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Mining Law Implementing Regulations: Mining Sector Legally Certain?

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Overview

Two of four long-anticipated implementing regulations to Law No. 4 of 2009 on Mineral and Coal Mining (Mining Law) were issued on 1 February 2010. Though their issuance was delayed, and stakeholders continue to wait patiently for the next two regulations, the two released thus far are nonetheless expected to provide a greater degree of legal certainty to actors in the mining sector.

The two regulations are: Government Regulation No. 22 of 2010 on Mining Zones, and; Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities. The former implements Articles 12, 19, 25, 33, and 89 of the Mining Law, while the latter implements Articles 5 (5), 34 (3), 49, 63, 65 (2), 71 (2), 76 (3), 84, 86 (2), 103 (3), 109, 111 (2), 112, 116, and 156 of the Mining Law.

This Indonesian Law Digest will highlight notable features of the Government Regulations, and briefly explore their implications for extractive industries.

Context

Between the time the Mining Law was enacted and the issuance of these Government Regulations, stakeholders can politely be said to have been in a state of uncertainty. Despite its comprehensiveness, the Mining Law left many provisions to be implemented and numerous questions to be answered.

Amongst the many issues raised by that Law was the status of Mining Concession ('KP') holders. Given that the Mining Law's articles make no reference to them, KP holders had reason to be anxious about the legal certainty of their situations.

Apart from that, the status of Work Contracts ('KK') and Coal Mining Exploitation Working Arrangements ('PKP2B') were the subject of a dubious contradiction in Article 169 of the Mining Law. It provides that agreements signed before the Law's enforcement will be considered valid until their expiry, but it then goes on to require that those agreements comply with the Law's provisions within one year of the Law's promulgation.

Purpose

The current, implementing Government Regulations are expected - at least by the government - to clarify those uncertainties, and bring regulatory structure to such issues as procedures for determining Mining Zones, introduction of a mining business license regime, divestment procedures and obligations, Domestic Market Obligation, and so on. Yet, not all stakeholders will be satisfied with these Regulations, and it may be that lingering legal uncertainties remain.

Mining Authorization: Before and After the New Framework

At the fundamental level, the Mining Law's issuance on 12 January 2009 precipitated a shift from what was previously a 'business-to-business' scenario - the government and mining companies essentially being 'equals' - to a 'state-to-business' scenario, whereby the government's position is elevated above companies by a newly-introduced licensing regime. That licensing authority grants the state tighter control over the extraction of coal and mineral resources throughout Indonesia.

The previous regulation that authorized mining companies to engage in extractive activities was Law No. 11 of 1967 on Basic Mining Provisions. Under that Law, authorization was given in the form of KK, KP, and PKP2B. The Mining Law, however, modified that authorization into a variety of licenses.

The 7 types of licenses provided by Government Regulation No. 23 of 2010 are: Mining Business License ('IUP'), IUP for Exploration, IUP for Production, Special Mining Business License ('IUPK'), IUPK for Exploration, IUPK for Production, and Community Mining License ('IPR'). The regulation extensively details how those licenses are to be acquired.

The licenses correspond to Mining Zones provided by Government Regulation No. 22 of 2010: Mining Business Zones ('WUP'), Licensed Mining Business Zones ('WIUP'), State Reserves Zones ('WPN'), Special Mining Business Zones ('WUPK'), Special Mining Business License Zones ('WIUPK'), and Community Mining Zones ('WPR'). Procedures around having a zone licensed are extensively detailed in the regulation, including a tender process, whereby mining companies bid for a zone's license - as with WIUP, for example.

For a brief overview on procedures for the determination of Mining Zones, see: ILB No. 1320 17/02/2010

The question remained: after the Mining Law came into force, what was to happen to KK, KP, and PK2PB?

Mining Concessions (KP)

Responding to an influx of questions and concerns around KP, the Director General of Mineral, Coal, and Geothermal issued Circular Letter No. 03.E/31/DJB/2009. The letter gave legal recognition to those KP that were granted prior to the Mining Law, saying that they would be valid until the date of their expiry; it also clearly stated that holders of Concessions would be required to comply with the Law's provisions within a year of its issuance.

In addition to abiding by that Circular Letter's provisions, a KP's compliance with the Law and its implementing Government Regulations (Article 112 of No. 23 of 2010, specifically) entails 3 things:

1. Become the holder of an IUP within 3 months of the implementing regulations being issued (i.e., April 30).
2. Report a plan for resource extraction of a given area(s) to the relevant authority (i.e., Minister of Energy and Mineral Resources, Governor, or Mayor/Regent).
3. Initiate resource extraction within 5 years of the Mining Law taking effect.

