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THE UNFINISHED BUSINESS OF THE EXPORT BAN – OLD AND NEW ISSUES FRUSTRATE THE GRAND COMPROMISE [1][2][3][4][5]

INTRODUCTION

The recently announced, much modified ban on the export of unprocessed mineral products ("**Export Ban**") and the accompanying progressive tax on exports of mineral concentrates ("**Export Tax**") was clearly intended by the Government to bring to an end the increasingly confused and confusing public dialogue over the future course of the domestic processing and refining obligation in respect of mineral products ("**DP&R Obligation**").

Perhaps not surprisingly, given the unseemly last minute and controversial nature of the grand compromise finally arrived at in respect of the DP&R Obligation ("**Grand Compromise**"), many old and new issues with regard to the Export Ban and the Export Tax remain to be resolved.

In this article, the writer will highlight a number of unresolved issues regarding the proper application and interpretation of the regulations, which the Government has introduced in its endeavor to make the Grand Compromise a workable reality, and why there seems to now be a real risk that, collectively, these issues may substantially frustrate the Grand Compromise.

Observers of the Indonesian mining industry are increasingly concerned that the "Grand Compromise" is in danger of becoming the "Grand Train Wreck", an outcome the Government very much hoped to avoid.

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[5] This article appeared in the February - March 2014 issue of Coal Asia Magazine.

BACKGROUND

The Grand Compromise distinguishes between (i) those metal minerals which it is not realistic to currently expect any greater level of domestic processing and refining than is already taking place ("**Category 1 Minerals**") and (ii) those metal minerals which it is realistic (at least in the mind of the Government) to currently expect a greater level of domestic processing and refining than is already taking place ("**Category 2 Minerals**").

Category 1 Minerals are allowed to be exported, after 12 January, in "concentrate form" so long as (i) a specified minimum level of processing and refining has been carried out and which minimum level of processing and refining is substantially less than that originally mandated by the Government in 2012 as part of MoEMR Regulation No. 7 of 2012 re Local Processing & Refining of Minerals ("**MoEMRR 7/2012**") and (ii) the Export Tax is paid.

Category 2 Minerals are only be allowed to be exported, after 12 January, if the full minimum level of processing and refining originally mandated by the Government in 2012 is carried out.

The Category 1 Minerals are primarily copper but also include iron ore, manganese, lead, zinc, ilmenite and titanium.

The Category 2 Minerals are primarily nickel, bauxite, tin, gold, silver and chromium as well as all the remaining mineral products originally specified by the Government in MoEMRR 7/2012 as being subject to the Export Ban and which are not otherwise Category 1 Minerals.

The details of the Grand Compromise are set out, at length, in the writer's earlier article "The Export Ban as Finally Introduced – A Grand Compromise with Much Residual Uncertainty", Coal Asia Magazine, January – February 2014.

The new regulatory regime, for the implementation of the Grand Compromise, now comprises (i) Government Regulation No. 1 of 2014 re Second Amendment to Government Regulation No. 23 of 2010 re Implementation of Mineral & Coal Mining Enterprise Activities, (ii) Minister of Energy & Mineral Resources Regulation No. 1 of 2014 re Increasing the Added Value of Minerals through Domestic Processing & Refining Activity ("**MoEMRR 1/2014**"), (iii) Minister of Finance Regulation No. 6 of 2014 re Second Amendment to MoF Regulation No. 75 of 2012 re Determination of Export Goods that are subject to Export Duty and the Applicable Tariff ("**MoFR 6/2014**") and (iv) Minister of Trade Regulation No. 4 of 2014 re Procedures for & Restrictions on the Export of Mineral Products ("**MoTR 4/2014**") (together, "**GC Regulatory Regime**").

