

Mining 2021

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Mining 2021

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and Lauren White****Cassels Brock & Blackwell LLP**

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Mining*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapter on Ireland, Nigeria and Uzbekistan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Darrell Podowski, Brian Dominique, Brandon Manhas and Lauren White of Cassels Brock & Blackwell LLP, for their assistance with this volume.



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MINING INDUSTRY

Standing

1 | What is the nature and importance of the mining industry in your country?

Indonesia is a major player in the global mining industry. With its immense mineral reserves and production industry, Indonesia aims to develop an attractive investment climate that is favourable to the interests of both investors and the Indonesian government.

There are still challenges that demand the attention of the government, including the negative trend in the profitability of mining companies, which has led to a paucity of exploration activities and a negative perception of the mining sector and its policy framework. In the mineral mining sector, however, the processing and refinery industry has experienced rapid growth since the implementation of the domestic processing obligation that prohibits the export of unprocessed minerals.

Improvements to the regulatory regime for the mining sector and to the Indonesian legal system in general are needed. There are several implementing regulations and policies that are not favourable to the interests of investors. The government faces the difficult task of balancing the interests of all stakeholders through legal instruments and has made a conscious effort to simplify bureaucracy in the mining sector to reinforce Indonesia's position as a competitive destination for mining investment. Legal certainty is one of the most important elements to reduce investment risk and is key to spur new investments in the mining sector.

The government has attempted to address the foregoing issues by amending the laws and regulations in the mining sector. Law 4 of 2009 dated 12 January 2009 on Coal and Mineral Mining (Law 4/2009), as amended by Law No. 3 of 2020 dated 10 June 2020 (the Mining Law Amendment), was further amended by Law No. 11 of 2020 dated 2 November 2020 on Job Creation (the Omnibus Law, and together with Law 4/2009 and the Mining Law Amendment, the Mining Law). The purpose of this legal reform is to simplify the licensing system in Indonesia, improve the ease of doing business in Indonesia and ultimately attract more investment to the mining sector.

Target minerals

2 | What are the target minerals?

The target minerals in Indonesia are gold, copper, bauxite, tin, silver and, in particular, nickel, which the significant increase in the use of battery technology has stimulated the need for. As one of the largest producers of nickel in the world, Indonesia has benefited from an increase in investment in nickel mining. This includes a US\$4 billion lithium battery project in Morowali, on the island of Sulawesi. The government is currently allocating an additional US\$6 billion worth of investment to the refining of nickel, with 22 nickel smelters expected to be operating by 2022.

Regions

3 | Which regions are most active?

The most active regions for mineral mining are:

- Bangka Belitung Islands;
- West Kalimantan;
- Central Sulawesi;
- Southeast Sulawesi;
- Maluku; and
- Papua.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

4 | Is the legal system civil or common law-based?

Indonesia has a civil law system.

Regulation

5 | How is the mining industry regulated?

The mining industry in Indonesia is regulated by way of mining laws and regulations. The main regulation is the Mining Law, which is further implemented by various regulations and decrees issued by:

- the central government (including the Ministry of Energy and Mineral Resources (MEMR)); and
- regional governments at the provincial and regency or municipal levels.

There are several types of mining permit under the Mining Law, namely:

- mining permit (IUP);
- special mining permit (IUPK);
- IUPK for the continuation of contract operation;
- small-scale mining permit (IPR);
- rock mining licence (SIPB);
- assignment permit;
- transportation and sales licence;
- mining service permit; and
- mining permit for sales.

An IUP is granted for mining activities undertaken in a mining business permit area (WIUP), while an IUPK is granted for activities carried out in a special mining permit area (WIUPK). To reflect the different stages of mining activity, IUPs and IUPKs are divided into:

- exploration IUP (IUPE) and operation production IUP (IUPOP); and
- exploration IUPK and operation production IUPK (IUPKOP).

Unlike the licensing system, a contract of work (CoW) is a contract entered into by a foreign investor with the government as the basis for the investor to carry out mineral mining business activities. When Law

4/2009 came into force, all mining authorities had to be converted into IUPs, while CoWs are honoured until their expiration. The Mining Law guarantees the continuation of the mining operations of CoW holders through the granting of an IUPK for the Continuation of Contract Operation, subject to the fulfilment of certain requirements. The granting of this licence, however, is subject to tax, non-tax state revenue or the adjustment of total area to increase state revenue from the mining activities, or a combination of these.

Under the Mining Law, the authority to issue licences falls with the central government, except for the IPR and SIPB, where the central government may delegate its authority to the relevant provincial government.

The Mining Law requires that every mining business activity be carried out based on business licensing by the central government in the form of business identification numbers, standard certificates and mining licences.

6 | What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

In addition to the Indonesian Constitution, the principal law that regulates the mining industry is the Mining Law.

The MEMR is the principal regulatory body that administers the implementation of mining laws and regulations. However, since the mining industry is closely tied to other sectors (eg, forestry and the environment), other ministries govern matters that fall under their respective authorities. Mining companies in Indonesia must comply with regulations issued by ministries other than the MEMR, to the relevant extent.

The Mining Law is further implemented by various governmental regulations, including:

- Government Regulation (GR) 22/2010 on Mining Areas;
- GR 23/2010 on the Implementation of Coal and Mineral Mining Business Activities, as amended by:
 - GR 24/2012;
 - GR 1/2014;
 - GR 77/2014;
 - GR 1/2017; and
 - GR 8/2018 (GR 23/2010);
- GR 55/2010 on the Development and Monitoring of the Implementation of Coal and Mineral Mining Business Activities;
- GR 78/2010 on Reclamation and Post-Mining Activities;
- GR 81/2019 on the Types and Tariffs for Non-Tax State Revenues Applicable to the Ministry of Energy and Mineral Resources;
- GR 5/2021 on Risk-Based Business Licensing; and
- GR 25/2021 on the Organization of the Energy and Mineral Resources Sector.

These regulations are further implemented by various ministerial regulations issued by the MEMR, including:

- MEMR Regulation 43/2015 on the Procedure for the Evaluation of the Issuance of Coal and Mineral Business Licences;
- MEMR Regulation 7/2017 on the Procedure for Determining Coal and Mineral Benchmark Prices, as amended by MEMR Regulation 44/2017, MEMR Regulation 19/2018 and MEMR Regulation 11/2020;
- MEMR Regulation 9/2017 on the Divestment Procedure and Price Determination Mechanism for the Divestment of Shares in Coal and Mineral Mining Businesses, as amended by MEMR Regulation 43/2018 (MEMR Regulation 9/2017);
- MEMR Regulation 48/2017 on the Supervision of Business Activities in the Energy and Mineral Resources Sector, as amended by MEMR Regulation 7/2020;

- MEMR Regulation 25/2018 on Coal and Mineral Mining Business, as lastly amended by MEMR Regulation 17/2020 (MEMR Regulation 25/2018);
- MEMR Regulation 26/2018 on the Implementation of Good Mining Principles and the Supervision of Coal and Mineral Mining; and
- MEMR Regulation 7/2020 on Procedures for the Granting of Areas, Licensing and Reporting of Coal and Mineral Mining Business Activities (MEMR Regulation 7/2020).

