after obtaining the consideration of the Head of SKK Migas. The implementation of the delegation of authority is reflected in the issuance of the Decree of the Minister of Energy and Mineral Resources Number 238K/10/MEM/2017 which stipulates the form and main provisions of the *Gross Split Cooperation Contract in the* North West Java Offshore *Working Area*, which emphasizes that contractual flexibility in the upstream oil and gas regime is a manifestation of legitimate attribution and delegation authority within the framework of state control over strategic natural resources.

The Constitutional Court in several of its decisions emphasized the importance of consistency between natural resource management policies and the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia. Policies that significantly change the pattern of state control and control over strategic natural resources must have a strong and clear legal basis. Without this basis, the policy is potentially unconstitutional, both directly and indirectly. Thus, from a formal legal aspect, the provisions governing the *Gross Split Profit Sharing Contract* raise serious problems related to the authority of regulatory makers and conformity with the hierarchy of laws and regulations. The arrangement of contracts for the management of upstream oil and gas as strategic natural resources through ministerial regulations not only risks violating the principle of legality, but can also weaken legal certainty in the management of upstream oil and gas.[48] This condition ultimately has the potential to harm the state and investors, because it creates a space of uncertainty in the implementation of long-term policies.

The existence of the Regulation of the Minister of Energy and Mineral Resources that regulates the PSC *Gross Split* has triggered an in-depth discussion on the limits of *delegated legislation* in the management of upstream oil and gas.[49] Doctrinally, the attribution and delegation of ministerial authority to determine the form and type of Cooperation Contract (KKS) independently must be based on an explicit mandate from higher norms. However, if examined carefully, both the 2001 Oil and Gas Law and PP 35/2004 are *silent* and do not delegate specific authority to the Minister of Energy and Mineral Resources to transform the contract model outside the conventional profit-sharing scheme. The absence of basis for this delegation indicates that the regulation of substance regarding the pattern of exploration and exploitation contracts is a content material that is *reserved* (fixed) at the level of the Law or at least government regulations as its direct derivatives.[50]

Viewed from a formal legal perspective, the issuance of the Regulation of the Minister of Energy and Mineral Resources regulating *the PSC Gross Split* indicates that there is an action that exceeds the limits of authority (*ultra vires*).[51] This is based on the principle of *lex superior derogat legi inferiori*, which requires that every regulation under the law must not only be substantially harmonized, but must also be born from a

48 Energy Policy.

49 Ahmad Redi, The Dynamics of Mining Law in Indonesia, Constitutional Journal, Vol. 14, No. 2, 2017, p. 402.

50 Mochamad Rizky Pradana, *Juridical Analysis of the Application of Gross Split in Oil and Gas Cooperation Contracts*, Journal of Law & Development, Vol. 48, No. 2, 2018, p. 235.

51 H.S. Tisnanta, *The Legal Problems of Gross Split Policy in Indonesia's Oil and Gas Sector*, *Padjadjaran Journal of Law*, Vol. 5, No. 1, 2018, p. 12.

procedure of legal *competence*. The concept *of Gross Split*, which radically eliminates the mechanism for cost *recovery*, can change the legal order of the national oil and gas without adequate primary regulatory support. Consequently, the validity and legal certainty of the ministerial regulation becomes vulnerable, considering that hierarchically, the ministerial regulation instrument does not have the reach to establish fundamental policies that have not been mandated by laws and regulations that are superior to it.[52] This formal legal analysis is an important basis for further assessing the material legal aspects of the *Gross Split Profit Sharing Contract*, especially related to the fulfillment of the conditions of the Cooperation Contract and the implementation of operational management control by the state, which will be discussed in the next section.

2.5 Material Implications of *PSC Gross Split* Arrangements: Control of Operations Management and the Role of SKK Migas

In the discussion of constitutional law and state administration, the substance of a policy cannot be justified only on the grounds of efficiency if the policy is proven to be contrary to the norms of the law and constitutional principles.[53] The principle *of the rule of law* emphasizes that economic effectiveness and pragmatism must not override the formal and material legality that has been established in the legislative hierarchy.[54] In the context of upstream oil and gas management, the material legal aspect is mainly related to the fulfillment of the requirements of the Cooperation Contract as stipulated in Article 6 of the 2001 Oil and Gas Law, which expressly requires that upstream oil and gas business activities be carried out through a Cooperation Contract with the main provision that the control of operation management is in the hands of the state through the implementing agency.[55] This norm reflects the implementation of state control rights in the form of direct control over oil and gas exploration and exploitation activities. Thus, the control of operations management is not just an administrative aspect, but a substantial element that determines the conformity of a cooperation contract with the mandate of the law.

