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### MINING LAW, POLICY & REGULATION IN INDONESIA AFTER 2014 – WHAT CAN WE REALISTICALLY EXPECT?<sup>12345</sup>

#### INTRODUCTION

It would be hard to overstate how difficult the last 4 years has been for many mining companies operating in Indonesia. This is especially the case for foreign-owned mining companies. The combination of declining commodity prices and rising resource nationalism has created the “perfect storm” for the local mining industry and for foreign investors in the local mining industry.

Mining companies are, of course, hoping that the April 2014 DPR elections and the July 2014 Presidential elections (together, the “**2014 Elections**”), along with the associated change of government (“**GoI**”) in October 2014, will herald the start of better times for the local mining industry and for foreign investors in the local mining industry, at least in terms of the applicable legal, policy and regulatory environment if not in terms of improving commodity prices. Some, no doubt, believe it is almost inconceivable the new GoI, which takes office in October 2014, could not be an improvement on the old GoI when it comes to the applicable legal, policy and regulatory environment for mining.

While the hoped for improvement in the applicable legal, policy and regulatory environment for mining, post October 2014, is entirely understandable, it is very questionable how realistic is this hoped for improvement. Foreign investors, in particular, are likely to be disappointed if they really believe that, come October 2014, someone in the new GoI is going to magically “press the reset button” and it will suddenly be as if the last 4 years never happened in terms of the applicable legal, policy and regulatory environment for mining.

Those with sufficiently modest expectations of the post 2014 legal, policy and regulatory environment for mining may, however, not be disappointed by what materializes. It is even possible that these realists could be pleasantly surprised by how the new GoI deals with some of the pressing issues facing the local mining industry and foreign investors. This is because Indonesia’s reliance upon implementing regulations, to provide the detail and substance of how any law actually operates in practice, may provide sufficient opportunity for a new GoI, which is even incrementally more favorably disposed to the mining industry and foreign investors than is the old GoI, to make some material improvements to the overall legal, policy and regulatory environment for mining while, at the

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same time, leaving substantially unchanged **official** GoI policy towards the local mining industry and foreign investors in the local mining industry.

## **BACKGROUND**

### **1. 2011 to 2014 in Review**

To dwell, at length, on the various legal, policy and regulatory changes, of the last 4 years, which have contributed to the current hugely unhelpful environment, in Indonesia, for mining companies in general and for foreign investors in particular, is an exercise almost too painful to contemplate undertaking. It is also not the intended focus of this article which is really forward looking rather than backward looking.

A partial list, however, of some only of the more unhelpful legal, policy and regulatory changes, of the last 4 years, would surely include the following:

- (a) increasing the IUP divestiture requirement from 20% to 51%;
- (b) bringing forward the start date for IUP divestiture from 5 years after the commencement of commercial production to the date of acquisition of a company holding an IUP;
- (c) setting the divestiture price at not more than investment cost when a government entity is able to exercise its first priority acquisition right;
- (d) substantially reducing the attractiveness of using IDX listings to satisfy the divestiture requirement;
- (e) insisting upon renegotiating CCoWs/CoWs and seeking changes to CCoWs/CoWs prejudicial to holders of CCoWs/CoWs;
- (f) setting the minimum domestic processing and refining requirements for various metal minerals at impractical levels;
- (g) not taking into account infrastructure and market constraints in imposing a January 2014 deadline for the commencement of domestic processing and refining;
- (h) leaving it until the very last moment to relax the export ban on certain metal minerals in concentrate form;
- (i) imposing a progressive export tax on certain metal minerals exported in concentrate form between 2014 and 2017;
- (j) introducing multiple further restrictions on the use of forest areas for mining activities;
- (k) expanding the definition of “mining services providers” to include numerous categories of

service providers which only have the most remote connection with mining concession activities; and

- (1) proposing to terminate the 63 bi-lateral Investment Treaties which Indonesia has with other countries and which Investment Treaties provide basic rights and protections for foreign investors in Indonesia including, most importantly, for foreign investors in the local mining industry (together, the “**2011 - 2014 Negative Developments**”).

Readers interested in knowing more, about the individual 2011 - 2014 Negative Developments may refer to the writer’s articles on these issues, which articles have appeared monthly in Coal Asia Magazine during the period 2011 to 2014.

