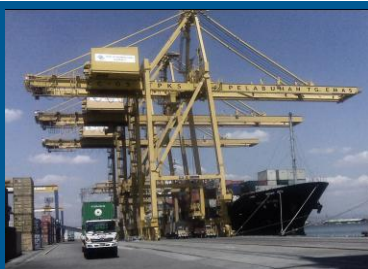




DEVELOPMENT OF SPECIAL RAILWAY REGULATIONS (PHASE 3) FINAL TECHNICAL REPORT



**INDONESIA
INFRASTRUCTURE
INITIATIVE**



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August 2011

INDONESIA INFRASTRUCTURE INITIATIVE

This document has been published by the Indonesia Infrastructure Initiative (IndII), an Australian Government funded project designed to promote economic growth in Indonesia by enhancing the relevance, quality and quantum of infrastructure investment.

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While this report is primarily concerned with the outputs of Phase 3 of the Special Railway study, it also summarizes the work of Phases 1 and 2. The report draws, where appropriate, on material from the final reports of Phases 1 and 2 - dated August 2010 and February 2011, prepared by Harral Winner Thompson Sharp Klein, Inc. Any errors of fact or interpretation are solely those of the author.

Guy Des Rosiers

Makarim & Taira S.

Jakarta, 19 August 2011

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ACRONYMS

AusAID	Australian Agency for International Development
BAPPENAS	<i>Badan Perencanaan Pembangunan Nasional</i> (National Development Planning Agency)
BATR	PT Bukit Asam Transpacific Railway
BKPM	<i>Badan Koordinasi Penanaman Modal</i> (Indonesia Investment Coordinating Board)
BUMN	<i>Badan Usaha Milik Negara</i> (State Owned Enterprise)
CMEA	<i>Kementerian Koordinator Bidang Perekonomian</i> (Coordinating Ministry for Economic Affairs)
DGR	<i>Direktorat Jendral Perkeretaapian</i> (Directorate General of Railways)
FGD	Focus group discussion
FR	Special Railway Guidelines and Regulatory Framework Recommendations – Final Report dated 3 February 2011
IAWG	Inter-agency working group
IIGF	Indonesian Infrastructure Guarantee Fund (a BUMN)
IndII	Indonesia Infrastructure Initiative
IUP	<i>Izin Usaha Pertambangan</i> (Mining Business Permit)
LPR	Limited Public Railway
MEC Coal	MEC Coal Pte. Ltd.
MEMR	<i>Kementerian Energi dan Sumber Daya Mineral</i> (Ministry of Energy and Mineral Resources)
MOF	<i>Kementerian Keuangan</i> (Ministry of Finance)
MOT	<i>Kementerian Perhubungan</i> (Ministry of Transportation)
Permen	<i>Peraturan Menteri</i> (Ministerial Regulation)
Permen MEMR 28/2009	Permen No. 28 of 2009 (MEMR) on Mining Services Business
Permen BAPPENAS 4/2010	Permen No. 4 of 2010 (BAPPENAS) on General Guidelines and Procedures for Cooperation between Government and Business Entities in Infrastructure Procurement
Perpres	<i>Peraturan Presiden</i> (Presidential Regulation)
Perpres 67/2005	Perpres No. 67 of 2005 on Cooperation Between Government and Business Entities in the Provision of Infrastructure (as amended by Perpres 13/ 2010)
Perpres 13/2010	Perpres No. 13 of 2010 amending Perpres 67/2005
PP	<i>Peraturan Pemerintah</i> (Government Regulation)
PP 56/2009	PP No. 56 of 2009 on Railways Development
PP 72/2009	PP No. 72 of 2009 on Railways Traffic and Transportation
PPP	Public Private Partnership
PR	Public Railway
PT BA	PT Bukit Asam (Persero) Tbk
RMP	Railway Master Plan
SR	Special Railway
TKK	PT Trans Kutai Kencana

TOP	PT Tekno Orbit Persada
TOR	Terms of Reference for Activity #229
UU	<i>Undang-Undang</i> (Law)
UU 5/1999	UU No. 5 of 1999 on Anti-monopoly
UU 4/2009	UU No. 4 of 2009 on Mineral and Coal Mining
UU 23/2007	UU No. 23 of 2007 on Railways

EXECUTIVE SUMMARY

The key purpose of this activity is to foster private investment in the Indonesian railway sector, within the limits of the existing legislative framework of Indonesia's Railway Law (UU 23/2007), by proposing an implementing Ministerial Regulation (Permen) for the development of Special Railways (SRs), and by suggesting a small number of amendments to existing Government Regulations dealing with railways (PP 56/2009 and PP 72/2009).

