CHRISTIAN TEO & PARTNERS
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OBTAINING PRIORITY DOWNSTREAM WIUPS – CONSTITUTIONAL COURT STRIKES BACK [1][2][3][4][5]

INTRODUCTION

The Constitutional Court has handed down an important decision regarding the potential non-constitutionality of the practice of granting mining concessions, on a priority application basis and without the applicants having to go through a public auction/tender process, to parties willing to commit to carrying out down-streaming/local value-added activity in respect of metal minerals/coal.

Parties willing to commit to carrying out down-streaming/local value-added activity, in respect of metal minerals/coal, are part of a much wider group of mining concession priority applicants which are "favoured" by the Government. This practice has become increasingly widespread during the 2024 – 2026 period and threatens to make the traditional and much more "level playing field" approach of public auctions/tenders for mining concessions, with the successful tenderer being the highest bidder, a somewhat rare occurrence. As the "favoured" applicants may not always include foreign investors, allowing priority applications effectively discriminates against foreign investors as well as other parties not "favoured" by the Government in these situations.

The obvious opportunities, for abuse of the priority application process, have been "called out" by the Constitutional Court.

In this article, the writer will initially review the existing process of granting mining concessions, on a priority application basis, to parties willing to commit to carrying out down-streaming/local value-added activity. The writer will then turn to the recent Constitutional Court decision and the priority application process as a whole which is now under challenge as a result of a second Constitutional Court decision.

BACKGROUND

1. **Overview of WIUPK/WIUP Priority Application Rights:** 2025 amendments to Law No. 4 of 2009 re Mining of Minerals & Coal (**4th 2009 Mining Law Amendment**) made it possible, for the first time, for:

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2 Bill Sullivan is the author of "*Mining Law & Regulatory Practice in Indonesia – A Primary Reference Source*" (Wiley, New York & Singapore 2013), the first internationally published, comprehensive book on Indonesia's 2009 Mining Law and its implementing regulations.

5 An earlier version of this article appeared in the August – September 2026 issue of Coal Metal Asia Magazine.

(a) **<u>cooperatives, small and medium-sized business entities and business entities owned by religious organizations</u>** to obtain **<u>large-scale</u>** mining concessions (**WIUPKs**) for coal and metal minerals, in addition to small-scale mining concessions (**WIUPs**) for coal, by priority (**<u>i.e.</u>**, without having to go through a public auction/tender process) as well as by public auction/tender (**Category One WIUPK/WIUP Priority Application Rights**);

(b) private business entities (as well as state-owned enterprises (**BUMNs**) and regional government-owned enterprises (**BUMDs**)) to obtain both WIUPKs and WIUPs, for metal minerals and coal, by way of priority and without having to go through a public auction/tender process if the relevant private business entity/ BUMN/BUMD (i) has a cooperation agreement with an accredited university and (ii) the cooperation agreement provides for an unspecified "*portion*" of the "*benefits*" from operating the resulting WIUPK/WIUP to go to the relevant university "*in order to increase the independence and excellence of higher education"/"improve public access to education services*" (**Category Two WIUPK/WIUP Priority Application Rights**); and

(c) BUMNs and private business entities to obtain WIUPs (but **<u>not</u>** WIUPKs), for both metal minerals and coal, by way of priority and without having to go through a public auction/tender process if the relevant BUMN/private business entity commits to increasing down-streaming activity/local value-added activity in respect of metal minerals/coal (**Priority Downstream WIUPs**) (**Category Three Priority Downstream WIUP Application Rights)** (together, **WIUPK/WIUP Priority Application Rights**).

Until recently, Category One WIUPK/WIUP Priority Application Rights and Category Two WIUPK/WIUP Priority Application Rights had received far more attention than had Category Three Priority Downstream WIUP Application Rights. However, various groups and individuals (claiming to have "special relationships" with the Minister/Ministry of Energy & Mineral Resources **(MoEMR**) and the Director General/Directorate of Minerals & Coal (**DGoMC**) have started offering their services in connection with obtaining Priority Downstream WIUPs.

In 2025, several parties (**Applicants**) challenged the constitutionality of various articles of the 4th 2009 Mining Law Amendment that make provision for the grant of Priority Downstream WIUPs; more particularly, (i) Article 51B paragraphs (1) and (2) and (ii) Article 60B paragraphs (1) and (2) of the 4th 2009 Mining Law Amendment (**Relevant Articles**).