COMMENTARY

1. Immediate Results of Grand Compromise

1.1 **No Exports**: Reports in the popular press (see the 25 January and 4 February editions of The Jakarta Post) indicate that there have been no or only minimal exports (**i.e.**, **legal** exports that is) of unprocessed metal minerals and metal minerals since 12 January. The substantial halt in exports of Category 2 Minerals, apart from gold and silver (which are already processed and refined domestically to the specifications provided for in MoEMRR 7/2012) was, of course, to be expected and, indeed, was the primary short term objective of the Government in introducing the Grand Compromise. It seems, however, that exports of Category 1 Minerals have also effectively stopped at least temporarily. This will surely come as something of a surprise to many people who saw the Grand Compromise as materially benefiting the Category 1 Mineral producers given their limited continuing right to export Category 1 Minerals in concentrate form and with specifications much reduced from those specifications originally provided for in MoEMRR 7/2012.

This substantial halt of Category 1 Mineral exports is undoubtedly attributable, in part, to the fact that most Category 1 Mineral producers will have sought to run down their stockpiles and ship as much Category 1 Mineral product as possible in advance of 12 January and not knowing what the Grand Compromise would ultimately provide for. Further, many traditional buyers of Category 1 Minerals from Indonesia have built up large stockpiles in anticipation of the rigorous enforcement of the Export Ban such that short term, international demand for Category 1 Minerals, sourced from Indonesia, has been reduced.

Notwithstanding the above limited commercial explanations, however, accepting and coming to terms with the Grand Compromise is apparently proving to be a major challenge for most metal mineral producers including Category 1 Mineral producers. Many Category 1 Mineral producers have, apparently, decided to discontinue their export activities unless and until their concerns regarding the Grand Compromise are satisfactorily resolved. Self-evidently, many Category 1 Mineral producers don't see the Grand Compromise as being as beneficial to them as was thought by many observers to be the case in the days immediately following 12 January when the Grand Compromise was portrayed in certain parts of the popular press as effectively being a Government "cave-in" to the Category 1 Mineral producers and even as the "Freeport – Newmont Amendment".

1.2 Legal Challenges

1.2.1 **IUP Holders**: It has not taken long for at least certain aspects of the Grand Compromise to become the subject to legal challenges. It has been reported in the popular press (see The Jakarta Post, Wednesday 22 January edition) that the Indonesian Mineral Entrepreneurs Association (otherwise known as "**APEMINDO**") filed a challenge, with the Constitutional Court, to the Export Ban on 16 January, just 4 days after the Grand Compromise was announced. APEMINDO primarily represents IUP holders.

The writer would not be surprised to see other mining industry organizations, such as the Indonesian Nickel Miners Association ("**ANI**"), follow the example of APEMINDO in filing challenges to the Export Ban and other aspects of the Grand Compromise. ANI already has an established track record of legal challenges to various aspects of the Government's mining policy as the same impacts nickel miners. This includes ANI's successful 2012 Supreme Court challenge to the original 2012 formulation of the Export Ban. ANI was quoted in the 23 January edition of The Jakarta Post as fully supporting the legal action taken by APEMINDO.

Although the writer has not seen the particular claims made by APEMINDO, any number of legal grounds, for IUP holders and their industry associations to challenge the Export Ban, are possible including that (i) the 2009 Minerals & Coal Mining Law does not impose any restrictions on the rights of IUP holders to export their mineral products, (ii) the Export Ban effectively renders worthless the rights, otherwise granted to them by the 2009 Minerals & Coal Mining Law, to sell their mineral products and (iii) the Export Ban discriminates against certain mineral producers (**i.e.**, Category 2 Mineral Producers) in favor of other mineral producers (**i.e.**, Category 1 Mineral Producers).

