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ESDM DRAFT NEW MINING LAW – A VERY MIXED BAG[1][2][3][4][5]

INTRODUCTION

A draft of Indonesia's proposed new minerals and coal mining law ("**New Mining Law**"), as prepared by the Ministry of Energy & Mineral Resources ("**ESDM**"), was published by Hukum Online in early April ("**April Draft Mining Law**").

The April Draft Mining Law represents only the first step in the process of enacting a New Mining Law. Nevertheless, the April Draft Mining Law provides a good opportunity to see ESDM's most recent thinking as to what the New Mining Law should contain as well as how that thinking has evolved since a position paper on the New Mining Law was published by the Directorate General of Minerals & Coal ("**DGoMC**") in October 2015 ("**DGoMC Paper**").

The April Draft Mining Law is very much a "mixed bag" for the private sector and foreign investors, with some positive aspects as well as, unfortunately, some seriously negative aspects.

In this article the writer will (i) summarize the main proposed changes contemplated by the April Draft Mining Law and (ii) make an assessment of the likely significance of these changes if and when they eventually become part of the New Mining Law.

BACKGROUND

Indonesia's existing regulatory regime for mining is found in the 2009 Minerals & Coal Mining Law ("**2009 Mining Law**") and the numerous implementing regulations made pursuant to the 2009 Mining Law as well as in sundry government regulations, presidential and ministerial decrees and other instruments (together, "**Existing Mining Regulatory Regime**").

It is a clear indication of the general dissatisfaction with the Existing Mining Regulatory Regime that, only 8 years after the introduction of the 2009 Mining Law, the consensus is that Indonesia needs a New Mining Law. Indeed, a New Mining Law was first proposed in 2015 if not earlier.

The deficiencies in the Existing Mining Regulatory Regime are numerous and have been the subject of much commentary by the writer and others.

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The April Draft Mining Law is only a draft. ESDM may rethink and rewrite the April Draft Mining Law on one or more occasions before the New Mining Law moves to the next stage. A separate draft of the New Mining Law will also be prepared by Commission VII of the Indonesian Parliament ("**DPR**") ("**Commission VII Draft**"). An attempt will then be made to reconcile the Commission VII Draft and the April Draft Mining Law (or whatever is the then current ESDM draft). It will be this reconciliation that is ultimately considered by and, likely, materially changed by the DPR.

It should be readily apparent from the foregoing there is no certainty that, if and when a New Mining Law is actually passed by the DPR and signed by the President, it will be even substantially the same, far less identical to, the April Draft Mining Law. Nevertheless, the April Draft Mining Law is an important, albeit early, milestone in the process of bringing about the New Mining Law.

COMMENTARY

1. Overview

The proposed changes to the Existing Mining Regulatory Regime, as represented by the April Draft Mining Law, essentially fall into three categories. First, proposed changes intended to ensure the New Mining Law reflects and is otherwise consistent with developments, since 2009, in terms of (i) the respective authority of the Central Government, the Provincial Governments and the Regional Governments regarding mining related matters and (ii) the collection of non-tax state revenue. Second, proposed changes intended to address shortcomings, as perceived by ESDM, in the 2009 Mining Law and which perceived shortcomings have not been previously addressed in ministerial regulations. Third, proposed changes intended to address the current difficult economic conditions facing the local mining industry. As such, the April Draft Mining Law is a combination of long anticipated and much needed "housekeeping" changes as well as of unanticipated changes that are, in some instances, both unnecessary and undesirable.

A significant number of the most important proposed changes to the Existing Mining Regulatory Regime are to be found in the so-called "Transitional Provisions" at the very end of the April Draft Mining Law. Accordingly and somewhat counterintuitively, the summary of the main proposed changes, in section 2 below, starts with the Transitional Provisions.

In some places, it is not entirely clear from the April Draft Mining Law just what ESDM's proposed changes are intended to achieve. As a consequence, the writer has, on occasions, had to struggle to interpret ESDM's proposed changes in a way that seems to make sense. It may, therefore, be necessary to revisit these interpretations if and when ESDM is willing to provide detailed input on and respond to questions regarding the intended effect of the proposed changes, something that has not been the case to date.

2. Main Proposed Changes and Their Possible Implications[6]

2.1 CoWs & CCoWs

2.1.1 **Proposal**: Contracts of Work ("**CoWs**") and Coal Contracts of Work ("**CCoWs**") must be "adjusted to" (**i.e.**, converted into/replaced with) Exploration IUPKs or Production Operation IUPKs within one year from the effective date of the New Mining Law (Article 128(1)).

Holders of CoWs/CCoWs are to submit applications for Exploration IUPKs or Production Operation IUPKs as of and from the effective date of the New Mining Law (Article 128(1)).

CoW/CCoW "working areas" (**i.e.**, contract areas or mining areas) are to be converted into Production IUPK mining business license areas ("**WIUPKs**") (Article 128(3)).

As part of the process of applying for Production Operation IUPKs, CoW/CCoW holders may submit applications for areas outside the relevant Production WIUPKs in order to support their existing and proposed mining activities (Article 128(4)).

