

RELAXATION OF MINERAL EXPORT REQUIREMENTS – PRAGMATIC RESPONSE TO ECONOMIC CRISIS¹²³⁴⁵

INTRODUCTION

The Government has relaxed the export requirements for coal and certain metal minerals, until the end of 2021, in response to the Covid-19 pandemic and the resulting economic crisis being experienced by Indonesia.

This initiative will allow producers of coal and certain metal minerals, which have not met their domestic supply obligations or which have fallen behind in meeting their smelter construction progress targets, to continue to export.

Allowing the continued export of coal and certain metal minerals, by non-compliant producers and in the difficult economic circumstances that Indonesia is currently facing, would seem like a sensible and pragmatic decision which prioritizes economic reality over resource nationalism. Advocates of renewable energy will, however, likely see increasing coal production and promoting coal exports as a “step backwards”. Likewise, promoters of, investors in and financiers of metal smelters may well be concerned that this “temporary” relaxation of smelter construction progress targets may prove to be anything but temporary and, in any case, sends the wrong “signal” about the Government’s commitment to downstream processing and refining of all metal minerals.

In this article, the writer will review the terms of the temporary relaxation of the export requirements for coal and certain metal minerals as well as the greater issue of whether or not this temporary relaxation indicates a material change in Government policy on the promotion of renewable energy and compulsory downstream processing and refining of all metal minerals.

BACKGROUND

Indonesia requires coal producers to prioritize the supply of coal to the domestic market (“**DM Obligation**”) by imposing (i) annual domestic market obligation quotas on certain coal producers (“**DMO Quota**”) and (ii) a ceiling price on the sale of coal to the state electricity company (“**PLN**”). The DMO quota for 2021 is 25% while the ceiling price for coal, with certain specifications, sold to PLN is currently US\$70 per tonne. Failure to fulfill the DM Obligation has **traditionally** meant that non-compliant producers faced the possible sanction of having their approved coal production quantities for the following year(s) reduced.

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With the market price of Newcastle coal approaching US\$125 per tonne, local coal producers would clearly much prefer to export their coal rather than supply it to PLN at what is now a hugely unattractive ceiling price. At the same time, Indonesia's export earnings from coal and the non-tax state revenue (**i.e.**, the production royalty calculated on the selling price of coal) that the Government derives from coal sales is materially less than it would otherwise be if the DM Obligation was not strictly enforced.

Indonesia also requires domestic processing and refining of all metal minerals, with construction of smelters to be completed by 2022 – 2023 (“**DP&R Obligation**”). The right to continue to export, in the case of certain metal minerals only, limited quantities of less than fully processed and refined metal minerals is subject to producers achieving six-monthly progress targets in the construction of their smelters. Producers that do not meet their smelter construction targets or are unwilling to commit to construction at all are prohibited from exporting their less than fully refined metal products and must try to find domestic buyers for the same.

Strict enforcement of the DP&R Obligation and, more particularly, of smelter construction targets reduces Indonesia's export earnings from metal mineral products. It likewise reduces the Government's non-tax state revenue from metal mineral sales to the extent that (i) the export sales price is higher than the domestic sales price and (ii) the domestic market cannot absorb all of the less than fully refined metal products that must be sold locally if at all.

Both the DM Obligation and the DP&R Obligation were introduced at a time when Indonesia's export earnings from the mining sector and the Government's non-tax state revenue collections from sales of coal and metal minerals were very strong. While recognizing that the introduction of the DM Obligation and the DP&R Obligation would have at least some material adverse impact, in the short to medium term, on export earnings and non-tax state revenue collections, the Government judged that the country's trade balance and its own fiscal position were sufficiently strong to withstand this adverse impact, especially as the Government expected the strict enforcement of the DP&R Obligation would, in the medium to long term, greatly improve both the country's trade balance and its own fiscal position as and when Indonesia started to export large quantities of high value added metal mineral products that had been fully processed and refined locally. At the same time, forcing coal producers to effectively subsidize PLN's operations, by supplying coal to PLN at a below market price, relieved the Government of fiscal responsibility for subsidizing PLN's operations or, at least, reduced the amount of the subsidy required from the Government.