Notwithstanding the “litany of horrors” which comprise the 2011 - 2014 Negative Developments, the old GoI has, of late, shown possible signs of a willingness to rethink some of the most egregious aspects of the 2011 – 2014 Negative Developments. Recent statements from various old GoI ministers have suggested that (i) divestiture may be capped at 30% to 40% for mining companies undertaking underground mining activities and/or willing to fully implement domestic processing and refining on a timely basis, (ii) the export tax rates on metal mineral concentrates may be significantly reduced, (iii) unspecified incentives may be provided in respect of the construction of smelters for those metal minerals with poor domestic processing and refining economics and (iv) long mooted increases in royalties for coal IUP producers will be deferred (together, the “**Recent Mildly Positive Announcements**”).

## 2. **2014 Elections**

The April 2014 DPR elections determine which political parties (i) may, individually, nominate their own presidential candidates or (ii) must join with other political parties in order to jointly nominate a presidential candidate for the July Presidential elections.

In the already held April 2014 DPR elections, no political party achieved the 25%/20% minimum voter support/DPR seats required to individually nominate its own presidential candidate.

The 3 best performing political parties in the already held April 2014 DPR elections were (i) PDI-P with 19%, (ii) Golkar with 15% and (iii) Gerindra with 12% approximately.

Notwithstanding PDI-P’s less than stellar performance in the April 2014 DPR elections, the most likely (but by no means inevitable) winner, at this stage, of the July 2013 Presidential elections is the popular Jakarta Governor Joko Widodo (“**Jokowi**”). If, as presently expected, Jokowi does become President, it will be as head of a PDI-P led, coalition government.

## COMMENTARY

### 1. Why are the 2011 - 2014 Negative Developments so Numerous?

Instead of dwelling upon the details of the individual 2011 - 2014 Negative Developments, it is surely more productive to focus on trying to understand why these setbacks have occurred. This is because such understanding will help us determine whether or not it is likely the same reasons will continue to influence new GoI legal, policy and regulatory initiatives after 2014.

The writer has identified 5 main reasons and 5 minor reasons for the 2011 - 2014 Negative Developments.

The 5 main reasons are:

- (a) old GoI believes that Indonesia did not “get its fair share” of the financial benefits generated by the local mining industry during the last commodities boom and is determined to not let this happen again (“**MA Reason 1**”);
- (b) old GoI believes that Indonesia has simply been too accommodating to foreign investors in the local mining industry over the past 25 years because Indonesia’s need for foreign investment in the local mining industry is overstated (“**MA Reason 2**”);
- (c) old GoI believes that, in fact, it is actually foreign investors which need Indonesia for its abundant natural resources and, therefore, foreign investors will still flock to the local mining industry despite increased regulatory burdens (“**MA Reason 3**”);
- (d) old GoI believes there has been and continues to be a serious disconnect between those who bear the costs and burdens of mining projects (i.e., local communities where mining projects take place) and those who reap the benefits/rewards of mining projects (i.e., mining companies and foreign investors) (“**MA Reason 4**”); and
- (e) growing political influence of local communities, in the post regional autonomy era, has obliged old GoI to be increasingly inward looking rather than outward looking in regulating the local mining industry and foreign investment in the local mining industry (“**MA Reason 5**”) (together, the “**Main Reasons**”).

The 5 minor reasons are:

- (a) as the overall level of economic prosperity has increased, old GoI and the population at large have become relatively more concerned about “higher order” values such as environmental integrity and protection and relatively less concerned about job creation and GDP growth (“**MI Reason 1**”);
- (b) a belief, in certain sections of the domestic business community, that discouraging foreign investment will create new opportunities for domestic entrepreneurs to enter the local mining industry at very attractive price levels (“**MI Reason 2**”);

- (c) the process by which new laws, policies and regulations, relating to the local mining industry and foreign investment in the local mining industry, are developed is inherently defective and otherwise substantially dysfunctional (“**MI Reason 3**”);
- (d) a lack, at all levels of GoI, of sufficient technical knowledge and practical experience with regard to mining and the important differences between exploration activity and operation production activity; something which makes it difficult, if not impossible, for GoI to regulate and supervise the local mining industry in an informed and appropriate manner (“**MI Reason 4**”); and
- (e) a perception by many political players that the local mining industry and foreign investors in the local mining industry are fundamentally unpopular with the general community and, therefore, taking a tougher line with the local mining industry and with foreign investors in the local mining industry, in terms of the applicable legal, policy and regulatory environment, will be welcomed and rewarded by voters in the 2014 Elections (“**MI Reason 5**”) (together, the “**Minor Reasons**”).