An integral part of approving applications for Production Operation IUPKs is to be the takeover or settlement, by MoEMR, of those assets of the CoW/CCoW holders which are to revert to the State upon the expiration or termination of the relevant CoWs/CCoWs (Article 128(5)). This is to take place not later than six months after the submission of the relevant IUPK application (Article 128(6)).

2.1.2 **Implications**: The 2009 Mining Law currently provides for the provisions of CoWs and CCoWs to be adjusted, within one year and except with regard to state revenue, so as to be in accordance with the 2009 Mining Law. ESDM's proposal is, apparently, intended to strengthen this existing requirement so as to compel adjustment or conversion of CoWs and CCoWs to IUPKs within one year. As currently worded, this proposal seems inconsistent with the long standing position of the Government that holders of CoWs and CCoWs remain valid until they expire but must then be replaced with IUPKs.

The obligation of CoW/CCoW holders to convert to IUPKs, within one year, is made considerably more onerous by virtue of the administrative penalties that may be imposed on CoW/CCoW holders which fail to do so. **These administrative penalties appear to, ultimately, include cancellation of CoWs/CCoWs** – see 2.15 below.

Allowing or requiring (depending upon one's interpretation) applications for IUPKs to be submitted as and from the effective date of the New Mining Law is, presumably, intended to overcome the existing position whereby applications for IUPKs may only be made not earlier than two years before the relevant CoW/CCoW expires.

The requirement for the takeover or settlement, by MoEMR, of CoW/CCoW assets, as part of the process of approving applications for Production Operation IUPKs, seems to be addressing the provision in most CoWs/CCoWs that, if a CoW/CCoW is terminated during the operating period, all property of the relevant CoW/CCoW holder, located in the contract area, shall be

[6] All Article references in this section are to the April Draft Mining Law.

offered for sale to the Government at the lower of cost or market value. The presence of this requirement in the April Draft Mining Law, however, ignores the fact that the CoW/CCoW holders will be continuing to carry on mining operations in their former contract areas, albeit in reliance upon IUPKs rather CoW/CCoWs, and, therefore, will need to retain ownership of and control over their existing operating assets. To the extent the ESDM proposal may be interpreted as requiring some sort of financial settlement by CoW/CCoW holders, if they want to retain their operating assets once they become IUPK holders, this will surely represent an unacceptable financial burden for most if not all CoW/CCoW holders.

2.2 Domestic Processing & Refining

2.2.1 **Proposal**: All IUP and IUPK holders are to be subject to the obligation to increase the added value of their mineral and coal resources (Article 76(1)). There is, however, no specific time frame within which this added value activity must be carried out.

IUP and IUPK holders, committing to increasing the added value of minerals and coal, are to receive fiscal and non-fiscal incentives (Article 76(3)).

CoW holders only, which "commercialize" (**i.e.**, carry out commercial production) of copper only are obliged to carry out "refining" within five years of the effective date of the New Mining Law (Article 129(1)).

2.2.2 **Implications**: The basic proposed statement of the domestic processing & refining obligation is substantially the same as the existing provision in the 2009 Mining Law.

ESDM's intention, however, seems to be give, at least, copper producers a further five years in which to build or obtain access to smelters that will enable them to produce a fully refined product.

The April Draft Mining Law does not specify any outside date by which CoW, IUP and IUPK holders, producing metal minerals **other than copper**, must carry out full local value added activity (**i.e.**, refining). Based, though, on what the April Draft Mining Law says about the export of processed but not refined metal minerals (see 2.3 below), it **may** actually be ESDM's intention to effectively allow **all** or **at least some** metal mineral producers, in addition to copper producers, a further five years, from the effective date of the New Mining Law, in which to build or obtain access to smelters that will enable them to produce a fully refined product.

It also seems ESDM **may** now accept that widespread progress, in terms of domestic smelter development, is only going to be possible if the Government provides various incentives. In other words, the Government has to contribute to smelter development if it is ever to become a reality on a large scale. This represents a significant change in thinking.

2.3 Export

2.3.1 **Proposal**: CoW holders, which are undertaking "**refining**", are to be allowed to export their refined products in "certain amounts" (Article 129(2)).

The export of "**processed**" product is to be allowed for a "maximum of five years" (Article 129(3)).

Production Operation IUP holders, which carry out commercial production of iron sand, iron ore, timbal and zinc and are undertaking "**processing**", are to be allowed to export, in "certain amounts", for a "maximum of five years" from the effective date of the New Mining Law (Article 130(1)).

Production Operation IUP holders, carrying out "**processing**", may export "**processed**" product, in certain amount for a "maximum of five years" from the effective date of the New Mining Law (Article 130(2) and (3)).

2.3.2 **Implications**: Reading the transitional provisions regarding the domestic processing & refining obligation (see 2.2 above) together with the transitional provisions regarding export (see 2.3.1 above), it seems to be ESDM's intention that, at a minimum, (i) CoW copper producers and (ii) IUP producers of iron sand, iron ore, timbal and zinc, which are undertaking "**processing**", are to be allowed to export, in "certain amounts" and for a "maximum of five years" from the effective date of the New Mining Law.