The relatively short but severe economic recession, brought on by the Covid-19 pandemic, has compounded the negative impact of the DM Obligation and the DP&R Obligation on Indonesia's export earnings and the Government's fiscal position. With the Government urgently needing to find ways to restore its fiscal position in particular, it is hardly surprising that the Government has been forced to rethink its priorities with regard to short term revenue generation versus pursuit of resource nationalist objectives in the form of the DM Obligation and the DP&R Obligation.

On 6 April 2021, the Minister of Energy & Mineral Resources (“**MoEMR**”) issued (i) Decree No. 66 of 2021 (“**MoEMR Decree 66/2021**”) re Amendment to Decree No. 255 of 2020 re Fulfillment of Domestic Coal Needs in 2021 (“**MoEMR Decree 255/2020**”) and (ii) Decree

No. 67 of 2021 re Granting of Recommendations for Overseas Sales of Certain Mineral Products during the Covid-19 Pandemic (“**MoEMR Decree 67/2021**”).

ANALYSIS AND DISCUSSION

1. Overview of MoEMR Decree 66/2021 and MoMR Decree 67/2021

Both MoEMR Decree 66/2021 and MoEMR Decree 67/2021 make specific reference to:

- (a) the impact of the Covid-19 pandemic on the mining sector in 2020 and the resulting global decline in the “economy of mining activities”; and
- (b) the Covid-19 pandemic being a Government designated non-natural disaster that justifies the need for Government support in promoting overseas sales of mining products.

The common language used in MoEMR Decree 66/2021 and MoEMR Decree 67/2021, as well as the fact that both MoEMR Decree 66/2021 and MoEMR Decree 67/2021 were issued on the same day, “underscore” the Government’s view that (i) a co-ordinated approach, across different mineral groups, is required to address the adverse economic impact of Covid-19 on the local mining industry and (ii) the best way to overcome this adverse economic impact is by way of encouraging and prioritizing export sales of mineral products in preference to domestic sales of mineral products.

2. Coal Exports and MoEMR Decree 66/2021

MoEMR Decree 66/2021 makes three important changes in Indonesia’s coal production and export regime for 2021.

First, MoEMR 66/2021 increases approved national coal production for 2021 by 75 million tonnes, from the previously approved coal production target of 550 million tonnes, to become 625 million tonnes.

Second, MoEMR 66/2021 specifies that 100% of the 75 million tonnes of additional coal production in 2021 shall be for export.

Third, MoEMR 66/2021 expressly exempts coal producers from compliance with the DM Obligation in respect of the 75 million tonnes of additional coal production.

It is important to understand that MoEMR Decree 66/2021 builds on an earlier relaxation of the DM Obligation which was introduced, during the last days of 2020, in the form of MoEMR Decree 255/2020. Among other things, MoEMR Decree 255/2020 changed the sanctions regime for coal producers which did not comply with the DM Obligation but, rather, exported coal which should have been supplied domestically. Prior to the issuance of MoEMR Decree 255/2020, coal producers (which exported coal in breach of the DM Obligation) were sanctioned by having their approved coal production quantities for the following year(s) reduced. MoEMR 255/2020, however, introduced a new sanctions approach whereby non-compliant coal producers simply had to pay financial compensation

for their non-compliance with the DM Obligation and no longer had their approved coal production quantities for the following year(s) reduced.

The new sanctions approach introduced by MoEMR 255/2020, which has not been amended or changed by MoEMR Decree 66/2021 and therefore continues to apply, is of significant potential benefit to coal producers. It effectively enables coal producers to calculate whether the higher selling price available in the export market sufficiently exceeds the US\$70 per tonne ceiling price payable by PLN in the domestic market to make it worthwhile for them to pay compensation for non-compliance with the DM Obligation and export all their coal production rather than offering 25% of their coal production to PLN as required by the DM Obligation and applicable DMO Quota in 2021.