In the PSC cost *recovery scheme*, operational management control is concretely realized through the active role of SKK Migas. This institution has the authority to approve work plans and budgets (*Work Program and Budget*), field development plans (*Plan of Development*), and supervise the implementation of business activities through a layered supervision mechanism. Through this mechanism, the state has effective instruments to ensure that upstream oil and gas business activities run in accordance with national interests and efficiency principles.[56] On the other hand, in the PSC gross *split scheme*, the control of operations management has undergone a significant shift. The elimination of the *cost recovery mechanism* has a direct impact on reducing the role of the state in controlling budget aspects and managing the procurement of goods and services by KKS contractors. In fact, the Government has regulated that allgoods and equipment that are directly used in Upstream Business Activities purchased by the KKS Contractor become

52 Maria Farida Indrati S., *Laws and Regulations: Types, Functions, and Content Materials*, Kanisius, Yogyakarta, 2007.

53 Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, Sinar Grafika, Jakarta, 2011, p. 152.

54 Bagir Manan, *Basics of Indonesian Legislation*, Ind-Hill Co, Jakarta, 1992, p. 45

55 Indonesia, Law Number 22 of 2001 concerning Oil and Gas, Article 6 letter b.

56 Rastri Paramita.

the property/property of the State, and can be used by the KKS contractor during the validity period of the Cooperation Contract.[57]

In PSC with *a gross split* scheme, PSC Contractors are given greater flexibility to manage costs and operations of upstream oil and gas business activities, on the grounds that all cost risks have been fully transferred to the contractor.[58] This shift raises fundamental questions about whether the state is still really carrying out the control function of oil and gas operations management as required by laws and regulations. Therefore, policies that substantially reduce state control instruments must be strictly tested for conformity with the principles of the rule of law and the principle of legal certainty to protect the public interest. Philipus M. Hadjon emphasized that without adequate control, the authority of state regulation and management has the potential to lose its effectiveness.[59]

What is interesting to examine further is whether the arrangement of the PSC *Gross Split* by the Minister of Energy and Mineral Resources has met the substantive requirements stipulated in Article 6 of the 2001 Oil and Gas Law, namely the main conditions of the Cooperation Contract, which is also re-described in article 2 of the Minister of Energy and Mineral Resources 08/2017 and the Minister of Energy and Mineral Resources Regulation 13/2024 regarding the conditions in the Cooperation Contract, namely:

a. the ownership of natural resources remains in the hands of the Government until the point of handover;
b. control of operation management is in the Executive Agency;
c. capital and risks are entirely borne by the Business Entity or Permanent Establishment.

Article 6 of Law Number 22 of 2001 concerning Oil and Gas requires that operational management control in upstream oil and gas business activities remain in the hands of the implementing agency. In the current institutional structure, this function is exercised by SKK Migas as the state institution responsible for supervising and controlling upstream oil and gas operations. Operational management control should therefore be understood not merely as formal supervision, but as the authority to evaluate, approve, and monitor the implementation of key operational instruments submitted by Cooperation Contract Contractors, including the Work Program and Budget (WP&B), Plan of Development (POD), and Authorization for Expenditure (AFE). Through these instruments, SKK Migas ensures that upstream oil and gas activities are conducted in accordance with the approved work program, technical standards, efficiency requirements, and the broader interests of the state.[60]

Under the cost recovery PSC scheme, this control is implemented through a layered supervisory mechanism consisting of pre-audit, current audit, and post-audit. The pre-audit mechanism operates at the planning stage through the evaluation and approval of WP&B, POD, and AFE. The current audit mechanism allows SKK Migas to monitor the implementation of approved work programs, including procurement and operational activities. The post-audit mechanism enables the state to examine the realization of

57 Indonesia, Government Regulation Number 35 of 2004 calms upstream oil and gas business activities.

58 Prahoro Nurtjahyo, *Answering Doubts About Gross Split: A Response to DR Madjedi Hasan's Opinion on Potential Problems in Gross Split*, Ministry of Energy and Mineral Resources (2018), (online) accessed through https://www.esdm.go.id/assets/media/content.