Of these regulations, several that were issued in 2018 are particularly important. GR 8/2018, which is the fifth amendment of GR 23/2010, confirms that the MEMR is authorised to determine the sale price of coal for the fulfilment of domestic market obligations.

MEMR Regulation 25/2018 generally regulates the performance of activities under:

- an IUP;
- an IUPK;
- an IUPOP specifically for processing and refining (IUPOP-PR); and
- an IUPOP specifically for transportation and sales (IUPOP-TS).

MEMR Regulation 25/2018 also contains provisions on:

- divestment;
- workforce;
- non-tax state revenue;
- the purchase of capital goods; and
- coal and mineral benchmark prices.

MEMR Regulation 7/2020 regulates matters relating to, among other things:

- determining and stipulating WIUPs and WIUPKs;
- information systems on mining areas;
- the procedure for granting WIUPs and WIUPKs;
- the procedure for granting mining permits;
- the rights and obligations of mining permit holders;
- work plans and budgets; and
- periodical reporting requirements.

MEMR Regulation 7/2020 provides, among other things: (1) a relaxed timeline on the escalation from an IUPE to an IUPOP; (2) additional obligations for holders of an IUJP and an IUPOP specifically for transportation and sales; (3) the obligation for IUP holders to apply to the MEMR to adjust their IUP upon the change of status from a domestic investment company to a foreign investment company; (4) a reporting requirement on the change of management (board of directors or board of commissioners) of a mining company; and (5) additional provisions on the amendment of the mandatory Annual Work Plan and Budget.

The Mining Law Amendment revised 83 provisions in the Mining Law and introduce 52 new provisions. Some of the changes provided under the Mining Law Amendment may need to be further implemented by government regulations or lower-level regulations. As a result, the existing implementing regulations may also be amended in the near future.

The Mining Law specifies 31 matters to be further regulated under government regulations, with the implementing legislation to be stipulated within a year of the enactment of the Mining Law Amendment. While waiting for the amendment to or new regulations to implement the Mining Law Amendment, the existing implementing regulations will remain effective and valid to the extent they are consistent with the Mining Law Amendment.

Classification system

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Directorate General of Mineral and Coal Regulation 569.K/30/DJB/2015 on the Application of the Indonesian National Standard and the Committee Code for Indonesian Mineral Reserves in Exploration Outcome Report, Natural Reserve Estimates, and Mineral and Coal Reserve Estimates requires all IUP and CoW holders to prepare reports on the outcome of:

- exploration activities;
- resource estimates; and
- coal or mineral reserve estimates.

These reports must comply with the Indonesian National Standard and the Committee Code for Indonesian Mineral Reserves, known as the KCMC Code, which is similar to the JORC Code. One of the key features of the KCMC Code is the requirement for these reports to be prepared by a Competent Person Indonesia (a minerals industry professional), who must be registered with the Association of Indonesian Geologists or the Indonesian Mining Experts Association.

MINING RIGHTS AND TITLE

State control over mining rights

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The Constitution stipulates that Indonesia's natural resources are controlled by the state and must be used for the maximum benefit of the Indonesian people. Article 4, paragraph 2 of the Mining Law enables the central government to exercise control over mineral mining activities.

The government has the authority to grant eligible private parties mining permits (IUPs) to conduct mining activities. An IUP does not grant ownership of the minerals in the ground. Ownership of the minerals is transferred from the government to the IUP holder once the royalty payment has been settled. In accordance with this, land rights do not give the rights holder ownership of the minerals in the ground or the right to mine the minerals. Unless the land rights holder also holds a mining licence, it will not have the right to mine the minerals in the ground.

Publicly available information and data

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency, or securities commission regulating public companies, which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

At present, the Ministry of Energy and Mineral Resources (MEMR) maintains a publicly accessible information database containing information on, among other things, mining area maps, number of mining permit holders, and basic geospatial and thematic maps. Such information and data are kept and maintained by the government. In support of the preparation of mining zones and the development of mining science and technology, the MEMR and governors may order state or regional research institutions to conduct surveys and research into mines.

IUP and IUPK holders, as well as contractors under the relevant contract of work (CoW), must submit reports on their mining business activities to the relevant central or regional government, including a mineral assessment. Data possessed by regional governments must be shared with the central government for the national management of mining data. Additionally, the Mining Law also provides several provisions on the management and content of mining data for the preparation of mining areas and to promote development in science and technology.

Acquisition of rights by private parties

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence or more senior tenure? What are the requirements to convert to a mining licence?

Under the Mining Law, mining activities can be conducted only after obtaining an IUP, which may be granted by the MEMR. IUPs can be granted to:

- business entities;
- cooperatives; and
- individuals.

The Mining Law Amendment changes the term 'individuals' to 'proprietorship'. Unfortunately, it does not provide any definition of proprietorship or elucidate this change.

Under the Mining Law and its implementing regulations, IUPs are divided into exploration IUPs (IUPEs) and operation production IUPs (IUPOP). An IUPE covers the general survey, exploration and feasibility study stages, while an IUPOP covers the construction, mining, processing and/or refining stages, development and/or utilisation, as well as transportation and sales.

An IUPK can also be granted by the MEMR to private entities. An IUPK holder is permitted to mine in a special mining business licence area that is located in a state reserve. However, state-owned and regional-owned enterprises have priority over private entities when it comes to obtaining an IUPK.

Before applying for an IUP, the applicant must participate in a tender process to obtain a mining business permit area (WIUP). There is an exemption for non-metal minerals and rock mining, whereby a WIUP and an IUP can be obtained through an application to the MEMR.

An IUPK will be granted after the mining company has secured a special mining permit area (WIUPK) through a competitive bid (for metal minerals and coal). State-owned and regional-owned enterprises have priority when it comes to obtaining a WIUPK. The MEMR can offer a WIUPK to private businesses by way of tender if no state-owned or regional-owned enterprises are interested in the offer or meet the financial, technical and environmental management and administrative requirements for the WIUPK. An IUPK may also be granted upon an application by a CoW holder whose CoW will expire, in the manner set out under MEMR Regulation 7/2020.

The Mining Law provides a guarantee to IUPE holders who have completed their exploration activity that they can obtain an IUPOP to continue their mining business activities. The holder of an IUPE or IUPK exploration may apply to the MEMR to upgrade the licence to an IUPOP or an operation production IUPK (IUPKOP).

Private companies that are engaged in mining-related activities (eg, mineral processing, refinery activities or mineral trading) are also subject to the licensing system under the Mining Law. Unlike the previous regime, under the Mining Law Amendment, any company that conducts mineral processing and refinery business activities must obtain an industrial licence issued by the Ministry of Industry. Therefore,

any existing IUPOP specifically for processing and refining must be converted to an industrial business licence issued by the MOI by no later than 10 June 2021.

On the other hand, previously, any company engaging in mineral trading business activities had to obtain an IUPOP specifically for transportation and sales (IUPOPK-TS). However, under Article 35 of the Mining Law Amendment, the reference to IUPOPK-TS is replaced by transportation and sales business licence. Based on Article 104 of the Mining Law, processing and refinery activities can be done by IUP or IUPK holders integrated with their mining activities or by entering into a cooperation with other IUPOP or IUPKOP holders that own processing and refinery facilities, or with other companies that run processing and refinery activities that are not integrated with mining activities and that operate based on the licence issued in accordance with the laws and regulations on industry.