The combined effect of MoEMR Decree 66/2021 and the earlier MoEMR Decree 255/2020 is that, during 2021, Indonesia's coal producers (i) can export 75 million tonnes of coal production without being subject to either the DM Obligation or having to pay compensation in lieu of compliance with the DM Obligation and (ii) have the option of exporting part or all of their 25% DMO Quota if the the higher selling price available in the export market sufficiently exceeds the US\$70 per tonne ceiling price payable by PLN in the domestic market to make it worthwhile for them to pay compensation for non-compliance with the DM Obligation.

Interestingly and despite the passage of nearly 6 months, it appears the Government has still not finalized and made available the formula for calculating the financial compensation payable for non-compliance with the DM Obligation. According to an article published by on-line news portal Bisnis.com on 15 June 2020:

“Currently, the Ministry of Energy and Mineral Resources is reviewing the formula for calculating the DMO compensation rate that will be imposed. Special Staff to the Minister of Energy and Mineral Resources for the Acceleration and Governance of Mineral and Coal, Mr. Irwandy Arif, confirmed that the Government is preparing a regulation regarding the imposition of the compensation tariff.”

MoEMR 66/2021 and the earlier MoEMR Decree 255/2020, together, evidence a profound shift, at least in the short run, in Government policy towards the local coal industry. The **short term** emphasis now is clearly on increasing coal production and encouraging export sales of coal rather than on prioritizing the satisfaction of domestic coal demand or the movement towards reliance upon renewable energy rather than fossil fuel.

3. **Metal Mineral Exports and MoEMR Decree 67/2021**

MoEMR Decree 67/2021 makes four important changes in Indonesia's metal mineral export regime for 2021.

First, MoEMR Decree 67/2021 provides that export approval recommendations (“**EA Recommendations**”) may be granted, **in respect of certain metal mineral products only** (“**Specified Metal Mineral Products**”) to:

- (a) holders of Production Operation Mining Business Licenses (“**PO IUPs**”) and Production Operation Special Mining Business Licenses (“**PO IUPKs**”) which:

- (i) have carried out/are carrying out processing and refining activities;
 - (ii) **are currently in the process of constructing processing and/or refining facilities** (“Smelters”); and/or
 - (iii) have engaged in/are engaged in processing and/or refining cooperation with other holders of PO IUPs or PO IUPKs or with holders of Special Production Operation Mining Business Licenses for Processing and/or Processing (“**P&R Special IUPs**”) and/or Processing and/or Refining Business Activity Licenses (“**P&R BA Licenses**”) (“**P&R Cooperation**”); and
- (b) holders of P&R Special IUPs and P&R BA Licenses which have or are **currently constructing Smelters** that are producing or will produce Specified Metal Mineral Products.

The Specified Metal Mineral Products are as follows:

No.	Commodity		Product	Quality
	Ore	Mineral		
1.	Bauxite Al ₂ O ₃ ≥ 42%	Gibbsite, Diaspor, and Buhmit	Washed Bauxite	Al ₂ O ₃ > 42%
2.	Iron	Hematite and Magnetite	Iron ore resulting from crushing and magnetic separator processes	Fe ≥ 62% dan TiO ₂ ≤ 1%
			Iron concentrate*)	
		Gutite, Hematite, Magnetite (Iron laterite)	Iron ore resulting from crushing and magnetic separator processes	Fe ≥ 50% dan Kadar (Al ₂ O ₃ + SiO ₂) ≥ 10%
			Laterite iron concentrate **)	
		Lamela magnetite-ilmenite (sand iron)	Iron sand concentrate ***)	Fe ≥ 56% dan Kadar 1% < TiO ₂ ≤ 25%
			Sand concentrate pellets iron****)	Fe ≥ 54% dan Kadar 1% < TiO ₂ ≤ 25%
Ilmenite concentrate *****)	TiO ₂ ≥ 45%			
3.	Manganese	Pyrolusite, Psilomelane, Braunit, and Manganite	Manganese concentrate	Mn ≥ 49%