1.2.2 **CoW holders**: Perhaps the best evidence that those Category 1 Mineral producers, which are CoW holders, don't see the Grand Compromise as being favorable to their interests, is to be found in the various direct and indirect indications from CoW holders that they may be seriously considering formally declaring a dispute with the Government and proceeding with international arbitration as provided for in their respective CoWs - see the various and somewhat inconsistent news items in The Jakarta Post on 24 January, 4, 5 and 7 February. Although the CoW holders will surely be keen to avoid a direct and acrimonious confrontation with the Government over the Grand Compromise (such a confrontation being the inevitable consequence of commencing international arbitration), the Export Tax is proving to be so unacceptable to the Category 1 Mineral producers that the relevant CoW holders may be ultimately left with no other choice unless the Government backs down on the Export Tax. Such a back down by the Government, however, seems wholly improbable to the writer given the looming parliamentary and presidential elections. Even if some key Ministers now realize that, in retrospect, the Export Tax was fundamentally misconceived, no Minister will want to publicly support the roll back of the Export Tax, so soon after it was introduced, for fear of tarnishing his nationalist credentials in the run up to the elections by becoming (at least in the fertile imaginations of Indonesia's numerous nationalists and populists) the "running dog" of the foreign CoW holders. The Government has effectively backed itself into a very "tight corner" with the Grand Compromise and otherwise left itself with almost no room for flexibility or maneuver this side of at least the parliamentary elections. This lack of room to maneuver does not bode well for an early resolution of the present standoff between those Category 1 Mineral producers, which are CoW holders, and the Government over the Grand Compromise.

1.3 **Consequences for Government**: The most serious consequence, for the Government, of the (i) actual legal challenges by IUP Holders and (ii) threatened international arbitration by CoW holders is the uncertainty this legal maneuvering creates for the longevity of the Grand Compromise in general and the Export Ban in particular. After all, 1 of the primary purposes of the Government, in announcing the Grand Compromise, was surely to provide international

promoters of domestic smelters, for Category 2 Minerals, with sufficient confidence, in respect of the Government's commitment to the DP&R Obligation and the Export Ban, to be able to proceed to carry out their plans for the construction of domestic smelters.

Unless and until (i) the legal challenges by IUP holders are finally resolved in favor of the Government and (ii) the risk of international arbitration by CoW holders is removed by the conclusion of the CoW renegotiations on terms minimally acceptable to CoW holders, as well as to the Government, the uncertainty over what will happen to the Export Ban, in the near to medium term, cannot be said to have been reduced and may, if anything, have actually been increased. It seems probable to the writer that international promoters of domestic smelters, for Category 2 Minerals, will not see the Grand Compromise, in light of the resulting legal "pushback" by IUP holders and CoW holders, as providing them with the level of certainty and confidence, in the longevity of the Export Ban, which these international promoters require in order to justify immediately proceeding with domestic smelter construction. Instead, international promoters are likely to adopt a "wait and see" policy until the legal maneuvering comes to an end, something which could still be a long way off. It was precisely this continuing delay in the progress of domestic smelter construction which the Government sought to avoid with its bold announcement of the Grand Compromise on 12 January.

2. Application Problems with GC Regulatory Regime

2.1 **Payment of Export Tax**: The principal application problem with the GC Regulatory Regime is the Export Tax provided for in MoFR 6/2014 as the "price" for Category 1 Mineral producers being allowed to continue to export mineral products in concentrate form until January 2017. There are 2 aspects to the application problem posed by the Export Tax.

The first aspect of the Export Tax problem applies to all Category 1 Mineral producers whether they are IUP holders or CoW holders. All Category 1 Mineral producers clearly have to determine whether or not payment of the Export Tax makes exporting their mineral products in concentrate form uneconomic. While the initial Export Tax rate of 20/25%, in the first half of 2013, may be painful but bearable for most Category 1 Mineral producers, the progressive nature of the Export Tax means that the Export Tax rate will eventually reach 60% in the second half of 2016. A 60% Export Tax is likely to make exporting of mineral products uneconomic for all except the most profitable Category 1 Mineral producers.