59 Philipus M. Hadjon, pp. 97-99.

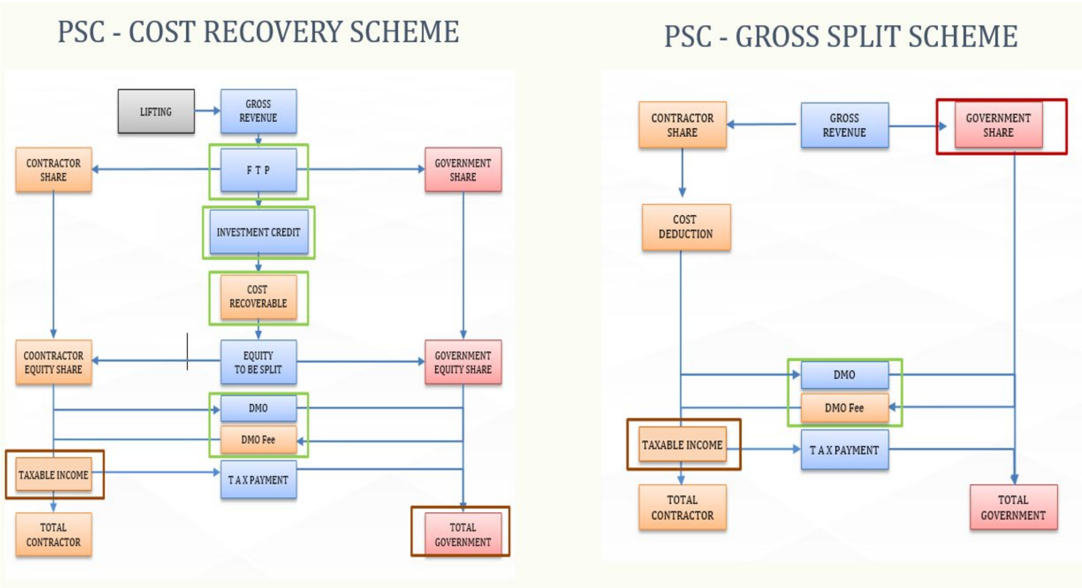
60 Indonesia, *Law Number 02 of 2022 concerning Oil and Gas*. Explanation of Article 6.

costs, verify the reasonableness of expenditures, and ensure that any recoverable costs are consistent with the approved plan and the applicable regulatory framework. This structure demonstrates that SKK Migas' role in the cost recovery PSC is not administrative in a narrow sense, but constitutes a substantive instrument of state control over upstream oil and gas operations. The following figure illustrates the supervisory structure of SKK Migas under the cost recovery PSC scheme.

It has become a common agreement that the upstream oil and gas industry is very loaded with high technology, large capital, no less great risks, and requires qualified human resource competence. As previously explained, the idea of a traditional profit-sharing contract (cost recovery scheme) aims to overcome the problem of limited capital owned by the state, lack of mastery of technology and human resources faced by countries that own natural resources, especially in carrying out oil and gas exploration and exploitation. This PSC cost recovery scheme was chosen because it provides some added value for countries that own natural resources and at the same time the country/ people still have the opportunity to actively manage their natural resources. Unlike the concession contract scheme, where the country owns the natural resources does not play an active role in its management, the state only waits for the receipt of its share in the form of taxes and royalties, without having the opportunity to enter into the management of its own natural resources management operations.

Ideally, the business pattern chosen by a country should be a business pattern that is in line with the natural resource management regime used. As an illustration, if the government applies the concept of private property, the most appropriate business pattern or scheme is the concession system. Meanwhile, if the government chooses to understand state property, the business pattern used is the cooperation contract system.[61] To provide a more comprehensive understanding, below is an illustration of the traditional profit-sharing/cost recovery contract scheme and the new Gross Split contract scheme.

61 Tienhaara, Kyla., pp. 15-20,



At the operational level of *petroleum operations*, the change in regime from *cost recovery* to *gross split* has shown interesting comparative findings, especially in the implementation of Planning or *Pre-Audit* by SKK Migas, as an institution established by the Government to carry out the management of *petroleum operations* operations. To carry out its duties, SKK Migas is equipped with the authority to evaluate, provide approvals, and supervise WP&B, POD, and AFE submitted by KKS Contractors.