What is much less clear is ESDM's intention with regard to the permitted processed but not refined exports of CoW and IUP producers of metal minerals **other than** (i) copper and (ii) iron sand, iron ore, timbal and zinc. However, the general statement, in Article 130(2) and (3) of the April Draft Mining Law, that "*Production Operation IUP holders, carrying out processing, may export processed product, in a certain amount and for a maximum of five years*, is most intriguing because it is **not** limited in any way to producers of particular metal minerals only. This **could** mean ESDM envisages that even those metal mineral IUP producers, which are presently banned from exporting anything less than a fully refined product (**eg**, bauxite and nickel IUP producers) will be allowed to export, in a certain amount and for a maximum of five years, so long as they are carrying out some domestic "processing". As "processing" is presently undefined, it remains to be seen just how significant this **possible** relaxation is. One but by no means the only interpretation is that this **might** be intended, by ESDM, to overcome the problem presently facing bauxite and nickel IUP producers that there is no commercial intermediate product, in concentrate form, they can produce. Provided "processing" is not subsequently defined too restrictively, in the implementing regulations for the New Mining Law, even bauxite and nickel IUP producers should be able to find some domestic "processing" activity they can carry out in respect of the mined ore in order to be able to take advantage of any intended relaxation of the present export ban as it applies to other metal minerals that are presently not fully refined in Indonesia and cannot be converted into concentrate as an intermediate step. Urgent clarification is clearly needed from ESDM of its intentions with regard to the temporary export (**i.e.**, for another five years) of processed but not refined metal minerals other than (i) copper and (ii) iron sand, iron ore, timbal and zinc.

It is also important to note the proposed changes indicate ESDM is increasingly moving away from a "one size fits all" approach to the export ban, as well as more generally to the domestic processing & refining obligation. In this regard, we now see proposed separate treatment of copper as well as of iron sand, iron ore, timbal and zinc. What about other metal minerals such

as bauxite, manganese and nickel?

2.4 Divestment

2.4.1 **Proposal**: PMA Companies, holding IUPs and IUPKs, will be subject to an unspecified divestiture requirement commencing after five years of commercial production (Article 79(1)).

The divestiture obligation may be satisfied by way of an initial public offering and stock exchange listing in the event that none of the Central Government, the Provincial Governments, the Regional Governments, BUMNs, BUMDs or national private business entities (**i.e.**, **non-**PMA Companies) are willing and able to acquire the divestiture shares on offer (Article 79(4)).

2.4.2 **Implications**: While in many respects the same as the 2009 Mining Law, ESDM's proposal to allow the divestiture obligation to be satisfied, in certain instances, by an initial public offering and a stock exchange listing represents a radical departure from the existing position. This **could** provide a means of overcoming the current "standoff" between Freeport and the Government over the value of the shares in Freeport's Indonesian subsidiary that need to be divested this year.

ESDM's proposal is silent on the all important question of the divestiture price which, presumably, is to be dealt with by way of subsequent implementing regulation. If the Government continues to insist upon a divestiture price substantially equivalent to cost recovery only, then there is likely to be little opportunity for the initial public offering and stock exchange listing alternative to be used by PMA Company IUP and IUPK holders. This is because there will, surely, always be some party, from among the Central Government, the Provincial Governments, the Regional Governments, BUMNs, BUMDs and national private business entities, willing and able to acquire divestiture shares, in an already producing mining company, at a "bargain basement" price equal to a proportion of accrued capital and operating costs to date less certain liabilities.

2.5 Taxes and Non-tax State Revenue

2.5.1 **Proposal**: The New Mining Law is to specify, in some detail, the types of taxes payable by IUP and IUPK holders which are to include (a) tax revenue in the form of (i) Central Government taxes and (ii) customs and excise duties; (b) non-tax state revenue in the form of (i) deadrent, (ii) production royalties, (iii) compensation for data/information, (iv) **investment substitution expenses**, (v) **mineral and coal data information system service provider costs** and **other lawful revenues**; and (c) regional revenue in the form of (i) regional tax, (ii) regional retributions/charges and (iii) **other lawful revenues** (Article 80).

Production Operation IUPK holders only, undertaking commercial production of metal minerals, rare earth minerals and coal, are to pay production royalties equal to 10% of their net profit before tax every year, with 4% going to the Central Government and 6% going to the Provincial and Regional Governments (Article 82).

IUP and IUPK holders are to be exempt from production royalties, regional taxes and regional retributions/charges on earth and rocks taken and used for their own purposes during

excavation mining operations (Article 83).

2.5.2 **Implications**: The 2009 Mining Law already provides for the same 10% production royalty included as part of the April Draft Mining Law.

ESDM's proposal regarding taxation has, however, to understood in the context of its apparent intention to compel CoW and CCoW holders to "adjust" (**i.e.**, convert or exchange) their CoWs and CCoWs to IUPKs within one year of the effective date of the New Mining Law (see 2.1 above). This will mean that all existing CoW/CCoW holders become subject to (i) a 10% production royalty rate which is far in excess of what they are currently paying and (ii) whatever subsequent changes in the tax rates are introduced by the Government over time. These are two things that most CoW and CCoW holders have strenuously resisted since the very beginning of the CoW/CCoW renegotiations.