UU 23/2007 provides for the development of 'exclusive' or 'special' railways (SRs) to complement the 'public' railway (PR) network. An SR is defined under UU 23/2007 as a railway used to support the main activities of a business enterprise.

Although there is a strong interest by Indonesian enterprises (most notably coal mine operators) in developing SRs, existing proposals have stalled at the initial licensing stage due to the generality of the SR provisions contained in UU 23/2007, PP 56/2009 and PP 72/2009, and the lack of an implementing Permen dealing specifically with SRs.

GOI wants the SR provisions to facilitate railway development and support the expansion of Indonesian extractive industries and other enterprises. This requires addressing several issues, among them:

- 1) Clarifying the legal parameters within which SR operators and clients will be expected to operate;
- 2) Clarifying the scope of SRs;
- 3) Clarifying the nature of SRs and SR assets, both during operation and after they are no longer needed by the SR client;
- 4) Defining basic rules for interconnection between SRs or between SRs and PRs;
- 5) Simplifying the licensing systems, where possible; and
- 6) Assuring proper harmonization between the SR licensing scheme and other relevant regulatory licensing schemes (most notably with respect to mining).

The key principles and ideas incorporated into our draft Permen (a copy of which is attached hereto as **Annexe 1**) and proposed draft amendments to PP 56/2009 and PP 72/2009 (copies of which are attached hereto as **Annexe 2**) have been discussed extensively with DGR and other echelon work units within MOT, as well as with other relevant GOI stakeholders and a number of SR project proponents. Between mid-July and mid-August 2011, further meetings were held with key MOT stakeholders in an effort to resolve remains points of disagreement and finalizing the draft regulation. For this purpose, a diagram illustration and article-by-article table comparing the most recent DGR legal division draft with the IndII proposal was created to assist DGR in the process of merging the two drafts. The brief, one-month extension was very helpful in trying to resolve the outstanding policy and drafting issues.

While GOI views on some of these principles are still evolving, we believe that an agreement in principle has been reached on many of the key points, and are confident that any remaining differences of opinion can be resolved in the near future.

In addition, a supplementary note explaining the macroeconomic and microeconomic arguments in support of our proposed reforms is attached hereto as **Annexe 8**.

CHAPTER 1: RELEVANT BACKGROUND TO PHASE 3

1.1 IMPORTANCE OF SPECIAL RAILWAYS TO INDONESIAN NATURAL RESOURCE DEVELOPMENT

Indonesia has an abundance of natural resources. Exploiting these resources will help drive economic growth. However, the ability to exploit these resources depends in large part on the availability of means to bring natural resources to the market. In many cases, railway transportation can play a vital role.

The Government of Indonesia (GoI) and State Owned Enterprises together can only be expected to finance a fraction of needed railway infrastructure; the rest must come from the private sector. The government wants private companies to develop new railway lines, either on their own or with participation of government entities. Since 1992, Indonesian railway legislation has contained provisions allowing for the development of SRs to encourage private sector investment in railways and enterprises reliant on railway transport to efficiently serve their activities. Despite growing demand for SRs, they have yet to be developed because of the lack of a clear regulatory framework.

In a December 2009 report entitled ‘The Market for Railways in Indonesia’, and prepared as part of early IndII assistance toward the development of a RMP, the author identified (among others) the need for the development of new coal railway lines in South Sumatra and Kalimantan, and noted “a lack of a legal and regulatory framework for private sector financing of dedicated railway lines” as one of the obstacles to the development of such dedicated railway lines. A subsequent report entitled ‘National Railway Master Plan – Consolidated Background Papers’ similarly noted the lack of proper interpretation of the applicable law relating to special or dedicated railway lines, as well as the lack of precedents for acceptable commercial practices under either special or special purpose railways.

