

**FORESTS AND MINING – IS THERE NOW SOME LIGHT AT THE END OF  
THE REGULATORY TUNNEL? <sup>12</sup>**

**INTRODUCTION**

At first sight, it appears that a lot has happened, in the last couple of months, with regard to the regulation of mining activities in Forest Areas. More particularly, the Indonesian Government has recently issued a Moratorium Instruction and 2 Regulations on Forest Area Utilization.

The Moratorium Instruction and 2 Regulations on Forest Area Utilization are as follows:

1. MoFOR Rent Use Permit Regulation;
2. Presidential Forestry & Peatlands Moratorium Instruction; and
3. Presidential Protected Forests Underground Mining Regulation.

The question which must be asked, however, is whether, individually or collectively, these regulatory initiatives actually represent any genuine progress in overcoming some of the “roadblocks” that have, in recent years, faced companies wanting to carry on mining activities in Forest Areas? In other words, is there now some real “light at the end of the tunnel” in terms of the regulation of mining activities in Forest Areas or are these recent regulatory initiatives just another example of the Government “shuffling the deck chairs on the Titanic” as far as mining activities in Forest Areas are concerned but without making any substantive change to what actually happens in terms of mining activities in Forest Areas?

**BACKGROUND**

In recent years, the regulation of mining activities in Forest Areas has proved to be one of the most intractable problems facing mining companies in Indonesia with any number of horror stories about the difficulty of and the associated delay and expense in obtaining Rent Use Permits which are required for mining activities in Forest Areas.

The difficulty of and the associated delay and expense in obtaining Rent Use Permits seemed to be compounded in May 2010 with the signing of the Oslo Accord between Indonesia and Norway pursuant to which Indonesia undertook to impose a 2 year moratorium, from 1 January 2011, on the conversion of Forest Areas and Peatlands.

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<sup>1</sup> Bill Sullivan, Licensed Foreign Advocate with Christian Teo Purwono & Partners

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Mining companies' concern about the possible implications of the Oslo Accord was heightened as a result of the repeated delays by the Indonesian Government in spelling out the precise terms of the Moratorium, which delays suggested to many that the Government was struggling to resolve the competing interest of different stakeholders in Forest Area utilization.

The Indonesian Government has certainly been under a lot of pressure to do a better job in accommodating and addressing the concerns and needs of the mining industry in terms of Forest Area activities. This has resulted in what may seem like progress at last.

At the end of March, a new regulatory regime for Rent Use Permits was introduced with the issuance of the MoFOR Rent Use Permit Regulation.

In mid May and more than 4 months late, the Moratorium contemplated by the Oslo Accord was finally introduced in the form of the Presidential Forestry & Peatlands Moratorium Instruction. At the substantially the same time, the Presidential Protected Forests Underground Mining Regulation was issued.

## **COMMENTARY**

### **1. MoFOR Rent Use Permit Regulation**

#### **1.1 Overview**

**Rent Use Permit Categories:** Rent Use Permits are now divided into 2 types being:

- (a) Rent Use Permits for Exploration Activity, which are valid for 2 years (and extendable); and
- (b) Rent Use Permits for Exploitation Activities, which are valid for the same period as the underlying business license (**e.g.**, IUP, CCoW or CoW).

**Application Requirements:** In order to obtain a Rent Use Permit, a party must, first, submit an application to MoFOR and fulfill a number of administrative and technical requirements.

**Approval in Principal:** If the Rent Use Permit applicant fulfills the subject administrative and technical requirements, MoFOR will issue to the Rent Use Permit applicant, in the first instance, an Approval in Principal License with a maximum validity period of 2 years which is extendable, subject to evaluation.

The Approval in Principal License is to be issued within 3 to 4 months of completion of the administrative and technical requirements.

The Approval in Principal License will specify a number of obligations that need to be fulfilled by the Rent Use Permit applicant for the purpose of obtaining the Rent Use Permit. Once the Approval in Principal License holder

fulfills the obligations stated in the Approval in Principal License, MoFOR will grant a Rent Use Permit to the Approval in Principal License holder.

**Rent Use Permit:** The Rent Use Permit is to be issued following submission of an application after fulfillment of the Approval in Principal License obligations and in (i) 4 months for Exploration Rent Use Permits and (ii) 2 months for Exploitation Rent Use Permits.

**Compensation Requirements:** A Rent Use Permit applicant must meet a compensation requirement as follows:

- (a) if the total Forest Area in the relevant Province, where the target Forest Area is situated, comprises less than 30% of the total Provincial land area (including islands and rivers), then the applicant must provide compensation land in certain ratios depending on the purpose of the activities to be conducted in the Forest Area; and
- (b) if the total Forest Area in the relevant Province, where the target Forest Area is situated, comprises more than 30% of the total Provincial land area (including islands and rivers), the applicant is obliged to pay Non Tax State Revenue in respect of Forest Area Utilization and carry out reforestation in certain ratios depending on the purpose of the activities to be conducted in the Forest Area.

