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Limitation of the Commercial Area for Forest Timber Products Utilization Business Licenses

By: Athalia Devina

Indonesia's forests used to be known as one of the biggest such areas in the world but its size has radically decreased in the past 10 years. Forested areas in Indonesia comprise around 98,56 million ha (52,4% of land in Indonesia) according to Forestry Statistics of Indonesia for 2011 published by the Ministry of Forestry in July 2012. The government realizes that Indonesia urgently needs regulations that can protect the forests on the one hand, but can facilitate commercial activities that are conducted by entrepreneurs in the field of forestry on the other hand.

On 17 January 2014, the Minister of Forestry enacted Regulation No. P.8/Menhut-II/2014 entitled Limitation of the Commercial Area for Forest Timber Products Utilization Business Licenses ("**IUPHHK**") in Natural Forests, Industrial Plantation Forests of Production Forests IUPHHK, or Ecosystem Restoration IUPHHK ("**Regulation No. P.8/Menhut-II/2014**"). Regulation No. P.8/Menhut-II/2014 aims to provide justice and equity by considering the implementation aspects of forest sustainability and business certainty. The aspects of forest sustainability include the following:

a. environmental sustainability which refers to the principles of sustainable forest management;
b. production sustainability based on the elected principles for sylviculture systems; and
c. implementation of fair and transparent social and cultural functions that are achieved through partnerships with the communities in and around forests in order to improve the welfare of society.

The aspects concerning business certainty include the following:

a. area certainty; the process governing the granting of the IUPHHK refers to the spatial considerations;
b. certainty of business period; the time period of the IUPHHK is decided in accordance with the prevailing regulations; and
c. certainty of legal guarantee for related activities; the granting of the IUPHHK gives legal certainty to undertake the activity until the permit is no longer valid.

Article 5.1 of Regulation No. P.8/Menhut-II/2014 stipulates that IUPHHK in Natural Forests, Industrial Plantation Forests of Production Forests IUPHHK, or Ecosystem Restoration IUPHHK can be granted for a maximum area of 50.000 ha and limited to a maximum of 2 permits for any 1 company or any 1 holding company. If the maximum area as stipulated in article 5.1 is exceeded, the permit will be granted in accordance with the resulting boundary measurement with the highest tolerance of 5%. There is a special regulation for the Provinces of Papua and West Papua regarding the area limitation. Article 5.2 of Regulation No. P.8/Menhut-II/2014 stipulates that IUPHHK in Natural Forests, Industrial Plantation Forests of Production Forests IUPHHK, or Ecosystem Restoration IUPHHK in the Provinces of Papua and West Papua can be granted for a maximum area of 100.000 ha and limited to a maximum of 2 permits for any 1 company or any 1 holding company.

Every IUPHHK for Natural Forests, Industrial Plantation Forests of Production Forests IUPHHK, or Ecosystem Restoration IUPHHK that was granted before the enactment of Regulation No. P.8/Menhut-II/2014 is still valid. The provisions governed by Regulation No. P.8/Menhut-II/2014 are effective from the date of its enactment.

Bambang Hendroyono, the Director General of Forestry Enterprise of the Ministry of Forestry, said that the background motivation of this limitation is to (i) facilitate supervision and completeness of technical personnel in the concession area, (ii) minimize the risk of encroachment, and (iii) streamline the contributions to the forestry sector. Therefore, the existence of Regulation No. P.8/Menhut-II/2014 is expected on the one hand to encourage more responsible and effective commercial activities, but on the other hand also to maintain forest sustainability in Indonesia.

Applications for the Reconsideration (*Peninjauan Kembali*) of Criminal Cases can now be made more than once

By: Dwi Defiantoro

On March 6 2014, the Constitutional Court (Mahkamah Konstiusi/MK) finally promulgated Ruling No. 34/PUU-XI/2013 (the ruling) regarding the revocation of Article 268 paragraph (3), Law No. 8/1981 concerning Criminal Procedure Law (KUHAP). The article stipulates that reconsideration (*peninjauan kembali*) is limited to one time only. The ruling was read out by the Panel of Judges on Thursday, March 6 2014 before the applicants, who were Antasari Azhar, Ida Ayu Laksmiwaty, and Ajeng Oktarifka Antasariputri.