1.2 INDII PROGRAM ON SRS

Since 2010, IndII has supported a program to address specifically the issue of SRs. Phase 1 of IndII support to DGR, which was completed in the first half of 2010, identified the need for changes in rail sector regulations to foster private sector investment. Phase 2, which took place in the second half of 2010 and involved extensive stakeholder consultation, culminated with the publication of the FR, identified specific problems with the current regulatory framework, and proposed various regulatory and policy changes to achieve meaningful reform and encourage greater private investment in the railway sector.

1.2.1 Phase 1 Activity objective

The objective of Phase 1 was to undertake an initial review of relevant national and international rail transport practices that have an impact on SRs and prospective investments in such undertakings and to scope the proposed *Guidelines for Special Railways*, should IndII technical assistance be recommended. These *Guidelines* would endeavour to reconcile the goals of promoting transport efficiency and expanded capacity in the rail sector with the infrastructure development objectives of multiple levels of government.

1.2.2 Phase 1 Deliverables

This activity required the completion of three deliverables by 31 July, 2010:

- **Deliverable 1:** Rapid Assessment Report; completed and submitted on 4 June, 2010.
- **Deliverable 2:** Recommended scope of activities and estimated level of effort for a complete development of *Guidelines for Special Railways*. Recommendations were presented to the DGR on 30 July, 2010 and forwarded to IndII as inputs to the Phase 2 Activity Design. Phase 2 recommendations would become necessary inputs to the revision of the legal framework, including PP 56/2009 on railway development and PP 72/2009 on railways traffic and transport.
- **Deliverable 3:** All necessary reporting to ensure compliance with the IndII Monitoring and Evaluation Framework, Gender Strategy, EcoMAP and Risk Management Plan, including a final completion report.

The Phase 1 analysis, strongly supported by DGR, led to a recommendation to proceed to Phase 2.

In the course of and at the final meeting with the GOI in Phase 1, it was determined that Phase 2 should employ a two-step approach to defining the *Guidelines for Special Railways*:

1. Conduct a diagnostic of SR initiatives that have been delayed; isolate the specific causes for delay that have been exacerbated by deficiencies in regulations and/or licensing procedures; and draft remedial changes in legislation; and
2. Work with key stakeholder agencies at national and sub-national levels to determine the rationale underlying existing policy and current regulatory provisions and their interpretation.

1.2.3 Summary of Phase 2

Phase II, which took place in the second half of 2010, ended with the publication of the FR. Specifically, the FR listed a number of significant problems with the current legal SR framework.

1. **Operation and exclusive use.** There is a fundamental uncertainty as to who may establish and operate a SR, though it is clear that the SR must serve a single business.
2. **Service limitations.** The service limitations set out in the current legal framework (*i.e.*, the so-called ‘point-to-point’ rules) are unclear and unduly restrictive.
3. **Licensing scheme.** The current multi-tiered licensing scheme is both cumbersome (*i.e.*, approvals must be obtained at different levels of government, multiplying the opportunities for contradiction and delay) and incomplete.
4. **Multiple Business Entities.** There is currently no simple way for multiple business entities (*e.g.*, mine owners along a single proposed route) jointly to establish and operate a single SR. Such a project can be established as a public railway under a PPP scheme, but would then be subject to public tender requirements, and the infrastructure would be open to third party operators.
5. **Third Party Access.** The current framework provides no opportunity for an SR operator to offer limited services to third parties on a purely voluntary basis. At the same time, however, the boundaries between an SR and a PR are not clearly defined, particularly if an SR is connected to a PR or to another SR, so there is also a regulatory risk that a SR may become converted to a PR.

The FR proposed the following guidelines for a new Permen and amendments to existing PPs to address the problems noted above.