**Permitted Area Coverage:** According to MoFOR, there is no express limitation on the size of the area which may be covered by an Exploration Rent Use Permit. However, certain limitations may apply, on a case by case basis, subject to evaluation and consideration by MoFOR.

In the case of a Production Forest Area that is already the subject of a Forest Utilization Business License, Exploitation Rent Use Permits may only be granted for a maximum of 10% of the total area covered by the Forest Utilization Business License.

In the case of a Production Forest Area that is not the subject of any Forest Utilization Business Licenses, Exploitation Rent Use Permits may only be granted for a maximum of 10% of the total Production Forest Area.

Exploitation Rent Use Permits may only be granted for a maximum of 10% of the total Protected Forest Area.

The “10% restriction” does not apply to Rent Use Permits in respect of Exploration Activities.

**Other Holder Rights:** In addition to the relevant utilization activities (i.e., general mining activities), a Rent Use Permit also gives the holder the right to carry out land clearance and deforestation activities.

**Transfers:** A party is not allowed to transfer its Rent Use Permit to another party without prior approval from MoFOR.

Transfers of Rent Use Permits will be approved within 2 months of the transfer application being submitted.

**Renewals:** Renewals of the Rent Use Permits will be approved within 2 months of the renewal application being submitted.

## 1.2 Assessment

The MoFOR Rent Use Permit Regulation is, apparently, intended to remove much of the uncertainty and reduce much of the delay which is presently associated with obtaining a Rent Use Permit. However, whether or not these objectives are realized depends very much on how the MoFOR Rent Use Permit Regulation is implemented in practice.

**Time Periods:** On its face, the most potentially significant change introduced by the MoFOR Rent Use Permit Regulation is setting out specific time periods for (i) issuing Approval in Principle Licenses and Rent Use Permits and (ii) approving renewals and transfers of Rent Use Permits. If the introduction of these time periods means that, subject to satisfying the application and approval conditions, MoFOR will definitely issue the Approval in Principle Licenses/Rent Use Permits and approve the renewals/transfers of Rent Use Permits within the specified time periods, that would, indeed, be a major step forward. This is because issuing Approval in Principle Licenses/Rent Use Permits and approving renewals/transfers of Rent Use Permits would no longer be a matter for the discretion of MoFOR but, rather, applicants would have a legal right to receive Approval in Principle Licenses/Rent Use Permits and approvals of renewals/transfers of Rent Use Permits subject only to meeting the specified criteria/obligations. It is the existence of this discretion which, in the past, has made it practically impossible to successfully challenge MoFOR failure, in a particular case, to issue an Approval in Principle License/Rent Use Permit and/or an approval of renewal/transfer of Rent Use Permit.

While a literal reading of the MoFOR Rent Use Permit Regulation might suggest the elimination of MoFOR discretion, other indicators lead the writer to reluctantly conclude that MoFOR discretion has not been removed as a result of the MoFOR Rent Use Permit Regulation. First, the MoFOR Rent Use Permit Regulation does not include any deeming provisions to the effect that, if an applicant for an Approval in Principle License/Rent Use Permit and/or an approval of renewal/transfer of Rent Use Permit does not receive written notification of the approval/rejection of its application within the specified time periods, the application is deemed to be approved. Second, at the recent CoalTrans Conference in Bali, MoFOR seemed very reluctant to acknowledge, in response to the writer's specific questions on this matter, that he no longer retained any discretion to approve/reject applications even if the application criteria and conditions have otherwise been met.

Having regard to the foregoing, it is likely the real position is simply that, if MoFOR decides to exercise his discretion in favor of an application for an Approval in Principle License/Rent Use Permit and/or an approval of renewal/transfer of Rent Use Permit, the resulting Approval in Principle

License/Rent Use Permit and/or an approval of renewal/transfer of Rent Use Permit should be forthcoming within the prescribed time periods. Assuming this is the case, the MoFOR Rent Use Permit Regulation merely represents an incremental improvement in the existing position as opposed to the exponential improvement that is actually required.

