

Indonesian mining bill passed into law, poses new challenges and opportunities

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Businesses are now entering a new era of mining in Indonesia. On 10 June 2020 President Joko Widodo finally signed a long-anticipated bill amending Law No. 4 of 2009 on Minerals and Coal Mining (the mining law) after previously passing parliamentary approval on 12 March 2020. The bill – now ratified into Law No. 3 of 2020 (the new mining law), and which is effective as of 10 June 2020, introduces large-scale revisions to the mining law which could improve the feasibility of doing business in Indonesia's natural resources sector.

Our key takeaways from the new mining law are as follows:

Licensing process is now centralized

The new mining law finally confirms the mandate of the central government, (through the Ministry of Energy and Mineral Resources (MEMR)), on its exclusive authority to issue licenses in the mining sector, including (i) mining business licenses (Izin Usaha Pertambangan or IUPs) and, (ii) special mining business licenses (Izin Usaha Pertambangan Khusus or IUPKs). Previously, the MEMR was only authorized to grant mining licenses for inter-province mining operations and licenses held by foreign investment companies. Further, consistent with the current practice, the new mining law authorizes the MEMR to delegate its authority to provincial governments.

By concentrating the licensing process at the central and/or provincial level of government, mining companies now do not need to deal with local (regional) bureaucracies.

Government to "guarantee" mining operations

The new mining law provides guarantees for the extension of mining operation periods. For example, the production operation phase of mining metallic minerals is granted for an initial term of 20 years, with two guaranteed extensions, each for an additional term of 10 years.

Contracts of work (COWs) and coal contracts of work (CCOWs) that have not been granted an extension may be converted into an IUPK for an initial maximum term of 10 years, and may be extended again maximum for another 10-year term. Meanwhile, a COW or CCOW that has already been extended can be converted into an IUPK applicable for a maximum term of 10 years.

The granting of the contract conversions, however, is still conditional on the government's review of regulations on state revenue, and the size of the mining concession under the new IUPK.

Accordingly, the "guarantee" provided by the government cannot be viewed as an "absolute guarantee" and investors would still need to see the implementation of this "guarantee" in practice at a later stage.

Green light for assignments of IUPs and IUPKs

License-holders are now allowed to assign their licenses to any party with the MEMR's approval, marking a significant change to the previous regime which prohibits transfer mining licenses to any person except to a related company (being a company in which the license holder held at least 51 percent of the shares) as part of an internal reorganization.

The new mining law provides that the assignment can only be granted upon the assignor's satisfaction of certain conditions, including the completion of the exploration phase, as well as certain administrative, technical, and financial requirements.

The procedures for assignment of IUP or IUPK have yet to be detailed by a government regulation. Therefore, mining companies and investors need to wait and see how this will be implemented by the government.

Divestment obligation

Under the old regime, the mining law required that any foreign-invested mining companies were required to comply with the divestment obligation after its fifth year of production operation, by which the company was required to offer its shares to the central government, regional government, a state/regional-owned enterprise, or a national business entity. The new mining law, however, only states that the divestment obligation must be conducted in stages, and does not expressly provide the timing of such divestment obligation. This raises questions as to when the divestment obligation is triggered.

Nevertheless, as the implementing regulation of the mining law (being Government Regulation 23/2010) is still in force, strictly speaking, the divestment obligation will still be applicable after the fifth year of production operation activity. We expect there will be changes to the implementation of the divestment obligation after the enactment of a further implementing regulation for the new mining law.

"Reserve fund" for production operations

IUP and IUPK holders entering the production operation phase are now required to establish a special "fund for sustaining mineral and coal reserves" that will be used for the discovery of new reserves. A more detailed guideline on this matter will also be governed under a government regulation.

More obligations: Reclamation and post-mining activities

In performing their reclamation obligations, IUP and IUPK holders must now ensure that the reclaimed portion of the concession should be equal in size to the portion that will be opened, and manage exhausted pits according to the applicable laws and regulations.

Prior to reducing and/or surrendering the concession area, or before the expiry of their IUP or IUPK, mining companies are now required to achieve a "100 percent success rate" in completing the post-mining or reclamation process. Based on our initial discussions with MEMR officials, this requirement means that all commitments under the post-mining or reclamation plan must be fully performed, not a promise to achieve a 100 percent reclamation result.

In the case that the mining area will be operated again, the funds allocated for performing the reclamation and/or post-mining obligations will be claimed by the government (i.e., the

reclamation and/or post mining fund deposited with the government will not be returned to the company).

Non-tax contributions revised

Under the new mining law, the obligation to pay non-tax contributions to the state no longer includes exploration royalties, while dead rent, production royalties, and "compensation for information data" remain.

Although the removal of exploration royalties may be favorable to mining companies, it should also be noted that mining companies are now obliged to pay other non-tax contributions to the state "in accordance with the laws and regulations." In our view, this makes it possible for the subordinate regulations to require additional non-tax contributions that may even be more burdensome than those specified in the mining law, and therefore creates uncertainty for mining companies when projecting financial outcomes.

Fresh incentives for integrated mining operations

The new mining law introduces several incentives for mining companies with operations which are integrated with processing and/or refining facilities. Integrated mining businesses, both for minerals and coal mining, will be granted a production operation term of 30 years, with another guaranteed 10 years for each extension, compared with a 20 year operational term for unintegrated mineral and/or coal mining activities. In addition, based on a strict reading of the new mining law, extensions of IUP and IUPK for mining activities that are integrated with processing and/or refinery activities could be granted without limitation, compared with extensions to IUP and IUPK for unintegrated mining activities which may only be granted a maximum of two times.