Renewal and transfer of mineral licences

11 | What is the regime for the renewal and transfer of mineral licences?

Under the Mining Law, mining licence holders may apply to the MEMR to extend the initial term of the IUP that is due to expire. Under MEMR Regulation 7/2020, applications for the extension of an IUPOP or IUPKOP for metal minerals and certain non-metal minerals must be submitted at the earliest five years and at the latest one year before expiration. The extension application for an IUPOP for non-metal minerals or rocks can be submitted at the earliest two years and at the latest six months before expiration. The Mining Law provides that IUPE for metal minerals can be extended for one year for each extension upon fulfillment of certain requirements. In addition, the Mining Law provides guarantee that an IUPOP for minerals can be extended upon fulfillment of certain requirements.

Under MEMR Regulation 7/2020, the application to extend an IUPOP and IUPKOP must be submitted at least one year before expiration, and an application to extend an IUPOPK-TS must be submitted no later than one month before the expiration date. It should be noted, however, the Mining Law would require the adjustment of a mining business licence for production operation specifically for processing and refining (IUPOPK-PR) to an industrial business licence (IUI) within a year of the effective date of the amendment of Mining Law, namely 10 June 2020. This provision may address the concerns of smelter companies that had to obtain an IUPOPK-PR and an IUI to conduct processing and refining.

With respect to the transfer of a licence, article 93A of the Mining Law provides that an IUP and an IUPK may only be transferred to other parties if the initial holders have completed the exploration stage and have satisfied administrative, technical, environmental, and financial requirements, and subsequently obtain an approval from the MEMR. Article 7A of GR 23/2010 further allows the holder of an IUP to transfer the IUP to its subsidiary, provided that the IUP holder holds at least 51 per cent of shares in the transferee. Furthermore, article 7B of GR 23/2010 also allows state-owned enterprises to transfer their mining licences to their subsidiaries, provided that they hold at least 51 percent of shares in the transferee.

With respect to the change of shareholding composition of licence holders, article 64(1) of MEMR Regulation 7/2020 requires the prior approval of the MEMR or governor, as relevant. This approval must be obtained prior to the registration of the share transfer with the Ministry of Law and Human Rights. Under the Mining Law, a transfer of shares in IUP and IUPK holders is subject to obtaining MEMR approval, which would be granted upon the completion of the exploration stage and the satisfaction of administrative, technical, environment and financial requirements.

Duration of mining rights

12 | What is the typical duration of mining rights? Is there a requirement to relinquish a portion of the mining rights to the government after a certain number of years?

Type of mining licence	Initial duration	Extensions
IUPE for metal minerals	8 years	Extendable, one year per extension
IUPE for certain non-metal minerals	7 years	N/A
IUPK exploration for metal minerals	8 years	Extendable, one year per extension
IUPE for non-metal minerals	3 years	N/A
IUPE for rocks	3 years	N/A
IUPOP for metal minerals	Maximum 20 years	Extendable twice, 10 years per extension
IUPOP for certain non-metal minerals	Maximum 20 years	Extendable twice, 10 years per extension
IUPOP for non-metal minerals	Maximum 10 years	Extendable twice, 5 years per extension
IUPOP for rocks	Maximum 5 years	Extendable twice, 5 years per extension
IUPOP that is integrated with processing and refinery	30 years	Extendable, 10 years per extension
IUPK that is integrated with processing and refinery	30 years	Extendable, 10 years per extension
IUPOPK-TS / Transportation and sales licence	5 years	Extendable, 5 years per extension
IUP for sales	Granted for a single sales activity	
SIPB	Not specified, to be provided under the SIPB	

Based on GR 23/2010, IUPE and IUPKE holders are obliged to relinquish a certain portion of their exploration areas after a certain period of time, as specified below:

Type of mining commodity	Year of exploration	Maximum mining area
Metal minerals	4 th year	50,000 hectares
	8 th year / at the end of Exploration stage	25,000 hectares
Coal	4 th year	25,000 hectares
	7 th year / at the end of Exploration stage	15,000 hectares
Non-metal minerals	2 nd year	12,500 hectares
	3 rd year / at the end of Exploration stage	5,000 hectares
Certain non-metal minerals	3 rd year	12,500 hectares
	7 th year / at the end of Exploration stage	5,000 hectares
Rocks	2 nd year	2,500 hectares
	3 rd year / at the end of Exploration stage	1,000 hectares

Acquisition by domestic parties versus acquisition by foreign parties

13 | Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Foreign parties may acquire mining rights in the form of an IUP or IUPK. To acquire mining rights, foreign parties must set up a limited liability company that can be 100 per cent foreign-owned (PT PMA). Under

the Company Law, at least two shareholders are required to set up a limited liability company. Alternatively, the foreign party may combine with a local investor to set up a PT PMA. However, once the PT PMA commences commercial production, it is obliged to gradually divest the shares owned by foreign shareholders after five years of production, so that by the 10th year of production 51 per cent of the shares are held by Indonesian participants. Both domestic and foreign parties are subject to the licensing regime under the Mining Law and its implementing regulations.

The central government shall stipulate a foreign ownership restriction, which may be applicable at the establishment of a mining company. This is in line with the government's effort to strengthen the role of state-owned enterprises in the mineral and coal mining sector. Recently, the central government issued Presidential Regulation No. 10 of 2021 concerning Capital Investment Business Fields (PR 10/2021), which lists those business activities subject to foreign ownership restrictions. Under PR 10/2021, the mineral and coal mining sector is not subject to any foreign ownership restriction.

Protection of mining rights

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Under article 154 of the Mining Law, any dispute arising from the implementation of an IUP or IUPR must be settled through a domestic court or arbitration. The enforcement of foreign arbitration awards in respect of domestic mining disputes may be relevant to mining activities based on a CoW, under which the parties may agree to submit to a foreign arbitration body to settle any dispute arising from the contract. A foreign arbitration award can be enforced after the District Court of Central Jakarta has recognised the award through the issuance of an exequatur. However, in practice, parties looking to enforce foreign arbitration awards face a number of challenges, and the judgments of Indonesian courts on enforcement often vary. At present, there are no reliable statistics on the number of foreign arbitral awards successfully enforced in Indonesia.

Surface rights

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests or does the holder of the mineral tenure have priority over surface rights use?

Under the Mining Law, the right to mining concessions granted under IUPs does not include surface rights. However, mining licence holders can acquire rights over the land in their concession area for mining activities or the construction of facilities. The Mining Law requires a mining licence holder to settle with any land owners that have title over the land before conducting mining activities. Under the Agrarian Law (Law 5/1960 on the Basic Agrarian Law), the types of land rights that may be acquired by mining companies are the right to build and the right to use. These land rights must be registered with the National Land Agency. Land owners can oppose the request to acquire the land and negotiations between owners and mining companies over compensation can be long and contentious.

To ensure the smooth implementation of land acquisition for mining companies, the Mining Law provides that the central government shall settle land title issues for mining business activities by way of mediation in the absence of mutual agreement between the IUP or IUPK holder and the land owner. The extent to which the central government would conduct such settlement is to be further regulated under an implementing government regulation.