The Applicants, among other things, argued that allowing private business entities to obtain Priority Downstream WIUPs had the potential to give rise to "*unfair practices*" (**<u>i.e.</u>** subjectivity and excessive administrative discretion). In addition, the Applicants argued that the priority mechanism in the Relevant Articles and the absence of any public tender process potentially benefited those who had a "*special connection*" with the Government, which "*special connection*" could be used to obtain "*certain privileges*" in the form of Priority Downstream WIUPs.

On 16 July 2026, the Constitutional Court handed down its decision (No. 202/PUU-XXIII/2025) on the constitutionality or otherwise of the Relevant Articles (**CC Decision 202/2025**).

Priority Downstream WIUPs and CC Decision 202/2025, as well as a second Constitutional Court decision in respect of other WIUPK/WIUP Priority Application Rights, are the focus of the balance of this article.

ANALYSIS & COMMENTARY

1. **Priority Downstream WIUPs**

MoEMR Regulation No. 18 of 2025 re Implementing Regulation of Government Regulation No. 39 of 2025 re Second Amendment to Government Regulation No. 96 of 2021 re Implementation of Mineral & Coal Mining Business Activities (**MoEMR Regulation 18/2025**):

(a) sets out various administrative requirements, technical requirements and commitments (to be provided in the form of written statements) that must be met/satisfied by interested applicants for Priority Downstream WIUPs (**Existing AT&C Requirements**);

(b) provides that the maximum area for a Priority Downstream WIUP is (i) 25,000 hectares in the case of metal mineral WIUPs and (ii) 15,000 hectares in the case of coal WIUPs;

(c) specifies that applications for a Priority Downstream WIUP, along with the required supporting documents and evidence of the fulfilment of the Existing AT&C Requirements (together, **Priority Downstream WIUP Applications**), are to be submitted through Indonesia's Online Single Submission System (**OSS System**), which is the electronic online system for processing various business license applications, including Business Identification Number (**NIB**) applications; and

(d) outlines a review process and timeline which contemplates that, once a Priority Downstream WIUP Application has been lodged, MoEMR will verify the Priority Downstream WIUP Application and issue a rejection or approval notification within 14 business days after the date on which the relevant Priority Downstream WIUP Application was duly received, in good order, by MoEMR via the OSS System.

The Existing AT&C Requirements are as follows:

(a) **Administrative Requirements:** The relevant business entity (**i.e.**, applicant) must:

(i) be in the form of a limited liability company;

(ii) have an NIB setting out the relevant business activities (**i.e.** metal minerals/coal mining **and** processing/refining/smelting industry activities); and

(iii) provide a list of management, shareholders and beneficial owners as well as copies of their supporting documents.

(b) **Technical requirements:** The relevant business entity (**i.e.**, applicant) must:

(i) submit a document setting out its plan to increase down-streaming/value-added products, which document/plan must include among other things:

(A) a description of the proposed downstream/local value-added activity supporting the availability of relevant industrial raw materials;

(B) development plans for and/or development of the downstream/local value-added ecosystem;

(C) details of the number of domestic/local workers to be absorbed/employed;

(D) technology development plans;

(E) planned capital and investment amounts; and

(F) details of proposed cooperation schemes to be implemented for the purpose of empowering the local community and its economy.

(ii) have available experts with certificates of competency in the fields of mining and/or geology; and

(iii) have a work plan and available financing for its proposed exploration activities.

(c) **Commitments:** The relevant business entity (**i.e.**, applicant) must submit written statements confirming its ability/intention/willingness to:

(i) pay compensation for data and information;

(ii) not transfer any granted Mining Business License (**IUP**) (as a result of an approved application) to another party;

(iii) not encumber/grant security, over the IUP or the mining commodities covered by the IUP, to another party; and

(iv) conduct mining business activities in accordance with good mining engineering principles, based on the prevailing laws and regulations (Article 26 of MoEMR Regulation 18/2025).