## 2. **Will The 2014 Elections Mean The Major Reasons And The Minor Reasons Are No Longer Relevant?**

- 2.1 **Overview:** It is the writer’s assessment that all the Main Reasons and most of the Minor Reasons reflect either entrenched beliefs or statements of fact which it is going to be very difficult to change in the short to medium term or, indeed, at all and regardless of which party leads the new GoI coalition.

MA Reason 1, MA Reason 2, MA Reason 3, MA Reason 4, MI Reason 2 and MI Reason 5 are all expressions of resource nationalism in 1 form or another which have developed over an extended period of time and now seem to be accepted by and supported at virtually all levels of the bureaucracy as well as, more arguably, at all levels of the Indonesian population.

MA Reason 5, MI Reason 1, MI Reason 3 and MI Reason 4 are simply the reality in modern day Indonesia.

MI Reason 3 and MI Reason 4 will not change unless there is (i) a complete re-think of how mining law, policy and regulation is made and (ii) a major and sustained investment is made in relevant skills training and human resource development. Both these requirements are clearly long term goals at best.

It is only MI Reason 5 (**i.e.**, vote getting initiatives) that is actually a direct product of the 2014 Elections and, therefore, can realistically be expected to moderate in the immediate aftermath of the 2014 Elections.

2.2 **Different Perceptions:** There are, however, many different perceptions of what the 2014 Elections will mean for the local mining industry and for foreign investors in the local mining industry. These different perceptions fall along a continuum which may be broadly described as being the “**Optimistic View**” at 1 extreme and the “**Pessimistic View**” at the other extreme. Let’s consider each of these different “extreme” perceptions in turn.

2.2.1 **Optimistic View:** Supporters of the Optimistic View would say:

- (a) the 2011 - 2014 Negative Developments have been primarily driven by vote getting initiatives in advance of the 2014 Elections and exacerbated by a weak and conflicted old GoI;
- (b) the new GoI will have a policy horizon of at least 5 years, something which should encourage more long term, economically rational policy making;
- (c) despite the rhetoric, the importance of foreign investment is well understood by all political parties and will not be overlooked by the new GoI; and
- (d) a PDI-P led, new GoI, with Jokowi as President, will be more favorably disposed to the local mining industry and to foreign investment in the local mining industry than is the old GoI or a Golkar or Gerindra led, new GoI would be.

Positive financial market reaction to PDI-P and Jokowi’s strong showing in many of the polls, prior to the April 2014 DPR elections, seemed to, initially at least, lend some support for the Optimistic View. The writer would suggest, however that (i) the positive financial market reaction was not necessarily warranted and (ii) was more about the widely held perception of Jokowi as an encouraging new type of Indonesian politician, relatively untainted by corruption and self-interest, who might actually be genuinely concerned about the well being of the average Indonesian, than it was about any hard evidence that PDI-P and Jokowi would be more favorably disposed to foreign investment or even better for the Indonesian economy than a Golkar led, new GoI or a Gerindra led, new GoI.

The wholly transitory nature of this financial market optimism certainly became apparent once the results of the April 2014 DOPR elections were announced and the actually somewhat disappointing performance of PDI-P in the April 2014 DPR elections was evident.

2.2.2 **Pessimistic View:** Supporters of the Pessimistic View would say:

- (a) the 2011 - 2014 Negative Developments really reflect a fundamentally negative change in Indonesia’s attitude to foreign investment as economic prosperity has made Indonesia much more self-confident and independently minded;
- (b) Indonesia has come too far down the path of resource nationalism, over the past 4 years, for a PDI-P led, new GoI to quickly change course after 2014 even if the serious downside implications of resource nationalism may be well understood by PDI-P;

- (c) PDI-P and Jokowi are, in any case, the ultimate populists and, therefore, not likely to be at all favorably disposed to the local mining industry and to foreign investment in the local mining industry; and
- (d) given its populist focus, mining law reform will not be high on the agenda of the new PDI-P led new GoI.

Superficially, at least, strong support for the Pessimistic View can be found in the economic platform of PDI-P prepared for the 2014 Elections. As summarized in the 6 March 2014 edition of *The Jakarta Post*, under the heading “Indonesia needs fewer foreign investors”, PDI-P’s economic platform states, among other things, that:

“We are facing a situation in which our economic sovereignty and policies are being dictated by foreign powers.”