Participation of government and state agencies

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The government has the right to apply for an IUP or IUPK through any state-owned or regional-owned company engaging in mining business activities. The Mining Law gives priority to state-owned and regional-owned companies seeking to obtain an IUPK.

State-owned and regional-owned companies also have the right to acquire shares in mining companies as a result of the implementation of divestment obligations of foreign investment mining companies.

There is no local listing requirement for the project company.

Government expropriation of licences

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Law 25/2007 on Capital Investment, as amended by the Omnibus Law, prohibits the government from nationalising or expropriating the proprietary rights of investors, unless provided by law. If the government nationalises or expropriates the proprietary rights of investors, it must pay compensation according to the market value. Additionally, Indonesia is a party to the International Convention for the Settlement of Investment Disputes (ICSID), which confers a right to foreign investors to challenge government expropriation in an ICSID tribunal.

Protected areas

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits to mineral exploration or mining, or specially regulated?

Under Law 41/1999 on Forestry, as amended by the Omnibus Law, mining activities are restricted in conservation forest areas. Mining activities are permitted only in production and protected forest areas. Production forest areas are open for both open-pit and underground mining, while protected forest areas are open only for underground mining. Recently, the government enacted Government Regulation 23/2021 on the Implementation of Forestry (GR 23/2021), which requires mining companies to obtain a Forest Utilization Permit from the Ministry of Environment and Forestry before conducting any mining activity in a forest area. Mining activities within forest areas are subject to obligations, restrictions and prohibitions provided under GR 23/2021. These include the obligations to pay official fees and conduct environmental rehabilitation, and a prohibition on granting security rights over a forest utilisation area.

Mining activities are prohibited in nature and wildlife reserves under Law 5/1990 on the Conservation of Biological Resources and Ecosystems.

DUTIES, ROYALTIES AND TAXES

Duties, royalties and taxes payable by private parties

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Mining Law obliges mining permit (IUP), special mining permit (IUPK), small-scale mining permit (IPR) and rock mining licence (SIPB) holders to, among other things, pay dead rent and royalties, which are categorised as non-tax state revenue (PNBP). Aside from dead rent and royalties, IUP and IUPK holders shall pay other PNBP in accordance with the laws and regulations.

IUP, IUPK, IPR and SIPB holders are also obliged to pay regional revenue in the form of regional tax, retribution, community mining contribution, and other regional revenue in accordance with laws and regulations.

GR 81/2019 on Types and Tariff of PNPB Applicable to the Ministry of Energy and Mineral Resources (MEMR) (GR 81/2019) requires IUP and IUPK holders to pay dead rent of 30,000 rupiah per hectare per year for the exploration stage and 20,000 to 60,000 rupiah per hectare per year for the operation production stage. Additionally, IUP and IUPK holders must pay royalties ranging from 1 per cent to 10 per cent of the sale price of the minerals produced per year, depending on the type of mineral products. Dead rent and royalties payable by contract of work (CoW) holders are stipulated in the relevant contract.

With respect to tax, IUP and IUPK holders are generally subject to:

- corporate income tax at the rate of 25 per cent of net taxable profit;
- VAT at 10 per cent for the delivery of goods or services; and
- regional taxes and retributions.

The tax rate for CoW holders is stipulated in the relevant contract.

Tax advantages and incentives

20 | What tax advantages, tax credits and incentives are available to private parties carrying on exploration and mining activities?

GR 78/2019 on Income Tax Facilities for Investment in Certain Business Sectors and/or Located in Certain Areas provides tax allowances for the mining sector are available subject to the fulfilment of certain criteria. Tax allowances include:

- a reduction of net taxable income up to 30 per cent of the amount that has been invested, in the form of tangible fixed assets including land, prorated at 5 per cent for six years calculated from the commencement of commercial operation;
- an accelerated depreciation of tangible assets and amortisation of intangible assets;
- withholding tax on the dividends that are paid to non-residents, other than permanent establishments, at a rate of 10 per cent; and
- an increased loss carry forward period from five years to 10 years.

These allowances are generally applicable for the construction or expansion of smelters.

In response to the covid-19 pandemic, the government provided tax incentives for various sectors, including the coal and mineral mining sector, as stipulated in Minister of Finance Regulation 9/2021 on Tax Incentives for Taxpayers Affected by the Corona Virus Disease 2019 (Covid-19) Pandemic (MOF Regulation 9/2021). The tax incentives provided under MOF Regulation 9/2021 comprise (1) article 21 Income Tax to be borne by the government; (2) Article 22 Import Tax holiday; and (3) article 25 Income Tax reduction.

Tax stabilisation

21 | Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No, there are no tax stabilisation legislation or tax stabilisation agreements in force.

Carried interest

22 | Is the government entitled to a carried interest, or a free carried interest in mining projects?

No, the government is not entitled to a carried interest or a free carried interest in mining projects.

Transfer taxes and capital gains

23 | Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Under the Mining Law, a mining licence can be transferred to another party upon the approval of MEMR, pursuant to article 66(k) of MEMR Regulation 7/2020 and subject to certain requirements under the Mining Law and its implementing regulations. There is no provision under the Mining Law on transfer taxes or capital gains resulting from the transfer of licences.

It appears that the provisions on the transfer of IUP are a bit relaxed under the Mining Law, which requires IUP holders to complete the exploration stage and fulfil administrative, technical, environmental, and financial requirements to subsequently obtain MEMR approval. There is also no provision on transfer taxes or capital gains resulting from the transfer of licences in the Mining Law.

The transferor may be subject to corporate income tax under the prevailing tax regulations for any revenue generated from the transfer of the mining licence.

Distinction between domestic parties and foreign parties

24 | Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign investment companies. IUP and IUPK holders are subject to dead rent and royalties at rates stipulated by GR 81/2019. In regard to taxes, IUP and IUPK holders are subject to the applicable laws and regulations. For CoW holders, the amount of duties, royalties and taxes payable to the government vary depending on the amounts agreed in the relevant contract.

BUSINESS STRUCTURES

Principal business structures

25 | What are the principal business structures used by private parties carrying on mining activities?

Most private parties engaging in mining business activities do so in the form of a limited liability company. In respect of foreign investment, Law 25/2007 requires a joint venture company to be established in the form of a limited liability company.

Local entity requirement

26 | Is there a requirement that a local entity be a party to the transaction?

A foreign investment company carrying out mining exploration activities can be 100 per cent foreign-owned at its establishment, subject to a divestment requirement as stipulated in the Mining Law. GR 23/2010 provides that operation production IUP and IUPK holders must begin to divest the shares owned by foreign shareholders after five years of production, so that by the 10th year of production 51 per cent of the shares are held by Indonesian participants.

Based on article 6(3) of the Mining Law, the central government will set foreign ownership limitations for foreign investment companies engaging in mining business activities. This may be an indication of the government's intention to limit foreign ownership in mining companies from the outset in addition to the divestment obligation for foreign investment mining companies.

Bilateral investment and tax treaties

- 27 | Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

The government has entered into bilateral investment treaties with many countries and the investment structure or cooperation arrangement between the government and its partners may vary from one treaty to another. Nevertheless, the government has entered into a number of bilateral investment treaties with the countries of origin of mining investors in Indonesia (eg, India, Australia and South Korea) and these generally contain similar provisions.

