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TRYING TO UNDERSTAND THE CCoW/CoW RENEGOTIATIONS – A CONUNDRUM WRAPPED IN AN ENIGMA¹²³⁴⁵

INTRODUCTION

Early March saw a flurry of apparent activity regarding the long running saga of the Coal Contracts of Work/Mineral Contracts of Work (“CCoW/CoW”) renegotiations between the largest domestic and foreign mining companies operating in Indonesia (“CCoW/CoW Holders”) and the Government of Indonesia (“GoI”) (“CCoW/CoW Renegotiations”).

The Corruption Eradication Commission (“KPK”) has unexpectedly involved itself in the CCoW/CoW Renegotiations claiming that the delay in concluding the CCoW/CoW Renegotiations has caused large losses to the State and hinting at corrupt behavior as a possible explanation for the delay.

Senior officials of the Ministry of Energy & Mineral Resources (“MoEMR”) have been quoted as saying that the CCoW/CoW Renegotiations are about to come to an end.

It has been reported in the popular press that a large number of CCoW/CoW Holders have signed or are about to sign a Memorandum of Understanding with GoI on the amendment of their CCoWs/CoWs (“CoW/CCoW Amendment MoU”).

Pity the poor casual observer of the Indonesian mining industry trying to make some sense out of all these developments and understand what is really happening with the CCoW/CoW Renegotiations. In every sense, the CCoW/CoW Renegotiations have become a “conundrum wrapped in an enigma” for most people.

In this article, the writer will endeavor to shed some light on what has been happening recently with the CCoW/CoW Renegotiations and where the CCoW/CoW Renegotiations may be heading.

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⁵ This article appeared in the March - April 2014 issue of Coal Asia Magazine.

BACKGROUND

Article 169(b) of the 2009 Mining Law is generally interpreted as imposing a 12 month deadline for bringing CCoWs/CoWs into line with the 2009 Mining Law.

In October 2011, the President outlined GoI's new energy security policy which sets out 9 objectives for the mining industry over the ensuing 3 years. The very first of these objectives is to renegotiate the so-called "onerous and unfair" contracts between foreign parties and Indonesia which, according to the President, have "become a matter of community concern". This none too subtle reference to CCoWs/CoWs clearly signaled GoI's determination to push forward with the CCoW/CoW Renegotiations.

When it became apparent that CCoW/CoW holders were likely to strenuously resist the very idea of a renegotiation of their CCoWs/CoWs, GoI set up a special team for overseeing the renegotiation of CoWs by virtue of Presidential Decree 3/2012 re Establishment of Evaluation Team for Renegotiation of CoWs ("**PD 3/2012**"). The drafters of PD 3/2012 proposed a 31 December 2013 deadline for the completion of the CCoW/CoW Renegotiations.

Although PD 3/2012 seems to contemplate 9 or more key issues requiring amendments to CCoWs/CoWs, this has been gradually whittled down to 6 main points or outstanding issues which the CoW holders are being asked to accept. The 6 main points or outstanding issues are (i) maximum contract area of 25,000 HA, (ii) no further extensions of CCoWs/CoWs and replacement of CCoWs/CoWs at the end of their current terms with mining licenses ("**IUPs**"), (iii) adjustment of royalties in accordance with changes in the law from time to time while leaving the rate of income tax fixed at that specified in the CCoWs/CoWs, (iv) commitment to undertake domestic processing and refining, (v) divestment of 51% equity interest to local parties in installments and by the end of 10 years from the commencement of commercial production and (vi) prioritization of the use of domestic goods and services (together, "**6 Main Points**").

MoEMR has repeatedly claimed that the CCoW/CoW Renegotiations were almost a "done deal".