MoEMR Regulation 18/2025, however, does **not** provide a clear definition of or any guidance as to what "*increasing Indonesia's downstream/value-added products process*" really means. At most, the list of the technical requirements may be interpreted as indicating that successful applicants are expected to support the production of industrial raw materials and to contribute to the development of the downstream/local value-added ecosystem in Indonesia. This lack of clarity implies the existence of a high level of bureaucratic discretion and leeway in assessing and evaluating Priority Downstream WIUP Applications as well as in deciding which particular Priority Downstream WIUP Applications are approved and which particular Priority Downstream WIUP Applications are rejected.

Enquiries, made with DGoMC, have disclosed that:

(a) MoEMR has **not** yet issued any technical guidelines or decrees in respect of the Priority Downstream WIUP Application process as contemplated by MoEMR Regulation 18/2025; but

(b) various guidelines or decrees are expected to be eventually issued by MoEMR making clear/setting out, among other things, the following details in respect of the Priority Downstream WIUP Application process:

  (i) the relevant WIUPs that may be applied for via the OSS System as identified by WIUP numeric codes (**WIUP Codes**);

  (ii) the complete set of procedures that must be followed in applying for WIUPs; and

  (iii) most importantly, the criteria for the granting of Priority Downstream WIUPs (together, **Implementing Guidelines/Decrees for Priority Downstream WIUPs**); and

(c) until such time as the WIUP Codes and the Implementing Guidelines/Decrees for Priority Downstream WIUPs are issued, it is **not** possible for DGoMC/MoEMR to accept or process any applications for, far less grant, any Priority Downstream WIUPs. In other words, (i) DGoMC/MoEMR is **not** currently able to accommodate any applications in respect of Priority Downstream WIUPs and (ii) **no** Priority Downstream WIUPs have been granted so far.

Somewhat confusingly, it is nevertheless possible to lodge/submit Priority Downstream WIUP Applications via the OSS System. However, these Priority Downstream WIUP Applications remain "on hold" within the OSS System because they **cannot**/**will not** be processed by DGoMC/MoEMR due to the absence of the necessary WIUP Codes and Implementing Guidelines/Decrees for Priority Downstream WIUPs.

Given the current situation, as outlined above, it is not clear to the writer what is the associated "value proposition" being offered by parties claiming to be able to "expedite" the process of obtaining Priority Downstream WIUPs.

2. What the Constitutional Court Decided

The key points of CC Decision 202/2025 are as follows:

(a) the phrase "*by way of/through priority*", as it appears in each of the Relevant Articles, is **unconstitutional** and **has no legal binding effect** **unless** it is read as/interpreted to mean "*through priority which may only be granted **with clear parameters in place and after going through an objective, transparent and accountable assessment** and therefore the grant through priority is not meant to be understood as a mere direct appointment*"; and

(b) the phrase "*and/or global*", as it appears in certain of the Relevant Articles, is also **unconstitutional** and **has no legal binding effect** **unless** it is read as/interpreted to mean "*prioritizing increases in domestic value-added products and fulfilment of the domestic supply chain such that, only after the domestic supply chain is fulfilled, the global supply chain may be fulfilled*".

3. Implications of CC Decision 202/2025 for Priority Downstream WIUP Applications

CC Decision 202/2025 is final, binding and non-appealable. As such, the Relevant Articles must now be read in conjunction with CC Decision 202/2025.

Following CC Decision 202/2025:

(a) Priority Downstream WIUPs may only be granted **after** clear criteria/parameters are put in place, by MoEMR/DGoMC, to ensure the objective, transparent and accountable assessment of each Priority Downstream WIUP Application (**OT&A Criteria/Parameters**);

(b) by necessary implication, the Existing AT&C Requirements (as set out in Article 26 of MoEMR 18/2025) are **not** sufficient and do **not** otherwise satisfy the need for OT&A Criteria/Parameters as mandated by the Constitutional Court;

(c) it is **not** clear, at this time, whether or not the OT&A Criteria/Parameters mandated by the Constitutional Court are the same as the WIUP Codes/Implementing Guidelines/Decrees for Priority Downstream WIUPs that DGoMC says it is preparing or if DGoMC will now need to "go back to the drawing board", in light of CC Decision 202/2025, so as to more fully meet the Constitutional Court's insistence upon there being OT&A Criteria/Parameters in place; and

(d) given that the OT&A Criteria/Parameters/WIUP Codes/Implementing Guidelines/Decrees for Priority Downstream WIUPs are still a "work in progress", it is **not** technically possible at this time to obtain Priority Downstream WIUPs even if, in practice, a Priority Downstream WIUP Application can still be submitted through the OSS System.