The approval process of WP&B proposals submitted by KKS Contractors, both those that are still in the Exploration stage, and those that are already in the Exploitation/ Development stage, begins with the process of submitting WP&B proposal documents, then an evaluation process is carried out by SKK Migas, and finally to the process of approving the WP&B proposal. The Head of SKK Migas issued a decree containing a Work Procedure Guideline (PTK) approval of *the Work Program & Budget* (WP&B). The guidelines aim to provide a reference to SKK Migas and KKKS regarding the procedures for preparing, submitting, evaluating and approving WP&B and its revisions. In addition, it is also to standardize processes and documents to SKK Migas and KKKS in preparing, submitting, evaluating, and approving the WP&B and its revisions.

Work Program & Budget *Control* ultimately aims to control costs and work programs implemented by the KKS Contractor and function more as a means of cost control that (later) can be refunded (cost recovery), which is optimized with *pre-audit, current audit*, and *post audit* mechanisms. In this context, the implementation of operational management by SKK Migas in the *cost recovery scheme* can be carried out in its entirety, by consistently implementing a comprehensive audit mechanism, starting from the initial stage of planning (evaluation and approval of the Plan of Development (POD), Work Program and Budget (WP&B) and Authorization for Expenditure (AFE)), implementation of the procurement process of goods/services, to post-control/audit, including an examination of the calculations of the State share, and the suspension of the imposition of operating costs, if necessary.[62]

62 Indah Dwi Qurbani, Theresia Sumarno, and Retno W. N. Cassy, 'Regional Economic Development Strategy: Increasing Local Generated Domestic Revenue of the Regional-Owned Enterprises in the Oil and Gas Sector', Brawijaya Law Journal 7, no. 1 (April 2020): 70–81, https://doi.org/10.21776/ub.blj.2020.007.01.05.

However, such a pattern of control over oil and gas operations management by the government is not found in the *gross split* profit sharing contract. The change *in the cost recovery* regime to *gross split* also changes the governance of the process of controlling and supervising upstream oil and gas related activities by SKK Migas. From a cost control perspective, SKK Migas does not evaluate and approve the budget plan issued by the KKS Contractor. The evaluation of the *KKS contractor's petroleum operations* activity plan is carried out on their work programs only. Meanwhile, the budget plan was not evaluated.[63]

In the context of *the current audit*, especially related to the procurement process of goods and services, there is no provision for the gross split KKS Contractor to mandatorily follow the provisions stipulated in the Decree of the Head of SKK Migas which regulates the guidelines for supply chain management work procedures the second book on the guidelines for the implementation of the procurement of goods/services revision 05 which contains the provisions of the supply chain management guidelines by the Contractor KKS. With the *gross split scheme*, the obligation of the KKS Contractor to carry out the auction process for the procurement of goods and operational supporting services following the provisions in the work procedure guidelines becomes optional.[64] In fact, laws and regulations stipulate that all goods and equipment that are directly used in Upstream Oil and Gas Business Activities purchased by KKS Contractors are state property/property. Even the Cooperation Contract also states that all equipment purchased (imported) by the KKS contractor will become direct state property upon landing at the import port.

Data sourced from SKK Migas shows that if the KKS Contractor implements the *Gross Split scheme*, then usually they will ask the Minister of Energy and Mineral Resources for an additional large split on their way, and the Minister of Energy and Mineral Resources will issue an additional discretion figure. With *a* camouflaged Base Split, where for the split oil production is 77% and gas 79%, it provides a higher level of certainty for contractor acceptance. This percentage is the 'worst' condition or the lowest contractor share. Thus, there is still the potential for additional contractors' parts to get a split of oil production reaching 85% and 87% for gas. In other words, with the *Gross Split scheme,* the government is willing to accept a share of 15% for oil and 13% for gas.[65] This shows that the implementation of the *gross split* scheme has not shown effectiveness and in terms of revenue by the State, it actually shows that the state share tends to be lower than the one in the *Cost Recovery mechanism*. On the other hand, the argument that *the Gross Split* provides certainty and flexibility for investors also needs a more critical study. Empirical data shows that a number of contractors actually apply to return to using the *Cost Recovery scheme* because they consider that the *Gross Split* scheme does not provide economic certainty for the project, especially in high-risk fields and marginal reserves.[66] This fact shows that the reduction of control by the state does not necessarily increase the attractiveness of investment.