FINANCING

Principal sources of financing

- 28 | What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Generally, there are two financing methods, namely: equity and debt financing. Equity financing by way of capital participation allows investors to participate in the company's capitalisation. Listed companies can also attract funds from the public through a stock exchange. Debt instruments are another option for mining companies, and bank loans or bonds are the most common debt instruments used by mining companies to obtain financing. Lenders or bondholders usually require mining companies to provide security over their assets or a guarantee to secure the repayment of the loans or bonds. However, with the challenges facing the mining industry and the volatility of commodity prices, it has become more difficult for mining companies to secure financing from investors and lenders.

Direct financing from government or major pension funds

- 29 | Does the government, its agencies or major pension funds provide direct financing to mining projects?

Other than financing the mining projects of state-owned and regional-owned companies by way of capital participation, the government does not provide direct financing to mining projects.

However, in 2018, through the Ministry of State-Owned Enterprises, the government established state-owned private investment firm PT Bandha Investasi Indonesia, which aims to provide funding for infrastructure projects in Indonesia.

Security regime

- 30 | Please describe the regime for taking security over mining interests.

Under the Mining Law and the Ministry of Energy and Mineral Resources (MEMR) Regulation 7/2020, any mining permit (IUP) or special mining permit (IUPK) holder is prohibited from granting security rights over their mining licences or mining commodities, or both. The assets of mining companies can be secured typically by way of mortgage, pledge or fiduciary security rights, depending on the type of secured object. Certain types of security rights, namely fiduciary security and land mortgage, require registration at the relevant and fiduciary security registration office and land office for perfection purposes.

RESTRICTIONS

Importation restrictions

- 31 | What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There is no restriction on such imports. Subject to the relevant contract of work or coal contract of work, mining licence holders may apply for import duty and VAT exemptions for certain machinery and equipment used in the development and expansion stages of their business activities. However, there is a restriction on the transfer, re-export or destruction of machinery and equipment imported by mining licence holders with import duty and VAT exemption. Failure to adhere to the restrictions on import duty and VAT exemptions may result in the forced payment of import duty and VAT, as well as penalties.

Standard conditions and agreements

- 32 | Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no standard conditions and agreements covering equipment supplies used in Indonesia. Parties to equipment supply agreements typically choose an arbitration forum to settle disputes relating to the agreement.

Mineral restrictions

- 33 | What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Under the Mining Law, mining companies must refine or process mining products domestically. At the Operation Production stage, mining companies can construct their own smelter or enter a cooperation with other mining companies at the Operation Production stage or smelter companies through the sale and purchase of ore or concentrate, or the joint construction of a smelter, subject to the approval of the MEMR).

With regard to exports, mining products may be exported only after the mining company:

- satisfies the minimum level of processing or refining;
- obtains an export recommendation from the Ministry of Energy and Mineral Resources (MEMR);
- obtains export approval from the Ministry of Trade (MOT); and
- pays export duties.

MEMR Regulation 25/2018 provides the minimum level of processing and refining for different mining products.

Pursuant to article 17 and article 44(a) of MEMR Regulation 25/2018, until 10 June 2023, metallic minerals such as copper, iron ore or sand, manganese, lead, zinc, ilmenite and titanium can be exported, provided that, among other requirements, they have been processed in accordance with the minimum processing requirement under MEMR Regulation 25/2018. Other minerals such as nickel, bauxite, tin, gold, silver and chromium must be refined according to the minimum refinery requirements under MEMR Regulation 25/2018 before being exported.

The obligation to satisfy the minimum refinery or processing requirements does not apply for minerals that are due to be used domestically or for R&D purposes through the delivery of samples to other countries.

Article 32 of MEMR Regulation 25/2018 enables the MEMR to control the sale of minerals by stipulating the amount and type of: minerals for the fulfilment of domestic needs (domestic market obligation); and minerals that can be sold abroad.

Furthermore, the government imposes limitations on the export of certain mineral products under MOT Regulation No. 96 of 2019 dated 30 December 2019 regarding Provisions on the Export of Processed and Refined Mining Products, which provides limitations on the export of various mineral products according to purity level.

In addition, the Mining Law provides an additional provision that an operation production IUP (IUPOP), operation production IUPK and CoW holders for metal minerals that have been or are processing or refining metal minerals may export certain unprocessed metal minerals within a certain quota for a maximum of three years as of 10 June 2020. However, this export would be subject to further requirements under a government regulation.

Import of funds restrictions

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Bank Indonesia Regulation 17/3/PBI/2015 on the Mandatory Use of Rupiah stipulates that parties must use rupiah in transactions conducted in Indonesia. However, the regulation also stipulates that certain transactions are exempt from this obligation. In addition, under Law 25/2007, as amended by the Omnibus Law, investors can transfer or repatriate funds in a foreign currency in certain circumstances.

Article 18 of Bank Indonesia Regulation 18/19/PBI/2016 on Foreign Currency Transactions against Rupiah between Banks and Foreign Parties (BI Reg. 18/2016) further provides that Indonesian banks are prohibited from transferring rupiah to any offshore account. As a result, amounts in rupiah must be converted into another currency before being transferred offshore. With regard to conversion, article 5, paragraph 1 of BI Reg. 18/2016 requires that any purchase of foreign currency exceeding US\$25,000 must have an underlying transaction as evidenced by supporting documents.

ENVIRONMENT

Principal applicable environmental laws

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws applicable to the mining industry are:

- Law 32/2009 on Environmental Protection and Management, as amended by the Omnibus Law, and its implementing regulations;
- GR 78/2010 on Reclamation and Post-mining;
- GR 22/2021 on Implementation of Environmental Protection and Management;
- the Ministry of Energy and Mineral Resources (MEMR) Regulation 26/2018 on the Implementation of Good Mining Principles and Supervision of Mineral and Coal Mining (MEMR Reg. 26/2018); and
- MEMR Decree 1827K/30/MEM/2018 on the Guidelines for the Implementation of Good Mining Technique Principles (MEMR Decree 1827K/2018).

The principal regulatory bodies that administer these laws are:

- the Ministry of Environment and Forestry (MOEF);
- the authority that issued the mining licence; and
- the relevant regional government.

Environmental review and permitting process

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Under the Environmental Law and the newly enacted GR 22/2021, assessment of the applicable environmental licensing is based on the environmental impact of the relevant business or activities.

Generally, businesses and activities must obtain an Environmental Approval as a prerequisite to obtaining business licence or licences to commence their production activities. An Environmental Approval is obtained by:

- having an environmental impact analysis (AMDAL) for businesses and activities with a material environmental impact;
- environmental management effort and environmental monitoring effort (UKL-UPL) for certain businesses and activities with a non-material environmental impact; and
- an environment management and monitoring capability statement (SPPL) for other businesses and activities with a non-material environmental impact, which are not subject to the UKL-UPL requirement.

The determination of the materiality of the environmental impact of a business or activity is stipulated in GR 22/2021.

In respect of mining activities, an AMDAL is required, save for exploration activities not accompanied by business or activities that require an AMDAL, and conducted outside of protected areas or in areas that do not neighbour protected areas or conducted within or in areas neighbouring exempted protected areas. Mining activities also require an Environmental Approval regardless of the stage.

