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SETTING ASEAN MINING POLICY & REGULATION

LEARNING FROM THE INDONESIAN AND MYANMAR EXPERIENCES

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OUTLINE OF SESSION

1. Introduction
2. Key Objective of Policy Makers
3. Importance of Good Mining Regulation
4. Overview of Indonesian and Myanmar Regulatory Experiences
5. Problems Encountered
6. Requirements for Good Mining Regulatory Regimes
7. Summary and Conclusions

INTRODUCTION

1. A well designed and properly administered regulatory system is a critical requirement for the long term health and sustainability of a country's mining industry
2. Other mineral rich ASEAN countries have much to learn from the Indonesian and Myanmar experiences with mining regulation in the 2009-2016 period

KEY OBJECTIVE OF POLICY MAKERS

1. Every country should want to ensure that its people derive the maximum benefit from the country's mineral resources
2. Policy makers need to make maximizing the benefit to local people the key objective of mining policy & regulation
3. Realizing this key objective cannot be achieved by (i) not developing the country's mineral resources or (ii) discouraging foreign investment in the development of the country's mineral resources
4. Countries need to attract world class international mining companies in order to ensure mineral resources are developed for the maximum benefit of the local people

IMPORTANCE OF GOOD MINING REGULATION

1. Provides legal and fiscal certainty
2. Ensures equitable and fair treatment of both foreign and local investors
3. Facilitates effective contracting arrangements
4. Makes dispute resolution easier and less costly
5. Provides incentives for mining companies to:
 - (a) act responsibly
 - (b) make an appropriate contribution to the country's economic development
6. Encourages investment by world class mining companies

OVERVIEW OF INDONESIAN REGULATORY EXPERIENCE

1. 1967 - Mining Law
2. 2009 - Mineral & Coal Mining Law
3. 2009 to 2016 - Transition from CoW System to IUP System
- Issuance of numerous Implementing Regulations on a “drip feed” basis
4. 2016 to 2017 - Proposed new Mineral & Coal Mining Law

OVERVIEW OF MYANMAR REGULATORY EXPERIENCE

1. 1994 - Mines Law and Mines Rules
2. Dec 2015 - Amendments to Mines Law adopted
 - (a) Some improvements
 - (b) Non-competitive fiscal terms
 - (c) Continuing insistence upon State Participation Right
 - (d) No right to transfer or grant security over Permits
3. 2016 - Amendments to Mines Rules drafted but not issued
4. 2017 - Possible further amendments to Mines Law

ASSESSMENT OF INDONESIAN AND MYANMAR REGULATORY EXPERIENCES

1. With their vast mineral resources, Indonesia and Myanmar have had every incentive to get their systems of mining industry regulation absolutely right
2. Notwithstanding 1, Indonesia's and Myanmar's existing systems of mining industry regulation do not satisfy anyone including:
 - (a) Central Government
 - (b) Regional/Provincial Governments
 - (c) Domestic Investors
 - (d) Foreign Investors
 - (e) Mine Owners
 - (f) Local Communities

PROBLEMS ENCOUNTERED

1. Declining exploration activity
2. Reluctance of world class mining companies to undertake new development activities
3. Chaotic administration of Mining Licenses/Permits
4. Growing community opposition to mining projects because of:
 - (a) environmental concerns
 - (b) inadequate benefits for local communities
 - (c) resource nationalism
5. Difficulty balancing domestic demand and foreign demand for mineral products

REQUIREMENTS FOR GOOD MINING REGULATORY REGIMES – PART I

CONCEPTUAL REQUIREMENTS

1. Understanding the mineral commodities price cycle
2. Recognizing that exploration is not mining
3. Promoting “good” foreign investment, not “bad” foreign investment
4. Carrying out comprehensive research and study before implementing new mining industry policies

REQUIREMENTS FOR GOOD MINING REGULATORY REGIMES – PART II

TECHNICAL REQUIREMENTS

5. Ensuring certainty of mining rights
6. Facilitating bankability of mining projects
7. Allowing for a single regulator
8. Insisting upon industry consultation at all stages
9. Maximising the role of technocrats

UNDERSTANDING MINERAL COMMODITIES PRICE CYCLE – PART I

1. Continuous and inevitable cycle of rising/falling demand and rising/falling prices for mineral commodities
2. Tendency to regulate mining industry so as to capture “fair share” of short term, wind-fall gains during boom periods without focusing on temporary nature of these gains
3. Focus should be on long term health and sustainability of mining industry
4. Tax based regulatory systems are more consistent with mineral commodities cycle

UNDERSTANDING MINERAL COMMODITIES PRICE CYCLE – PART II

1. Every Government should want to maximise the benefits to the country and the people from mining activity
2. Benefits can be activity derived or tax derived
3. Activity derived benefits result in fixed deadweight costs unsustainable except in boom times
4. Tax derived benefits result in variable costs sustainable at all stages of mineral commodities price cycle