“Indonesia must limit foreign ownership in certain sectors.”

“national interests are being harmed as the indirect result of the influx of foreign capital, with national interests taking a back seat to foreign interests.”

PDI-P’s economic platform hardly sounds like that of party which, if and when it leads the new GoI, will be making promotion of foreign investment in the local mining industry a top priority or, indeed, doing everything possible to roll back the 2011 - 2014 Negative Developments.

It is also important to remember that PDI-P is the “torchbearer” of the legacy of Indonesia’s very first President, Sukarno, whose antipathy towards foreign investment, as well as his fondness for overtly nationalistic and socialist policies, is a matter of indisputable, historical record. The fact that Sukarno’s daughter, Megawati Sukarno Putri (“**Megawati**”), is the chairwoman of PDI-P might, in and of itself, give some pause for thought as they ponder the likely attitude of a PDI-P led, new GoI to the local mining industry and to foreign investors in the local mining industry.

Finally, Jokowi’s populist, “man of the people” style, as well as his background as a small-time furniture producer from Central Java, no doubt contribute to the pessimists’ concern that, as President, Jokowi will not be a big supporter of the local mining industry or of foreign investors in the local mining industry.

Supporters of the Pessimistic View are, of course, not likely to find any greater comfort in the possibility (albeit unlikely at this stage) that Jokowi might actually lose the July 2014 Presidential elections and/or, as a result of political machinations, Golkar or Gerindra, rather than PDI-P, might ending up leading the new GoI coalition. After all, even a cursory glance at the 2014 Election platforms of Golkar and Gerindra, as well as at the published statements of their respective leaders, quickly reveal that resource nationalism is a sentiment common to all the mainstream Indonesian political parties. As reported by Bloomberg on 6 March 2014, Golkar’s chairman, Aburizal Bakrie, has been reported as saying:

“Indonesia should keep more of its natural resources, such as natural gas, at home bolster its domestic industries.”

“Indonesia needs the courage to face and negotiate with parties overseas.”

“We say thank you for buying our gas. But going forward, I will use this gas first and export the rest.”

Likewise, Harry Azhar Azis, a senior member of Golkar’s economic team, was reported by Reuters, on 12 March 2014, as having said:

“Golkar will **not** alter it (the export ban policy), instead we will underline the importance of value-added (commodities).”

The resource nationalist policy stance of Gerindra is also readily apparent from the following statements of its chairman Prabowo Subianto:

“Gerindra will **not** change the mining rules if I win the presidency.”

“We want there to be a consistent message that tells people like Freeport and Newmont to just do it and build smelters.”

At least on the basis of their official party positions, it certainly does not sound as though either Golkar or Gerindra will be rushing to “push the reset button” and overcome the 2011 - 2014 Negative Developments should 1 or other of these parties end up leading or even participating in the new GoI coalition.

Despite the apparent strong justification for the Pessimistic View, the writer believes the Pessimistic View is, at most, only partially correct. More particularly, in the writer’s opinion, it is a mistake to place too much weight on party platforms and electioneering speeches in trying to divine how the new GoI will approach the regulation of the local mining industry and foreign investment in the local mining industry after 2014. Like political parties and politicians everywhere, Indonesia’s political parties and politicians will surely say just about anything and espouse just about any view if this is what they think is required to win the 2014 Elections and form the new GoI. In this regard, Indonesia’s political parties and politicians are no better and no worse than most political parties and politicians in other countries.

Notwithstanding the danger of taking political party platforms and electioneering speeches at face value, the almost uniform, official support for resource nationalism, among Indonesia’s mainstream political parties and their leaders, is still very significant because of what it says about what Indonesia’s mainstream political parties and their leaders **think** is important to the voters in the 2014 Elections. If Indonesia’s mainstream political parties and their leaders are correct in their thinking that the majority of voters in the 2014 Elections fully support resource nationalism and want the new GoI to actively pursue resource nationalist policies, that certainly does not bode well for how the new GoI will deal with the local mining industry and foreign investors in the local mining industry post 2014. This must be so regardless of the actual views,

of the mainstream political parties and their leaders, when it comes to the merits or otherwise of making resource nationalism a central element of new GoI policy.