Applicants' reasoning

The applicants' petition to the Panel of Judges that Article 268, paragraph (3) of Law No. 8/1981 regarding Criminal Procedure should be deemed to contradict the 1945 Constitution if further reconsideration is prevented or excluded in the event of the discovery of new evidence (*novum*) based on the use of science and technology. It was ruled that Article 268, paragraph 3 KUHAP is not commensurate with Article 1 paragraph (3), Article 24 paragraph (1), Article 28C paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution.

Antasari Azhar is a former Chairman of the Corruption Eradication Commission (Komisi Pemberantasan Korupsi/ KPK) who was sentenced to 18 years in prison for the assassination of Nasruddin Zulkarnaen. He argued that he could present new plausible evidence after his first attempt for reconsideration was rejected by the Supreme Court in 2012. The *novum* is expert testimony that SMSs to the victim that appeared to be evidence of the assassination were perhaps sent from the web server rather than Antasari's cellular phone.

In addition, the applicant also argued that for a reconsideration request to be filed more than once, it was a sufficient reason that new evidence or circumstances are found. The *novum*, for example, can be based on the development of science and technology that has not been available before or had not yet been discovered when the case was tried.

The Ruling

The ruling of the Constitutional Court was that it accepted the petition of the applicant, stipulating that:

1. Article 268 paragraph (3) of Law No. 8 of 1981 on Criminal Procedure contradicts the 1945 Constitution of the Republic of Indonesia.
2. Article 268 paragraph (3) of Law No. 8 of 1981 on Criminal Procedure has no binding legal force.

Thus, based on this ruling of the Panel of MK Judges an application for reconsideration of criminal proceedings can now be made more than once if new evidence (*novum*) emerges. The scope of this ruling is limited to criminal cases only because KUHAP is *lex specialis* of Supreme Court law (UU Mahkamah Agung) and Judicial Power law (UU Kekuasaan Kehakiman). For other matters such as civil cases, administrative court cases, and others in which the procedure is governed by UU MA and UU KK the reconsideration is still limited to only once.

Issues that need to be anticipated

As always, the Constitutional Court as negative legislator cannot make any new provisions. They only have authority to remove or delete articles in a law. Thus, in the ruling there is no further explanation about the extent to which the review may be filed more than once. Up until now, there is still no Regulation of the Supreme Court that addresses this matter. Maybe in the near future, a regulation implementing the second reconsideration will be drafted by the Supreme Court. In addition, the new Criminal Procedure law heralded, or even new Supreme Court law would be important to see (now they are both included in the 2014 National Legislation Program as priority bills), since lawmakers may still reincorporate a new regulatory provision to restrict or to make a second reconsideration difficult to file.

Although the reconsideration can be proposed multiple times, it may nonetheless not be a reason to hinder or delay the execution of prisoners. Reconsideration (PK) does not inhibit or impede the execution of a criminal (*vide*: Article 66 paragraph (2) of Law No. 14 of 1985 regarding the Supreme Court). Based on Supreme Court practice, when filing a reconsideration, the convict must be present at the hearing. The convict's status at that time is still as a prisoner. In the case of criminal fines, if the convicted criminal proposes a PK, the fine must be paid in advance.

Closing remarks

The ruling serves as a 'door opener' for prisoners who think they might have new evidence in support of their struggle for justice, even if they are finally executed. It is also important to know what can be categorized as *novum*. Hence, before someone proposes a reconsideration, he/she must ensure that new evidence presented to the court is really *novum*.

However, we hope this permission to propose reconsideration more than once will not constitute a new opportunity for court mafia to manipulate judicial decisions in criminal cases, or to make reconsideration a game of trial and error. So, it has become vital for the Supreme Court or lawmakers to make regulations which implement the right of a second reconsideration.

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The Implementation of Health Insurance in Indonesia

By: Meitha Ria

Since January 2014, the Indonesian government has begun to implement a national social security program which gives health insurance to all Indonesia citizens. According to the definition stated in the Presidential Regulation No. 12 of 2013 on health insurance ("**Presidential Reg No. 12/2013**"), health insurance is a guarantee of health coverage for participants to obtain health care benefits and protections to cover the basic health needs of every person who has paid contributions or for whom contributions have been paid by the government. This health insurance is organized by BPJS Kesehatan.