RECOGNIZING THAT EXPLORATION IS NOT MINING

1. Exploration for mineral resources and development of mineral resources are very different businesses
2. Risk/return profile of exploration companies requires special incentives to ensure high level of exploration activity
3. Failure of the regulatory regime to recognize that exploration is not mining leads to inadequate “pipeline” of new mineral resource projects to be developed

PROMOTING GOOD FOREIGN INVESTMENT, NOT BAD FOREIGN INVESTMENT

1. Not all foreign investment is equal
2. Good foreign investment comes from international mining companies that:
 - (a) have high levels of technical expertise
 - (b) use industry best practices
 - (c) emphasize worker safety and environmental protection
 - (d) understand the importance of and are committed to local community development
 - (e) pay their taxes
3. Only good foreign investment is consistent with maximizing the benefit a country and its people derive from their mineral resources

CARRYING OUT COMPREHENSIVE RESEARCH & PLANNING BEFORE IMPLEMENTING NEW MINING INDUSTRY POLICIES

Poorly researched and planned policies:

- (a) rarely achieve the Government's intended objective
- (b) can dramatically change the economics of mining projects
- (c) lead to investor perception of increased sovereign risk

ENSURING CERTAINTY OF MINING RIGHTS – PART I

OVERVIEW

1. Certainty of mining rights comprises:
 - (a) legal certainty
 - (b) fiscal certainty
2. Essential for long term investment
3. Cannot be dependent upon short term political considerations

ENSURING SECURITY OF MINING RIGHTS – PART II

LEGAL CERTAINTY

1. Absolute right to extend/renew/upgrade Mining Licenses/Permits
2. No Government right to terminate other than in clearly defined and exceptional situations
3. Effective/timely right to challenge any proposed termination
4. Transparent review process
5. Independent and reliable local court/legal system, otherwise international arbitration
6. Contracts of Work generally preferable to Mining Licenses/Permits in countries with weak court/legal systems

ENSURING CERTAINTY OF MINING RIGHTS – PART III

FISCAL CERTAINTY

1. Applicable taxes and tax rates need to be clearly defined and fixed for the life of the project
2. All taxes should be payable to the Central Government
3. Central Government should be responsible for ensuring Provincial and Regional Governments receive adequate compensation for mining projects in their geographic areas

FACILITATING BANKABILITY OF MINING PROJECTS

1. Mining Contracts/Licenses/Permits need to be:
 - (a) transferrable
 - (b) available as security
2. Foreign investors must be able to have majority ownership and management control of mining projects
3. No compulsory State Participation Rights

ALLOWING FOR A SINGLE REGULATOR

1. Multiple regulators for mining industry give rise to confusion, delay, frustration and heightened risk
2. A single regulator requires:
 - (a) all necessary licenses/permits to be available from a common Department or Ministry and/or one level of Government
 - (b) no or minimum overlap between mining/environment/forestry/trade Departments or Ministries

INSISTING UPON INDUSTRY CONSULTATION AT ALL STAGES

1. Government will never understand the mining industry as well as the mining industry understands itself
2. Effective industry consultation requires:
 - (a) well resourced industry groups with a specific mandate to provide input on proposed mining regulations
 - (b) clear procedures and timetables for Government consultation with industry groups
 - (c) proper mechanism for integrating industry feedback into redrafts of proposed mining regulations

MAXIMISING ROLE OF TECHNOCRATS

1. To the greatest extent possible, mining regulation should be the responsibility of technocrats rather than politicians
2. Maximising the role of technocrats requires competent Regulator staff with:
 - (a) technical expertise to properly deal with mining tenement issues
 - (b) ability/authority/standing to take control of regulatory drafting process
 - (c) professionalism to resist political interference
 - (d) interest in and willingness to learn from mining industry practical experience

SUMMARY & CONCLUSIONS - I

1. Without exploration and development of a country's mineral resources, the country and its people derive no benefit from those mineral resources
2. Optimal development of mineral resources requires a good mining regulatory regime
3. Understanding the inevitability of the mineral commodities price cycle is essential to regulating the mining industry in a way that is sustainable at all stages of the cycle
4. Legal certainty and bankability are non-negotiable issues

SUMMARY & CONCLUSIONS - II

4. Indonesia and Myanmar each have huge mineral resources
5. The people of Indonesia and Myanmar have not seen anything like the benefit they deserve from their countries' mineral resources
6. Part of the reason for this is the existence of fundamental deficiencies in the mining regulatory regimes of Indonesia and Myanmar
7. All mineral rich ASEAN countries should learn from the Indonesian and Myanmar regulatory experiences

A grayscale photograph of an industrial facility, likely a water treatment plant. In the foreground, there are several large, cylindrical tanks. The tank on the left is labeled 'T-101' and 'ISMAX-VOLUME'. The two tanks in the center are labeled 'T-102' and 'T-103', both with 'ISMAX-VOLUME' written below them. The tanks are connected by a complex network of pipes and valves. In the background, there are more industrial structures and a cloudy sky. The text 'Thank You' is overlaid in a large, bold, orange font in the center of the image.

Thank You