Work Contracts (KK) and Coal Mining Exploitation Working Arrangements (PKP2B)

According to Transitional Provisions (Article 112) of Government Regulation No. 23 of 2010, KK and PKP2B whose authorizations were established prior to the regulation will continue to be legally valid until the date of their expiry. However, like KP, they also must comply with the Mining Law's provisions within a year of its issuance.

In fact, KK and PKP2B holders who have not yet acquired an extension for their activities may still do so, but now the extension must take the form of an 'IUP Extension'. Rather than having to engage in a tender process, existing KK and PKP2B holders can continue with their extractive activities by obtaining an IUP Extension in accordance with Government Regulation No. 23 of 2010.

Divestment

For any licensed, operational mining company (i.e., those holding IUP and IUPK) that is either foreign-owned or even has shares that are controlled by foreign entities, within 5 years and 90 days of the company's Operation Production License for mining being issued, at least 20% of the company's foreign-owned shares must be divested to an agent of the Indonesian state. Article 97 (within Chapter IX) of Government Regulation No. 23 of 2010 elaborates the mechanism for that divestment.

First, the shares must be offered to the central government; if they are not willing to buy, the next to be offered shares are provincial or regent/municipal governments. If those parties are unwilling to purchase the shares, the next stage is to tender the shares to both state- and regional-owned enterprises ('BUMN' and 'BUMD' respectively). In all of those cases, parties are given 60 days from the date of offering to declare their interest. If no state-related party is willing to purchase the shares, they can be tendered to private, local companies; they are given 30 days to declare their interest after the initial offering date.

The foreign-owned shares may not be divested to any other parties: in the event that none of the previously-mentioned parties declares interest, the entire process is to be repeated the following year.

Domestic Market Obligation

Article 5 of the Mining Law establishes export and production controls, designed to (a) require mineral and coal resources to first be sold in the domestic market to satisfy the domestic demand (before being exported), and (b) control the extent of production to ensure that long-term reserves are available for domestic necessities. That control is known as the Domestic Market Obligation (DMO), supporting Article 33 (3) of the 1945 Constitution, which assures that Indonesian natural resources will be used for the national wealth.

Article 84 of Government Regulation No. 23 of 2010 supports the Mining Law by requiring that every IUP and IUPK Production Operation participate in fulfilling the DMO. The exact arrangement for how an individual company participates in satisfying the domestic demand (e.g., what proportion of production must be prioritized accordingly) is referred to Minister of Energy and Mineral Resources Regulation No. 34 of 2009 on Prioritizing the Supply of Mineral and Coal for the National Interest. That Ministerial Regulation provides that the arrangement will be determined on a case-by-case basis in agreements between the state and a given company - licenses, contracts, and so on.

As set out by Article 84 (2) of Government Regulation No. 23 of 2010, the sectors that will benefit from the DMO are (a) mineral and coal processing industries, and (b) domestic mineral and coal users.

Having satisfied the domestic demand for mineral and coal resources, IUP and IUPK Production Operations may export their production elsewhere. The price for those commodities will be regulated, as provided by Article 85 - which again refers to the aforementioned Ministerial Regulation (No. 34 of 2009), which has been in force since 31 December 2009.

For a brief overview of Minister of Energy and Mineral Resources Regulation No. 34 of 2009, see ILB No. 1281 19/01/2010

Conclusion

At least government officials have expressed confidence that the implementing Government Regulations to the Mining Law would answer lingering questions, and rectify any issues that arose as a consequence of the Law's issuance; some have posited that it will open multi-billion dollar floodgates of investment into the mining sector.

In light of the issues created by their absence, the Regulations are welcome: they elaborate in substantial detail many of the features of the Mining Law that have allowed the government to tighten its control of the sector. As this inquiry has discussed, a critical feature of that dynamic is the introduction of a licensing regime, and corresponding mining zones; features which are well-regulated by the Government Regulations.

Amongst other things, the implementing regulations (particularly No. 23 of 2010) address: governmental supervision and management of Mining Zones, delegation of central authorities to provincial and municipal/regent governments, benefit-sharing between different levels of government, and the obligation to process mineral and coal resources within Indonesia.

On the other hand, although this inquiry has sought to discern those aspects of the Regulations that are clear, particularly around the foreign-share divestment mechanism and Domestic Market Obligation, a thorough review reveals a number of lingering uncertainties that stakeholders may experience. The size of the Regulations somewhat disguises the fact that in many respects, they are not extensive - as suggested by a large number of provisions which make reference to other regulations that are in themselves vague, or in many cases inexistent. In so far as it relates to legal certainty for investment, it may be that the licensing regime is a strong foothold for necessary subsequent regulation to come.