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NEW RULES FOR MINING LICENSE ISSUANCE – WHAT DOES IT ALL MEAN?¹²³⁴⁵

INTRODUCTION

The Investment Coordination Board (“**BKPM**”) has been given the authority, for the first time, to issue certain mining licenses (“**IUPs**”).

Delegating to BKPM the authority to issue certain mining licenses is part of the ongoing efforts of the Central Government (“**GoI**”) to facilitate the doing of business, in Indonesia, by making BKPM a “one stop services shop” for all the approvals and licenses foreign investors need (“**First Initiative**”).

Contemporaneously with the First Initiative, GoI is insisting upon full compliance, by the Provincial and Regional Governments, with a 2014 government regulation that provides for the delivery to and renewal by the Minister of Energy & Mineral Resources (“**MoEMR**”) of certain IUPs previously issued by the Provincial and Regional Governments (“**Second Initiative**”).

With the First Initiative and the Second Initiative (“**Two Initiatives**”) proceeding at the same time, there is some confusion, among mining industry participants, as to just what is the current position with regard to the issuance of IUPs.

In this article, the writer will endeavor to disentangle the Two Initiatives and explain the same in terms that make it clear why the Two Initiatives are not as revolutionary as they might otherwise seem on the basis of a cursory review only.

BACKGROUND

The First Initiative has its origins in the early 2015 announcement by GoI that, going forward, BKPM would be able to provide substantially all the approvals, licenses and permits that foreign investors require, from GoI, to carry on their proposed investment projects in Indonesia. This designation of BKPM as a “one stop services shop” is set out in Presidential Instruction No. 4 of 2015 re the Implementation of One Stop Services of BKPM dated 16 March 2015 (“**PI 4/2015**”).

PI 4/2015 (a) was issued to some twenty three high State officials including MoEMR, the Minister of

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⁵ This article appeared in the November-December 2015 issue of Coal Asia Magazine.

Finance, the Minister of Industry and the Minister of Trade and (b) instructs the relevant high State officials to, by not later than 31 December 2015, (i) delegate to the Head of BKPM licensing and non-licensing authority related to investment and (ii) assign to BKPM one or more ministerial employees or officials for the purpose of assisting BKPM carry out its new “one stop services shop” role.

The delegation of certain IUP issuing authority to BKPM, as contemplated by PI 4/2015, is provided for in MoEMR Regulation No. 25 of 2015 re Delegation of Licensing Authority in the Minerals and Coal Sector to the Head of BKPM for One Stop Services Purposes (“**MoEMRR 25/2015**”).

MoEMRR 25/2015’s delegation of certain IUP issuing authority to BKPM is intended to be an important step in giving effect to or implementing PI 4/2015 as it relates to foreign investment projects in the mining industry to be carried out on the basis of IUPs.

The Second Initiative has its origins in Law No. 23 of 2014 re Provincial Administration (“**PA Law**”) which provides that, going forward, all IUPs for PMA Companies are to be issued by GoI rather than by the Provincial and Regional Governments.

GoI subsequently introduced Government Regulation No. 77 of 2014 re Third Amendment of Government Regulation No. 23 of 2010 re Implementation of Minerals and Coal Mining Enterprise Activities (“**GR 77/2014**”). GR 77/2014 has various purposes including, among other things, to give effect to the expanded IUP issuance authority of GoI mandated by the PA Law.

Article 112E of GR 77/2014 provides that (i) not later than 14 October 2015, the Provincial Governments and the Regional Governments are required to submit to MoEMR all IUPs previously issued by the Provincial and Regional Governments to PMA Companies and (ii) MoEMR will thereafter “renew” these previously issued IUPs “in accordance with the provisions of the relevant laws and regulations” (“**GR 77/2014 Article 112E**”).

Readers interested in knowing more about the history of the Second Initiative are referred to the writer’s earlier articles (i) “*Delegation of MoEMR Supervisory Authority to Governors - Trying to Tame the Beast*”, Coal Asia Magazine, September – October 2014 and (ii) *Possible End to Regional Autonomy in Energy, Mining and Oil & Gas – Has the Beast been Finally Tamed?* Coal Asia Magazine, November - December 2014.