In May 2012 it was reported that as many as 60 CCoW/CoW holders had already agreed to renegotiate the 6 Main Points while as many as a further 14 CCoW/CoW holders had agreed to renegotiate at least some of the 6 Main Points. The CCoW/CoW holders, which had expressed a willingness to renegotiate all or part of the 6 Main Points, were said to include Freeport, Newmont and Vale. MoEMR was sounding very confident in its public statements about the progress being made in the CCoW/CoW Renegotiations. GoI's strategy of dealing with the CCoW/CoW holders individually rather than collectively and putting maximum pressure on small and medium sized CCoW/CoW holders, in particular, appeared to be a huge success. This was essentially a "bottom up" strategy with GoI aiming to, initially, get a large number of the small and medium sized CoW/ CCoW/ holders to accept the 6 Main Points and then use this acceptance to get the large CCoW/CoW holders to fall into line. Nothing more, however, was heard about this supposed progress for another 12 months.

In late April 2013, the Director General of Minerals & Coal ("**DGoMC**") announced that GoI's renegotiation talks with 1 of the major CoW holders, Vale, had progressed very smoothly and that agreement had been reached with Vale on all but 1 of the 6 Main Points with the only outstanding

issue being an increase in royalty payments. DGoMC went on to indicate that GoI was prepared to compromise with Vale by allowing Vale to retain more than the 25,000 HA maximum CoW area originally contemplated in the 6 Main Points and that DGoMC was otherwise optimistic that the renegotiation of Vale's CoW would be completed by the end of 2013 as envisaged by PD 3/2012. This appeared to represent a major shift in GoI's strategy for the CCoW/CoW Renegotiations with GoI now trying to pursue a "top down" strategy focusing on getting 1 or more of the major CCoW/CoW holders to accept the 6 Main Points in the expectation that this would then create a momentum which the small and medium sized CCoW/CoW holders would find impossible to resist. Nothing more, however, was heard about this supposed progress for another 7 months.

In November 2013, DGoMC indicated that he expected the CCoW/CoW Renegotiations to be "substantially completed" by 31 December 2013. Nothing more, however, was heard about this supposed progress for another 5 months.

Most recently, the Energy Minister is quoted in the 5 March 2014 edition of the Indonesian Mining Association-Daily Update as saying that the CCoW/CoW Renegotiations between GoI and 11 CoW/CCoW holders will end soon. Somewhat inconsistently, however, in the 8 March 2014 edition of The Jakarta Post, DGoMC is quoted as saying that the CCoW/CoW Renegotiations have been completed in respect of 25 CCoWs/CoWs while a further 83 CCoW/CoW holders have partly completed their CCoW/CoW Renegotiations and there are only 3 CCoW/CoW holders which have refused to renegotiate their CCoWs/CoWs.

The 31 December 2013 deadline for the completion of the CCoW/CoW Renegotiations, as envisaged by PD 3/2012, has now long since come and gone with not even 1 of the more than 100 CCoW/CoW Holders having signed the agreement proposed by GoI for giving effect to the 6 Main Points and which sets out GoI's perception of the resulting required, detailed, drafting amendments to individual articles of each generation of CoW/CCoW ("**CCoW/CoW Amendment Agreement**").

COMMENTARY

Against the above Background, the writer will now address a number of questions which the recent developments in the CCoW/CoW Renegotiations inevitably give rise to.

1. Why is KPK Now Involved in the CCoW/CoW Renegotiations?

KPK has apparently sent a letter to MoEMR outlining its findings on the management of non-tax State revenues (i.e., royalties) in the mining industry. As reported in the 5 March 2014 edition of the Indonesian Mining Association-Daily Update, KPK has found "discrepancies" of some Rp6.7 trillion over the period 2003 to 2011.

KPK is said to be interested in the CCoW/CoW Renegotiations because 1 of the 6 Main Points is the adjustment of royalties in accordance with changes in the law from time to time while leaving the rate of income tax fixed at that specified in the CCoWs/CoWs. It seems KPK has taken the view that, if the CCoW/CoW Renegotiations had been completed within the 12 month period supposedly contemplated

by Article 169(b) of the 2009 Mining Law, the State would have been receiving much increased royalty payments from the CCoW/CoW holders for up to 4 years already and the fact that this has not happened means that the State has suffered major losses.

It is likely that KPK's sudden interest in the CCoW/CoW Renegotiations is a consequence of its ongoing investigation of alleged wrongdoing at the most senior levels of SKK Migas, an investigation which has now led to allegations of wrongdoing at the most senior levels of MoEMR as well as at Commission VII of the DPR.