This implementation of health insurance by BPJS Kesehatan requires a number of supporting regulations. Based on this provision, in December 2013, the Indonesian government enacted Presidential Reg No. 12/2013 on health insurance, as amended by Presidential Reg No. 111/2013 ("**Presidential Reg No. 111/2013**") as a regulation implementing health insurance in Indonesia.

The implementation of health insurance regulated by Presidential Reg No. 12/2013 as amended by Presidential Reg No. 111/2013, provides for, inter alia:

1. Participants of the health insurance:
   a. Beneficiaries of contributions to the health insurance ("PBI Jaminan Kesehatan") classified as poor;
   b. Non-Beneficiaries of contributions to the health insurance ("bukan PBI Jaminan Kesehatan") classified as workers who receive a salary and their families, workers who do not receive a salary and their families, and non-workers and their families;
2. Contributions to health insurance:
   a. contributions to health insurance for participants of PBI Jaminan Kesehatan are paid by the government, in the amount of IDR19.225,- (nineteen thousand two hundred and twenty five Indonesian Rupiah);
   b. contributions to health insurance for participants who are registered by the regional government are paid by the regional government, in the amount of IDR19.225,- (nineteen thousand two hundred and twenty five Indonesian Rupiah);
   c. contributions to health insurance for participants who are workers and who receive a salary paid by their employer, and workers where the following conditions apply:
      (i) for civil servants, TNI members, Polri members, and state officials in the amount of 5% (five percent) of the monthly salary, of which 3% (three percent) is paid by the employer, 2% (two percent) is paid by the worker;
      (ii) for other workers apart from those who fall under point (i) contributions in amount of 4,5% (four point five percent) of the monthly salary must be paid, of which 4% (four percent) is paid by the employer, 0,5% (zero point five percent) by the worker;
   d. contributions to health insurance for workers who do not receive a salary and non-worker participants are paid by themselves, where the following conditions apply:
      (i) contributions are in the amount of IDR25.500,- (twenty five thousand five hundred Indonesian Rupiah) per person per month for 3rd class hospital services;
      (ii) contributions are in the amount of IDR42.500,- (forty-two thousand five hundred Indonesian Rupiahs) per person per month for 2nd Class II hospital services;
      (iii) contributions are in the amount of IDR59.500,- (fifty nine thousand five hundred Indonesian Rupiah) per person per month for 1st class hospital services.
3. Healthcare benefits:

   Every participant in this health insurance has the right to Healthcare Benefits in the form of individual healthcare services covering promotive, preventive, curative, and rehabilitative services including medicine and medical consumables in accordance with medical requirements, which consist of medical benefits that are not bound up with the premium amount, and non-medical benefits such as accommodation and ambulance services.

The new Presidential Regulation, Presidential Reg No. 111/2013 outlines more detailed rules and provisions concerning the implementation of health insurance that were previously stated in Presidential Reg No. 12/2013. All provisions stated in the regulations apply to all Indonesian citizens, with the priority to the poor, in order that all Indonesian citizens receive health insurance.

The Indonesian Financial Services Authority ("OJK") imposes certain levies on Financial Services Participants

By: Anindia Kusuma

On 12 February 2014 the Indonesian Government enacted Government Regulation No. 11 of 2014 concerning the levies by the Financial Services Authority, which came into force on the date of its issuance ("**GR No.11/2014**"). Under GR No.11/2014, financial services industry participants will have to pay to the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan* or the "OJK"), among other things, fees for licensing, approval, registration, ratification, and reviewing of their corporate action plan and annual fees for OJK control, supervision, examination and research. The OJK levies are used to fund operations, administration, procurement of assets, as well as other supporting activities.

GR No. 11/2014 sets out the general rules for the fees and the amount of each fee. The payment guidelines are to be further regulated in the OJK Regulation. Whilst the OJK Regulation is still waiting to be issued, we have highlighted below some key provisions relating to the fees and other important stipulations in the regulation concerning the procedures for determination and use, types, amounts, time of billing and payment of fees, adjustment to the required fees and sanctions for non-compliant financial services participants.