Permen guidelines:

1. Provide a legally credible clarification of primary enterprise control of an SR that will allow the project developer greater flexibility to structure project financing, permit opportunities for greater local participation in the enterprises served by the SR, and secure commercial benefits for the railway.
2. Clarify and specify the regulations and outcomes that will apply when an SR interconnects with another SR or a PR service.
3. Specify exceptions to the so-called point-to-point rule so that service interconnections and spur lines to third party facilities along the railway alignment may be approved as part of the SR services.
4. Specifically link, through consistent terminology and precise cross-references, proposed articles in the Permen with articles of existing PPs, so as to minimise conflicting interpretations.

PP guidelines:

1. Empower MOT with the authority to waive SR service restrictions where public transport capacity is demonstrably inadequate.

2. Provide an LPR option as a subcategory of PRs, permitting a broader scope of services than the SR, but with an infrastructure access option to serve the broader public interest. The LPR would permit core train services to be offered to one or more enterprises on a business-to-business (B2B) negotiated access basis, using facilities and equipment dedicated to those enterprises and not available for use by other parties except with the consent of the original investors. Unlike the SR, an LPR would specifically allow infrastructure to be used by other train operators as agreed with the original investors and licensing authorities.
3. Exclude an LPR (like the SR) from (a) any government financial support or subsidy for the development, so that no public funds are risked; (b) the PPP requirements for competitive tendering under the provisions of Perpres 67/2005 (as amended by Perpres 13/2010); and (c) inclusion in the RMP, which otherwise applies to a PR.
4. Provide that negotiated LPR licenses (and not the PP itself) will specify (a) the applicable termination and handover requirements, subject to the consent of the original investor, (b) the applicable procedures for applications for access from suitably qualified third party transporters using their own equipment, and (c) that, in the absence of adequate public transport, the LPR operator may offer tariff services to cargo and passengers at its discretion and with the agreement of the licensing authority.
5. Simplify and consolidate the licensing requirements for SRs and LPRs with the aim of avoiding overlap and duplication, with (a) the MOT/DGR focusing on monitoring compliance with national technical, health and safety standards, and (b) sub-national authorities focusing on monitoring compliance with local spatial planning, environmental, and social safety net provisions.
6. Specify the process, including dispute resolution, and the broad parameters of provisions for access to railway infrastructure (using precedents based on generally accepted best international practice from heavy freight railway systems). Specify that negotiations for such access will be on a business-to-business basis between the original licensee and the third party.
7. Require license conditions for both SRs and LPRs to address compliance or adherence by railway infrastructure developers and operators with environmental protection, anti-discrimination and gender-equality and social mitigation measures that are consistent with existing norms in Indonesia.

1.2.4 TOR for Phase 3

Following a peer review of the FR, the following proposed changes to the SR legal framework were incorporated into the TOR for Phase 3.

1. Clarify and improve the current SR provisions through the mechanism of a Permen, which will also increase awareness of and interest in SR activities/opportunities. This will involve:

- a. Providing a legally credible interpretation of ‘primary enterprise control’ of an SR that will allow project developers greater flexibility in project structure financing;
 - b. Providing regulations that will apply when an SR interconnects with another SR or PR service. The regulation would be used to create a PR controlled by the owners of the contributing railways able to negotiate with potential customers on a business to business basis;
 - c. Providing, for a network of SRs, that negotiated licenses (not the PP itself) will specify: (i) any termination and handover requirements which will apply and which will be subject to the consent of the original investors; (ii) the procedures for applications for access by suitably qualified third-party transporters using their own equipment; and (iii) where the operators will be allowed to offer tariff services for cargo and passengers at its discretion and by agreement with the licensing authority;
 - d. Specify the process (including dispute resolution, and the broad parameters of the access provisions) which will apply for a network of SRs in the case of an application by a third party to access the railway (using precedents based on generally accepted best international practice from heavy freight railway systems); and
 - e. Linking, through consistent terminology and precise cross-referencing, proposed articles in the Permen with articles of existing PPs, to minimise conflicting interpretations.
2. Expand railway investment opportunities through new or amended PP and introducing other measures to respond to current inadequate PR capacity. This will involve:
- a. Empower MOT with the authority to waive SR service restrictions – where inadequate public transport capacity is demonstrated to exist by agreement with the owner;
 - b. Specifying exceptions to the so-called ‘point-to-point’ rule so that service interconnections and spur lines to third party facilities along the railway alignment may be approved as part of the SR services – and are not construed as inappropriate support facilities;
 - c. Providing a railway-specific process for licensing a privately constructed and operated railway to replace Perpres 67/2005 (as amended by Perpres 13/2010) in the case of railway;
 - d. Excluding PR projects from PPP requirements for competitive tendering in cases where the railway is promoted by a private company and government financial development support or subsidies are not required (so that no public moneys are at risk);
 - e. Providing a simple mechanism for inclusion of privately promoted railways in the RMP (or excluding them from the requirement);