No.	Commodity		Product	Quality
	Ore	Mineral		
4.	Lead and Zinc	Galena, Spalerite, Smitsonite, and Hemimorphites (calamides)	Zinc concentrate	Zn \geq 47%
			Lead concentrate	Pb \geq 55%
5.	Tin	Cassiterite	Ilmenite concentrate	TiO ₂ \geq 45%
6.	Zirconium	-	Ilmenite	TiO ₂ \geq 45%
7.	Zircon	-	Ilmenite concentrate	Refer to the requirements of ilmenite concentrate in iron sand

Further Details:

**) Iron concentrate means iron concentrate containing mineral hematite/ magnetite with total iron element Fe \geq 62% and titanium oxide compound content of TiO₂ \leq 1%.*

****) Laterite iron concentrate means iron concentrate containing gutite/hematite/magnetite minerals with total iron content of Fe \geq 50% and total content of alumina (Al₂O₃) and silica (SiO₂) \geq 10%.*

*****) Iron sand concentrate means iron concentrate containing magnetite-ilmenite lamellae with total iron content of Fe \geq 56% and titanium oxide compound content of 1% $<$ TiO₂ \leq 25%.*

******) Iron sand concentrate pellets mean iron concentrate in the form of pellets containing magnetite-ilmenite lamellae with total iron element content of Fe \geq 54% and a titanium oxide compound content of 1% $<$ TiO₂ \leq 25%.*

******) Ilmenite concentrate means iron concentrate containing the mineral lamella magnetite-ilmenite with titanium oxide compound content TiO₂ \geq 45%.*

Second, MoEMR Decree 67/2021 specifies that P&R Cooperation, between holders of PO IUPs/PO IUPKs and P&R Special IUPs/P&R BA Licenses, may be in the form of:

- (a) share ownership; and/or
- (b) guarantee of metal mineral supply to Smelters.

Third, MoEMR Decree 67/2021 requires that the quantity of Specified Metal Mineral Products, which may be the subject of an EA Recommendation, must be consistent with what is provided for in the Annual Business Plan & Budget of the relevant producer or processor & refiner as approved by the Ministry of Energy & Mineral Resources (“**ESDM**”).

Fourth, MoEMR Decree 67/2021 obliges the relevant producer or processor & refiner, receiving an EA Recommendation, to pay export duties on the quantity of Specified Metal Mineral Products exported in reliance upon the EA Recommendation.

The significance of MoEMR Decree 67/2021 is that it **no** longer makes obtaining an EA Recommendation conditional upon achieving Smelter construction targets. Previously, EA Recommendations were only available to (i) producers and processors & refiners which had completed Smelter construction and were producing fully refined metal mineral products, (ii) producers and processors & refiners which were carrying out Smelter construction in accordance with an ESDM approved construction plan **and had realized not less than 90% progress in achieving their Smelter construction targets on a six monthly basis**, which progress had to be reviewed and confirmed by ESDM and (iii) producers engaged in P&R Cooperation with holders of P&R Special IUPs and P&R BA Licenses which were carrying out Smelter construction in accordance with an ESDM approved construction plan **and had realized not less than 90% progress in achieving their Smelter construction targets on a six monthly basis**, which progress had to be reviewed and confirmed by ESDM. In other words, producers and processors & refiners, of Specified Metal Mineral Products, may now obtain EA Recommendations so long as they have an ESDM approved Smelter construction plan and are carrying out construction in accordance with the Smelter construction plan even if they have **not** achieved at least 90% progress (or, indeed, any progress) in achieving their Smelter construction targets on a six monthly basis.

It is important to bear in mind, however, that granting an EA Recommendation remains a matter for the discretion of MoEMR. Therefore, MoEMR is **not** under any obligation to issue an EA Recommendation to producers and processors & refiners in respect of which MoEMR forms the view that they are not genuinely committed to Smelter construction as evidenced by their lack of construction progress over time.