ESDM also seems to be intent on subjecting CoW and CCoW holders to some new forms of non-tax state revenue such as (i) investment substitution expenses and (ii) mineral and coal data information system service provider costs. Just what these new items of non-tax state revenue include and how onerous they are likely to be is not presently clear. However, the very presence of these additional items of non-tax state revenue will surely confirm the worst fears of CoW/CCoW holders that the Government is looking to the CoW/CCoW holders to be the source of much of the additional revenue the Government is seeking to raise from the mining industry over the next few years.

Some generations of CoW/CCoW are also not presently subject, in certain situations, to customs and excise taxes which are now to be standard imposts for all IUPK holders.

The oblique reference to "other lawful revenues" appears to indicate the possibility (if not the probability) of new and additional forms of non-tax state revenue still to come.

The one positive aspect of the tax aspects of ESDM's proposal is the apparent intention to eliminate so-called "Galien C Tax" on excavated earth and rocks used for IUPK holders' own purposes.

2.6 Mining Business Services

2.6.1 **Proposal**: IUP and IUPK holders are to be obliged to carry out "all of their mining activities" (Article 87(1)).

IUP and IUPK holders are to be only allowed to co-operate with local or national mining business service providers (Article 87(2)).

Mining business services are to be expanded to include "minerals and coal mining" (Article 87(4)(l)).

2.6.2 **Implications**: There seems to be something of an internal conflict between Article 87(1) and Articles 87(2) and 87(4)(1).

Read literally and assuming this is not just a drafting error, ESDM's proposal **may** evidence an intention to eliminate all co-operation between IUP/IUPK holders and so-called "other mining business service providers" (**i.e.**, PMA Company mining business service providers). If this was really to become part of the New Mining Law then foreign owned, mining business services providers would, for all intents and purposes, no longer have any role in the local mining industry; at least, once their existing contracts expire. While the writer hesitates to attribute such an intention to ESDM, it may be motivated by the current hard times facing all mining business services providers (whether local, national or other mining business service providers) and the perceived need to reserve the remaining limited business opportunities for local and national mining business service providers only.

Assuming the reference to "minerals and coal mining" has not been included by mistake as part of mining business services, ESDM's intention also seems to be to no longer insist that IUP and IUPK holders exclusively carry out their own production activities but, rather, to allow IUP and IUPK holders to co-operate with mining business service providers in carrying out the basic production activities. If correct, this may reflect ESDM's realization that the current insistence of the 2009 Mining Law, on Production Operation IUP/IUPK holders carrying out their own basic production activities, has proved quite ineffective. Creative Production Operation IUP/IUPK holders and their legal advisers have had little difficulty in coming up with easy "workarounds" which, technically, comply with the 2009 Mining Law but, in practice, result in third party contractors (**i.e.**, mining business service providers) doing most if not all the actual production in many instances.

2.7 Issuance of IUPs, IUPKs, IUJPs & SKTs

2.7.1 **Proposal**: The issuance of mining business licenses, mining business service licenses and mining services registration certificates (**i.e.**, IUPs, IUPKs, IUJPs and SKTs) will now be the exclusive authority of the Central Government and the Provincial Governments (Articles 6 to 8).

2.7.2 **Implications**: ESDM's proposal is simply intended to bring the New Mining Law into line with the surviving parts of the September 2014 Provincial Administration Law ("**PA Law**") which substantially eliminated any ongoing role for the Regional Governments in the licensing of mining projects going forward.

2.8 Determination of WIUPKs

2.8.1 **Proposal**: Notwithstanding 2.7 above, Regional Governments will, however, still retain a role in determining the size and boundaries of coal and metal mineral WIUPKs, something which is to be carried out by the Central Government "in co-ordination with" the relevant Regional Governments (Article 16).

2.8.2 **Implications**: At first sight, ESDM's proposal would not seem to be fully consistent with the 22 November 2012 decision of the Constitutional Court which ruled that, in the case of multiple articles of the 2009 Mining Law, (i) it was actually the Regional Governments which had the authority to initially determine the relevant WPs, WIPs and WIUPs and (ii) the role of the Regional Governments in this process was not properly to be limited to "co-ordination" or "consultation" with the Central Government. It may well be, however, ESDM has satisfied itself that the surviving parts of the PA Law have effectively rendered the 22 November 2012 decision of the Constitutional Court no longer applicable.

2.9 Minimum & Maximum WIUPs & WIUPKs, Duration of IUPs, IUPKs and IPRs

2.11.2 **Proposal**: There are various proposed changes in the minimum and maximum WIUPs/WIUPKs and in the duration of IUPs/IUPKs (Articles 30 to 36). The details of these proposed changes are summarized, in table form, in the Schedule.