The above was confirmed by MEMR official during our discussions. We believe that this provision reflects the government intention to improve local productivity and encourage mining companies to add value to commodities before export.

Independent smelters and refiners to obtain industrial license

Before the new mining law was enacted, independent smelters and refineries needed to obtain different operational licenses from two different authorities, one being the Special Production Operation IUP (Izin Usaha Pertambangan Operasi Produksi Khusus or IUP-OPK) from the MEMR as required under the mining law, and the other being the Industrial Business License (Izin Usaha Industri or IUI) granted by the Minister of Industry (MOI).

These overlapping requirements have, in practice, given rise to confusion about which ministry held the authority over independent smelters and refineries, and whether it would still be necessary for IUP-OPK holders to obtain an IUI.

To avoid further regulatory uncertainty, the new mining law revokes the requirement for an IUP-OPK and provides that independent smelters and refineries shall hold the necessary licenses as made mandatory under the laws and regulations on industrial affairs, i.e., the IUI. Consequently, as a matter of compliance, holders of IUP-OPK are now required to process their IUI within one year of the enactment date of the new mining law.

Central government to mediate land disputes

The central government is now authorized to mediate land disputes that may arise between IUP or IUPK holders and land title-holders. It remains unclear as to exactly what type of mediation will be provided by the government. We have consulted on this issue with the MEMR officials,

but they are unable to provide further details with respect to this government mediation. The new mining law simply provides that details on this dispute settlement process will be further regulated by government regulation.

No encumbrances over mining licenses and commodities

The new mining law expressly prohibits mining companies from encumbering their IUPs and IUPKs, as well as their commodities.

This is consistent with the general rule under Indonesian property law that encumbrances can only be created over property to which the debtor has perfect title. In principle, mining commodities are the property of the state, and are deemed to be transferred to the mining company once all financial obligations to the state have been settled. This prohibition under the new mining law is also consistent with the current practical implementation of encumbrance on mining commodities.

Mining services to include extraction activities

Holders of a mining services license (Izin Usaha Jasa Pertambangan or IUJP) may now offer services in extraction (penambangan). As the new mining law provides no further restrictions or limitation regarding the extraction activity that may be undertaken by a mining service company, a further implementing regulation would be required to draw a separate line between the activities of a mining services company and a mining company, particularly with respect to extraction activities.

Commodities conservation gets expansion of concession area

Under the new mining law, IUP holders may now propose the expansion of concession areas for the conservation of metallic minerals and coal, subject to MEMR approval. This relatively new concept in the mining law should be further set out in detail under a government regulation.

Increase in fines

A wide range of revisions were also made to the sanctions under the mining law, such as: (i) operating without a valid license, and (ii) submitting forged reports. While the new mining law generally lowers the maximum imprisonment terms from 10 years to five years, fines are raised from a maximum of IDR 10 billion to a hefty IDR 100 billion (US\$700,000 to US\$7 million).

Considering that the mining sector is largely operated by corporate entities, the reduced prison sentences and tougher fines appear to be a response to the fact that violations are more often committed by corporations rather than individuals.

We would expect that this increase should motivate mining companies to impose stricter rules in carrying out their activities, to ensure full compliance with the prevailing laws.

License moratorium

The new mining law provides that the government shall not issue any new mining-related licenses for six months as of the enactment of the new mining law (i.e., starting from 10 June 2020) or until its implementing regulation is issued (the moratorium period). As a guideline to this license moratorium, on 18 June 2020 the MEMR has issued an instruction letter to all governors in Indonesia to further explain the moratorium of license issuance (MEMR instruction letter). Note that under the MEMR instruction letter, several licenses are still permitted to be issued by the government.

The following are list of licenses which are prohibited and permitted to be issued by the provincial government during the moratorium period:

Licences which are prohibited to be issued during the moratorium period	Licences which are still permitted to be issued during the moratorium period
a) IUP.	a) Adjustment of existing IUP exploration to IUP production operation.
b) People mining licence (Izin Pertambangan Rakyat or IPR).	b) Extension of any existing licences.
c) Temporary licence to undertake mining transportation and sales.	c) Adjustment of existing IUP in the event of any change to investment status.
d) IUP production operation for processing and/or refinery.	d) Approval and recommendation with respect to management and supervising of mining activity (e.g., approval for reclamation plan).
e) IUP production operation for transportation and sales.	
f) IUJP.	
g) IUP production operation for sales.	

Lastly, the MEMR instruction letter provides that any application of new mining licenses to the governor which has been submitted prior to 10 June 2020 shall not be processed.

Conclusion

The new mining law appears to reflect the government's intention to "resurrect" mining investment in Indonesia. This is evidenced by the provision of incentives, assurances, and benefits for mining business in the new mining law. Centralization of the licensing process aims to simplify bureaucracy and minimizes the risk of a "conflict of policy" between the central and local governments. The longer terms granted to undertake mining business and assurances that the central government will assist to resolve land issues are examples of the positive initiatives provided in this new law.

Nevertheless, some uncertainties remain, as some new concepts under the new mining law require implementing regulations to be issued. Hence, all stakeholders must wait and see the substance of these implementing regulations to fully assess whether the new mining law will go on to facilitate mining investment in Indonesia.

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