COMMENTARY

1. First Initiative

1.1 **Delegation of IUP Issuance, Extension & Termination Authority:** Subject to 1.4 and 1.5 below, MoEMR has delegated to the Head of BKPM authority to:

- (a) issue:
 - (i) Exploration IUPs;

- (ii) Production Operation IUPs;
 - (iii) Special Production Operation IUPs for Transportation & Sales;
 - (iv) Special Production Operation IUPs for Processing & Refining;
 - (v) Temporary Licenses for Transportation & Sales;
 - (vi) Special Production Operation IUPs for Sales;
 - (vii) Principal Licenses for Processing & Refining; and
 - (viii) Mining Services Business Licenses (“**IUJPs**”);
- (b) extend:
- (i) Production Operation IUPs;
 - (ii) Special Production Operation IUPs for Transportation & Sales;
 - (iii) Special Production Operation IUPs for Processing & Refining; and
 - (iv) IUJPs; and
- (c) terminate Exploration IUPs and Production Operation IUPs returned/surrendered by holders (Article 2(1) of MoEMRR 25/2015).

1.2 **Status Conversion Approval:** MoEMR has also delegated to the Head of BKPM authority, in the case of companies holding IUPs, to approve:

- (a) conversions of PMDN Companies to become PMA Companies; and
- (b) conversions of PMA Companies to become PMDN Companies (Article 2(2) of MoEMRR 25/2015).

1.3 **Special IUP Approvals:** Finally, MoEMR has delegated to the Head of BKPM authority to approve the following changes in respect of holders of Special Production Operation IUPs for Transportation & Sales:

- (a) adjustment of existing “cooperation” (**i.e.**, changes to **already in place** sales and transportation arrangements) with Production Operation IUP holders;
- (b) additional “cooperation” (**i.e.**, entering into **new** sales and transportation arrangements) with Production Operation IUP holders;
- (c) increase of “capacity” (**i.e.**, increase in the quantity of mineral products in respect of

which a particular holder of a Special Production Operation IUP for Transportation & Sales may provide sales and transportation services); and/or

- (d) adjustment of Special Production Operation IUPs for Transportation & Sales (Article 2(3) of MoEMRR 25/2015).

1.4 **Limitations of Delegation:** Notwithstanding 1.1 to 1.3 above and although it is not in any way apparent from a reading of MoEMRR 25/2015, enquiries made by the writer's staff with the Directorate General of Minerals & Coal (“DGoMC”) have confirmed that the delegation of authority to the Head of BKPM **only applies to those IUPs which MoEMR is otherwise authorized to issue by virtue of the PA Law**; namely:

- (a) **all** IUPs held by/to be held by **PMA Companies**;
- (b) Exploration IUPs, Production Operation IUPs, Temporary Licenses for Transportation & Sales and Special Production Operation IUPs for Sales held by/to be held by **PMDN Companies** in respect of metal minerals, coal, non-metal minerals and rock commodities that are in respect of mining concessions which:
 - (i) cross the borders of two or more provinces;
 - (ii) are located in a mining business area (**i.e.**, a “WIUP”) adjacent to another country; or
 - (iii) are more than twelve nautical miles from the shoreline;
- (c) Special Production Operation IUPs for Processing & Refining held by/to be held by **PMDN Companies** and where the mineral products to be processed and refined are either (i) derived from a different province from the province where the processing and refining facilities are located or (ii) imported;
- (d) Special Production Operation IUPs for Transportation & Sales held by/to be held by **PMDN Companies** and where the relevant transportation and sales activities are/to be carried out in two or more provinces; and
- (e) IUPs held/to be held by **PMA Companies** and where the relevant mining business services activities are/to be carried out in more than one province.

This implied limitation on the IUP issuance authority delegated to the Head of BKPM is, of course, entirely appropriate given that MoEMR can only delegate that IUP issuance authority that has already been vested in him. Accordingly, MoEMRR 25/2015 does **not** (despite the unqualified breadth of its wording) bring about any change in the authority of Provincial Governments (as vested in Governors by the PA Law) to issue:

- (a) Exploration IUPs, Production Operation IUPs, Temporary Licenses for Transportation & Sales and Special Production Operation IUPs for Sales held by/to be held by **PMDN**

Companies in respect of metal minerals, coal, non-metal minerals and rock commodities where the relevant mining concession is located wholly within one province only or up to not more than twelve nautical miles from the shoreline;

- (b) Community Mining Rights (**i.e.**, IPRs) for metal minerals, coal, non-metal minerals and rock commodities where the relevant mining concession is located within a Community Mining Area;
- (c) Special Production Operation IUPs for Processing & Refining held by/to be held by **PMDN Companies** and where the mineral products to be processed and refined are derived from one province only;
- (d) Special Production Operation IUPs for Transportation & Sales held by/to be held by **PMDN Companies** and where the relevant transportation and sales activities are/to be carried out within one province only or up to not more than twelve nautical miles from the shoreline; and
- (e) IUIPs and Mining Registration Letters (“**SKTs**”) held by/to be held by **PMDN Companies** and where the relevant activities are to be carried out within one province only.

