A New Era
of Mining in Indonesia

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A mining regime was established by Laws 1/1967 (on *Foreign Investment*) and 11/1967 (on *Mining*) which served Indonesia well for forty years. Consider the politics of the time, and one realises that desperate times require desperate measures. Not that they were desperate measures, but they were ground-breaking and they were open invitations to foreign capital to rescue Indonesia from the doldrums and help it turn potential into reality.

But inevitably times and expectations and needs change. And just as inevitably there are those who are nervous about any change.

There is no need for a lesson in history and politics to remind one that the Indonesian people as individuals now have a far greater direct say in how they are to be managed; central to which is the decentralisation of power. And in the case of mining, decentralisation took off on 30 November 2001 when the power to issue mining licences was handed to the regions.

But the time had come to refine the exercise of that power, and at the same time to fine-tune the power of foreign capital in the achievement of national goals. Adding value was the catch-cry of former ESDM Director General and Deputy Minister Simon Sembiring when addressing a recent breakfast session on the mining law hosted by the IABC. And he launched a broadside at a prominent car company which after many years in Indonesia has not yet got beyond merely assembling products manufactured elsewhere. The equivalent being, those who simply dig and export. The demand is to increase capacity and add value at home.

A New Law

Law 4/2009 on *Mineral and Coal Mining* was introduced to assert state control over the exploitation of non-renewable resources, and thereby to achieve greater national benefit from their exploitation. This meant that Indonesians must play a greater direct role in this effort; and especially Indonesians living where the resources are to be found. Regional autonomy may have got out of control, but this was no reason to turn away from it.

And in this day and age everyone expects greater respect for the living environment for the benefit of future generations.

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Licencing

Under the new law, licences may be granted to companies owned by foreigners, which was not possible previously. But the system of contracting areas to foreigners has come to an end; now all who wish to invest in a mine have the same access and the same responsibilities.

Licences may be granted to companies, cooperatives or individuals (sole traders). But the only way for foreigners to hold a licence is through a company; consistent with longstanding practice and the current Law 25/2007 on *Investing*.

The important thing is that an applicant for a right to a mining area (WIUP) must establish through a tender system that they have

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the financial strength and ability to undertake mining activity; the capacity.

What had been taking place was that licence owners were sitting by while contractors did their work, paid them a share, and then disappeared into the next black hole. The owner had contracted out his responsibilities and simply banked the money. Now he is not just accountable; he is the miner.

The government establishes that an area is open to mining (although does not offer a guarantee that there is no conflict with residential, forest and other needs). Within areas available to mining (WP), areas with confirmed potential (WUP) are identified. Within these areas, a mining area (WIUP) is granted by tender to a successful tenderer. Central control of mining areas is intended to eliminate overlapping claims.

Mining Areas

Mining areas are strictly limited according to the type of mineral known to predominate; which is the target of the potential miner. The areas are generally not less than previously allowed by law, but are far less than was actually being granted to those willing to pay. And less than areas granted under the old develop-at-all-cost Contract of Work system.

Licences

Experience established long ago that the multiple licence system (initially six of them) provided for in the old law was unworkable. So now there are just two; the licence (IUP) to explore and the licence to exploit. And a notable feature is that there is guaranteed progression from one to the other. A feature of the CoW was that it was one licence; but in effect that is what we now have for everyone.

There are limits on the time for which a licence is granted. For example a licence to explore for coal may be granted for up to seven years (which is divided into time for surveying and extendable times for exploring and time for a feasibility study). The licence to exploit coal deposits may be granted for up to 20 years, extendable twice for 10 years each time. This compares with the initial 30 years which could be granted under the old CoWs.

Areas of WIUP are reduced at the transition from exploration to exploitation. For example, coal WIUP are reduced from a maximum of 50,000 ha to 15,000 ha.