Under GR No. 11/2014, parties who engage in financial services sector activities related to banking, capital markets, insurance, pension funds and financial institutions are subject to the fees applied and collected by the OJK ("**Financial Services Participants**"):

a. Activity Fees

This type of fee is related to applications to the OJK for licensing, approval, registration, and/or ratification which includes:

i. fees for licensing, approval, registration, and ratification of institutions:

a) licenses for financial services institutions, such as:

i) the stock exchange, clearing and underwriting institutions, deposit and settlement institutions, commercial banks, life insurance companies, general insurance companies and fund managers;

ii) rating agencies, underwriters, multi-finance companies, venture capital companies and other financial services institutions;

iii) brokers who administer clients' securities accounts;

iv) brokers who do not administer clients' securities accounts, investment advisors, securities administration bureaux and securities appraisal institutions;

v) custodian banks and rating institutions;

vi) securities issuers ad public companies;

vii) *wali amanat*/trustees and mutual fund selling agents; and

viii) financial institution pension funds.

continue to page 5...

b) licenses for individuals, such as:
   i) investment manager representatives and investment advisors;
   ii) underwriters;
   iii) brokers' representatives and mutual fund selling agents;
   iv) banking support professionals;
   v) capital market support professionals; and
   vi) accountants, legal consultants, appraisers and public notaries.

ii. registration fees:
   a) registration statements in relation to public offerings (securities and *sukuk*);
   b) registration statements for public companies;
   c) registration statements in relation to voluntary tender offers.

iii. reviewing fees:

fees for reviewing corporate action plans such as rights issues, mergers, or consolidations of listed companies, voluntary changes of listed companies into private companies, or acquisitions of listed companies.

The types of fees above must be paid prior to the application or the corporate action plan being submitted by the relevant parties.

b. Annual Fees

These are the annual fees to be paid for OJK control, supervision, examination and research. The rate for this type of fee is based on certain criteria and using a specific calculation method as set out in GR No. 11/2014 and its Enclosure. There are two categories of annual fees:

i. fixed rate annual fees:

the public companies are obliged to pay Rp15.000.000,- per company. Meanwhile, the supporting professionals in banking and capital market sectors are obliged to pay Rp5.000.000,- per person.

ii. percentage-based annual fees:

this type of annual fee for other Financial Services Participants such as stock exchanges; bank and other financial service institutions; investment managers, investment advisors, issuers, supporting institutions such as those in relation to banks, capital markets, the non-banking financial industry, and stock price appraisers and professionals, are calculted based on a certain percentage with reference to:

a) the audited financial reports;
b) nominal values which refer to the audited financial reports; or
c) nominal values which do not refer to the financial reports.

The payment for the annual fees which are calculated based on point a) and b) above are to be made in 4 instalments at the latest on 15th of each April, July, October and 31st of December in the current year. For each installment, the Financial Services Participants are obliged to pay 25% of the annual fees. For the calculation using nominal values which do not refer to the financial reports, it has to be paid at the latest on 15th of June in the current year.

A Financial Service Paticipant running more than one business activity in which each of those businesses are subject to a separate annual fees requirement, shall only be obliged to pay the annual fees of the business activity having the highest rate.

Since the calculation of percentage-based annual fees uses a self-assessment method, OJK has the verification right against the result of the self assessed annual fees. In case there is a discrepancy between the self-assessed annual fees paid by the financial service participant and the result of the verification, the results of the verification shall prevail. Any difference will be used to adjust the annual fees due to paid by the financial service participant in the year of verification.

In case of financial difficulties or in restructuring and/or settlement by the relevant Financial Services Participants, the OJK may at its own discretion adjust and reduce the fees up to 0% of the fees as regulated in the Enclosure to GR No. 11/2014.

Any violation of the provisions under GR No.11/2014 will be subject to a penalty in the amount of 2% of the required annual fees per month, provided that the maximum penalty is 48% of the due and payable annual fees and any other administrative sanctions.