The most important of the proposed changes are the substantial increases in the maximum WIUPK areas which have increased from (i) 50,000 hectares/100,000 hectares/100,000 hectares for coal/metal minerals/rare earth minerals to 100,000 hectares/200,000 hectares/200,000 hectares respectively for Exploration WIUPKs and (ii) 15,000 hectares/25,000 hectares/25,000 hectares for coal/metal minerals/rare earth minerals to no maximum/75,000 hectares/75,000 hectares respectively for Production Operation WIUPKs.

2.11.3 **Implications**: The dramatic increase in the maximum permitted size of WIUPKs is significant for two reasons. First, it brings the size of WIUPKs more into line with the traditional size of CoW/CCoW contract areas, something entirely consistent with the original intention that IUPKs were to be the successor to CoWs/CCoWs. Second and more importantly, it probably indicates a realization, on the part of ESDM, that it is unrealistic to expect, as part of the ongoing CoW/CCoW renegotiations, CoW/CCoW holders will ever agree to major reductions in their CoW/CCoW contract areas as was originally contemplated by ESDM. This suggests some flexibility on the part of ESDM regarding the ongoing CoW/CCoW renegotiations.

2.10 Categories of Mining Business

2.14.1 **Proposal**: The categories of mining business will be expanded to include Rare Earth Mineral Mining (Article 20(2)(d)).

Recognition of Rare Earth Mineral Mining, as a separate category of mining business, will result in a new category of IUPs/IUPKs in the form of Rare Earth Mineral Exploration IUPs/IUPKs and Rare Earth Mineral Production Operation IUPs/IUPKs (Article 22).

2.14.2 **Implications**: ESDM's proposal to make Rare Earth Mineral Mining a separate category of mining business needs to considered in the context of ESDM's proposal to expand the rights of BUMNs – see 2.11 below.

2.11 Special Rights for BUMNs and BUMDs

2.11.1 **Proposal**: State-owned enterprises ("**BUMNs**") are to be able to obtain Rare Earth Mineral WIUPs by way of application (Article 32).

BUMNs and regional government enterprises ("**BUMDs**") are also to be given a "priority right" to obtain IUPKs although private entities may still obtain IUPKs by way of WIUPK tenders but, presumably, only if no BUMN or BUMND is interested in obtaining a IUPK in respect of a particular WIUPK (Article 55).

The restrictions on the transfer of IUPs/IUPKs are not to apply to BUMNs (Article 74). Strangely, there is no similar exemption provided for BUMDs.

2.11.2 **Implications**: Although far from clear, ESDM's intention may be to give BUMNs the exclusive right to carry on rare earth mining by way of IUPs. Alternatively, it may be that, if no BUMNs apply for Rare Earth Mineral WIUPs, private sector parties will then become eligible to obtain the same, whether by application or tender, although this is nowhere stated to be the case.

In the case of rare earth minerals, the only rationale the writer can presently think of for giving BUMNs special rights is that ESDM may see rare earth minerals as having national strategic significance due to the use of rare earth minerals for hardening steel in armaments manufacturing.

Presumably, existing private sector parties, holding IUPs in respect of rare earth minerals, will be allowed to continue their development and exploitation of those rare earth mineral resources.

BUMNs already have a priority right to obtain IUPKs under the 2009 Mining Law.

ESDM's proposals regarding quite limited special rights for BUMNs and, in certain instances, BUMNDs, seem to be all that is left of the original idea, underlying the DGoMC Paper, that "special" BUMNs (**i.e.**, BUMNKs) should be given a dominant role in the future development of the local mining industry.

2.12 **Foreign Workers Limitation**

2.12.1 **Proposal**: IUP and IUPK holders are only to be allowed to "utilize" (**i.e.**, employ) foreign workers (**i.e.**, expatriates) if they, first, obtain a recommendation from MoEMR (Article 66(1)).

2.12.2 **Implications**: ESDM's proposal is probably intended to extend the existing provision of the 2009 Mining Law, that IUP/IUPK holders must give priority to using local manpower, by requiring a special recommendation where a IUP/IUPK holder wants to employ foreign workers. As there is no right to such a MoEMR recommendation and, therefore, no certainty such a MoEMR recommendation will be forthcoming, this requirement, if it becomes part of the New Mining Law, is likely to make it increasingly difficult for expatriates to find employment in the local mining industry. In this regard, ESDM presumably envisages the local mining industry going the way of the local O&G industry where employment of expatriates has become more and more limited over an extended period of time.

While ESDM may have been motivated to make this particular proposal due to the increasing unemployment in the local mining industry, mining companies will surely be concerned about the growing limitations on their freedom of choice to employ whichever workers (local or expatriates) have the combination of technical expertise and practical experience they need to ensure particular roles are carried out with maximum effectiveness and efficiency.

2.13 Public Protection

2.13.1 **Proposal**: Directly affected members of the "public" are to be given the explicit right to (i) receive reasonable payment "over" (**i.e.**, in addition to ?) damages for the negative effects experienced by them and (ii) bring civil recovery actions and receive compensation for the negative impact of mining business activities resulting from the failure to carry out those mining business activities in accordance with the prevailing laws and regulations (Article 101).