The delegation of **limited** IUP issuance and approval authority to the Head of BKPM also does **not** represent any change in the rules related to public tenders for WIUPs in the case of metal minerals and coal. Accordingly, a PMA Company or a PMDN Company will still only be able to obtain, from BKPM or the relevant Provincial Government, as the case may be, an Exploration IUP for metal minerals or coal once it is the winner of a public tender for the relevant WIUP.

Further, even though the Head of BKPM, as the delegate of MoEMR (and, therefore, for and on behalf of MoEMR), will be issuing legal status conversion approvals for companies holding IUPs, supporting recommendations from the relevant provincial government will still be required, as part of the application process, in the case of conversions of PMDN companies to become PMA companies.

MoEMR also reserves the right to withdraw the delegation of limited IUP issuance and approval authority to the Head of BKPM in the event of, amongst other things, a change in MoEMR policy or if the Head of BKPM is unable to successfully implement the delegated authority (Article 7 of MoEMRR 25/2015).

1.5 **Retained Authority:** Somewhat curiously, MoEMR has **not** delegated to the Head of BKPM and, therefore, MoEMR retains the authority to:

- (a) issue **all** Exploration IUPKs and Production Operation IUPKs held by/to be held by both **PMA Companies** and **PMDN Companies** in respect of metal minerals and coal;
- (b) approve **all** (i) changes of management, investment and source of funds, BoC and BoD

composition and shareholding composition and (ii) AoA amendments in respect of IUP holders and regardless of whether the IUP holders are **PMA Companies** or **PMDN Companies** (“**IM&C Changes**”);

- (c) issue SKTs for PMA Companies; and
- (d) **renew** all IUPs held by PMA Companies where the IUPs were previously issued by Governors, Regents and Mayors pursuant to GR 77/2014.

1.6 **Assignment of Staff:** MoEMR will second a DGoMC staff member to BKPM to facilitate the effective implementation of the delegation to the Head of BKPM of the authority to issue certain IUPs (Article 3 of MoEMRR 25/2015).

1.7 **Continuing Supervision:** The Head of BKPM is obliged to submit to MoEMR (i) copies of all IUPs issued by the Head of BKPM and (ii) quarterly reports on the progress being made by the Head of BKPM in implementing the delegation of certain IUP issuance and approval authority (Article 5 of MoEMRR 25/2015).

MoEMR also retains overall authority for the future development and supervision of licensing authority in the context of making BKPM a “one stop services shop” as this initiative relates to foreign investors and the mining industry (Article 6 of MoEMRR 25/2015).

1.8 **Transition:** All applications for IUPs, that were submitted to DGoMC/MoEMR prior to 12 August 2015, will continue to be processed by DGoMC/MoEMR. Likewise, all those IUPs, issued prior to 12 August 2015, continue to be valid (Articles 8 and 10 of MoEMRR 25/2015).

1.9 **Assessment:** The delegation of certain IUP issuing authority to BKPM, as contemplated by PI 4/2015, is certainly consistent with the concept of BKPM becoming a “one stop services shop” that can provide foreign investors with all the approvals, licenses and permits they require to start operations in Indonesia. Further, in the long run, it is reasonable to expect that there will be cost savings and time efficiencies realized by foreign investors, in the local mining industry, in not having to deal, first, with BKPM in order to obtain their PMA Company establishment approvals and, second, with DGoMC/MoEMR in order to obtain their IUPs, being their principal business licenses. Nevertheless, how quickly and the extent to which these expected benefits are realized will depend greatly on the administrative ability of BKPM and its staff to implement the delegation of certain IUP issuance authority on a day to day basis. Based on the writer’s experience with other initiatives to give effect to PI 4/2015, the short term result may actually be longer delays rather than shorter delays for PMA Companies seeking to take advantage of BKPM’s new role as a “one stop services shop”. These initiatives always sound promising when reduced to a clever slogan such the “BKPM – the one stop services shop” but the reality can be and often is disappointing as practical problems with the initiative only become apparent once the implementation process is underway.

2. **Second Initiative**

- 2.1 **Delivery of IUPs to MoEMR:** All Governors, Mayors and Regents are required to deliver to MoEMR, by not later than 14 October 2015, all IUPs (including Special Production Operation IUPs) previously issued by the Governors, Mayors and Regents to PMA Companies only (GR 77/2014 Article 112 E).
- 2.2 **Renewal of IUPs by MoEMR:** Sometime after the relevant IUPs are received by MoEMR, MoEMR is meant to “renew”, in accordance with the prevailing laws and regulations, all IUPs (including Special Production Operation IUPs) previously issued by the Governors, Mayors and Regents to PMA Companies only (GR 77/2014 Article 112E).