The second aspect of the Export Tax problem only applies to those Category 1 Mineral producers which are CoW holders. Because CoW holders have long maintained that they are only subject to those taxes specified in their CoWs and none of the CoW generations provide for an Export Tax, paying the Export Tax in accordance with MoFR 6/2014 would amount to a major change in the position taken by CoW holders with regard to their claimed overall tax status. Effectively, paying the Export Tax, at any rate, would mean that CoW holders now accept that (i) they are subject to whatever taxation regime applies from time to time in Indonesia and (ii) their CoWs do not otherwise exhaustively specify the types of taxes and the rates of tax which they are obliged to pay. Having agreed to pay the Export Tax, CoW holders would then, most likely, find it impossible to resist subsequent moves by the Government to

impose additional new taxes on them or to increase the rates of existing taxes payable by CoW holders. In other words, a very dangerous precedent would be created which has the potential to cost CoW holders dearly for the remaining duration of their CoWs.

Refusal to accept changes in the applicable tax regime, from that already provided for in their CoWs, has been a major issue in the long running CoW renegotiations taking place between the Government and all CoW holders. It is entirely understandable, therefore, if CoW holders are reluctant to pay the Export Tax (even at the initial not unduly punitive rates of 20/25%) out of concern that, to do so, will inevitably compromise their bargaining power in the on-going CoW renegotiations.

The writer believes that, in introducing the Export Tax at the last moment (at least in its new progressive form) and then insisting the Export Tax be paid by CoW holders as well as IUP holders, the Government forgot to take into account the inevitable strategic linkage the CoW holders would see between paying the Export Tax at any rate and fundamentally undermining their long held positions in the ongoing CoW re-negotiations. Although Category 1 Mineral producers, which are CoW holders, very much want to be able to continue to export their mineral products in concentrate form only, fatally compromising their position on 1 of the most central issues in the CoW renegotiations may be too high a price to pay for the continuing right to export at least in the short term and without a great deal of careful thought and "soul searching".

2.2 **Acceptance of Reduced DP&R Obligation**: Given Category 1 Mineral producers, which are CoW holders, also take the position that they are not subject to the DP&R Obligation at all or at least not as set out in MoEMRR 7/2012, any argument by the Government that paying the Export Tax should be seen as the inevitable tradeoff for temporarily relieving CoW holders of full compliance with the DP&R Obligation, as set out in MoEMRR 7/2012, is also not going to find much ready acceptance with CoW holders. Again, imposing the DP&R obligation on CoW holders is another 1 of the unresolved contentious issues in the ongoing CoW renegotiations.

Having regard to the above, those Category 1 Mineral producers, which are CoW holders, may take the position that accepting even that limited part of the Grand Compromise which obliges them to carry out the reduced levels of DP&R specified in the GR Regulatory Regime is not advisable, with or without the attendant obligation to pay the Export Tax at any rate, as this will mean they have given up on yet another 1 of the unresolved contentious issues in the ongoing CoW renegotiations and without getting anything in return.

3. Interpretation Problems and Other Concerns with GC Regulatory Regime

The GC Regulatory Regime itself gives rise to many challenging issues of interpretation and other causes for concern which are already leading to significant practical problems for mining companies seeking to export mineral products post 12 January. MoEMRR 1/2014 is particularly troubling in this regard. Some only of the more significant of these interpretation problems and causes for concern are detailed and discussed below.

3.1 **Delays in Exporting otherwise Exportable Mineral Products – Article 12(1) to (5) of MoEMRR 1/2014**: Article 12(1) to (3) and (5) of MoEMRR 1/2014 provide, in quite general terms, that holders of CoWs and Production Operation IUPs for metal minerals can export, for a further 3 years, their metal mineral products once they meet the DP&R Obligation specifications in Appendix 1 of MoEMRR 1/2014. However, Article 12(4) then goes on to provide that Article 12(1) to (3) does **not** apply to 6 specified Category 2 Minerals being nickel, bauxite, tin, gold, silver and chromium. Read literally, Article 12(4) could be understood as meaning that, even if producers of these 6 specified Category 2 Minerals do meet the applicable 2012 DP&R Obligation specifications, they still cannot export their production. This is clearly not the intention of the Grand Compromise which is actually to still allow the export of these 6 specified Category 2 Minerals so long as the producers of the same do meet the applicable 2012 DP&R Obligation specifications. Nevertheless, the standard rules of statutory interpretation would normally require the specific wording of Article 12(4) to be applied in preference to the more general wording of Article 12(1) to (3).