**Administrative and Technical Requirements:** It should also be noted that the MoFOR Rent Use Permit Regulation does not make any attempt to eliminate or reduce the numerous and very burdensome administrative and technical requirements for obtaining an Approval in Principal License/Rent Use Permit. In particular, the requirement for various Regent/Governor Recommendations remains unchanged. The practical difficulty and cost of obtaining Regent/Governor Recommendations has, in the past, proved to be a major “choke” point for many mining projects in need of an Approval in Principal License/Rent Use Permit. If the required Regent/Governor Recommendation cannot be obtained, then the application for an Approval in Principal License/Rent Use Permit does not even reach MoFOR with the result that the specified time periods for MoFOR to issue an Approval in Principal License/Rent Use Permit, following receipt of the application and all required supporting documents, are simply irrelevant.

**10% Restriction:** The existence of overlapping Forest Utilization Business Licenses has long been a problem for mining companies in need of an Approval in Principal License/Rent Use Permit because of the associated 10% limitation on the area covered by the overlapping Forest Utilization Business Licenses which may be the subject of Approval in Principal Licenses/Rent Use Permits. Rather than doing anything to relax this restriction, the MoFOR Rent Use Permit Regulation seems to only make the same worse by expanding the scope of the 10% restriction so that Approval in Principal Licenses/Rent Use Permits may now only be obtained for 10% of the total Production Forest Area regardless of whether or not there are any overlapping Forest Utilization Business Licenses.

## 2. **Presidential Forestry & Peatlands Moratorium Instruction**

### 2.1 **Overview**

**Scope:** For the purpose of reducing greenhouse gas emissions, the President has instructed various authorities to take all necessary action to support a moratorium on the issuance of new licenses for the utilization of Primary Natural Forests and Peat Lands except in the case of:

- (a) applications that have already received an Approval in Principle License from MoFOR;
- (b) the implementation of vital national development, such as geothermal, oil and gas, electricity, rice and sugar cane fields;
- (c) extension of existing Forest Utilization Business Licenses and/or Forest Area Utilization Permits (**i.e.**, Rent Use Permits) provided that

the relevant business licenses (**e.g.**, IUPs/CCoWs/CoWs) are still valid; and

- (d) ecosystem restoration.

**Duration:** The Moratorium is for 2 years from 20 May 2011.

**Primary Natural Forest:** “Primary Natural Forest” is a term which is commonly understood as referring to natural forest areas which have never been the subject of any logging activities. However, there is no legal definition of “Primary Natural Forest”. Accordingly, the determination of whether or not a Forest Area is Primary Natural Forest is to be made by having regard to the Indicative Map attached to Presidential Forestry & Peatlands Moratorium Instruction.

**Indicative Map:** The Indicative Map is to be prepared by MoFOR and revised and updated every 6 months.

- 2.2 **Assessment:** The restrictive wording of the Presidential Forestry & Peatlands Moratorium Instruction and, more particularly, the confinement of the Moratorium to Primary Natural Forest and Peatlands is to be seen as a big win for the mining industry. This is because it is likely to be only Conservation Forest Areas and Protected Forest Areas that contain substantial tracts of Primary Natural Forest. Even before the Presidential Forestry & Peatlands Moratorium Instruction, mining activities in Conservation Forest Areas were not allowed while mining activities in Protected Forest Areas were strictly confined to underground mining activities. Accordingly, as the Presidential Forestry & Peatlands Moratorium Instruction is intended to give effect to Indonesia’s most important obligations under the Oslo Accord; namely, the conversion of Forest Areas and Peatlands, it is not really clear what, if anything, Norway is actually getting in return for its promise to provide funding of up to US\$ 1 billion for Indonesia’s efforts to reduce greenhouse gas emissions from deforestation and forest degradation as part of the Bali Action Plan.

There are two caveats to the above positive assessment of the Presidential Forestry & Peatlands Moratorium Instruction. First, the Moratorium applies to Primary Natural Forest and Peatlands wherever they are found. Accordingly, to the extent that certain Production Forest Areas, as well as Areas for Other Purposes, do include areas of Primary Natural Forest and/or Peatlands, the Moratorium will prevent the issuance of Rent Use Permits for mining activities in those parts only of Production Forests and Areas for Other Purposes which comprise Primary Natural Forest or Peatlands. Second, as the Indicative Map is to be revised and updated every 6 months, there is clearly a risk that land which is not presently identified on the existing Indicative Map as being Primary Natural Forest and/or Peatland may be subsequently so identified on a later revised and updated Indicative Map.

### 3. Presidential Protected Forests Underground Mining Regulation

#### 3.1 Overview

**Underground Mining Allowed:** Mining activities may be carried out in Protected Forest Areas by way of underground mining so long as this does not alter the main purpose and function of the Protected Forest Areas.

**Rent Use Permit Required:** In order to be able to utilize Protected Forest Areas for underground mining activities, the holders IUPs/CoWs/CCoWs must apply for and obtain Protected Forest Rent Use Permits from MoFOR.