Before preparing an AMDAL or UKL-UPL, the mining company must ensure that the intended mining location complies with the applicable spatial layout plan; otherwise, the AMDAL or UKL-UPL document cannot be assessed by the authorities.

A UKL-UPL is prepared by completing the UKL-UPL Form stipulated by the relevant ministries, which should be available in the Environmental Information System organised by the MOEF, or if not available there, in Annex III of GR 22/2021. The completed form shall be submitted to the minister, governor or regent/mayor, as relevant, through the Online Single Submission (OSS) system for those activities or businesses classified as medium-low risk under GR 5/2021, or through the Environmental Information System maintained by the MOEF for those activities or businesses classified as medium-high risk and high risk. For medium-low risk activities or businesses, an Environmental Management Commitment Approval shall be issued through the OSS system automatically upon the completion of the assessment of the UKL-UPL documents, while for medium-high risk and high-risk activities or businesses, the Environmental Management Commitment Approval shall be issued through the Environmental Information System maintained by the MOEF within two business days upon the completion of the assessment of the UKL-UPL documents. Such Environmental Management Commitment Approval shall constitute an Environmental Approval as required under GR 22/2021.

An AMDAL document includes:

- terms of reference form;
- an environmental impact analysis report (ANDAL); and
- an environmental management plan/environmental monitoring plan (RKL/RPL).

An AMDAL must be prepared by a party that holds a relevant certificate of competence. Preparation of the AMDAL consists of the following stages:

- involving the affected community;
- completion, submission, examination and issuance of minutes of agreement on terms and reference form;

- preparation and submission of ANDAL and RKL-RPL; and
- assessment of ANDAL and RKL-RPL.

In respect of the affected community's involvement, the mining company shall announce the activity and business plan to the affected community through the mass media or at the premises of the mining company, or both. In addition, the mining company can announce the same in other media (eg, brochures, pamphlets, television, websites, radio or the announcement board at the local environmental office).

The mining company must also conduct a public consultation to enable community members to comment on the planned project. These comments will then be reviewed by the Environmental Feasibility Team to be reflected in the terms of reference form. The mining company must then prepare the terms of reference form in accordance with the terms of reference form stipulated by the relevant ministries, which shall be available in the Environmental Information System organised by the MOEF, or if not available there, in Annex II of GR 22/2021. The terms of reference will then be evaluated by the minister, governor or regent/mayor, as relevant, through the Environmental Feasibility Team.

Once the terms of reference have been approved, the mining company must prepare the ANDAL and RKL/RPL documents in the manner prescribed by GR 22/2021, and submit the same to the minister, governor or regent/mayor, as relevant, through the environmental information system for the evaluation of the Environmental Feasibility Team. Evaluation of the documents comprises administrative and substantive assessments. Substantive assessment should be completed within 50 business days upon the submission of the complete ANDAL and RKL/RPL documents, based on the administrative assessment of the same. Based on this evaluation, the Environmental Feasibility Team shall issue an environmental feasibility recommendation to the minister, governor, regent or mayor, as relevant, which shall become the basis for the issuance of the Environmental Feasibility Decision. The Environmental Feasibility Decision shall be issued within 10 business days following the receipt of the environmental feasibility recommendation.

The Environmental Feasibility Decision issued by the minister, governor or regent/mayor, as relevant, shall constitute an Environmental Approval as required under GR 22/2021.

Sustainability

37 | Do government agencies or other institutions in your jurisdiction provide incentives or publish environmental and social governance (ESG) guidelines for green projects?

Generally, mining companies are obliged to uphold good mining principles pursuant to MEMR Reg. 26/2018. To implement this provision, the government has issued a guideline for environmental and social guidance for mining companies through MEMR Decree 1827K/2018. The scope of MEMR Decree 1827K/2018 covers the management of technical, environmental and safety aspects of mining companies.

With regard to the conservation of the environment, MEMR Decree 1827K/2018 sets out specific guidelines for each stage of mining activity (eg, exploration, construction, exploitation, transportation). In short, the guidelines cover the mitigation of environmental damage, fulfilment of standard effluent, management of land and conservation of surrounding ecosystems.

The government does not provide financial or fiscal incentives for mining companies for green projects. Under MEMR Decree 1827K/2018, mining companies will receive an award from the MEMR if they implement good environmental management.

Closure and remediation process

38 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Under GR 78/2010 and MEMR Reg. 26/2018, CoW, IUP and IUPK holders are subject to reclamation and post-mining obligations at both the exploration and exploitation stages.

As part of their reclamation and post-mining obligations, IUP exploration and IUPK holders must:

- submit a reclamation plan for the exploration stage to the mining licence issuing authority;
- provide a reclamation and post-mining guarantee, the amount of which will be subject to the approval of the appropriate issuing authority;
- carry out the reclamation plan; and
- submit a reclamation plan for the operation production stage and a post-mining plan when applying for an operation production IUP (IUPOP) or an exploration IUPK and operation production IUPK (IUPKOP) and obtain MEMR approval for the same.

IUPOP or IUPKOP holders must:

- provide a reclamation and post-mining guarantee, the amount of which will be subject to approval of the appropriate issuing authority;
- submit periodic reclamation plans for the operation production stage;
- carry out operation production stage and post-mining reclamation; and
- report the implementation of these activities to the appropriate issuing authority.

The Mining Law seems to require mining companies to prepare reclamation and post-mining plans at any stage of their mining activities (ie, exploration and operation production).

Restrictions on building tailings or waste dams

39 | What are the restrictions for building tailings or waste dams?

Construction of tailings or waste dams is governed under, among others, Minister of Public Works and Housing (MOPWH) Regulation 27/PRT/M/2015 on Dams, as amended by MOPWH Regulation No. 6 of 2020 (MOPWH Regulation 27/2015). The construction of a tailings or waste dam requires:

- a water resources utilisation licence from the MOPWH, local governor or local regent or mayor (as applicable), unless no water resource is used;
- a principle licence from the MOPWH, local governor or local regent or mayor, depending on the construction location, after obtaining a technical recommendation from the MOEF and the MEMR; and
- a construction licence from the MOPWH.

MOPWH Regulation 27/2015 imposes a general obligation to use workers with the relevant expertise and skills, and certain roles may require a certificate of expertise.

Furthermore, pursuant to GR 22/2021, if tailing dams are used to store hazardous waste, standard or technical details for the storage of hazardous waste, as well as environmental requirements, must be fulfilled. The storage of hazardous waste is subject to the maximum storage duration and reporting obligations stipulated in GR 22/2021.

MOPWH Regulation 27/2015 does not refer to the responsibilities of mining companies with regard to rescuing people in case of a dam failure. The local community has the right to file a complaint or lawsuit

against a mining company for any damages due to the construction and management of a dam. In practice, the mining company may be required to provide compensation to the local community in the event of a dam failure. Additionally, GR 22/2021 provides that in the event of environmental damage from hazardous waste, the business actor that produces and/or manage the hazardous waste must remedy the damage through the mechanism stipulated under GR 22/2021. Such remedy comprises environmental pollution and/or environmental damage mitigation, as well as recovery of environmental function measures.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

40 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety and labour laws applicable to the mining industry are:

- Law 1/1970 on Occupational Safety;
- Law 13/2013 on Manpower as amended by the Omnibus Law, and its implementing regulations; and
- the Ministry of Energy and Mineral Resources (MEMR) Reg. 26/2018.