Certainly to parties, which are not intimately familiar with the long history of the CCoW/CoW Renegotiations and the numerous practical, legal and technical issues which have prevented the CCoW/CoW Holders reaching agreement with GoI on the 6 Main Points, the apparently never ending nature of the CCoW/CoW Renegotiations may well seem suspicious. In a climate of general suspicion about the goings on at MoEMR, KPK has simply drawn understandable, but ultimately erroneous, tentative conclusions about why the CCoW/CoW Renegotiations have not been concluded to date.

The numerous practical, legal and technical issues which have prevented the CCoW/CoW Holders reaching agreement with GoI on the 6 Main Points, despite the assumed best intentions and good faith efforts of all the parties concerned, are discussed at length in the writer's 2013 article "*CoW Renegotiations – The Current Position and the Likely End Game*" which appeared in the June – July 2013 edition of Coal Asia Magazine.

2. **Are the CCoW/CoW Renegotiations likely to be Soon Concluded?**

It is almost certainly the case that many if not all the CCoW/CoW Holders are willing to accept, in some form, 1 or more of the 6 Main Points. Accordingly, the writer has no reason, up to a point, to dispute the accuracy of the banner headline in the 8 March 2014 edition of The Jakarta Post which reads "Govt claims partly-agreed amendment with big miners". Nor does the writer have any reason, up to a point, to dispute DGoMC's quoted statements, in the article which follows the previously referenced headline, as to which of the 6 Main Points have been agreed to by particular CCoW/CoW holders.

Notwithstanding the foregoing, the fact that certain of the 6 Main Points have been agreed to, in some form, with most if not all of the CCoW/CoW holders does not necessarily mean that the CCoW/CoW Renegotiations are really much closer to being concluded in March 2014 than they were in May 2012, April 2013 or November 2013.

What has been overlooked in these repeated claims from MoEMR that the CCoW/CoW Renegotiations are almost a "done deal", as well as in the popular press' uncritical reporting of these claims, is that most well advised CCoW/CoW holders have surely been approaching the CCoW/CoW Renegotiations on an all or nothing basis. By this, the writer means that well advised CCoW/CoW holders are insisting upon agreement being reached with GoI on **all** the 6 Main Points before the agreement on any **1** of the 6 Main Points becomes binding. In other words, well advised CCoW/CoW holders are not allowing GoI to "cherry pick" from the concessions they are prepared to make on certain of the 6 Main Points while ignoring their rejection of the balance of the 6 Main Points. Accordingly, for example, the fact

that certain CCoW/CoW holders may well have agreed, in-principle, to pay higher royalties and accept reduced CCoW/CoW areas (being 2 only of the 6 Main Points) does not mean that these CCoW/CoW holders are now bound by these in-principle agreements to pay higher royalties and accept reduced CCoW/CoW areas. This is because these in-principle agreements on 2 of the 6 Main Points are conditional upon and subject to GoI accepting the positions of the CCoW/CoW holders on the residual 4 Main Points.

Self-evidently, certain of the 6 Main Points are likely to be easier for individual CCoW/CoW holders to accept than are other of the 6 Main Points. Accordingly, it is hardly surprising that in-principle agreement has been reached between GoI and individual CCoW/CoW holders on those of the 6 Main Points which are not seen by individual CCoW/CoW holders as posing a serious threat to their operations. With, however, the more easily agreed of the 6 Main Points now resolved in most cases, the much more difficult task remains of reaching agreement on those residual Main Points which individual CCoW/CoW holders do see as posing a serious threat to their operations. Unless and until this agreement on the residual and most difficult Main Points can be reached, the in-principle agreement already reached on the easier of the Main Points actually means much less than might otherwise be thought unless the parties are willing to make major concessions on the residual and most difficult Main Points.