The interpretation problem with Article 12(1) to (5) is greatly compounded by the fact that Appendix 1 to MoEMRR 1/2014 contains a combination of Category 1 Minerals and Category 2 Minerals, making it difficult to discern the different export treatment for Category 1 Minerals compared to Category 2 Minerals.

The failure of Article 12(1) to (5) of MoEMRR 1/2014 to properly reflect the intention of the Grand Compromise has resulted in the producers of certain Category 2 Mineral producers being denied, at least on a temporary basis, the right to export certain of their mineral products even though the subject mineral products already fully satisfy the applicable 2012 DP&R Obligation specifications. In this regard and given government officials in Indonesia are not known for trying to understand the actual intention underling the regulations they are responsible for administering, the failure of Article 12(1) to (5) to properly reflect the intention of the Grand Compromise is a potentially significant problem.

With the more recent issuance of MoTR 4/2014, some of the confusion created by Article 12(1) to (5) of MoEMRR 1/2014 has, arguably, been removed as Article 2(1) of MoTR 4/2014 may be interpreted as meaning that **any** metal mineral (**i.e.**, whether Category 1 Minerals or Category 2 Minerals) can be exported once the applicable mining DP&R Obligation specifications have been met. The wording of Article 2(1) of MoTR 4/2014, however, is far from ideal, with metal mineral producers and the relevant regulatory authorities (**i.e.**, MoEMR and MoT) being left to try to reconcile the apparent inconsistency between Article 12(4) of MoEMRR 1/2014 and Article 2(1) of MoTR 4/2014.

3.2 **Possible Re-Introduction of Export Quotas - Article 12(1) to (3) of MoEMRR 1/2014**: Each of Article 12(1), (2) and (3) of MoEMRR 1/2014 refer to metal mineral producers, which have satisfied their applicable DP&R Obligations, being able to export a "specific amount" of the relevant processed and refined metal mineral product. The reference to "specific amount" immediately raises the specter of export "quotas" being applied to metal mineral products after 12 January. In other words, even though metal mineral producers have satisfied their applicable DP&R Obligations, they may still **not** be able to export all of the relevant processed and refined mineral product.

The possibility, not to say likelihood, of export quotas being imposed on metal mineral producers, after 12 January and even though they have already satisfied their applicable DP&R Obligations, was specifically referred to by MoEMR's Chief of Mineral Production Supervision at a recent industry conference.

Limiting exports of processed and refined metal mineral products to a "specific amount" makes little sense for 2 reasons.

First, it was only in the second half of 2013 that MoF announced the abolition of any and all export quotas for mineral products as part of the Government's response to problems being experienced with Indonesia's balance of trade as a result, supposedly, of the impending phase out of quantitative easing in the United States. It is hard to believe that the outlook for the Indonesian economy has improved so much (or indeed at all since the second half of 2013) as to make the late 2013 rationale, for the then abolition of any and all export quotas for mineral products, no longer applicable.

Second, if metal mineral producers, that have already satisfied their DP&R Obligations, cannot export **all** of their resulting processed and refined metal mineral products, what was the point of them satisfying their DP&R Obligations in the first place? No metal mineral producer is likely to be willing to carry out even a much modified and reduced DP&R Obligation if the cost of compliance with the same cannot be, at least partially, recouped through the sale and export of **all** the resulting processed and refined metal mineral products. As far as metal mineral producers are concerned (and regardless of whether they are Category 1 Mineral producers or Category 2 Mineral producers), the only possible economic justification for carrying out the DP&R Obligation is so that they are free to export **all** the resulting processed and refined metal mineral products.