2.13.2 **Implications**: ESDM's proposal appears to be intended to make clear the civil liability of mining companies to local communities for the negative consequences of mining operations where these negative consequences amount to a breach of the law. Presumably, this proposal reflects ESDM's response to growing community concerns, in many parts of Indonesia, about and opposition to mining operations. It is questionable, though, whether this proposal really has the potential to create any liability that does not already exist by virtue of Article 1365 of the Indonesian Civil Code which is the basis of tort law in Indonesia. The reference, however, to "*payment over/in addition to damages"* may be significant in this regard as it seems to imply something in addition to the normal measure of damages in civil claims for tort.

2.14 Investigations

2.14.1 **Proposal**: A new class of "Investigators" is to be introduced in addition to the already existing Mining Inspectors (Article 103(1)).

This new class of "Investigators" will comprise civil service officials, with responsibilities in the field of mining and who are not Police but will be given special authority to, among other things, (i) carry out examinations and searches of and summon for questioning persons and entities suspected of criminal acts in respect of mining business activities, (ii) seal and/or seize, for evidentiary purposes, mining business activity "instruments" used to carry out criminal acts in respect of mining business activities and (iii) arrest perpetrators of criminal acts in connection with mining business activities (Article 103(2)).

Investigators will carry out the all the preliminary stages of criminal investigations into mining business activities before turning over the results of their investigations to the Police (Article 104).

2.14.2 **Implications**: ESDM's rationale for this proposal may be (i) the need to prevent illegal mineral exports and otherwise ensure that all mining companies pay their production royalties as well as (ii) a lack of confidence in the ability and willingness of the Police to properly investigate wrongdoing by well-connected mining companies.

It is not clear, however, who will control or supervise the Investigators and the only protection against abuse of authority seems to be the requirement that Investigators cease their investigations in a particular case if they are unable to find sufficient evidence of criminal activity or conclude there was, in fact, no criminal activity. Mining companies will surely be very concerned that the draconian powers of Investigators may be abused. The potential for unlawful rent seeking behavior by Investigators is obvious.

2.15 Penal Provisions

2.15.1 **Proposal**: Failure to convert CoWs/CCoWs to IUPKs, within one year of the New Mining Law coming into effect, will render the relevant CoW/CCoW holders liable to administrative sanctions that may include cancellation of their CoWs/CCoWs (Article 105).

The fines and terms of imprisonment that may be imposed for breach of certain obligations have been dramatically increased compared to those fines and terms of imprisonment presently provided for in the 2009 Mining Law. These fines and terms of imprisonment may now be as much as Rp10 billion and ten years in prison (Articles 113 to 119).

Negligence of IUP and IUPK holders, resulting in (i) failure to report production revenue, (ii) failure to pay non-tax state revenue or (iii) untrue or incomplete information being provided in connection with the calculation or payment of non-tax state revenues and resulting in state losses, may attract fines and /or terms of imprisonment of up to twice the amount of the resulting state loss and/or two years of imprisonment (Article 120).

In the case of **intentional** wrongdoing with regard to the reporting of production revenue and the payment of non-tax state revenue, the applicable penalties may be as much as four times the resulting state loss and/or six years of imprisonment (Article 121).

Fines and imprisonment are also to be imposed on officials of Regional Governments and Provincial Governments that purport to issue IUPs, IUPKs or IPRs in contravention of the New Mining Law (Article 124).

2.15.2 **Implications**: ESDM is, quite obviously, seeking to strengthen its position in the ongoing CoW/CCoW renegotiations by making failure to convert to an IUPK, within one year, potentially punishable by cancellation of the relevant CoW/CCoW. This overcomes a weakness, as far as ESDM is concerned, in the 2009 Mining Law where there is no apparent penalty for failing to bring CoWs/CCoWs into line with the 2009 Mining Law within the prescribed period. The threat of cancellation of CoWs/CCoWs will surely elicit a very negative reaction from CoW/CCoW holders. It is also unclear to the writer how effective this threat will be in forcing CoW/CCoW holders to convert to IUPKs as any attempt to cancel a CoW/CCoW will inevitably trigger a dispute, for the purposes of the relevant CoW/CCoW, and lead to international arbitration. This is something the Government is likely to be quite keen to avoid given its poor track record in previous international arbitrations.

As with the introduction of Investigators (see 2.14 above), the proposed increase in penalties for breach of various provisions of the New Mining Law is clearly intended to show ESDM's seriousness in ensuring mining companies fully comply with their obligations, especially with

regard to the payment of production royalties.

The provisions, regarding penalties for non-payment of production royalties, would simply make part of the New Mining Law anti-non-tax state revenue avoidance measures that are already in place by virtue of MoEMR Circular No. 4 of July 2013 re Optimization of Non Tax State Revenue.

ESDM clearly wants to be in a position to take strong action, in future, against officials of Regional Governments and Provincial Governments that abuse their mining license issuing authority. This is, no doubt, intended to prevent a repeat of the KP/IUP issuing "frenzy" that took place around the time of the coming into effect of the 2009 Mining Law and from which the local mining industry is still trying to recover.