Against the above explanation, readers will hopefully understand why it is the writer can only smile indulgently when he sees the latest claims from MoEMR that the CCoW/CoW Renegotiations will surely soon be concluded. This may, of course, happen but it won't be because MoEMR says it is going to happen. If the conclusion of the CCoW/CoW Renegotiations did not happen in May 2012, April 2013 or November 2013 when MoEMR previously indicated the end was in sight, why should anyone believe that, suddenly in March 2014, things will be different although they may, in fact, be so? This seems to be a sad case of the "little boy who cried wolf once too often"

3. Does the KPK's Involvement Make it More or Less Likely the CCoW/CoW Renegotiations will Soon be Concluded?

It is very difficult to predict whether the KPK's unexpected involvement makes it more or less likely that the CCoW/CoW Renegotiations will soon be concluded. At least 2 quite different scenarios are possible in this regard.

- 3.1 **Scenario 1 – KPK Involvement Speeds up CCoW/CoW Renegotiations:** According to this scenario, the KPK's unexpected involvement in the CCoW/CoW Renegotiations comes at an amazingly convenient and opportune time for MoEMR given MoEMR has clearly been having considerable difficulty bringing the CCoW/CoW Renegotiations to a satisfactory conclusion, at least as far as GoI is concerned, with agreement not yet having been reached between GoI and the CCoW/CoW Holders on all 6 Main Points. MoEMR can, arguably, now use KPK's involvement and the implicit threat of being held liable for State losses as a point of leverage to encourage/force/pressure the CCoW/CoW Holders to make concessions on and ultimately accept the residual Main Points in respect of which no agreement has yet been reached.

A variation of the first scenario is that KPK's unexpected involvement in the CCoW/CoW Renegotiations actually puts as much if not more pressure on MoEMR, as it does on the CCoW/CoW Holders, to quickly finalize the CCoW/CoW Renegotiations. This is because, if anyone is going to be held liable for causing State losses, it is just as likely to be MoEMR as it is the CCoW/CoW holders. Accordingly, both the CCoW/CoW Holders and MoEMR are now newly incentivized to make concessions in order to reach agreement on the residual Main Points and thereby minimize the likelihood of a full KPK investigation into the CCoW/CoW Renegotiations. This variation of the first scenario sees the KPK's unexpected involvement as a form of general "circuit breaker" or catalyst which will encourage more pro-active and conciliatory behavior, from both the CCoW/CoW Holders and MoEMR, towards the CCoW/CoW Renegotiations.

Some support for this scenario is to be found in the generally reasonable and fair minded approach the writer understands was exhibited by DGoMC at a Thursday, 6 March 2014 meeting with some 25 CCoW/CoW Holders ("**6 March Meeting**") when he seemed to express a new willingness to entertain any and all reasonable proposals from CCoW/CoW Holders for reaching a compromise on those residual Main Points in respect of which no agreement has been possible so far.

The 6 March Meeting is very significant because, among the 25 CCoW/CoW Holders invited to attend the same, were all the major foreign-owned CoW holders including Freeport, Newmont and Vale. It is clear that GoI's main focus, in the CCoW/CoW Renegotiations, are these major foreign-owned CoW holders which GoI has found the greatest difficulty in reaching agreement with on the 6 Main Points.

The writer also understands that, at the 6 March Meeting, DGoMC indicated the divestiture obligation, which is 1 of the 6 Main Points, would be reduced to 40 – 45% from 51% as previously demanded by GoI. This is certainly a compromise although not necessarily a very significant compromise as it has always been the divestiture price, as much as the divestiture percentage, which is the real concern for many CCoW/CoW holders.

Reference should further be made to the fact that the Energy Minister was quoted in the 5 March 2014 edition of the Indonesian Mining Association-Daily Update as saying that the President has formed a new team to handle the CCoW/CoW Renegotiations on behalf of GoI and comprising the Energy Minister, the Coordinating Minister of the Economy and the Finance Minister. The presence of the Finance Minister, as part of this new GoI team, may be quite significant as 1 of the long running issues, CCoW/CoW Holders have had with the CCoW/CoW Renegotiations, is that the people they are obliged to negotiate with have no authority to make any concessions on behalf of GoI. This is particularly the case with regard to tax matters where only the Finance Minister is really in a position to accept some of the compromises put forward by individual CCoW/CoW Holders regarding the Main Point involving the proposed adjustment of royalties in accordance with changes in the law from time to time while leaving the rate of income tax fixed at that specified in the CCoWs/CoWs. It has simply not been within the authority of the MoEMR officials handling the CCoW/CoW Renegotiations, up to date, to agree to any proposals from CCoW/CoW Holders which would impact the tax revenues received by the State from CCoW/CoW Holders.