The principal regulatory bodies that administer those laws are:

- the Ministry of Manpower (MOM);
- the MEMR as the issuing authority of the mining licence; and
- the relevant regional government.

Management and recycling of mining waste

41 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The management and recycling of mining waste products must be done by the mining companies that produce the waste products, as regulated by GR 22/2021. GR 22/2021 further stipulates that companies that produce toxic or hazardous waste must carry out toxic and hazardous waste management in the form of waste identification, reduction, storage, collection, transportation, utilization, processing, piling, dumping, exclusion, transboundary movement, management of environmental pollution or damage, restoration of environmental function, creation of a waste management emergency response system, and financing. GR 22/2021 states that any utilisation, processing and storage of toxic and hazardous wastes shall be performed by the producer of such waste. If the producer of the waste is incapable of carrying out the utilisation, processing and storage of the waste, it can contract with a licensed party to carry out the utilisation, processing and storage of the toxic and hazardous waste including tailings produced from mining activities.

Use of domestic and foreign employees

42 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There is no restriction or limitation imposed on the use of domestic and foreign employees specific to mining activities. The Mining Law sets forth a rather generic requirement for mining companies to prioritise the utilisation of local manpower according to the relevant laws and regulations but still considering the competency and expertise of the available local manpower.

As a general rule, the employment of domestic workers is subject to various restrictions, including:

- minimum wage;
- the execution of a collective labour agreement or employment agreement in the Indonesian language (as applicable);
- enrolment in the mandatory social security programme;
- filing of mandatory worker reports; and
- severance payment on termination.

The employment of foreign nationals is also subject to various restrictions, including:

- the MOM's list of roles closed to foreign employees;
- completion of a foreign worker utilisation plan;
- notification to the MOM; and
- a work permit.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

43 What are the principal community engagement or corporate and social responsibility (CSR) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Although not specific to the mining industry, the Company Law, the Mining Law and GR 47 of 2012 dated 4 April 2012 on Corporate Social and Environment Responsibility provide certain corporate social and environmental responsibilities for companies. More specifically, under article 108(1) of the Mining Law and article 106 of GR 23/2010, mining companies must implement community development and empowerment programmes as part of their annual work and budget plans, which must be approved by the Ministry of Energy and Mineral Resources (MEMR), the governor, regent or mayor, as relevant. The realisation of community development and empowerment programmes must be reported semi-annually to the relevant authority. Companies that fail to comply with these requirements will be subject to administrative penalties. For contract of work (CoW) holders, the relevant CoW will contain provisions on community development.

The implementation of community development and empowerment is strengthened under the Mining Law Amendment, with mining permit (IUP) and special mining permit (IUPK) holders required to allocate certain funds for community development and empowerment in a minimum amount as stipulated by the MEMR.

Rights of aboriginal, indigenous or disadvantaged peoples

44 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The rights of aboriginal, indigenous or currently or previously disadvantaged peoples are acknowledged only through the local community's right to obtain a people's mining right licence. This is a licence to conduct mining activities in a people's mining area that is granted to the local community, which may comprise individuals, community groups or cooperatives.

International law

45 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Indonesia is not currently a party to any international conventions or treaties related to CSR issues.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

46 Describe any local legislation governing anti-bribery and corrupt practices.

Provisions regarding anti-bribery and corrupt practices can be found in, among others:

- Law 1/1946 on the Indonesian Criminal Code;
- Law 11/1980 on Criminal Acts of Bribery (Law 11/1980);
- Law 28/1999 on State Organisers that are Clean and Free from Corruption, Collusion and Nepotism;
- Law 31/1999 on the Eradication of Criminal Acts of Corruption, as amended by Law 20/2001 (Law 31/1999);
- Law 30/2002 on the Commission for the Eradication of Criminal Acts of Corruption, as lastly amended by Law 19/2019;
- Law 7/2006 on the Ratification of the 2003 United Nations Convention Against Corruption;
- Law 46/2009 on the Court for Criminal Acts of Corruption; and
- Government Regulation 53/2010 on Civil Service Discipline.

Law 31/1999 and Law 11/1980 govern acts of corruption involving government officials or causing losses to state finances only. Corruption in the private sector, which involves only companies or private individuals, and does not involve a government official or relate to state finances, is not subject to these laws. The scope of private corruption therefore falls under the ambit of the Criminal Code and, in practice, perpetrators are reported as committing a crime of embezzlement or fraud.

Foreign legislation

47 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Only foreign companies operating in Indonesia are subject to foreign legislation governing anti-bribery and foreign corrupt practices with extraterritorial applicability (eg, the US Foreign Corrupt Practices Act and the UK Bribery Act).

Disclosure of payments by resource companies

48 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Presidential Regulation 26/2010 on the Transparency of State and Regional Revenue Originating from Extractive Industry has established an extractive industry transparency team as a first step toward implementing the EITI Standard. However, due to the covid-19 pandemic in Indonesia, the extractive industry transparency team has been dismissed and the function is now carried out by the MEMR. The dismissal was based on Presidential Regulation (PR) No. 82 of 2020 dated 20 July 2020 regarding Corona Virus Disease 2019 (Covid-19) Mitigation Committee and Recovery of the National Economy, as amended by PR 108 of 2020 dated 10 November 2020. In 2018, the government issued:

- Presidential Regulation No. 13 of 2018 on the Implementation of Know-Your-Beneficial-Owner by Corporations in the Context of Preventing and Suppressing Money Laundering and Financing of Terrorism; and
- MEMR Decree 1796K/30/MEM/2018 on Implementing Guidance for the Application, Evaluation and Issuance of Licences in the Field

of Mineral and Coal Mining, which imposes the disclosure of ultimate beneficial ownership for mining companies.

These regulations require corporations to disclose information on beneficial ownership, which is one of the requirements of the EITI.

FOREIGN INVESTMENT

Foreign ownership restrictions

49 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

A company engaging in mining business activities may be established with 100 per cent foreign investment, although it will be subject to a divestment requirement. Law 4/2009 on Coal and Mineral Mining (Law 4/2009) states that after five years of production, IUP and IUP holders whose shares are owned by foreign entities shall divest their shares to the central government, regional government, state-owned enterprises, regional-owned enterprises or private entities. Government Regulation (GR) 23/2010 further provides that operation production IUP and IUPK holders are obliged to gradually divest the shares owned by foreign shareholders after five years of production, so that by the 10th year of production 51 per cent of the shares are held by Indonesian participants (as defined below). The divestment obligation does not apply to holders of IUPOPs for processing or refining. The minimum gradual divestment is as follows:

Year after commercial production	Required divestment by mining company
6th	20%
7th	30%
8th	37%
9th	44%
10th	51%

During divestment, shares will be offered to Indonesian participants (in order of priority):

- the central government of Indonesia (through the Ministry of Energy and Mineral Resources (MEMR));
- regional governments (provincial governments or municipality or regency governments);
- state-owned enterprises and regional government-owned enterprises; and
- Indonesian private business entities (in the form of limited liability companies owned entirely by Indonesian investors).