2.16 WP Management

2.16.1 **Proposal**: Mining areas ("**WPs**") are to be managed by MoEMR as part of a nationally integrated Mining Area Information System intended to ensure the consistency and uniformity of the co-ordinates and maps used in approving/issuing WUPs, WIUPs, WPRs, WPNs, WIUPs and WIUPKs (Article 126).

2.16.2 **Implications**: ESDM's proposal for a nationally integrated Mining Area Information System is, presumably, intended to ensure there is not a repeat of the chronic problem of defective and overlapping KPs/IUPs which characterized the start of the 2009 Mining Law and which problem ESDM is still trying to resolve by virtue of the Clean & Clear List. To the extent this problem was, at least in part, the result of the use of conflicting maps and poor technical data, the Mining Area Information System may be a sign of real progress if it can be properly implemented.

3. Assessment of Main Changes

3.1 Positive Aspects

The April Draft Mining Law is notable, in a positive way, for the extent to which it shows a rethink, at ESDM, of the appropriate role for BUMNs to play in the future development of the local mining industry. ESDM has clearly decided, at this stage, **not** to give BUMNs a dominant role in the local mining industry although BUMNs will enjoy certain special rights. This is in sharp contrast to where the New Mining Law seemed to be headed in 2015 when both the DGoMC Paper and the earlier discussion paper issued by the Indonesian Mining Experts Association in September 2015 ("**PERHAPI Paper**") advocated, in part, such a dominant role for BUMNs as a proposed solution to the Constitutional Court's very restrictive interpretation of Article 33(3) of the Indonesian Constitution in the 2012 BPMigas Decision. Readers interested in knowing more about the DGOMC Paper, the PERHAPI Paper and the 2012 BPMigas Decision are referred to the writer's earlier article "*Mining & O&G Reform – Dodging a Bullet in 2015*", Coal Asia Magazine, December 2015 – January 2016.

To the extent the ESDM Proposal may contemplate a relaxation, if only temporarily, of the domestic processing and refining obligation and the export ban, this will also be welcomed by many metal mineral producers which are presently unable to export their unrefined mineral products. Also, recognizing that different metal minerals need to be treated differently, for the purposes of the domestic processing & refining obligation and the export ban, is definitely a move in the right direction. Of course, promoters of and investors in domestic refining facilities will be rightly concerned that allowing another five years for smelter construction, in the case of at least some metal minerals, and any relaxation of the export ban in the interim undermines the viability of their projects and raises doubts about the Government's real commitment to domestic processing and refining.

3.2 **Negative Aspects**

CoW/CCoW holders are, inevitably, going to be concerned about the apparent intention to compel them to apply for and accept IUPKs within one year of the New Mining Law coming into effect or face the potential cancellation of their CoWs/CCoWs. As this indicates a much more aggressive stance, on the part of ESDM, in bringing to an end the long running CoW/CCoW renegotiations and regardless of whether or not agreement has been reached on the so-called "six strategic issues", ESDM's proposal must be expected to generate considerable "pushback" from CoW/CCoW holders.

The possible exclusion of foreign owned mining business service providers from the local mining industry and the increased restrictions on employing expatriates in the local mining industry are also likely to be strenuously resisted by foreign investors.

There will surely be further opposition, from both foreign and domestic investors in the local mining industry, to the creation of Investigators with police like powers and the ability to shut down a mining project in the event of suspected criminal activity. The writer would suggest that the last thing the Indonesian mining industry needs is yet another group of officials with sweeping powers to interfere in mining operations.

SUMMARY AND CONCLUSIONS

The April Draft Mining Law is properly to be seen as a "work in progress" and many subsequent changes to the same are inevitable before we finally have the New Mining Law. Nevertheless, the April Draft Mining Law provides an interesting and useful interim "snapshot" of ESDM's current thinking about the New Mining Law and how that thinking has evolved since 2015.

Different stakeholders in the local mining industry will, inevitably, have very different views about the April Draft Mining Law.

CoW holders, in particular, are likely to have sharply conflicting reactions to the April Draft Mining Law depending upon just what part of the April Draft Mining Law they are looking at and whether or not they already carry out full domestic processing and refining. It is unlikely, however, foreign investors will find a lot of joy in the April Draft Mining Law. That said, the April Draft Mining Law should be regarded by everyone as a definite improvement on the 2015 thinking, regarding the

proposed New Mining Law, present in the DGoMC Paper and the PERHAPI Paper.

The April Draft Mining Law is, in every respect, a very “mixed bag”.

One can only hope that ESDM will listen carefully to and act upon industry feedback to the April Draft Mining Law before reworking the April Draft Mining Law to remove some of the more negative aspects while, hopefully, still retaining the positive aspects.