3.3 **Irrelevant Recommendation Requirements – Article 12(6) of MoEMRR 1/2014**: Article 12(6) of MoEMRR 1/2014 may be interpreted as requiring that, even after metal mineral producers have fulfilled their DP&R Obligations, they must still obtain a recommendation from DGoMC, on behalf of MoEMR ("**Recommendation**"), before they can export the resulting processed and refined metal mineral product. There is no apparent distinction, drawn in Article 12(6), between metal mineral producers (whether Category 1 Mineral producers or Category 2 Mineral producers) which have fully satisfied the 2012 DP&R Obligation specifications and those Category 1 Mineral producers which have only satisfied the much reduced and temporary DP&R Obligation specifications introduced as part of the Grand Compromise. While the continuing need for a Recommendation can be understood in the case of those Category 1 Mineral producers which have only satisfied the much reduced and temporary DP&R Obligation specifications introduced as part of the Grand Compromise and which have to be able to show appropriate "seriousness" in achieving the full 2012 DP&R Obligation specifications by 2017, there seems to be no justification at all for imposing the Recommendation requirement on those metal mineral producers (whether Category 1 Mineral producers or Category 2 Mineral producers) which have already fully satisfied the 2012 DP&R Obligation specifications. These latter mineral producers should then be outside the ambit of the export restrictions of MoEMRR 1/2014 altogether, which export restrictions are only meant

to ensure compliance with either the much reduced and temporary DP&R Obligation specifications in the case of Category 1 Mineral producers or the full 2012 DP&R Obligation specifications in the case of Category 2 Mineral producers.

In the case of those metal mineral producers (whether Category 1 Mineral producers or Category 2 Mineral producers) which have already fully satisfied the 2012 DP&R Obligation specifications, any continuing Recommendation requirement seems totally irrelevant and unnecessary.

3.4 **Unrealistic Recommendation Requirements – Article 12(8)(b) and 12(9) of MoEMRR 1/2014**: Article 12(8)(b) of MoEMRR 1/2014 provides that, in order to obtain the Recommendation, metal mineral producers (whether Category 1 Mineral producers or Category 2 Mineral producers) must, among other things, establish their "seriousness" in building refining facilities (either directly or in co-operation with other parties) by submitting "the construction plan for the refining facilities". Literally interpreted, Article 12(8)(b) makes the availability of the all-important Recommendation conditional upon the relevant mineral producer having an actual construction plan in place for particular refining facilities.

An actual construction plan for particular refining facilities implies that (i) the capacity and engineering specifications of the refining facility have been determined, (ii) the site for the refining facilities has been selected, (iii) the necessary environmental impact study has been carried out and, most probably, (iv) a location permit obtained. That these are, indeed, the minimum pre-requisites for an actual construction plan for particular refining facilities is strongly suggested by Article 12(9) of MoEMRR 1/2014 which specifies the supporting documents that must accompany the Recommendation application and include such things as "an approved feasibility document", "an approved environmental document" and "an approved development plan schedule for refining facilities".

In the case of most metal mineral producers (whether Category 1 Mineral producers or Category 2 Mineral producers), the "construction plan" requirement seems to be impossible to satisfy at least in the short to medium term. This is because most metal mineral producers have made little or no progress in building or even planning refining facilities as the same have been determined to be uneconomic. Accordingly, it is most unlikely these metal mineral producers will already have an actual construction plan in place for particular refining facilities or be in a position to develop such a construction plan any time soon.