2.2.3 **Balanced View:** If neither the Optimistic View nor the Pessimistic View should be regarded as being correct, is it possible to develop a more nuanced view of what the 2014 Elections will mean for the local mining industry and for foreign investors in the local mining industry? The writer believes such a more nuanced view (let's call it the "**Balanced View**") is not only possible to develop but is, indeed, much more likely to be substantially correct than either the Optimistic View or the Pessimistic View. The Balanced View might be expressed as follows:

- (a) accept the likelihood (but not the certainty) that Jokowi will be the next President and head of a PDI-P led, new GoI coalition;
- (b) recognize that, even though Megawati will not be the President, she will still be the "dalang" (**i.e.**, the puppet master);
- (c) focus on Megawati's past record as President from 2001 to 2004 as the best evidence of how a PDI-P led, new GoI coalition will deal with the local mining industry and with foreign investors in the local mining industry;
- (d) take comfort in the fact that, when she was President, Megawati showed herself to be:
  - (i) an avowed secularist;
  - (ii) understanding of her own limitations as a day to day administrator;
  - (iii) generally willing to appoint competent technocrats to fill key Ministries and then, by and large, leave them to get on with the job; and
  - (iv) not overtly anti the mining industry or anti foreign investment; and
- (e) notwithstanding (d)(iv) above, resource nationalism will continue to be **officially** supported by the new GoI.

With regard to Megawati's attitude to foreign investment, it is important to bear in mind it was during Megawati's presidency that Indonesia negotiated and concluded the ASEAN Free Trade Agreement.

There are, however, 2 important caveats to the Balanced View. First, it has been suggested, in some quarters at least, that Megawati has subsequently questioned whether her comparatively liberal stance, when President, on foreign investment and trade contributed to her loss in the 2004 Presidential elections to the present incumbent. Second, because of PDI-P's less than impressive showing in the April DPR elections, PDI-P will need other political parties to join a coalition in order to form the new GoI. Accordingly, Megawati is likely to have to make more compromises, in order to keep PDI-P's coalition partners on-side, and otherwise have less freedom to play the role of "dalang" as she thinks fit than would be the case in a PDI-P only

new GoI.

### 3. **What does the Balanced View Mean for the Mining Industry?**

Assuming the Balanced View proves to be substantially correct, this leads inevitably to the issue of what will the realization of the Balanced View mean for local mining industry and for foreign investment in the local mining industry post 2014? The implications of the Balanced View for the local mining industry and for foreign investment in the local mining industry may be considered from 4 different perspectives.

3.1 **GoI Policy towards the Mining Industry:** Given the firm support for resource nationalism evident in the PDI-P party platform, as well as in the platforms and public statements of the other main political parties and their respective leaders, it is only realistic to expect that, even under the Balanced View, the new GoI's **official** policy towards the local mining industry and foreign investment in the local mining industry will be resource nationalist in its tone and approach. More particularly, it should be assumed that the emphasis of new GoI **official** policy will continue to be on ensuring that Indonesia and Indonesians as a whole derive more benefit from the local mining industry than has supposedly been the case in the past.

The likely continued emphasis on maximizing Indonesia's benefit from the local mining industry leads the writer to reluctantly conclude that the new GoI will not **officially** withdraw support for the more controversial mining industry policies of the old GoI such as (i) domestic processing and refining of metal minerals, (ii) divestiture of foreign ownership of IUP holders, (iii) renegotiation of CoWs/CCoWs and (iv) higher taxes for and more rigorous collection of taxes from mining companies whether IUP holders or CoW/CCoW holders.

The most that can be reasonably expected, even under the Balanced View, is that the new GoI's **official** continuing support for the controversial mining industry policies of the old GoI may be tempered by (i) a more sophisticated understanding of the inevitable, long term, negative consequences of rigorously enforcing these policies and (ii) the consequent implementation of these policies in a manner which does not automatically and inevitably alienate foreign investors.

3.2 **2009 Mining Law:** Any material amendment to the 2009 Mining Law itself seems to be almost certainly a "non-starter" even under the Balanced View.

The lack of effective GoI control over the DPR, which is an inherent weakness of the Indonesian political system in terms of progressing major legislative initiatives, is only going to be exacerbated in the case of the new GoI by the likelihood of the new GoI being a relatively weak coalition of several parties with a collective, primary focus of staying in power as long as possible. Amending the 2009 Mining Law itself is surely going to be seen by the new GoI as impractical and politically unwise in terms of the political capital which would have to be expended to achieve the same.

