

## The new year's coal export ban: no way out!

### Overview

On 31 December 2021, the Directorate General of Mineral and Coal (**DGMC**) on behalf of the Ministry of Energy and Mineral Resources (**MEMR**) banned all coal exports from 1 to 31 January 2022 by circular letter No.B-1605/MB.05/DJB.B/2021 of 31 December 2021 regarding the Fulfilment of Coal Needs for Public Electricity (**MEMR Circular**). (In this Client Update, we refer to the DGMC imposed ban on coal exports as the **Coal Export Ban**.)

DGMC also issued Circular Letter No.B-1611/MB.05/DJB.B/2021 regarding the Coal Export Ban, addressed to the Director General of Foreign Trade, the Director General of Customs and Excise and the Director General of Sea Transportation (**DGST**).

### Executive summary of findings

The following important issues arise out of the Coal Export Ban.

- The government appears to have a sound legal basis for imposing the Coal Export Ban over all Coal Companies (as defined below), even over those that have complied with their domestic market obligations (**DMO**), regardless of any fairness considerations.
- It is not yet clear whether the government will focus its coal requirements by only punishing Coal Companies that have failed to comply with their DMO rather than those that have complied.
- Business reaction against the Coal Export Ban is strong and could influence the government's manner of implementing the Coal Export Ban.
- Coal Companies impacted by the Coal Export Ban will need to evaluate their contractual obligations to coal off-takers and other relevant stakeholders (including shippers, insurers and lenders), and should consider taking immediate steps to inform all relevant stakeholders of the Coal Export Ban.
- Depending on their particular circumstances, Coal Companies may be able to declare a (political) force majeure event due to change in law or government policy to their relevant stakeholders and may need to try to renegotiate with the relevant stakeholders, supply commitments and schedules, demurrage payments, penalties, indemnities and loan repayments.

### Details on the Coal Export Ban

The Coal Export Ban is addressed to the holders of Coal Transportation and Sales Licences and the following coal mining production-operation permit and concession holders:

- a. Coal Contracts of Work (PKP2B);
- b. Mining Business Licences (Operation Production IUP);
- c. Special Mining Business Licences (Operation Production IUPK); and
- d. Special Mining Business Licences (IUPK) as a continuation of production operations/contracts, (together, **Coal Companies**).

The MEMR Circular states that:

1. Coal Companies are banned from exporting coal between 1 to 31 January 2022 and are obliged to supply all of their mined coal to fulfil public electricity needs in accordance with:
  - (a) the regulated DMO; and/or
  - (b) any assignment from the government to Coal Companies; and/or
  - (c) any contracts between PT PLN (Persero), including its subsidiaries (together, **PLN**) and independent power producers (**IPPs**); and

2. coal that is already stockpiled at any loading port and/or has already been loaded onto a vessel must be immediately delivered to a power plant under the control of (or operated by) PLN and IPPs, the implementation of which must be immediately settled with PLN.

The MEMR Circular also mentions that the Coal Export Ban will be further evaluated and reassessed by DGMC based on the realisation of the coal supply to PLN and the IPPs. No further guidance is provided as to how DGMC will conduct such evaluation and reassessment.

To implement the MEMR Circular, on 31 December 2021, DGST issued the following Circular Letters:

1. No.UM.006/26/1/DA-2021 on the Temporary Coal Export Ban, prohibiting any agency under DGST from issuing any Sailing Approval Letter (*Surat Persetujuan Berlayar*, **SPB**) for any ship that will export coal from 1 to 31 January 2022; and
2. No.UM.006/25/20/DA-2021, under which DGST appealed to national shipping companies and shipping agencies to temporarily cease providing services relating to coal cargo export shipping between 1 to 31 January 2022 ),

(the above Circular Letters referred to as the **DGST Circulars**).

The government appears to have a sound legal basis (under the 2009 Mining Law, as amended, and the relevant regulations, including the MEMR Decision, referred to below) on which to impose the Coal Export Ban on the Coal Companies.

### **Coal reliance**

Indonesia is still heavily dependent on coal to fire its power plants, despite the government's public efforts and commitment to reduce coal usage for domestic (including power generation) purposes, including by being a signatory to the "Global to Clean Power Transition Statement" at United Nations Climate Change Conference UK 2021 in November 2021.

In fact, it was only on 31 December 2021 that PLN, as the sole state-owned company providing electricity to the public, formally alerted MEMR that there was a coal supply crisis for PLN-operated power plants (and IPPs). The government appears to have responded with lightning speed by issuing the MEMR Circular and DGST Circulars to address PLN's coal supply crisis.

### **DMO**

According to a recent [MEMR press release](#), the coal supply crisis has been caused by the fact that many Coal Companies have not fulfilled their DMO and such crisis may further lead to major power outages across Indonesia.

By way of background, to ensure domestic supply, the Indonesian government regulates its DMO policy in accordance with MEMR Decision No.139.K/HK.02/MEM.B/2021 on Fulfilment of Domestic Coal Needs (**MEMR Decision**) under which Coal Companies must supply 25% of their annual production (as approved by the government) for public and private domestic electricity supply and domestic industry. Coal Companies that fail to fulfil their DMO could be exposed to various sanctions, including coal export bans, financial penalties and compensation payments.