- f. Simplifying and consolidating the licensing requirements for SRs and PRs, with the aim of avoiding overlap and duplication; and
- g. Requiring license conditions to both SRs and PRs to address compliance or adherence by railway infrastructure developers and operators with environmental protection, anti-discrimination and gender-equality measures and social mitigation measures which are consistent with existing standards in Indonesia.

CHAPTER 2: WORKPLAN FOR PHASE 3

2.1 PRELIMINARY OBSERVATIONS

UU 23/2007 and its implementing regulations place a number of broadly-worded constraints on the operation of SRs. While we believe that the meaning of these constraints can effectively be clarified through a new Permen (ideally coupled with minor amendments to existing PPs), there are a number of legal and policy forks in the road to reform, and it was clear to us from the outset of this activity that many viewpoints would need to be considered and possibly reconciled in arriving at an effective solution endorsed by key GOI stakeholders.

The FR documents important differences among the views expressed by various stakeholders regarding the flexibility (or lack thereof) of the current legislative and regulatory framework. Given the importance of GOI buy-in to the success of Phase 3, we undertook a new round of stakeholder consultation in order to ascertain current stakeholder views (particularly within DGR and other relevant echelon work units at MOT) regarding the various reforms proposed in the FR, as well as to test the perceived limits of the current legislative framework. Summaries of these meetings can be found in **Annexe 3**.

In initial meetings with DGR, it became clear to us that there was little support within MOT for the development of LPRs, as this was felt to go beyond what was permitted under UU 23/2007. Therefore, key proposals from the FR could not be implemented as drafted, but needed as a priority to be reframed within the existing SR regulatory framework. In this regard, we felt that the current lack of implementing regulations governing interconnection (for both PRs and SRs) might provide fertile ground for the development of meaningful reforms through the creation of clear and simple rules for the establishment of SR networks in which multiple SR operators, each functioning within the constraints of UU 23/2007, would be permitted to share a common network. A complementary proposal would involve the ability for a consortium of unaffiliated businesses (*e.g.*, various coal mines along a single route) to create a single SR to serve their businesses. With clear interconnection rules and a broadening of the concept of SR client to include a consortium of unaffiliated businesses, we believed that many of the benefits of LPRs could be achieved within the existing SR framework.

2.2 FORMATION OF IAWG

At the outset of Phase 3, it was anticipated that the IAWG would be formed during the week of 18 April 2011, consisting of representatives from MOT, BKPM, MEMR, CMEA, BAPPENAS and the Ministry of Agriculture, and that the initial meeting of the IAWG (to discuss and finalise a proposed term sheet for the draft Permen and amendments to PP 56/2009 and PP 72/2009) would be held before the end of April 2011.

Unfortunately, various delays in the creation of the IAWG resulted in the first meeting taking place only on 10 June 2011, followed by a second (and final) meeting held on 24 June 2011. Nevertheless, both IAWG meetings were well attended, and served their purpose of providing a forum for a full and frank exchange of views among relevant GOI agencies. Minutes and other materials from the IAWG meetings can be found in **Annexe 5** and **Annexe 7**, respectively.