Given how long it took to finalize the 2009 Mining Law and guide it through the DPR, even when it was generally accepted the previous 1967 Mining Law had become almost totally irrelevant and unworkable, it must be regarded as quite understandable the new GoI will not readily take on this herculean task.

Apart from the political realities impeding any material amendments to the 2009 Mining Law, the writer would contend that the 2009 Mining Law while far from perfect is, in fact, more or less acceptable in its current format and, at least as far as foreign investment in the local mining industry is concerned, something which foreign investors can and should have no real difficulty working with so long as its implemented in a rational economic manner. After all, it was the 2009 Mining Law which, for the very first time, allowed foreign investors to hold a mining license. The 1 obvious exception to the general acceptability of the 2009 Mining Law is its treatment of CoWs and CCoWs.

The issue has, very arguably, never been the 2009 Mining Law itself but, rather, the confused, impractical and inconsistent way in which the 2009 Mining Law has been implemented and applied by the old GoI. This assessment simply reflects the fact that, in Indonesia, laws are generally not very detailed and really intended just to set out the broad parameters of a new policy, legal and regulatory framework. The substantive impact of Indonesian laws only begins to be felt by business once the all important implementing regulations are produced and issued by the relevant ministry with responsibility for overseeing the administration and supervision of the industry in question. This point may be illustrated with just 2 examples taken from the 2011 - 2014 Negative Developments.

First, with regard to domestic processing and refining, as well as the associated export ban, the 2009 Mining Law merely says that (i) holders of IUPs and IUPKs shall be obliged to enhance the value of their mineral products through processing and smelting (Article 102) and (ii) holders of CoWs shall undertake smelting within 5 years (Article 170). There is nothing in the 2009 Mining Law about what form the processing, refining and smelting should take or the minimum level of purity which must be achieved as a result of such processing, refining and smelting. Neither is there anything in the 2009 Mining Law about an export ban on unprocessed mineral products. These things are merely found in implementing regulations issued by the Ministry of Energy & Mineral Resources (“**MoEMR**”) and the Ministry of Trade (“**MoT**”).

Second, with regard to the divestiture requirement applicable to foreign owned IUP and IUPK holders, the 2009 Mining Law merely says that, after 5 years of production, foreign owned IUP and IUPK holders shall be obliged to divest shares to various specified government and private entities (Article 112(1)). There is nothing in the 2009 Mining Law which mandates that the level of divestiture must be even 20% far less 51%. Neither is there anything in the 2009 Mining Law about the divestiture price being set at investment cost. The current 51% level of required divestiture and the prejudicial divestiture price are merely found in implementing regulations issued by MoEMR.

3.3 **Implementing Regulations:** Although, to date, the implementing regulations for the 2009 Mining Law have proved to be little short of disastrous for the local mining industry and for foreign investors in the local mining industry, the relative ease with which existing implementing regulations can be amended and new implementing regulations introduced may actually offer the best hope for some improvement under the new GoI and assuming the Balanced View prevails.

The fact that the DPR does not have to be consulted about and is not otherwise directly involved in the issuance or amendment of implementing regulations leaves a great deal of discretion in the hands of the relevant minister and his staff.

As the writer has pointed out in 3.2 above, many if not all of the more serious 2011 - 2014 Negative Developments are really, at least to some degree, the product of discretionary exercises of authority by MoEMR and other relevant ministers, such as MoT, in putting their interpretation on what is required by the 2009 Mining Law and how these requirements can and should be implemented. That said, it must be acknowledged that Commission VII of the DPR, with its specialist function in respect of mining and other resources related matters, has unquestionably had considerable indirect influence over the approach taken by MoEMR and MoT in preparing the implementing regulations for the 2009 Mining Law. Further, as career politicians rather than career bureaucrats, the current ministers at MoEMR and MoT could not afford to get too far out of step with the overall resource nationalist policy direction of the old GoI without risking their own positions. It is also, of course, the case that implementing regulations cannot (or, at least, should not) conflict with the relevant law they are purporting to implement and are otherwise subject to challenge before the Supreme Court and even the Constitutional Court.

Even acknowledging the various legal and practical restrictions on what a minister can do in terms of issuing implementing regulations for a law he is charged with responsibility for administering, the ministers at MoEMR and MoT could, unquestionably, have chosen a different path in interpreting what is required by the 2009 Mining Law and how these requirements can and should be implemented compared to what is currently reflected in the implementing regulations for the 2009 Mining Law. Had the old GoI been less strident in its support of resource nationalism, the ministers at MoEMR and MoT might well have felt more able to take account of industry feedback and their own expert staff input on the likely practical consequences of the 2011 - 2014 Negative Developments.

