

# Review of the Indonesian mining industry



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The Constitutional Court (the Court) recently issued decisions in two cases that could help change the playing field in Indonesia's mining industry, giving smaller companies the chance to compete with big miners. In separate rulings in cases brought by tin miners from Bangka-Belitung Province, the Court found that several provisions of Law No. 4 of 2009 regarding Mineral and Coal Mining (the 2009 Mining Law) were unconstitutional and not binding.

**Background: The 2009 Mining Law**

The 2009 Mining Law replaced the 1967 Mining Law. The most noticeable feature of the 2009 Law was the introduction of various types of licenses, including Mining Business Licenses (Izin Usaha Pertambangan) (IUP). The IUP replaced the contract and licensing system adopted in the 1967 Mining Law, which featured Mining Rights, Contracts of Work (COW) and Coal Contracts of Work (CCOW).

In the cases that went to the Constitutional Court, the Government argued that the 2009 Mining Law covered previously overlooked regulatory issues, providing the legal certainty necessary to promote a healthy investment climate while at the same time protecting the interests of all Indonesians. The petitioners argued that the 2009 Law protected only high-capital companies and did not offer the same legal protection to smaller businesses or individual miners.

**Constitutional Court Review**

The Court found Article 22 (f) of the 2009 Mining Law unconstitutional as it limited local people's right to obtain a so-called People's Mining Area (Wilayah Pertambangan Rakyat) (WPR) by requiring that the mining area be operated for at least 15 years. The Court agreed with the petitioners that it was rare to have a mine operated by local people for at least 15 years.

Articles 51, 60 and 75 (4), which deal with the tender process to obtain an IUP area and a Special IUP area, were also found unconstitutional. The Court found that the tender process for an IUP area and Special IUP area created an unfair competition

between local people, who mostly run small mining operations, and high-capital national and multinational companies. It argued that the Government should set forth different tender classifications for IUP and Special IUP areas based on the capabilities of the bidders to carry out exploration or production activities. This, the Court said, would open up the process to all business entities, cooperatives and individuals.

In keeping with the theme of protecting the rights of individual miners and small-capital companies, the court found Articles 52 (1), 55 (1) and 61 (1) of the 2009 Mining Law unconstitutional for their minimum area requirement for an IUP. This requirement, in the Court's view, was unreasonable because it could reduce or preclude people's right to obtain an IUP.

Several Articles of the 2009 Law survived the challenge to their constitutionality. The Court rejected the petitioners' request to find Article 22 (a) and (c) unconstitutional, ruling that the requirement to obtain a WPR could be adapted and applied depending on local conditions. Article 38, regarding business entities that are entitled to obtain an IUP, was also upheld. The petitioners had claimed the Article limited the granting of IUPs to a "legal business entity," but the Court argued that Article 49 of the 2009 Mining Law and Article 6 (1) and (3) of Government Regulation No. 23 of 2010 regarding mineral and coal mining business activities made clear that non-legal business entities such as business partnerships, in the form of Commanditaire Vennootschap or Firma, or private individuals could also receive an IUP.

**Conclusion**

While these Court decisions point to a possible shift in the mining industry, they will not have any immediate implications while we wait for the Ministry of Energy and Mineral Resources to issue implementing regulations on the stipulation of mining areas and the tender process. However, the Ministry should consider these Court decisions when drafting the implementing regulations and ensure that it does not put up barriers to the participation of small local miners.

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