3.2 **Scenario 2 – KPK Involvement Slows Down the CCoW/CoW Renegotiations:** According to this scenario, the KPK's unexpected involvement in the CCoW/CoW Renegotiations will actually slow down and make less probable an early conclusion of the CCoW/CoW Renegotiations. This scenario focuses on the likelihood that, with KPK taking an active interest in the CCoW/CoW Renegotiations, MoEMR will be extremely cautious about and reluctant to make any concessions regarding the residual Main Points which have not yet been agreed to out of a concern that such concessions may be later viewed by KPK as themselves amounting to actions causing losses to the State.

A variation of this scenario is that because KPK lacks any detailed understanding of the long and tortuous course of the CCoW/CoW Renegotiations to date, it may have unrealistic expectations as to how the CCoW/CoW Renegotiations should ultimately be concluded with regard to that Main Point involving the proposed adjustment of royalties in accordance with changes in the law from time to time while leaving the rate of income tax fixed at that specified in the CCoWs/CoWs. To the extent KPK continues to take the position that the failure to complete the CCoW/CoW Renegotiations by January 2010, as envisaged by the 2009 Mining Law, means that the State has been suffering losses for a number of years because CCoW/CoW Holders are still not paying royalties at the same rate as IUP holders, this may mean that KPK will pressure MoEMR into insisting that any royalty increases, which eventually result from the CCoW/CoW Renegotiations, must be backdated. This is something which is not likely to be acceptable to CCoW/CoW Holders under any circumstances as it means that those already producing CoW holders will start the post CCoW/CoW Renegotiation period with potentially large liabilities for accrued but unpaid royalties.

Some support for this scenario is to be found in the Tuesday 4 March 2014 report in The Jakarta Post that DGoMC intends to make the proposed increase in royalties payable by CCoW/CoW Holders retroactive to at least 2012 when a government regulation on non-tax State revenue was issued. GoI takes the position that the 2012 regulation applies to CCoW/CoW Holders as well as to IUP holders although this has always been denied by the CCoW/CoW Holders. Although the proposed increase in royalties only affects the CoW holders producing metal minerals and not the CCoW holders producing coal (which CCoW holders already pay royalties at much higher rates), the relevant CoW holders include Freeport, Newmont and Vale. The CCoW/CoW Renegotiations clearly cannot be considered completed unless and until agreement is reached between GoI and all the large foreign CoW holders on the 6 Main Points.

4. **What is the CoW/CCoW Amendment MoU?**

At the 6 March Meeting each of the attending CCoW/CoW Holders was presented with a 2.5 page document, in Bahasa Indonesia only, setting out GoI's understanding of what each of the CCoW/CoW holders has so far agreed to and not agreed to in terms of the 6 Main Points. This is the CoW/CCoW Amendment MoU referred to in various reports in the popular press during the period 5 to 8 March 2014.

The CCoW Amendment **MoU** varies for each CCoW/CoW holder as each CCoW/CoW holder has reached a different stage in the CCoW/CoW Renegotiations with regard to which of the 6 Main Points it accepts and which of the 6 Main Points it does not accept.

It is important to understand that the CCoW Amendment **MoUs** are completely different from and not, presumably, intended to be any sort of long term substitute for the CCoW/CoW Amendment **Agreements** which were circulated in draft form in 2013. Whereas the draft CCoW/CoW Amendment **Agreements** are very comprehensive and detailed documents, setting out the article by article wording changes required to each CCoW/CoW in order to implement final agreement between GoI and the CCoW/CoW Holders on the 6 Main Points, the CCoW/CoW Amendment **MoUs** are just short form summaries of the current positions of the CCoW/CoW holders on each of the 6 Main Points. No detail is provided in the CCoW/CoW Amendment **MoUs** as to how the noted position of the CCoW/CoW holders on each of the 6 Main Points relates to the actual wording of the CCoWs/CoWs.