4. WIUPK/WIUP Priority Application Rights in General

Category One WIUPK/WIUP Priority Application Rights can be viewed as being offered by the Government to "favoured" entities in pursuit of the "social engineering/social welfare" objective of expanding the groups in society that should be allowed (at least in the Government's view) to **directly** participate in the development and exploitation of Indonesia's mineral resources.

Category Two WIUPK/WIUP Priority Application Rights meanwhile can be viewed as being offered by the Government in pursuit of a related but somewhat different "social engineering/social welfare" objective; namely, facilitating the funding and financial well-being of universities.

Category Three Downstream WIUP Priority Application Rights, on the other hand, are supposedly being offered by the Government in pursuit of the industrial restructuring objective of promoting down-streaming activity/local value-added activity, in respect of metal minerals/coal, as a key Government policy for realizing the economic aspects of the President's bold vision of Golden Indonesia 2045.

Regardless, however, of the different **claimed** objectives underlying the offering of WIUPK/WIUP Priority Application Rights and whether we are talking about Category One WIUPK/WIUP Priority Application Rights, Category Two WIUPK/WIUP Priority Application Rights or Category Three Downstream WIUP Priority Application Rights, **they all suffer from exactly the same potential for abuse**. The absence of a public auction/tender process, with the highest bidder being awarded the relevant WIUPK/WIUP, enables non-objective/non-economic criteria to be used by MoEMR/DGoMC in deciding which parties actually receive WIUPKs/WIUPs. This facilitates the use of WIUPK/WIUP Priority Application Rights to "reward" parties which are regarded as being "supportive" of the Government and, correspondingly, to "penalize" parties which are regarded as not being supportive of the Government. In a country such as Indonesia, where the problem of "transactional politics"/"vote buying" is said to be endemic, the existence of WIUPK/WIUP Priority Application Rights makes it possible to take "transactional politics"/"vote buying" to an entirely new level. This very objection was levelled, in the most open and public manner by numerous groups, when Category One WIUPK/WIUP Priority Application Rights for religious organizations were first introduced, with the claim being repeatedly made that the real objective, of introducing Category One WIUPK/WIUP Priority Application Rights for religious organizations, was to "reward" certain religious organizations for their support of the current President in the 2024 presidential election. The truth or otherwise of that claim is, of course, impossible to verify and the writer would not want to express any view on the same. Nevertheless, the fact that it was so widely and repeatedly made, clearly indicates what many Indonesians, rightly or wrongly, believe it to be the case.

In addition to the potential for abuse, Category One WIUPK/WIUP Priority Application Rights may also be viewed as being objectionable to the extent that they also discriminate against foreign investors. Foreign investors and their PMA Companies are **not** one of the groups "favoured" by the Government as potential recipients of Category One WIUPK/WIUP Priority Application Rights. On the other hand, foreign investors and their PMA Companies could, at least in theory, seek to take advantage of Category Two WIUPK/WIUP Priority Application Rights or Category Three Downstream WIUP Priority Application Rights if they are willing and able to meet the necessary commitment to profit sharing with an accredited university or promoting down-streaming activity/local value-added activity in respect of metal minerals/coal. The Government may well have less objection to, in practice, "favourably" considering applications by PMA Companies for WIUPKs/WIUPs, in the case of Category Two WIUPK/WIUP Priority Application Rights and/or Category Three Downstream WIUP

Priority Application Rights, because they will **not** be competing with cooperatives, small and medium-sized business enterprises and business entities owned by religious organizations which do **not** qualify for Category Two WIUPK/WIUP Priority Application Rights and/or Category Three Downstream WIUP Priority Application Rights but, rather, only for Category One WIUPK/WIUP Priority Application Rights.