Under the Balanced View, the new GoI may be expected to be less overtly anti the mining industry and anti foreign investment in the local mining industry than was the old GoI. More particularly, while still **officially** supporting resource nationalist policies, there is some hope the new GoI will show a greater willingness to (i) acknowledge the inevitable negative consequences of doing everything possible to advance the resource nationalism agenda and (ii) look for compromises that do not automatically alienate the local mining industry and foreign investors in the local mining industry while still trying to ensure that, overall, Indonesia and Indonesians as a whole benefit more from the mining industry that has supposedly been the case in the past. This somewhat more sophisticated attitude may create enough latitude for the new ministers at MoEMR and MoT to be willing and able to exercise their discretion to

interpret and apply the 2009 Mining Law in a way that will ameliorate at least some of the worst consequences of the 2011 - 2014 Negative Developments. Certainly, it will be in their power to do so by amending the existing implementing regulations and issuing new implementing regulations in respect of the 2009 Mining Law. The only question is whether or not the hoped for change in attitude of the new GoI will be sufficient to make this a politically possible option for career-minded ministers to seriously pursue.

- 3.4 **Ministers and Bureaucracy:** With the new GoI will come new ministers at MoEMR and MoT as well as, perhaps, new appointees at the level of Director General and Director. Under the Balanced View, Megawati's continuing role (albeit behind the scenes) in influencing the selection and appointment of new ministers at MoEMR and MoT makes it possible that career technocrats, with serious, long term experience in the administration and regulation of mining and trade, will be appointed to these 2 important positions. This would greatly improve the chances of the new GoI taking modest steps, through changes to the relevant implementing regulations and acting on the Recent Mildly Positive Announcements, to do something about the worst aspects of the 2011 - 2014 Negative Developments.

## SUMMARY & CONCLUSIONS

The local mining industry and foreign investors in the local mining industry need to be very realistic about what improvements in the applicable legal, policy and regulatory environment can be expected after 2014.

Regardless of which political parties form the new GoI and who is the new President, no one is going to magically "press the re-set button" such that the 2011 - 2014 Negative Developments just become an unpleasant memory.

For better or for worse, resource nationalism has simply come too far in Indonesia and been accepted as a good thing by too large a segment of the population for the new GoI, regardless of its makeup, to directly and openly try to move Indonesia in a different direction. With only a very few exceptions, the Main Factors and the Minor Factors identified by the writer, as being the underlying causes of the 2011 - 2014 Negative Developments, will require a long time to overcome.

There are multiple viewpoints on the likely outcome of the 2014 Elections and the impact of the same for the local mining industry and for foreign investment in the local mining industry. These viewpoints range from highly optimistic to highly pessimistic and are prone to change over time as the 9 July Presidential election comes closer. While major improvements in the applicable legal, policy and regulatory environment, after 2014, cannot realistically be expected, all is not lost.

The writer favors the Balanced View as providing the most accurate prediction of how the new GoI will deal with the local mining industry and with foreign investment in the local mining industry after 2014.

Accordingly to the Balanced View (i) new GoI policy will continue to **officially** support resource nationalism while favoring greater compromise and (ii) there will be no change to the 2009 Mining Law but (iii) there is a reasonable chance of extensive amendments to the implementing regulations for the 2009 Mining Law directed at overcoming some of the worst consequences of the 2011 - 2014 Negative Developments and giving effect to the Recent Mildly Positive Announcements and (iv) it is possible (even likely) that competent and experienced technocrats will fill the key ministries of MoEMR and MoT.

The expectations under the Balanced View may seem very modest and even inadequate to some. With, however, (i) the high level of discretion vested in ministers to amend existing implementing regulations and issue new implementing regulations as well as (ii) the singular importance of the implementing regulations in determining how the 2009 Mining Law affects the mining industry in practice, these expectations, if realized, may just be sufficient to bring some tangible improvement in the applicable policy, legal and regulatory environment for mining.

Those that expect anything more than that which falls within the Balanced View are destined to be disappointed. For, those, however with suitably modest expectations, consistent with the Balanced View, the new GoI may at least prove able and willing to meet those modest expectations.

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