**Approval Process:** MoFOR will, first, issue an Approval in Principal License to the applicant for a Protected Forest Rent Use Permit, with a maximum initial validity period of 2 years but which is extendable, subject to evaluation by MoFOR.

The Approval in Principal License will specify a number of obligations that must be fulfilled by the Protected Forest Rent Use Permit applicant in order to obtain the Protected Forest Rent Use Permit.

Once the Approval in Principal License holder fulfills the Approval in Principal License Obligations, MoFOR will issue the Protected Forest Rent Use Permit.

Protected Forest Rent Use Permits will be initially granted for a maximum period of 20 years but be extendable in accordance with the validity period of the underlying IUPs/CoWs/CCoWs and subject to evaluation by a Monitoring & Evaluation Team.

**Transfer:** Protected Forest Rent Use Permits are transferable subject to MoFOR's prior written approval.

**Prohibitions:** Protected Forest Rent Use Permit holders are prohibited from carrying out underground mining activities which may cause land surface subsidence or permanent change to the purpose or function of Protected Forest Areas.

**3.2 Assessment:** The Presidential Protected Forests Underground Mining Regulation was issued at substantially the same time as the Presidential Forestry & Peatlands Moratorium Instruction and is apparently intended to make clear that the Moratorium does not prevent underground mining in Protected Forest Areas even if those Protected Forest Areas include tracts of Primary Natural Forest or Peatlands and so long as one first obtains a Protected Forest Rent Use Permit.

Protected Forest Rent Use Permits may, presumably, be either Exploration Rent Use Permits or Exploitation Rent Use Permits for the purposes of the MoFOR Rent Use Permit Regulation

## SUMMARY AND CONCLUSIONS

Together, the MoFOR Rent Use Permit Regulation, the Presidential Forestry & Peatlands Moratorium Instruction and the Presidential Protected Forests Underground Mining Regulation represent a mixture of good and bad news for the mining industry.

From a good news perspective, the long awaited and much feared Moratorium has proven to be something of a damp squib which essentially leaves unchanged the rights of miners in respect of Forest Areas except in the case of any Production Forest Areas and Areas for Other Purposes that, somewhat improbably, happen to contain tracts of Primary Natural Forest or Peatlands and then only to the extent of the Primary Natural Forest or Peatland.

From a bad news perspective, the MoFOR Rent Use Permit Regulation only brings marginally greater transparency to the process of obtaining Approval in Principal Licenses and Rent Use Permits by providing for specific time periods for the issuance of Approval in Principal Licenses and Rent Use Permits. However, as the better view must be that MoFOR still retains his discretion on whether or not to issue an Approval in Principal License or a Rent Use Permit in any particular case, a golden opportunity has been lost to overcome materially reform the Rent Use Permit process by giving miners a legal right to Approval in Principal Licenses and Rent Use Permits subject only to meeting the application requirements.

At the same time, the MoFOR Rent Use Permit Regulation has done nothing to eliminate or reduce the burdensome and costly administrative and technical requirements for obtaining Approval in Principal Licenses and Rent Use Permits. Indeed, by imposing a 10% restriction on the maximum area of a Production Forest which may be the subject of Approval in Principal Licenses and Rent Use Permits, regardless of the existence or otherwise of overlapping Forest Utilization Business License, the MoFOR Rent Use Permit Regulation will surely make it harder to obtain Approval in Principal Licenses and Rent Use Permits.

It becomes readily apparent that “roadblocks” which many mining companies have previously faced in obtaining Approval in Principal Licenses and Rent Use Permits may continue to be a problem notwithstanding the cosmetic changes introduced by the MoFOR Rent Use Permit Regulation. Now, though, that the Moratorium has proved to be such a non event, this may cause MoFOR to be more willing to issue Approval in Principle Licenses and Rent Use Permits.

Overall, the recent flurry of forestry related regulatory initiatives has merely removed the uncertainty over what the Moratorium would contain without, however, necessarily making it any easier to obtain Approval in Principal Licenses and Rent Use Permits. Rather than genuine “light at the end of the tunnel”, it could be that the recent flurry of forestry related regulatory initiatives is just more “shuffling the deck chairs on the Titanic.”

*[This article has been contributed by Bill Sullivan, Licensed Foreign Advocate with [Christian Teo Purwono & Partners](#). [Christian Teo Purwono & Partners](#) is a Jakarta based, Indonesian law firm and a leader in Indonesian mining law and regulatory practice. Readers may contact the author at email: [bsullivan@cteolaw.com](mailto:bsullivan@cteolaw.com); office: 62 21 5150280; mobile: 62 815 85060978]*