Assuming Article 12(8)(b) of MoEMRR 1/2014 is strictly enforced, it is going to be impossible for most metal mineral producers to obtain a Recommendation in the near to medium term because of their inability to submit to DGoMC, as part of the Recommendation application, the required actual construction plan for particular refining facilities. This is going to effectively prevent most metal mineral producers from exporting their concentrate despite the fact that the concentrate meets the reduced DP&R Obligation specifications introduced as part of the Grand Compromise.

3.5 **Tying of Quota Amounts to Construction Progress – Article 12(10)(b) of MoEMRR 1/2014**: Article 12(10)(b) of MoEMRR 1/2014 appears to contemplate that, as part of the process of reviewing Recommendation applications, DGoMC will determine the "specific amount" of concentrate (**i.e.**, the quota amount) which can be sold and exported by the Category 1 Mineral producers submitting the Recommendation applications and having regard to, amongst other things, the "construction progress of the refining facilities". By implication, Article 12(10)(b) seems to mean that (i) if a Category 1 Mineral producer has made no progress in constructing its refining facility, then DGoMC will set the "specific amount" of concentrate which can be sold and exported by that Category 1 Mineral producer at zero and (ii) in the case of a Category 1 Mineral producer which has made some progress in constructing its refining facility, then DGoMC will set the "specific amount" of concentrate, which can be sold and exported by that metal mineral producer, equal to the proportion of the refining facility which has already been constructed by the metal mineral producer. In other words, if a Category 1 Mineral producer has completed construction of 25% of its proposed refining facility, DGoMC will set the "specific amount" of concentrate which can be sold and exported by that Category 1 Mineral producer at 25% of the concentrate currently produced by the Category 1 Mineral producer.

The notion that the "specific amount" of concentrate, which can be sold and exported by a Category 1 Mineral producer at any point in time prior to January 2017, should be tied to the progress made, to date, in constructing its smelting facility is momentarily and superficially appealing given that the Grand Compromise envisages Category 1 Mineral producers will fully meet the applicable 2012 DP&R Obligation specifications by January 2017, something which is only possible with a suitable refining facility in place. A more serious understanding, however, of the current position of most Category 1 Mineral producers makes it apparent that this approach makes almost no sense in practical terms. This is because, as the writer has already pointed out in 3.4 above, most Category 1 Mineral producers have, to date, made no progress in constructing their refining facilities and are not likely to do so for some time to come. The position is particularly untenable if "construction" means physical construction as opposed to merely planning the construction of refining facilities.

Having regard to the above, a strict application of Article 12(10)(b) of MoEMRR 1/2014 may mean that, at least for the next year or so, DGoMC could set the "specific amount" of concentrate which can be sold and exported by most Category 1 Mineral producers at zero on the basis that very few if any Category 1 Mineral producers have started physical construction of refining facilities or even undertaken any detailed planning for refining facility construction.

3.6 **Short Term Nature of Recommendation & Semi-Annual Review of Construction Progress – Article 12(14) of MoEMRR 1/2014**: Article 12(14) of MoEMRR 1/2014 makes clear that, if and when a Category 1 Mineral Producer receives a Recommendation and is, therefore, able to start exporting the "specific amount" of concentrate determined by DGoMC, the Recommendation is only good for 6 months. In other words, Category 1 Mineral producers will have to repeat the exercise of applying for a Recommendation and satisfying, again, the Recommendation requirements every 6 months. This is a daunting prospect which will surely be the source of major administrative headaches for most Category 1 Mineral producers. More importantly, as the granting or withholding of the Recommendation is almost certainly a matter

for the discretion of DGoMC and not something that Category 1 Mineral producers have any right to even if they otherwise satisfy the Recommendation requirements, the uncertainty over whether or not a Recommendation can be obtained in subsequent periods undermines the market position of Category 1 Mineral producers and may result in them being seen by overseas buyers as potentially unreliable suppliers.