“Renewal” is being interpreted and applied by DGoMC in a manner that means MoEMR will issue new IUPs (including new Special Production Operation IUPs) to PMA Companies (GR 77/2014 Article 112E). Although not at all apparent from the literal reading of GR 77/2014 Article 112E, enquiries made by the writer’s staff with DGoMC have made clear that it is only those existing IUPs that, pursuant to the PA Law and GR 77/2014, are now to be issued by MoEMR, rather than by the Governors, Regents and Mayors, that will be “renewed” by MoEMR. In the case of those IUPs where, pursuant to the PA Law and GR 77/2014, the Governors have issuance authority, there will be **no** renewal by MoEMR.

The purpose of the “renewal” process is to ensure that **all** PMA Companies will now only have IUPs issued by MoEMR (and **not** by the Governors, Regents and Mayors) as contemplated by the PA Law and GR 77/2014.

- 2.3 **No MoEMR Approvals until IUP Renewal:** In an endeavor to compel compliance with GR77/2014 and although nowhere provided for in GR 77/2014, DGoMC has indicated to the writer’s staff that, as of 14 October 2015, MoEMR will **not** approve any IM&C Changes in respect of PMA Companies holding IUPs that, according to the PA Law, are now to be issued by MoEMR, rather than by the Governors, Regents and Mayors, until such time as the relevant IUP holder has had its IUP “renewed” (**i.e.**, reissued) by MoEMR.
- 2.4 **Assessment:** The unwillingness of DGoMC/MoEMR to entertain applications for approval of/approve IM&C Changes in the case of IUP holding PMA Companies, until such time as the relevant PMA Company has had its IUP “renewed” by MoEMR, is to be regretted for a number of reasons. First, there is no obvious connection between IM&C Changes and IUP renewal. Second, the completion of the IUP renewal process is wholly independent of the relevant PMA Company which has no ability whatsoever to influence how quickly or otherwise the IUP renewal process is completed. Third, as GR 77/2014 does not impose any sanctions on Governors, Regents and Mayors, who fail to comply with GR 77/2014 Article 112E and do not forward the relevant IUPs to MoEMR by 14 October 2015 or at all, it is not clear to the writer that the Governors, Regents and Mayors have any incentive to comply with GR 77/2014 Article 112E. Indeed as GR 77/2014 foreshadows the end of any substantive role for Governors, Regents and Mayors, in the licensing of mining projects owned by PMA Companies, the Governors, Regents and Mayors would actually seem to have every reason to **not** comply with GR 77/2014 Article 112E because, once the IUPs of PMA Companies are

renewed by MoEMR, a traditionally important source of informal revenue for Governors, Regents and Mayors, in mineral rich areas, will have been lost for good. Fourth, there is **no** time line for DGoMC/MoEMR to complete the process of renewing IUPs once the relevant IUPs are received from the Governors, Regents and Mayors.

At the risk of stating the obvious, there would seem to be an unacceptably high risk that holders of IUPs, seeking to undergo IM&C Changes, may have to wait indefinitely and for no good reason to have the proposed IM&C Changes approved by MoEMR unless the process of delivering and renewing existing IUPs is carried out with uncharacteristic efficiency. Given many PMA Company IUP holders need to undergo urgent reorganizations and refinancings in the current depressed economic and operating environment for mining companies in Indonesia, the practical limitations of the IUP renewal process may become a significant impediment to the completion of these reorganizations and refinancings on a timely basis.

SUMMARY AND CONCLUSIONS

The First Initiative and the Second Initiative are actually concerned with different things.

In the case of the First Initiative, the focus is improved overall licensing efficiency for foreign investment projects in the mining industry, as part of a strategy of encouraging investment in a weak economic environment, and has nothing to do, per se, with regional autonomy in the mining industry and whether it is a good thing or a bad thing (i.e., the focus is realization of an economic objective rather than a political objective).

In the case of the Second Initiative, however, the focus is on completing the process of substantially eliminating any continuing role for Regional Governments in the licensing of foreign investment projects in the mining industry given the general disenchantment with the practical application of regional autonomy in respect of the mining industry (i.e., the focus is realization of a political objective rather than an economic objective). That said, the Two Initiatives both concern licensing of foreign investment mining projects and, therefore, it is perhaps not surprising many participants in the Indonesian mining industry are finding it difficult to separate and distinguish between the Two Initiatives.

At first glance, the Two Initiatives seem to herald major changes to the IUP issuance process. In fact, however, this is not the case because there is no change in the authority of the Governors to issue most (but not all) IUPs to PMDN Companies and, notionally at least in the case of those IUPs to now be issued by the Head of BKPM, the Head of BKPM will simply be carrying out this issuance authority on behalf of MoEMR who still retains overall control and supervision of the IUP issuance process in the case of PMA Companies and some PMDN Companies.

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