There is also **no** relaxation of the export requirements for Nickel or Copper. Nickel is the metal mineral in respect of which the DP&R Obligation has, to date, had far and away the greatest success in achieving Smelter construction. Copper, on the other hand, is undoubtedly Indonesia's most important metal mineral export and in respect of which Smelter construction has proved to be highly controversial. While the progress of Smelter construction for Copper has been very slow and a continuation of the currently allowed export of an intermediate concentrate form of Copper is hugely important to Indonesia's export earnings, the Government may well believe that including Copper in the list of Specified Metal Mineral Products would be too politically risky **at this time**.

4. **Assessment of MoEMR Decree 66/2021 and MoEMR Decree 67/2021**

The relaxation of mineral export requirements, as provided for in MoEMR Decree 66/2021 and MoEMR Decree 67/2021, are expressed to be only applicable for 2021. As such, ESDM will surely say this relaxation is merely a temporary measure and there is no need to be concerned the Government is wavering in its absolute commitment to the DM Obligation and/or the DP&R Obligation. Accordingly, Indonesia's resource nationalists and their "champions" serving on Commission VII of the Indonesian parliament need not be concerned.

Indonesia's resource nationalists and Commission VII "champions" may well, however, not be wholly convinced that MoEMR Decree 66/2021 and MoEMR Decree 67/2021 are necessarily either temporary in nature or not a threat to the longer term continuation of the DM Obligation and/or the DP&R Obligation. If the Covid-19 pandemic continues to "rage" largely unchecked in Indonesia for the rest of 2021 and, as a consequence, Indonesia's economic performance does not return to its pre Covid-19 pandemic levels by the end of 2021, the Government could find it necessary or, at least, expedient to extend the relaxation of mineral export requirements into 2022 and beyond or even add additional metal minerals to the list of Specified Metal Mineral Products. If this happens and the longer the relaxation continues beyond the end of 2021, the less likely it must be that the DM Obligation and/or the DP&R Obligation will be once again enforced in their pre-2021 form.

Advocates of renewable energy may also worry that the Government's resort to increasing coal production and encouraging coal exports, as a way to preserve its fiscal position during 2021, simply highlights the Government's over-reliance upon non-tax state revenue from coal sales and its consequent likely reluctance to commit to any material reduction in coal production and coal exports in the foreseeable future.

Notwithstanding the possible concerns of resource nationalists and renewable energy advocates, the writer would suggest that the changes introduced by MoEMR Decree 66/2021 and MoEMR Decree 67/2021 are, in fact, very positive. If nothing else, MoEMR Decree 66/2021 and MoEMR Decree 67/2021 highlight that the Government is **not** prepared to let the **claimed** importance of the DM Obligation and the DP&R Obligation, to the future of Indonesia, override the need to maintain Indonesia's trade balance and avoid undermining the Government's fiscal position. This prioritization of achieving economic and fiscal stability over "blindly" pursuing resource nationalist objectives should be seen as an encouraging sign of commitment to responsible economic management on the part of the Government. While far too much "political capital" has surely already been spent on promoting the DM Obligation and the DP&R Obligation for it to be realistic to expect that these resource nationalist policies will disappear any time soon, it may be that MoEMR Decree 66/2021 and MoEMR Decree 67/2021 are a promising indication that the Government is not adverse to varying the DM Obligation and the DP&R Obligation as and when responsible economic management dictates this to be appropriate.

SUMMARY & CONCLUSIONS

The Government has moved to relax the export requirements for coal and the Specified Metal Mineral Products in an endeavour to help overcome the economic crisis that Indonesia is currently enduring as a result of the Covid-19 pandemic.

While the changes introduced by MoEMR Decree 66/2021 and MoEMR Decree 67/2021 are expressed to only apply during 2021, whether or not these changes are continued in 2022 and beyond will likely depend on how quickly and how successfully Indonesia emerges from the current economic recession. It is possible that these changes may prove to be less temporary than they are currently being represented to be by ESDM and a literal reading of MoEMR Decree 66/2021 and MoEMR Decree 67/2021 would indicate is the case.

It must be an encouraging sign for the remainder of the Government's term of office that the Government has shown a pragmatic approach in putting the achievement of economic and

fiscal stability ahead of pursuing resource nationalist objectives during a very difficult time for Indonesia and all Indonesians.

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