Although not entirely clear from the wording of Article 12(14), it seems to be envisaged that, each time a 6 monthly application for a Recommendation is made, DGoMC will review the progress the particular Category 1 Mineral producer has made in the construction of its refining facilities since the last Recommendation was granted. Such a 6 monthly review of refining facility construction progress may result in (i) a change (either an increase or a reduction) in the "specific amount" of concentrate which can be sold and exported by that Category 1 Mineral producer during the next 6 months or (ii) **no** Recommendation being granted at all for the next 6 months due to progress in refining facility construction, during the past 6 months, which is deemed "inadequate" by DGoMC.

Just how DGoMC will determine the adequacy or inadequacy of refining facility construction during any 6 month period is nowhere specified in MoEMRR 1/2014. It is probable, however, that any progress in construction which, if it continues at the same pace, will **not** result in a fully constructed and operating refining facility by January 2017, is likely to be determined inadequate by DGoMC, thereby risking the withholding of a Recommendation for the next 6 months.

SUMMARY & CONCLUSIONS

The Grand Compromise has, so far at least, failed to deliver the Export Ban certainty, post 12 January, which the Government was very much hoping to achieve. This is due to the combination of various still unresolved issues. Some of these issues have been around for a long time while others relate to the problematic wording of the GC Regulatory Regime in general and of MoEMRR 1/2014 in particular.

There was little the Government could, realistically, do to prevent legal challenges to the Export Ban by disgruntled IUP holders and their industry associations. However, the Government seems to have made a serious tactical error in not understanding and addressing the inevitable strategic link the CoW holders would see between (i) agreeing to pay the Export Tax at any rate and accepting even much reduced DP&R Obligation specifications on the 1 hand and (ii) completely undermining their long held positions on these issues in the ongoing and as yet unresolved CoW renegotiations with the Government on the other hand. Requiring the CoW holders to give up on 2 of the most important outstanding issues in the ongoing CoW renegotiations, as the price for continuing to be able to export, was always going to be extremely difficult for the CoW holders to accept.

This much hoped for and needed level of Expert Ban certainty seems inherently unlikely to be achieved until 2 things happen. First, the various actual and threatened legal challenges to various aspects of the grand Compromise need to be either withdrawn or resolved in favor of the Government. Second, the renegotiation of the CoWs needs to be completed in a way that meets the minimum needs of both the Government and the CoW holders.

Indonesia's Constitutional Court is not known for its quick and timely decision making while international arbitration, were it to be commenced by any CoW holder, would likely take several years to conclude.

With the April parliamentary elections almost upon us, the Government has left itself with very little room for maneuver in brokering a deal, over the Grand Compromise, with the CoW holders and which deal would not threaten to undermine the resource nationalist credentials of any Minister who might otherwise want to support such a deal. At this point, any sort of deal in respect of the Grand Compromise may simply be politically impossible until the second half of 2014 at the earliest.

Having regard to the foregoing, the Government's hoped for Export Ban certainty still seems to be a long way off notwithstanding the Grand Compromise. Indeed, if anything, the Grand Compromise may have simply increased the uncertainty over what is ultimately going to happen about the Export Ban.

The seemingly inevitable continuing uncertainty over what is going to actually happen, in the short to medium term, about the Export Ban does not bode well for the chances of domestic smelter construction starting any time soon.

Even if the current uncertainty about the legality of the Export Ban could be quickly resolved, there are so many interpretation and practical problems with the GC Regulatory Regime that it may not be possible for metal mineral producers to quickly resume their exports in any event. The practical problems involved in complying with the GC Regulatory Regime in general and with MoEMRR 1/2014 in particular are likely to be most serious for those Category 1 Mineral producers which have not, as yet, made any progress at all in domestic smelter construction. This is because these Category 1 Mineral producers seem to stand little chance of being able to satisfy the Recommendation requirements of MoEMRR 1/2014 in the short term.

Only time will tell whether or not the "Grand Compromise" morphs into the "Grand Train Wreck" but the early signs are not encouraging.

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