Land Rights

It is clear that a WIUP (right to a mining area) is not a land right. The miner must (as previously) obtain permits to use from government or owners. Post mining land use must be agreed with the landowner before exploitation commences. And while IUP holders own the minerals for which the licence is granted (not automatically all minerals found), they never own radioactive minerals. (This is a development on the old law, which stated that the state controlled the minerals, and simply granted the right to sell).

Obligations of a Miner

The licence holder cannot simply acquire a licence and then sell it; he has it for its life. And he can trade shares in his company only at the production phase (interpreted as after the feasibility study has been completed).

All exploration and production data becomes the property of the state; the miner cannot keep it to himself.

The licence holder must be the miner. It is intended that while the licence holder can contract out all other activities, he must actually remove the minerals (or mineral-bearing ore) himself. So, the old days of 'cooperation agreements' are gone, so it seems.

Contracting

Hotel conference rooms are awash with seminars on what is meant by mining services (Article 124 of the law) and what services can be contracted out, and to whom. Ministerial Regulation 28/2009 on *Mining Service Businesses* does not provide the clarity preferred.

Starting at the coal face (as it were), is transporting from the coal face mining or mining services? In any case, it appears that ESDM may be

comfortable with a system under which a miner wet hires men and equipment. But equipment hire and labour supply are activities restricted by Presidential Regulation 111/2007 (the negative list) to 100% domestic capital. So the foreign investor must own (or part-own) the mine in order to undertake mining. And remember, these shares must be owned at the tender stage, not acquired later (at least, not until after the feasibility study).

The law allows the miner to use another miner (holder of an IUP to exploit) to process his ore and refine his minerals. But the regulation just mentioned is not so generous; it requires the miner to process and refine. The law should of course prevail.

All other activities may be contracted out.

The law (Article 124) describes a range of activities which can be contracted, and these include mine planning and consulting for the actual line process. Exploration, construction, transport, reclamation, and health and safety, are all activities which can be contracted out. Regulation 28 requires such contractors to obtain a licence (IUJP), which is good for three years at a time.

Contractors

This is where the pressure is placed on local activity and sourcing. Contractors are classified into local contractors (owned and based in the area, or branches of national contractors), national contractors (owned and based outside the area) and other contractors (wholly or partly owned by foreigners).

But this is also where uncertainty creeps in: what is "national"? Is a company which is owned by a company which is owned by a company with foreign shareholders a national company? It appears that ESDM would regard it as a national company, while the Investment law would define its capital as foreign. We are dealing with two different concepts; characterisation of the capital (investment law), and characterisation of the company itself (mining law).

Mine owners may use "other" contractors only if local or national contractors are not available. And what does "not available" mean. Clearly ability to muster capital and equipment must play a key role, along with the ability to manage the use of the equipment. Established contractors should be well ahead of the market in this regard. "Other" contractors must still sub-contract part of the work to a local; not an unreasonable requirement, which many would undertake as a matter of course.

It appears that an "other" contractor may help himself considerably by formally establishing a branch in a mining area, and might obtain some advantage over a national contractor without a branch; depending on his local connections.

Related Companies

Mine owners may not in any case award contracts within their licence area to directly owned affiliates without the approval of the Director General. And such awards must follow a tender process, and all involved must be able to establish that there is no transfer pricing activity; the parties are operating at arms length on commercial terms.

None Core Services

Regulation 28 adds a category of non-core mining services, for no apparent reason, and without defining them. They are simply described as "other". The operators of such services are required to obtain a lesser licence known as a certificate of registration (SKT), which like the IUJP is also good for three years. Given the wide range of activities included as mining services (and the list is not stated to be exclusive) it is not at all clear what are non-core mining services. Possibilities are equipment hirers and caterers; but are tax advisers included? And are non-core services subject to the local/national/other categorisation? ESDM says they are.

Unfortunately, new regulation always brings with it a spate of uncertainty until things settle down. And things have far from settled down, as key government regulations and clarifications continue to be issued; all as yet untested by experience. ●