---

63 Decree of the Head of SKK Migas Number: PTK-066/SKKMA0000/2021/S4 concerning the Preparation and Reporting of Upstream Oil and Gas Business Activities with the Gross Split Scheme Revised 01.

64 Decree of the Head of SKK Migas Number: PTK-007/SKKIA0000/2023/S9 dated April 04, 2023 concerning Guidelines for Supply Chain Management Work Procedures Second Book on Guidelines for the Implementation of Procurement of Goods/Services Revision 05.

65 "A. Rinto Pudyantoro: Revision of PSC Gross Split and Upstream Oil and Gas Investment", Editor: Sorta Tobing, Katadata.co.id., accessed via https://katadata.co.id/indepth/opini/648bc314d7e2e/revisi-psc-gross-split-dan-investasi-hulu-migas,

66 SKK Migas, *Upstream Oil and Gas Industry Performance Report Mid Year 2023.*

The Constitutional Court in Decision No. 36/PUU-X/2012 emphasized that the right of state control includes management and supervision functions that cannot be separated from market mechanisms. In this context, the reduction of SKK Migas' role in operational control through the *gross split* scheme is contrary to the constitutional interpretation. It is not enough for the state to only set regulations and receive a share of the production results, but it must also have effective control over the implementation of business activities. The reduction of the state's role in controlling operations management also has implications for weakening the state's ability to ensure the optimization of state revenues and the protection of its interests in the long term. Policy studies show that in the high-risk upstream oil and gas sector, an imbalance in risk allocation and control can encourage opportunistic behavior and reduce the accountability of CSD contractors. This condition can ultimately harm the state as the owner of resources.[67]

The policy of replacing the *cost recovery* scheme with a *gross split scheme* in its implementation poses new challenges. Among them are the potential difficulties faced by the Government in forcing the approval process of business activities, the implementation of operation management, and the utilization of upstream oil and gas operation facilities to remain in the hands of SKK Migas. In addition, it is difficult to implement a policy of prioritizing local content (Domestic Component Level-TKDN) in upstream oil and gas operations. KKS contractors who use the *gross split scheme* tend to prioritize the interests of their corporate business network, even prioritizing the procurement of goods and services from companies from their own affiliates.

3. CONCLUSION

Both the cost recovery PSC and the gross split PSC place the initial capital and operational risks of exploration and exploitation on the contractor. Therefore, the main legal issue does not lie in the assumption that the cost recovery mechanism uses state funds at the initial financing stage, but in the different structure of reimbursement, revenue sharing, and operational control. Under the cost recovery scheme, SKK Migas exercises stronger control through the evaluation and approval of work programs, budgets, development plans, procurement, and audit mechanisms. By contrast, the gross split scheme gives contractors broader flexibility in managing operational costs because there is no reimbursement mechanism for operating expenses. This shift has structural implications for the exercise of state control, as SKK Migas' role is reduced mainly to the evaluation and approval of work programs, while substantive control over budgetary planning and operational expenditure is largely transferred to the contractor.

Based on the analysis of formal and material law, it is concluded that the regulation of the Gross Split Profit Sharing Contract through the Regulation of the Minister of Energy and Mineral Resources poses serious problems from the perspective of constitutional law and administrative law. Formally, the establishment of a strategic contractual regime through ministerial regulations has the potential to go beyond the authority granted by higher authorities. Materially, the characteristics of the *gross split scheme* tend to weaken the control of operation management by the state as mandated in the 2001 Oil and Gas Law and as interpreted by the Constitutional Court as an integral part of the state's control rights. The reduction in the role of SKK Migas is contrary to the principle of state control over strategic natural resources and the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia.

67 Victor D. Ola et al.

Thus, the renewal of the upstream oil and gas contract policy should be carried out through amendments to the Oil and Gas Law or at least through government regulations, not through ministerial regulations. Upstream oil and gas governance reform needs to be directed at strengthening transparency, efficiency, and accountability in *the cost recovery scheme* without sacrificing the principle of state control. This approach is expected to be able to maintain the constitutional consistency of national oil and gas management, while creating a sustainable investment climate and ensuring legal certainty.

REFERENCES

Aprizal, Mohamad Firwan, et al. "Indonesian Upstream Oil & Gas Governance for Sustainable Innovation." Jurnal Manajemen dan Organisasi (JMO) 13, no. 1 (March 2022): 48–60.