SCHEDULE

COMPARISON OF MINIMUM & MAXIMUM WIUP's & WIUPK's ETC UNDER 2009 MINING LAW AND APRIL DRAFT MINING LAW

No.	Subject	Minimum Area		Maximum Area		Duration/Term	
		ML[7]	ADML[8]	ML	ADML	ML	ADML
1.	**Exploration WIUPs/ IUPs**						
	(a) Coal	5,000 hectares	No minimum	50,000 hectares	50,000 hectares	7 years	7 years
	(b) Metal Minerals	5,000 hectares	No minimum	100,000 hectares	100,000 hectares	8 years	8 years for General Metal Minerals but 7 years only for certain-typed of Metal Minerals
	(c) Non-Metal Minerals	500 hectares	No minimum	25,000 hectares	25,000 hectares	3 years for most Non-Metal Minerals but 7 years only for certain types of Non-Metal Minerals	3 years
	(d) Rare Earth Minerals [9]	5,000 hectares	No minimum	100,000 hectares	100,000 hectares	8 years	8 years
	(e) Rocks	5 hectares	No minimum	5,000 hectares	5,000 hectares for most rocks but 1,000 hectares only for certain types of rock.	3 years	3 years

[7] 2009 Mining Law.
[8] April Draft Mining Law.
[9] Previously part of Metal Minerals.

No.	Subject	Minimum Area		Maximum Area		Duration/Term	
		ML[7]	ADML[8]	ML	ADML	ML	ADML
2.	**Production Operation IUPs**						
	(a) Coal	No minimum	No minimum	15,000 hectares	15,000 hectares	20 years, extendable twice for 10 years each time	20 years, extendable twice for 10 years each time
	(b) Metal Minerals	No minimum	No minimum	25,000 hectares	25,000 hectares	20 years, extendable twice for 10 years each time	20 years, extendable twice for 10 years each time
	(c) Non-Metal Minerals	No minimum	No minimum	5,000 hectares	5,000 hectares	10 years, extendable twice for 5 years each time for most Non-Metal Minerals but 20 years, extendable twice for 10 years each time for certain types of Non-Metal Minerals	10 years, extendable twice for 5 years each time for most Non-Metal Minerals but 20 years, extendable twice for 10 years each time for certain types of Non-Metal Minerals
	(d) Rare Earth Minerals	No minimum	No minimum	5,000 hectares	25,000 hectares	20 years, extendable twice for 10 years each time	Not specified
	(e) Rocks	No minimum	No minimum	1,000 hectares	1,000 hectares	5 years, extendable twice for 5 years each time.	5 years, extendable twice for 5 years each time.
3.	**Exploration WIUPKs / IUPKs**						
	(a) Coal	No minimum	No minimum	50,000 hectares	100,000 hectares	7 years	7 years
	(b) Metal Minerals	No minimum	No minimum	100,000 hectares	200,000 hectares	8 years	8 years
	(c) Rare	No	No	100,000	200,000	8 years	8 years

No.	Subject	Minimum Area		Maximum Area		Duration/Term	
		ML[7]	ADML[8]	ML	ADML	ML	ADML
	Earth Minerals	minimum	minimum	hectares	hectares		
4.	**Production Operation IUPKs**						
	(a) Coal	No minimum	No minimum	15,000 hectares	No maximum	20 years, extendable twice for 10 years each time	20 years, extendable twice for 10 years each time
	(b) Metal Minerals	No minimum	No minimum	25,000 hectares	75,000 hectares for most Metal Minerals but 50,000 hectares for some Metal Minerals	20 years, extendable twice for 10 years each time	20 years, extendable twice for 10 years each time
	(c) Rare Earth Minerals	No minimum	No minimum	25,000 hectares	75,000 hectares	20 years, extendable twice for 10 years each time	20 years, extendable twice for 10 years each time
5.	**IPRs**						
	(a) Coal	No minimum	No minimum	1 hectare for individuals, 5 hectares for communities & 10 hectares for cooperatives	10 hectares	5 years and extendable	5 years and extendable
	(b) Metal Minerals	No minimum	No minimum	1 hectare for individuals, 5 hectares for communities & 10 hectares for cooperatives	10 hectares	5 years and extendable	5 years and extendable
	(c) Non-	No	No	1 hectare for	10	5 years and	5 years and

No.	Subject	Minimum Area		Maximum Area		Duration/Term	
		ML[7]	ADML[8]	ML	ADML	ML	ADML
	Metal Minerals	minimum	minimum	individuals, 5 hectares for communities & 10 hectares for cooperatives	hectares	extendable	extendable
	(d) Rocks	No minimum	No minimum	1 hectare for individuals, 5 hectares for communities & 10 hectares for cooperatives	10 hectares	5 years and extendable	5 years and extendable

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[This article has been contributed by Bill Sullivan, Senior Foreign Counsel with Christian Teo & Partners. Christian Teo & Partners is a Jakarta based, Indonesian law firm and a leader in Indonesian mining law and regulatory practice. Christian Teo & Partners operates in association with international law firm Stephenson Harwood LLP which has nine offices across Asia, Europe and the Middle East: Beijing, Dubai, Hong Kong, London, Paris, Piraeus, Seoul, Shanghai and Singapore. Readers may contact the author at email: *bsullivan@cteolaw.com*; office: 62 21 5150280; mobile: 62 815 85060978]