The CCoW/CoW Holders attending the 6 March Meeting were told to (i) review the CoW/CCoW Amendment **MoUs**, (ii) make any changes to the CoW/CCoW Amendment **MoUs** they considered to be absolutely necessary, (iii) resubmit the CoW/CCoW Amendment **MoUs**, incorporating any necessary changes, to MoEMR not later than the end of Friday 7 March 2014 and (iv) be ready to sign the resubmitted CoW/CCoW Amendment **MoUs** on Monday 10 March 2014 before the Energy Minister representing GoI.

On Saturday 8 March 2014, the proposed signing of the CCoW/CoW Amendment **MoUs**, on Monday 10 March 2014 and by the attendees at the 6 March Meeting, was postponed indefinitely and without any reason being given for the postponement.

As of the 12 March deadline for submitting this article to Petromindo, the signing of the CoW/CCoW Amendment **MoUs**, by the attendees at the 6 March Meeting, has still not taken place and there is no definite indication as to when this will now happen if at all.

It may, however, be the case that some CCoW/CoW Holders which were not included in the 6 March Meeting, because they had previously reached agreement with GoI on all the 6 Main Points, have now signed CoW/CCoW Amendment **MoUs** although this is yet to be confirmed by MoEMR. If there are any such CCoW/CoW Holders then, most probably, they are CCoW Holders, rather than CoW Holders. This is because the 6 Main Points generally pose less of a threat to CCoW Holders than they do to CoW Holders given that CCoW Holders (i) do not have to carry out domestic processing and refining and (ii) already pay royalties at much higher rates than CoW Holders.

5. **What is the Significance of the CoW/CCoW Amendment **MoUs**?**

5.1 **Legal Significance:** It is very questionable whether the CCoW/CoW Amendment **MoUs** have any legal significance at all. This is because, as a general rule, a “memorandum of understanding” is not regarded as giving rise to any legally binding obligations for the parties signing the same but, rather, is more commonly regarded as being in the nature of a statement of present intention only. This tentative interpretation of the CCoW/CoW Amendment **MoUs**, as not having any legal significance, also finds support in the fact that the CCoW/CoW

Amendment MoUs, as presented to the CCoW/CoW Holders at the 6 March Meeting, do not have any or most of the provisions which it is usual to find in documents that are intended to be legally binding on the parties signing the same. The absence of any governing law or dispute resolution provisions in the CCoW/CoW Amendment MoUs is particularly notable in this regard.

Notwithstanding the foregoing, the CCoW/CoW Amendment MoUs, as presented to the CCoW/CoW holders at the 6 March Meeting, do not make clear whether or not, in fact, GoI believes or intends that the CCoW/CoW Amendment MoUs should have some legal significance. This is because there is no statement in the CCoW/CoW Amendment MoUs as to whether or not the CCoW/CoW Amendment MoUs are or are not legally binding and enforceable. This ambiguity in the legal status of the CCoW/CoW Amendment MoUs may be seen as a significant weakness inhibiting ready acceptance of the CCoW/CoW Amendment MoUs by many CCoW/CoW holders.

5.2 **Political Significance:** Although less benign interpretations are certainly possible, the CCoW/CoW Amendment MoUs should, most probably, be seen as a well-intentioned if somewhat misconceived attempt by MoEMR to:

- (a) document, in a formal but non-legally binding and enforceable way, (i) the progress that has undeniably been made to date and (ii) what remains to be done in the CCoW/CoW Renegotiations and with regard to the 6 Main Points: and
- (b) show to KPK, DPR and the public at large that MoEMR has not been deliberately “dragging its feet” in concluding the CCoW/CoW Renegotiations.

The CCoW/CoW Amendment MoUs may also be seen as a tacit acknowledgment by MoEMR that, notwithstanding the brave public announcements to the contrary, the conclusion of the CCoW/CoW Renegotiations could still be a long way off given the herculean task which remains, even once agreement, in-principle, is reached on the 6 Main Points, of negotiating the detailed wording of the CCoW/CoW Amendment Agreements and their proposed drafting changes to individual articles of each CoW/CCoW.