Even though article 37 paragraph 6 of the Law No. 21 of 2011 on the Financial Services Authority has mandated the OJK to collect the levies from parties engaged in the financial services industry by the enactment of GR No. 11/2014, the Government Regulation has led to the criticism from various parties that the OJK levies are too burdensome and could potentially cause a domino effect that will, in the end, burden bank customers and the general public.

Considering that the OJK Regulation has not been issued, the Financial Services Participants can take action, such as to provide suggestions for the forthcoming OJK Regulation, so that in the end the Financial Service Participants are not doubly burdened by both the GR No. 11/2014 and the OJK Regulation. Alternatively, they can file a Judicial Review of the Law No. 21 of 2011 in the Constitutional Court. Even though the validity of GR No. 11/2014 would not be legally affected by the Judicial Review, the applicability of GR No. 11/2014 will be affected if the Constitutional Court decides in favour of the applicants.

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New Guidance on the Processing and Refining of Mining Products

By: Ignatia Oktavia Simorangkir

The Indonesian government is increasingly establishing rules for the processing and refining/smelting of mining products. Most recently, by issuing 2 (two) new regulations, namely the Minister of Trade Regulation No. 06/M-DAG/PER/1/2014 Concerning Procedures for the Export Reference Price on Processed Mining Products imposed as Export Duties and the Minister of Trade Regulation No. 12/M-DAG/PER/2/2014 Concerning Export Reference Price for Processed Mining Products imposed as Export Duties.

Previously, the Indonesian government enacted the Minister of Trade Regulation No. 04/M-DAG/PER/1/2014 on Export Regulations For Processed and Refined Mining Products ("**Permendag No. 04/M-DAG/PER/1/2014**"), which came into force on January 13, 2014. Article 2 of Permendag No.04/M-DAG/PER/1/2014 stipulates, that mining products derived from metallic minerals, nonmetallic minerals, and rocks in the form f ore and have not reached the minimum limit of processing and/or refining, are prohibited from exportation. Companies interested in exporting mined products must obtain recognition as a Registered Exporter of Processed and Refined Mining Products from the Minister of Trade. Then, any Registered Exporter of Processed and Refined Mining Products who wishes to obtain export approval must submit a written request to the Director General of Foreign Trade.

The stipulations regarding the obligation to process and to refine mining products are quite controversial. Formerly, the Government of Indonesia enacted several regulations related to the obligation to process and to refine mining products, as follows:

a. The Minister of Energy and Mineral Resources Regulation No. 07/2012 Concerning Mineral Added Value Through Mineral Processing and Refining Activity, as subsequently amended by the Minister of Energy and Mineral Resources Regulation No. 20/2013.

b. The Minister of Energy and Mineral Resources Regulation No. 1/2014 Concerning Mineral Added Value Through Mineral Processing and Refining Activitiy Inside the State, which came into force on January 11, 2014.

c. Government Regulation No. 1/2014 Concerning the Second Amendment to Government Regulation No. 23/2010 on the Implementation of Mineral and Coal Mining Activity, which came into force on January 11, 2014.

Although Article 170 of Law No. 4 of 2009 concerning Mineral and Coal Mining (**"Law No. 4/2**009") mandates that the mining permit holder must conduct refining/smelting activities no later than 5 (five) years since Law No. 4/2009 was enacted, mining permit holders are still not ready to undertake this obligation. The processing and refining obligations related to mining products are considered commercially adverse and detrimental to them. Mining permit holders must expend relatively large sums to implement these obligations.

This also brings to the fore a claim Japan filed against the Government of Indonesia in the World Trade Organization ("WTO") forum related to the ban on the export of unprocessed minerals. Japan was dependent on Indonesia's nickel, which accounted for up to 44 percent of its total need in 2012[1]. Because of the ban on the export of unprocessed minerals, Japan, as home to some of the world's top stainless steel producers, is struggling to cope with higher costs and has been seeking new sources to supply nickel. Now Japan is trying to consult with the Government of Indonesia through the WTO forum. If the consultation does not result in an agreement, then Japan will request the establishment of a panel in WTO to resolve this dispute.

[1]Bagus BT Saragih, "*RI Seeks Lawyers For Japan's WTO Complaint*", The Jakarta Post, February 27, 2014.

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