



## Surveying Indonesia's 2017 Mining Regulations: Mineral Export Ban doesn't Pan Out?

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**Relaxing the export ban on unprocessed mineral ore and ongoing disputes with Contract of Work holders have created new uncertainty for Indonesia's mining industry. Establishing a set of overarching goals, priorities and strategies could help the government break the deadlock with the private sector and pave the way for a new law.**

The Ministry of Energy and Mineral Resources ("ESDM") implemented new regulations in January 2017 that allow exports of certain grades of unprocessed mineral ore for another 5 years (the "New Regs"). A list of the New Regs is set out below.

Metal analysts have highlighted a perceived risk that the New Regs could lead to oversupply in the global markets if they trigger the sudden release of large export quantities that have been stockpiled in Indonesia since the ban first took effect in 2014. It is now clear that this is unlikely to occur for the following reasons:

- the relaxation of the ban does not apply to mining companies holding a Contract of Work;
- ESDM may not issue new export permits until it establishes a new permit process that complies with the New Regs; and
- the New Regs introduce onerous new Export Conditions (as defined below), including for eligible mining companies to show that they are building a smelter.

### Policy Flip-flop?

The relaxation of the ban has called into question the government's commitment to its downstream mineral policy. It is logical to assume that the government still wants to develop a smelter industry, as evidenced by the Export Conditions. On the other hand, the Indonesian Cabinet chaired by President Jokowi has made it clear that improving the economy is a priority. Potentially, the

government has now reached an informal consensus that the strict enforcement of the ban is not compatible with its immediate objectives. This raises the possibility that ESDM could be instructed to adopt an exporter-friendly approach to the implementation of the New Regs, to the extent that it is able to do so in light of the Export Conditions.

### New Export Conditions

During the exemption period, eligible mining companies must comply with the following conditions (among others) to export specified grades of unprocessed ore:

- commitment to build a smelter by 11 January 2022;
- independent verification of smelter construction plans;
- evidence of physical smelter construction on a cumulative basis up to 90% progress, and
- for foreign owned mining companies, 51% divestment of share capital to Indonesian interests.

(the "Export Conditions").

The New Regs apply to IUP/IUPK mining license holders for various grades of copper, iron ore, lead, zinc, bauxite and nickel (among others). Therefore, to fall within the scope of the New Regs, PT. Freeport Indonesia Company ("Freeport") and other Contract of Work holders must convert to an IUP/IUPK.

Together with the 51% divestment requirement, the proposal for Freeport to give up its Contract of Work has been a key aspect of contention that has rendered the government unable to implement Law No. 4 of 2009 (the "2009 Mining Law") in its entirety. Reportedly, Freeport has recently acquiesced to the IUP/IUPK conversion, although it is unclear on what terms this has been agreed.

## Supreme Court Challenge?

A group called the Civil Society Coalition intends to challenge the New Regs in the Supreme Court, arguing that they breach the 2009 Mining Law. The group claims the government has given preferential treatment to several companies that have violated the 2009 Mining Law, instead of protecting those who have invested billions of dollars to build smelters.

The claim highlights the tensions among interested stakeholders and criticism over how the government is handling the issue. Some commentators even support a view that the Export Conditions were only proposed as a cosmetic measure to rebut anticipated legal challenges by masking the true nature of the recent concessions that are intended to be given to mineral exporters.

Whilst the exact nature of the Supreme Court claim is currently unclear, it may not go far if the breach can be cured by the government simply replacing the 2009 Mining Law. A new mining law has been previously proposed, with a draft circulated to interested parties in September 2016.

## Charting a Way Forward

As mentioned above, the government has relaxed the ban without any reference to the broader process that needs to be established in connection with the proposed new mining law, which will replace the 2009 Mining Law. For example, no indication was given as to whether the 51% divestment requirement will be entrenched in the new law for other mineral companies.

In order to move towards a robust and transparent set of mining laws, the government may wish to consider the following steps, particularly in light of the regulatory uncertainty that has created huge challenges in recent years:

- **Statement of Principles** – clearly set out in principle the government’s expectations and commitments for the Indonesian mining industry, potentially by way of a “Statement of Principles”. The protection of existing investments could be addressed, together with the risk of future regulatory changes. As a measure of good faith, the statement may be signed by the government and other relevant stakeholders;
- **Proposed New Mining Law** – issue a new law that draws on the Statement of Principles and includes a complete set of implementing regulations. Investors will then be clearer on the detail of how the law is to be implemented; and
- **Transition Plan** – establish a transition plan that clearly sets out a path to compliance with the new law for all mining companies, building on the matters referred to in the Statement of Principles.

Clearly, further discussion is needed in order to chart a way forward that meets the government’s objectives whilst continuing to attract foreign investment in power plants and other infrastructure needed to drive Indonesia’s future smelter industry. If positive steps can be taken by the government following these discussions, a survey of the mining industry in 2022 could reveal a

landscape that is not only sustainable, but also prosperous and investor-friendly.

## Regulation List

The New Regs include the following:

1. Government Regulation No. 1 of 2017 re fourth amendment of government regulation No. 23 of 2010 re implementation of minerals and coal mining enterprise activities (“GR 1/2017”);
2. Minister of Energy & Mineral Resources (“MoEMR”) regulation No. 5 of 2017 re increasing the added value of minerals through domestic processing and refining activities (“MoEMR 5/2017”);
3. MoEMR Regulation No. 6 of 2017 re procedures and requirements for recommendations in respect of offshore sales of processed and refined minerals (“MoEMR 6/2017”);
4. Minister of Trade (“MoT”) Regulation No. 1 of 2017 re export of processed & refined minerals (“MoTR 1/2017”); and
5. MoEMR regulation No. 9 of 2017 re procedures for divestiture of shares and price mechanism stipulation for divestiture of shares in mining and coal business activities (“MoEMR 9/2017”).

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