Against the above tentative explanations, the CCoW/CoW Amendment MoUs may be viewed, from MoEMR’s perspective at least, as a sort of “half-way house” or interim step between the undertaking of the CCoW/CoW Renegotiations and GoI’s hoped for eventual signing of the CCoW/CoW Amendment Agreements. In this regard, MoEMR is undoubtedly coming under a lot of pressure, with the DPR and Presidential elections now so close, to show that it has made some progress in the CCoW/CoW Renegotiations. The thinking at MoEMR may well be that this progress can be best evidenced by putting in place now a document between GoI and each of the CCoW/CoW holders even if that document does not record agreement on all the 6 Main Points and otherwise falls far short of what is envisaged by the CCoW/CoW Amendment Agreements.

6. Why has the Signing of the CoW/CCoW Amendment MoUs been Delayed?

There are a number of possible reasons for the postponement of the originally proposed 10 March signing of the CoW/CCoW Amendment MoUs by those CCoW/CoW Holders attending the 6 March Meeting.

First, it was never very realistic to expect that all the CCoW/CoW Holders, attending the 6 March Meeting, would be able and willing to (i) review, (ii) make the desired changes to, (iii) obtain the necessary internal approvals for and (iv) return to MoEMR the duly revised CoW/CCoW Amendment MoUs within 1.5 days so that signing could take place, as mandated by MoEMR, on Monday 10 March 2014. To even propose such a timetable shows a certain lack of understanding on the part of MoEMR as to how large mining companies work. Accordingly, it is probable that a significant number of the CCoW/CoW Holders, which attended the 6 March Meeting, were simply not in a position to return the duly revised CoW/CCoW Amendment MoUs to MoEMR by the close of business on Friday 7 March 2014.

Second, the actual legal status of the CCoW/CoW Amendment MoUs is unclear. As explained in 5.1 above, while the CCoW/CoW Amendment MoUs are probably not legally binding and enforceable, this cannot be said definitely to be the case. The unfortunate ambiguity as to the legal status of the CCoW/CoW Amendment MoUs makes it difficult for individual CCoW/CoW holders to decide how seriously or otherwise they should take the CCoW/CoW Amendment MoUs. Not surprisingly, however, well-advised CCoW/CoW Holders are likely to have erred on the side of caution, proceeding to review the CCoW/CoW Amendment MoUs on the basis that whatever they end up signing may be used against them, in the ongoing CCoW/CoW Renegotiations, if this serves the purposes of GoI.

Third, well advised CCoW/CoW Holders will have surely been very reluctant to sign the CoW/CCoW Amendment MoUs in the form presented to them by MoEMR. Without questioning the good faith of MoEMR in preparing the CoW/CCoW Amendment MoUs, there are a number of provisions common to all or certain of the CoW/CCoW Amendment MoUs which it was inevitable would be a cause for serious concern among well advised CCoW/CoW Holders which have not already agreed to the 6 Main Points. These provisions include:

- (a) Separate acknowledgments from the CCoW/CoW Holders that (i) the CCoWs/CoWs must be adjusted to take into account the investment climate **and the national interest** and (ii) the CCoW/CoW Holders are otherwise under a good faith obligation to adjust their CCoWs/CoWs so as to give effect to **all** the 6 Main Points.
- (b) In the case of those CCoW/CoW holders which have already accepted the Main Point specifying a commitment to undertake domestic processing and refining, a statement of this commitment in terms involving an obligation to actually “**build**” processing and refining facilities even though (i) some of the relevant CCoW/CoW Holders are presently carrying out full domestic processing and refining using third party services providers and (ii) the 2009 Mining Law and its implementing regulations clearly allow mineral producers to use third party services providers to carry out domestic processing and refining rather than obliging every mineral producer to build its own processing and refining facilities.

- (c) In the case of those CCoW/CoW holders which have already accepted the Main Point specifying an obligation to use domestic goods and services, a statement of this obligation in absolute terms without any qualification as to the competitiveness of the available domestic goods and services.
- (d) No recognition of the fact that existing in-principle agreement on any 1 or more of the 6 Main Points is conditional upon and subject to agreement eventually being reached on all of the 6 Main Points.

