

INDONESIA – NEW MINING LAW CLARIFIED

This summary is contributed by Christian Teo & Associates Law Offices of Jakarta, Indonesia, which specializes in handling the legal aspects of local mining projects for foreign investors.

1. The First Draft Implementing Regulations have clarified a number of important issues regarding the New Mining Law.
2. The administrative, technical and financial requirements for participants in tenders for Exploration IUP/IUPKs have not been made clear at least in part.
3. The holder of an Exploration IUP/IUPK is guaranteed the right to obtain a Production Operation IUP/IUPK without going through a tender process.
4. For the purpose of meeting domestic needs for minerals and coal only, the Government has the right to determine the domestic selling price of the minerals and coal as well as control other aspects of the production, supply and sale of minerals and coal.
5. It has become somewhat clearer what will be sufficient to satisfy the local 'processing and refining' requirement in certain instances.
6. In the case of coal only, crushing, washing and blending (among other things) will constitute 'processing and refining'.
7. MOEMR will set a monthly benchmark price for minerals and coal having regard to international market conditions.
8. The benchmark price for coal only will be set on the basis of FOB delivery.
9. IUP/IUPK holders will be prohibited from selling minerals and coal at a price below the specified benchmark price.
10. If the actual selling price of minerals and coal is less than the specified benchmark price (i) the selling price will be subject to adjustment in order to bring the same into line with the benchmark price, (ii) the shortfall in selling price must be paid to the Government and (iii) the seller will be liable to a fine.
11. In the case of long term or fixed period supply arrangements for coal only, the selling price must be reset at least once every 12 months and in accordance with the benchmark price prevailing at the time of reset.
12. Starting in the 6th year of production, foreign owned IUP/IUPK holders must divest shares to local parties such that, by the end of the ninth year of production, local parties hold a minimum of 20% of the issued capital of the IUP/IUPK holder.
13. The 'value' to the shares to be divested ('Divestiture Shares') must be 'assessed' by an 'independent valuer'.
14. Existing KPs are to be converted into IUPs not later than the first anniversary of the Implementing Regulations.
15. Already producing Contracts of Work/ PKP2Bs are to be extendable, for up to a further 10 years, by conversion to a Production Operation IUP.
16. Existing Contracts of Work and PKP2Bs will continue to be valid until they expire and, thereafter, will be extendable.
17. Although not free from doubt, it seems that the Government may have decided not to push for the financial terms of Contracts of Work and PKP2Bs to be brought into line with the New Mining Law and/or within a specified period of time as there is nothing about this in the First Draft Implementing Regulations.
18. Notwithstanding 1 to 17 above, there remain many areas of uncertainty in the New Mining Law which have not been fully resolved by the First Draft Implementing Regulations. Also, the First Draft Implementing Regulations give rise to their own uncertainties. Accordingly, further clarification is still required in respect of a number of issues which are likely to be very important to foreign investors and their professional advisers. These outstanding and unresolved issues include the following:
 - (a) Local Processing & Refining: In the case of metal minerals that are capable of being processed and refined into successive and more highly value added products, what is the level of processing and refining which the IUP/IUPK holder must carry out in Indonesia? The reference in Article 46(2) of the First Draft Implementing Regulations to 'processing' and 'refining' leaves this entirely unclear.
 - (b) Divestiture: Who determines and how is it determined which local Indonesian party may acquire the Divestiture Shares of a foreign owned IUP/IUPK holder which becomes subject to the divestiture requirement in Article 112 of the New Mining Law?
 - (c) Although Article 63(2) the First Draft Implementing Regulations refers to the 'offered share price' for the Divestiture Shares being 'assessed by an independent value', on what basis is the 'offered share price' to be assessed/determined? Is the 'offered share price' the same as 'fair market value'?
 - (d) Is the 'offered share price' of the Divestiture Shares, once assessed/determined by an independent valuer, the end of all discussions and negotiations as to the purchase price for the Divestiture Shares or is it merely the beginning of those discussions and negotiations?
 - (e) Must a local Indonesian party, which wishes to acquire the Divestiture Shares, be able to establish that it can pay, in full, the purchase price for the Divestiture Shares on completion?
 - (f) Foreign Mining Services Providers: Are foreign owned mining services providers, established as Indonesian, limited liability, foreign investment (ie, PMA) companies to be treated as 'local mining services providers' for the purposes of Articles 124 to 127 of the New Mining Law which oblige IUP/IUPK holders to only 'co-operate with' (ie, use) 'local and/or Indonesian national mining services companies' ('LMSP Requirement')?
 - (g) In the case of the only exception to the LMSP Requirement, who determines and how is it determined that there is no local or Indonesian national company providing the required mining services?

(h) Benchmark Prices: Do the MoEMR determined Benchmark Prices for minerals and coal only apply to export sales or do they also apply to domestic sales?

(i) What happens to existing long term or fixed period supply arrangements which do not comply with the Benchmark Price requirements?

(j) Conversion of KPs: How will the conversion of KPs to IUPs be carried out? The mechanics of the conversion process remain unspecified.

19. It is hoped and expected that the remaining areas of uncertainty concerning the New Mining Law and the First Draft Implementing Regulations (some only of which are highlighted in 18 above) will be resolved in a further redraft of the Implementing Regulations.

- Any questions about the draft Implementing Regulations for the New Mining law should be directed, in the first instance, to CTA's Bill Sullivan - bsullivan@cteolaw.com