Asshiddiqie, Jimly. Konstitusi dan Konstitusionalisme Indonesia. Jakarta: Sinar Grafika, 2011.

Asshiddiqie, Jimly. Konstitusi Ekonomi. Jakarta: Kompas, 2016.

Bartlett, Anderson G. Pertamina: Indonesia National Oil. New York: Tulsa Amerasian Ltd., 1972.

Energy Policy. "Regulatory Certainty in Upstream Oil and Gas." Energy Policy Journal 156 (2021).

Fajri, Muhammad. "Analisis Hukum Skema Kontrak Gross Split terhadap Peningkatan Investasi Hulu Minyak dan Gas Bumi." Jurnal Hukum & Pembangunan 50, no. 1 (2020): Article 4. http://dx.doi.org/10.21143/jhp.vol50.no1.2482.

Hadjon, Philipus M. Pengantar Hukum Administrasi Indonesia. Yogyakarta: UGM Press, 2015.

Hasan, Madjedi, and Arnold Sirait, ed. "Potensi Masalah Skema Kontrak Bagi Hasil Gross Split." Katadata.co.id. https://katadata.co.id/indepth/opini/5e9a56246d03f/potensi-permasalahan-skema-kontrak-bagi-hasil-gross-split?page=2.

Hayati, Tri. "Hak Penguasaan Negara terhadap Sumber Daya Alam dan Implikasinya terhadap Bentuk Pengusahaan Pertambangan." Jurnal Hukum & Pembangunan 49, no. 3 (2019): Article 15.

Ilyas, Adam, Fachrizal Afandi, and Indah Dwi Qurbani. "Closing the Injustice Gap: Reconstructing Pre-Trial Proceedings as an Effective Remedy for Victims of Terminated Preliminary Inquiries: Menutup Celah Ketidakadilan: Rekonstruksi Praperadilan sebagai Effective Remedy bagi Korban Penghentian Penyelidikan." Jurnal Konstitusi 22, no. 4 (December 2025): 736–776. https://doi.org/10.31078/jk2247.

Indonesia. Kementerian Energi dan Sumber Daya Mineral. Peraturan Menteri Energi dan Sumber Daya Mineral Nomor 48 Tahun 2017 tentang Pengawasan Pengusahaan di Sektor Energi dan Sumber Daya Mineral.

Indonesia. Kementerian Koordinator Bidang Perekonomian. Siaran Pers, "HM.4.6/401/SET.M.EKON.3/07/2022: Menjadi Penopang Pertumbuhan Ekonomi, Menko Airlangga Dorong Industri Migas Tingkatkan Penggunaan Produksi Dalam

Negeri." Jakarta, July 18, 2022.

Indonesia. Mahkamah Konstitusi. Putusan Mahkamah Konstitusi Nomor 001-021-022/PUU-I/2003 tentang Pengujian Undang-Undang Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi.

Indonesia. Mahkamah Konstitusi. Putusan Mahkamah Konstitusi Republik Indonesia Nomor 36/PUU-X/2012.

Indonesia. Peraturan Pemerintah Nomor 35 Tahun 2004 tentang Kegiatan Usaha Hulu Minyak dan Gas Bumi.

Indonesia. SKK Migas. Laporan Tahunan SKK Migas 2022.

Indonesia. SKK Migas. Press Release Juli 2023: Laporan Kinerja Industri Hulu Migas Mid Year 2023.

Indonesia. Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Indonesia. Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan.

Indonesia. Undang-Undang Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi.

Indrati S., Maria Farida. Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan. Yogyakarta: Kanisius, 2007.

Intaniasari, Kirana. "Gross Split Contract Framework Regulation on the Caring for People." Jurnal Bestuur 8, no. 2 (December 2020).

Manan, Bagir. Dasar-Dasar Perundang-undangan Indonesia. Jakarta: Ind-Hill Co, 1992.

Nostalgi, Bunga. "Kepastian Hukum Pengelolaan Sektor Migas dengan Kontrak Bagi Hasil Split yang Bersifat Lintas Sektor dan Implementasinya terhadap Pertumbuhan Investasi di Sektor Hulu Migas." Jurnal Dharmasisya 1, no. 1 (2021).