The MEMR Decision also regulates that in case of emergency in which domestic coal needs have not been fulfilled, DGMC, on behalf of MEMR, can appoint Coal Companies to fulfil the relevant domestic coal needs (**Emergency DMO**).

One very sensitive and important aspect of the MEMR Decision is that it sets the coal selling price for public electricity supply at \$70 per ton free on board (FOB) vessel, based on certain specifications. As Coal Companies are acutely aware, this selling price is well below the coal market price, a fact that may well explain their reluctance to comply with the DMO. It is also likely that many Coal Companies were trying to make up for the significant decline in thermal coal exports broadly experienced in 2020.

### **Relevant impact**

#### **1. Business reaction**

The MEMR Circular has stimulated considerable reaction from various business circles, including the Indonesian Coal Mining Association (**ICMA-APBI**), the largest Indonesian coal mining business organisation, and the Indonesian Chamber of Commerce and Industry (**KADIN**).

On the one hand, ICMA-APBI expressed concern that the Coal Export Ban significantly impacts its members' coal mining and related businesses, and has argued that:

- (i) instead of immediately imposing a Coal Export Ban, the government should have instead entered into discussions with the relevant Coal Companies in order to find the best solution to the coal supply crisis; and
- (ii) PLN's coal supply crisis should be resolved by PLN entering into temporary coal supply contracts, due to the fact that its current supply crisis is merely temporary.

On the other hand, KADIN's position is that the temporary Coal Export Ban should not be applicable to **all** the Coal Companies, particularly those that have already fulfilled their respective DMO obligations (or have already fulfilled domestic coal supply obligations that are even greater than their required DMO). KADIN has also suggested that the government implement a "reward-and-penalty" system for Coal Companies that do not fulfil their DMO, rather than imposing sanctions that impact all Coal Companies.

Based on the media reports available as at the date of this Client Update, KADIN appears to have expressed general support for the government's policy on the Coal Export Ban. However, ICMA-APBI may have a different position. At this stage it is not clear whether ICMA-APBI or KADIN intend to take further action in response to the Coal Export Ban.

## **2. Contract implications**

As the Coal Export Ban will significantly impact Coal Companies' ability to fulfill their respective contractual obligations to off-takers (buyers) and other relevant stakeholders (including shippers, insurers and lenders), Coal Companies should consider taking immediate steps to inform all relevant stakeholders of the Coal Export Ban as well as to analyse and reassess the impacted provisions under their relevant stakeholder contracts.

For example, depending on their particular circumstances, Coal Companies may be able to declare a (political) force majeure event due to change in law or government policy to their relevant stakeholders, such as off-takers (buyers), shipping companies, and/or lenders. Coal Companies may also need to try to renegotiate with the relevant stakeholders supply commitments and schedules, demurrage payments, penalties, indemnities and loan repayments.

Logistical issues involving coal sales and transportation to the relevant PLN/IPP ports may also need to be considered if the Coal Companies are required to fulfil MEMR Circular requirements.

Apart from the above actions, stock exchange listed Coal Companies should also consider any commercial implications resulting from fluctuations of their shares price in the market as a result of the Coal Export Ban.

## **3. Scope of the MEMR Circular and DGST Circulars**

The MEMR Circular and the DGST Circulars do not clearly specify whether the Coal Export Ban is limited only to Coal Companies who have not satisfied their respective DMO and/or whether any Coal Companies may be exempted from the Coal Export Ban.

Based on our research, we understand that the Coal Export Ban is intended to apply to all Coal Companies, whether or not they have fulfilled their DMO. We speculate that the government may have adopted this position on the basis that Coal Companies are still obliged to comply with Emergency DMO upon DGMC's request.

Our research further indicates that any ship carrying coal for export that has obtained an SPB (sailing approval) before 1 January 2022 is also subject to the coal shipping restrictions (i.e. the relevant ships are not permitted to transport coal overseas and national shipping companies / shipping agencies must temporarily cease to provide coal shipping services for export coal between 1 to 31 January 2022).

## **4. Future evaluation and reassessment commitment**

Our research also indicates that DGMC intends to closely evaluate and reassess the Coal Export Ban policy based on the realisation of coal supply for power plants under PLN and IPPs. The results of such evaluation and reassessment will determine when the Coal Export Ban will be revoked or modified, which could even be before 31 January 2022 or, in the worst-case scenario, sometime beyond 31 January 2022.

## Conclusion

The government appears to have reacted very swiftly to PLN's distress call, perhaps too swiftly before alternatives could be considered that may have achieved the same results, but in a fairer manner. Hopefully the government will give due recognition to those Coal Companies that have been good corporate citizens (complying with their DMO). At this stage it is too early to tell if such recognition will be given, because all Coal Companies appear to have been dealt the same collective punishment, regardless of their corporate compliance record.

Coal Companies will need to closely assess the damage caused by the Coal Export Ban to their businesses, particularly their contractual arrangements with stakeholders, that may require immediate action.

We are closely monitoring the government's implementation of the MEMR Circular and DGST Circulars and how the coal industry is responding. We will issue further updates on this topic as more information becomes available.



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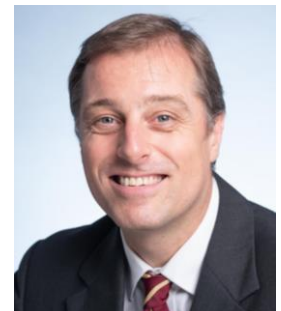
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