Fourth, well advised CCoW/CoW Holders will have been particularly concerned that signing the revised CoW/CCoW Amendment **MoUs**, in the form presented to them by MoEMR, might (i) restrict their ability to seek concessions from GoI in respect of the those residual Main Points on which no in-principle agreement has been reached to date and in consideration for the CCoW/CoW Holders' existing in-principle agreement on 1 or more of the 6 Main Points and (ii) otherwise be interpreted and used by MoEMR as evidence of their acceptance of GoI's long maintained position that the CCoW/CoW Holders are under a legal obligation to renegotiate their CCoWs/CoWs so as to address all of the 6 Main Points.

Fifth, having regard to the second, third and fourth reasons given above, it seems likely that most well advised CCoW/CoW Holders will have significantly redrafted the CoW/CCoW Amendment **MoUs**, as presented to them by MoEMR at the 6 March Meeting. Accordingly, even if the significantly redrafted the CoW/CCoW Amendment **MoUs** were submitted to MoEMR by the close of business on Friday 7 March 2014 as requested, MoEMR will now need some time to study the proposed changes to the CoW/CCoW Amendment **MoUs** in order to determine whether or not it can accept the changes proposed by the CCoW/CoW Holders.

At the end of the day, it may prove to be almost as difficult for GoI and those CCoW/CoW Holders, which have not already accepted all the 6 Main Points, to reach agreement on the CoW/CCoW Amendment **MoUs** as it has already proven to be for GoI and these CCoW/CoW Holders to reach agreement on the CCoW/CoW Amendment **Agreements**. Simply put, it is just not that easy to distill the essence of the very different positions of GoI and many CCoW/CoW Holders on the 6 Main Points, many of which 6 Main Points give rise to complex issues, into a short form memorandum of understanding of only 2.5 pages.

SUMMARY & CONCLUSIONS

While MoEMR continues to promise an early end to the CCoW/CoW Renegotiations, this is something we have heard many times before. Accordingly, there seems little reason to be overly confident that, somehow, this time will be different and the CCoW/CoW Renegotiations are now really a "done deal" although this may now be the case for some CCoW/CoW Holders.

The CCoW/CoW Renegotiations have, however, clearly entered a new and potentially decisive phase in early March, with KPK unexpectedly taking an interest in the CCoW/CoW Renegotiations and MoEMR requesting all the CCoW/CoW Holders to sign CCoW/CoW Amendment **MoUs**.

It remains to be seen whether KPK's involvement speeds up or slows down the CCoW/CoW Renegotiations. Possible indicators of both alternative outcomes can be seen in the recent developments.

Although other less benign interpretations are certainly possible, the CCoW/CoW Amendment MoUs should probably be seen as a well intentioned if somewhat misguided attempt by MoEMR to document the progress which has been made, to date, in reaching agreement on the 6 Main Points while, at the same time, setting out what still remains to be done before the CCoW/CoW Renegotiations can be considered over. As such, the CCoW/CoW Amendment MoUs are really just an interim step on the way to signing the CCoW/CoW Amendment Agreements which, clearly, even MoEMR now recognizes is still a considerable way off.

The CCoW/CoW Amendment MoUs are not intended to be a substitute for the CCoW/CoW Amendment Agreements which still remain to be negotiated.

Unfortunately, the uncertain intended legal status of the CCoW/CoW Amendment MoUs and the less than even handed wording of the draft CCoW/CoW Amendment MoUs, as presented to the CCoW/CoW Holders at the 6 March Meeting, may give rise to considerable problems in having the same signed, on a timely basis, by both GoI and those CCoW/CoW holders which have not already accepted the 6 Main Points. At a minimum, well advised CCoW/CoW holders, which have not already accepted the 6 Main Points, are surely going to want the CCoW/CoW Amendment MoUs to be substantially redrafted before agreeing to sign the same.

Although for many, the CCoW/CoW Renegotiations have become impossible to make any sense of and are otherwise the ultimate example of a "conundrum wrapped in an enigma", the writer hopes that at least the developments of the last couple of weeks are now a little more understandable to some.

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