An argument can be made that, of all the WIUPK/WIUP Priority Application Rights, Category Three Downstream WIUP Priority Application Rights are the **least** objectionable of all the categories. Although open to the same potential for abuse as Category One WIUPK/WIUP Priority Application Rights and Category Two WIUPK/WIUP Priority Application Rights, promoting down-streaming activity/local value-added activity, in respect of metal minerals/coal, may be seen to have some economic justification as supporting an important industrial policy of the Government – this, of course, assumes that promoting down-streaming activity/local valued-added activity, in respect of metal minerals/coal, is indeed a sensible industrial policy for the Government to be pursuing so unconditionally, something about which a wide spectrum of views is possible.

The Constitutional Court has made clear, in a second decision (No. 160/PUU-XXIII/2025) (**CC Decision 160/2025**) and handed down on the same day as CC Decision 202/2025, that it agrees with the above assessment. Applying substantially the same reasoning and using substantially the same language as in CC Decision 202/2025, the Constitutional Court held in CC Decision 160/2025 that (i) Article 51 paragraph (1), (ii) Article 51 paragraphs (3), (4), (5) and (6) and (iii) Article 60 paragraph (1) of the 4th 2009 Mining Law Amendment, which make provision for Category One WIUPK/WIUP Priority Application Rights and Category Two WIUPK/WIUP Priority Application Rights, are likewise provisionally unconstitutional unless all references in the highlighted articles to the granting of WIUPKs/WIUPs "*by way of/through priority*" are read subject to and understood as requiring the existence of OT&A Criteria/Parameters.

5. Government's Response to CC Decision 160/2025

The Government has been quick to respond to CC Decision 160/2025 and, by implication, to CC Decision 202/2025. It was reported in the 22 July 2026 edition of The Jakarta Post, under the headline "*Co-ops, religious groups to still get mining permits*" that a ministerial regulation/decree would soon be issued setting out clear criteria/requirements for the award of WIUPKs/WIUPs on the basis of the exercise of Category One WIUPK/WIUP Priority Application Rights and Category Two WIUPK/WIUP Priority Application Rights (as well as, presumably, Category Three Downstream WIUP Priority Application Rights). More particularly, MoEMR was quoted in this news item as having said:

> "*The priority [mechanism] will remain in place. But the court [**i.e.**, the Constitutional Court in CC Decision 160/2025/CC Decision 202/2025] stated that there must be clear mechanisms and regulations in place.* ***It is a positive step because we also want the entire process to be conducted transparently***."

The quick response of the Government is to be commended even if MoEMR's final words, as highlighted in the above quote, may bring "knowing" smiles to the faces of more cynical readers.

It remains to be seen, however, whether or not the obvious potential for abuse, associated with the existence of WIUPK/WIUP Priority Application Rights, can really be addressed by the simple expedient of issuing a ministerial regulation/decree setting out clear criteria/mechanisms/requirements for the award of WIUPKs/WIUPs on the basis of the exercise of WIUPK/WIUP Priority Application Rights (**i.e.**, the OT&A Criteria/Parameters mandated by the Constitutional Court). As is so often the case in the Indonesian mining industry, all the necessary regulations/decrees for a better system can be in place but they still wholly fail to achieve their intended purpose because of the way they are interpreted and applied in practice. We will have to wait and see whether or not the reality of how the proposed regulations/decrees, governing the award of WIUPKs/WIUPs on the basis of the exercise of WIUPK/WIUP Priority Application Rights, are interpreted and applied proves to be any different.

SUMMARY & CONCLUSIONS

CC Decision 202/2025 and CC Decision 160/2025 are to be welcomed as progressive and much needed decisions by the Constitutional Court "calling out" the obvious potential for abuse inherent in the increasingly widespread use of WIUPK/WIUP Priority Application Rights to award WIUPKs/WIUPs and the associated move away from the use of public auctions/tenders, with the highest bidder being successful, to award WIUPKs/WIUPs.

When valuable WIUPKs/WIUPs are awarded on any basis other than "highest bidder wins", in a transparent public auction/tender process, it is always going to be difficult if not impossible to determine the real reason why a particular priority applicant was successful while other priority applicants were unsuccessful. This is without denying that the existing public auction/tender process, for WIUPKs/WIUPs, is itself far from perfect.

Whether or not CC Decision 202/2025 and CC Decision 160/2025 achieve the outcome intended by the Constitutional Court will depend on the wording of the soon to be issued OT&A Criteria/Parameters and, more importantly, on how these OT&A Criteria/Parameters are interpreted and applied by MoEMR/DGoMC in practice.

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