Shares must be offered before 90 calendar days in the fifth year after production. Divestment procedures are further regulated by MEMR Regulation 9/2017. IUP holders that fail to comply with the divestment obligation will be subject to administrative penalties in the form of a written reprimand, suspension of mining activities or revocation of mining licence, or a combination of these.

MEMR Regulation 9/2017 provides that contract of work (CoW) holders must comply with the divestment requirements set forth in this regulation. MEMR Regulation 25/2018, as amended, also permits contract of work and coal contract of work holders to divest at least 51 per cent of their foreign shareholding to Indonesian participants once in the 10th year after production. A further foreign ownership restriction is stipulated in GR 77/2014, where the acquisition of a domestic mining company by foreign investors is subject to a foreign ownership restriction depending on the type of mining licence it holds.

In addition to the gradual divestment as discussed above, Article 59 of MEMR Regulation 25/2018 allows CoW holders to divest all 51 per

cent shares on the 10th year after production (lump sum divestment). MEMR Regulation 25/2018 is silent on how the lump-sum divestment method should be implemented. It is our understanding that the MEMR takes the view that the lump-sum divestment method can be employed by CoW holders if the contracts require it. Accordingly, it may be the case that the method should not be interpreted as an option but is heavily dependent on whether the relevant CoW expressly states that the divestment obligation should be done by way of lump-sum divestment.

Under the Mining Law, the central government would be authorised to stipulate a foreign ownership restriction, which may be applicable at the establishment of a mining company. With regard to the divestment obligation, the Mining Law reiterates the obligation to gradually divest 51 per cent of shares in a foreign investment mining company to Indonesian participants. However, interestingly, the Mining Law does not provide the commencement date for the divestment obligation at the fifth year after operation production. It remains to be seen in the implementing government regulation whether the commencement date of divestment obligation will be retained or changed.

INTERNATIONAL TREATIES

Applicable international treaties

50 | What international treaties apply to the mining industry or an investment in the mining industry?

Indonesia is not a party to any international (multilateral or bilateral) mining treaties. The international treaties applicable to investment in the mining industry are:

- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
- double taxation treaties; and
- free trade agreements.

UPDATE AND TRENDS

Recent developments

51 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry (legislation, major cases, significant transactions)?

Consistent with the government's commitment to boost investment and create jobs by streamlining regulations and simplifying the licensing process to improve the ease of doing business in Indonesia, the Indonesian government issued the Mining Law Amendment as well as the Omnibus Law in 2020. The Mining Law Amendment and the Omnibus Law attempt to strike a balance between the interests of business and the government. They impose additional obligations on holders of mining permits, but the government provides greater assurances that mining permit holders will be able to continue their ongoing operations. The Mining Law Amendment also seeks to foster Indonesia's mining industry by simplifying and centralising the licensing process and creating a more flexible approach for conducting mining business activities.

The key changes covered by the Mining Law Amendment include (1) types of mining licences; (2) authority to issue mining permits; (3) designation of mining areas, transfer of mining licences and change of shareholding in mining companies; (4) validity period of mining licences; and (5) provision for companies to hold more than one mining permit (IUP). The Omnibus Law addresses issues related to, among other things, tax and non-tax state revenue (eg, production contributions and royalties) and sanctions related to impediment over mining activities.

After the issuance of the Omnibus Law, the government enacted a number of regulations related to various sectors related to mining with the purpose of implementing the Omnibus Law. For instance, the government issued GR 5/2021, which concerns the licensing requirements for various business sectors, including the mineral and coal mining sectors, and GR 22/2021, which concerns the organisation of the protection and management of the environment. GR 22/2021 contains provisions related to mining activities such as environmental licensing and waste management.

Commodity prices in Indonesia generally showed a downward trend owing to low demand as a result of the covid-19 pandemic. However, currently the mining industry is trending more positively following the recovery of China's economy after the covid-19 crisis in that country.

The development of battery technology and the growth in demand for electric vehicles have contributed to an upswing in the nickel industry. As a country with a huge reserve of nickel, Indonesia has the potential to develop the nickel mining industry, both upstream and downstream. With the smelter industry growing rapidly following the implementation of the raw material export ban, mineral processing, especially nickel processing, Indonesia may become one of the world's biggest players in the nickel mining sector. Following the plan to develop the lithium battery industry in Morowali, in Central Sulawesi, the government expects nickel production to increase to meet demand.

There is a promising outlook for the Indonesian mining sector in 2021. Besides undertaking legal reforms, the government may also wish to consider providing incentives for the smelting industry to help boost the growth of this industry in Indonesia.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Indonesia has taken various actions to mitigate the impact of covid-19. These actions include the government's response to the effects of the covid-19 pandemic on the mining industry. The policies adopted by the government cover issues related to social distancing policy, tax incentives, relaxation on the issuance of export recommendation to smelter businesses, credit and easing the procedure for issuing import licences.

By virtue of Presidential Decree 12/2020 dated 13 April 2020 on the Stipulation of non-Natural Disasters of the Spread of Covid-19 as a National Disaster (PR 12/2020), regional governments are able to implement controls on the movement of residents. For example, DKI Jakarta has implemented large-scale social restrictions that restrict some on-premise business activities.

MOF Regulation No. 9/PMK.03/2021 of 2021 dated 2 February 2021 regarding Tax Incentive for Taxpayers Affected by the Covid-19 Pandemic provides tax incentives, which comprise (1) article 21 Income Tax to be borne by the government, (2) article 22 Import Tax holiday and (3) article 25 Income Tax reduction.

The Ministry of Energy and Mineral Resources (MEMR) Decree No. 46.K/MB.04/MEM.B/2021 dated 12 March 2021 on the Granting of Export Recommendation for Metal Minerals during the Covid-19 pandemic allows for the granting of export recommendations to those mining permit (IUP) and special mining permit (IUPK) holders at the Operation Production stage whose construction of refinery facilities has not reached 90 per cent completion as of the enactment of PR 12/2020, which stipulates covid-19 as a national disaster.

The Financial Services Authority (*Otoritas Jasa Keuangan* (OJK)) issued Regulation No. 11/POJK.03/2020 dated 13 March 2020 concerning National Economic Stimulus as Countercyclical Policy to the Covid-19 Outbreak, as amended by OJK Regulation No. 48/POJK.03/2020 dated 3 December 2020. This regulation allows banks to take certain measures to relax credit requirements or to restructure loans. Based on the OJK Announcement on Credit Relaxation or Restructuring, dated 31 March 2020, public banks are free to set their own terms for implementing relaxation measures.

The President issued Decree No. 9 of 2020 dated 20 March 2020, whereby the head of the National Agency for Disaster Mitigation (*Badan Nasional Penanggulangan Bencana* (BNPB)) is authorised to provide exemptions for licensing procedures in the trade and import sector. The President subsequently issued Regulation No. 58 of 2020 dated 8 April 2020, which serves as an overarching regulation stipulating the relaxation of licensing procedures for the import of:

- essential goods and foodstuffs;
- foodstuffs for government food reserves; and
- raw materials or supporting materials.



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