Nugroho, Ahmad, Aan Eko Widiarto, and Indah Dwi Qurbani. "Green Constitution in the Indonesian Perspective: Reconstruction of the 1945 Constitution for Sustainable Development." Multidisciplinary Science Journal 8, no. 2 (August 2026): e2026024. https://doi.org/10.31893/multiscience.2026024.

Nurtjahyo, Prahoro. "Menjawab Keraguan terhadap Gross Split: Tanggapan atas Opini Dr. Madjedi Hasan Potensi Permasalahan dalam Gross Split." Kementerian Energi dan Sumber Daya Mineral, 2018. https://www.esdm.go.id/assets/media/content.

Ola, Victor D., Azubuike H. Amadi, Raphael Okeke, and Paul O. Okafor. "Comparative Analysis of Nigeria and Malaysia's Production Sharing Contract." European Journal of Business and Management Research. www.ejbmr.org.

Paramita, Rastri. "Permasalahan dan Tantangan Peningkatan Investasi Industri Hulu Migas." Jurnal Budget 7, edisi 2 (2022). Pusat Kajian Anggaran, Badan Keahlian DPR RI.

Partowidagdo, Widjajono. Pengantar Produksi Investasi dan Kemampuan Nasional Hukum Migas. CIDES, 2008. Dalam Muhammad Luthfan Hadi Darus, "Constitutionality in Production Sharing Contracts: Legal Policy on Petroleum and Natural Gas." Prophetic Law Review 1, no. 2 (2020).

Pradana, Mochamad Rizky. "Analisis Yuridis Penerapan Gross Split dalam Kontrak Kerja Sama Migas." Jurnal Hukum & Pembangunan 48, no. 2 (2018).

Pudyantoro, A. Rinto, and Sorta Tobing, ed. "Revisi PSC Gross Split dan Investasi Hulu Migas." Katadata.co.id. https://katadata.co.id/indepth/opini/648bc314d7e2e/revisi-psc-gross-split-dan-investasi-hulu-migas.

Qurbani, Indah Dwi. "Analisis Perubahan atas Undang-Undang Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi." Jurnal Hukum Lingkungan Indonesia, 2014.

Qurbani, Indah Dwi. "Politik Hukum Pengelolaan Minyak dan Gas Bumi di Indonesia." Jurnal Arena Hukum, 2012.

Qurbani, Indah Dwi, Raphael J. Heffron, and Arrial Thoriq Setyo Rifano. "Justice and Critical Mineral Development in Indonesia and across ASEAN." The Extractive Industries and Society 8, no. 1 (March 2021): 355–362. https://doi.org/10.1016/j.exis.2020.11.017.

Qurbani, Indah Dwi, Russeto Saptono, Ricardo Simatupang, Raras Natasya Anindita, and Anggi Ari Yuliani. Politik Hukum dalam Teori dan Praktek Empiris. Padang: CV. Gita Lentera, 2024.

Qurbani, Indah Dwi, Theresia Sumarno, and Retno W. N. Cassy. "Regional Economic Development Strategy: Increasing Local Generated Domestic Revenue of the Regional-Owned Enterprises in the Oil and Gas Sector." Brawijaya Law Journal 7, no. 1 (April 2020): 70–81. https://doi.org/10.21776/ub.blj.2020.007.01.05.

Redi, Ahmad. Hukum Sumber Daya Alam dalam Sektor Minyak dan Gas Bumi. Jakarta: Sinar Grafika, 2017.

Ridwan HR. Hukum Administrasi Negara. Jakarta: Raja Grafindo Persada, 2014.

Salim H.S. Hukum Pertambangan di Indonesia. Jakarta: Rajawali Pers, 2012.

Setyadi, Didik Sasono. "Perang Normandia dan Skema PSC." Rubrik Kelana, Harian Disway, March 6, 2024.

Shah, Kumkum. "Analysis of Doctrine of Permanent Sovereignty over Natural Resources." SSRN, 2019. https://ssrn.com/abstract=3326636 or http://dx.doi.org/10.2139/ssrn.3326636.

Standard & Poor's Global. International Energy Forum: Upstream Oil and Gas Investment Outlook. February 2023.

Tienhaara, Kyla. "Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses." Sustainable Development Law & Policy 11, no. 3 (2011): 15–20, 39–40.

Tisnanta, H.S. "The Legal Problems of Gross Split Policy in Indonesia's Oil and Gas Sector." Padjadjaran Journal of Law 5, no. 1 (2018).