2.3 REGULAR MEETINGS WITH MOT

In addition to the two IAWG meetings held in June, we met regularly with MOT to discuss the details of our proposals and get feedback on a number of key ideas. Most of the initial meetings in April and May were with members of DGR's traffic division (*Lalu Lintas dan Angkutan Kereta Api*) and MOT's legal bureau (*Biro Hukum*), who deal directly with applicants on pending SR projects and are therefore well aware of the legal and practical issues to be addressed in the draft regulation. The reaction to our proposed approach was generally positive, and our proposals, in turn, benefitted tremendously from such input throughout the three-month period.

Following various scheduling difficulties, we were finally able to meet with DGR's Legal Division (*Bagian Hukum*) on 30 May 2011. We discovered at that time that the Legal Division was working on its own draft Permen for SRs (which was different from an earlier 2010 draft mentioned in the FR, which had already been made available to us), and that some of the views held by DGR's Legal Division (particularly with respect to the point-to-point rule, interconnection and the use of consortiums) differed somewhat from the views reflected in our proposal. We met several times with DGR's Legal Division throughout June, including an intensive one and a half day work session, during which our proposals were presented and discussed in detail, and a copy of DGR's draft Permen was made available to us. Our discussions with DGR's Legal Division yielded positive results on a number of key points (including with respect to end-of-project-life issues), and we are confident that remaining differences of opinion can be bridged.

2.4 FOCUS GROUP DISCUSSIONS (FGDS)

In addition to the regular meetings with MOT and the two IAWG meetings, two FGDs were also held, on 20 May and 21 June (respectively). Both FGDs were well attended by members of GOI, representatives from certain regional governments, and a number of private sector participants. Minutes and other materials from the two FGDs can be found in **Annexe 4** and **Annexe 6**, respectively.

2.5 MEETINGS WITH SR PROJECT PROPONENTS

At DGR's request, we also met separately with a number of SR project proponents, including MEC Coal, BATR, PT INKA (Persero) and PT Adani Global. Minutes of these meetings can be found in **Annexe 3**.

CHAPTER 3: MAIN REGULATORY CHALLENGES

As a follow-up to the extensive review conducted in prior phases of this project, and as a result of our further consultation with GOI and other stakeholders, we have identified a limited number of main regulatory challenges, and have proposed solutions to address each of these.

3.1 LACK OF CLARITY OVER WHO CAN USE/OPERATE AN SR

Article 5(3) of UU 23/2007 provides that an SR can only be *used* by a business entity to support its main activities, whereas Article 33(1) of UU 23/2007 provides that an SR can only be *operated* by a business entity to support its main activities.

For the above two conditions to be met, we believe it is not strictly necessary for the operator and the user of the SR to be the same business entity. On the one hand, we propose that the SR user can be a single legal entity, a group of affiliated legal entities, or even a consortium of unaffiliated legal entities which share a common purpose or enterprise (such as mines along a single route). On the other hand, the SR operator can be the same legal entity as the user, an affiliate of the user, or even a subsidiary of an unaffiliated transportation company that enters into an exclusive transportation agreement with the user.

Similarly, we propose that the ‘main activities’ of the user need not be the same as the ‘main activities’ of the operator. The main activities will be the same if the user and operator are the same or affiliated legal entities. However, if the operator is an unaffiliated party, the ‘main activities’ of the operator could be a transportation business, which is supported (financially) by having a special purpose subsidiary enter into a long-term agreement to build and operate an SR for the exclusive benefit of a single client.

Many of the above ideas enjoy widespread support within DGR and MOT’s Legal Bureau, including the key idea that the user and the operator can be two separate but affiliated entities, and that the user can be a single entity or a group of affiliated entities. Other ideas, such as the concept of the client as a consortium of unaffiliated entities and the idea of the client and operator being unaffiliated companies united only by an exclusive, long-term transportation agreement, are still being considered internally by DGR. Yet we believe there are sound reasons for proposing both of these rules.

First, the ability for a consortium of companies to establish and share a single SR would make SRs available to a broader spectrum of potential users. Otherwise, only a handful of companies are likely to have the wherewithal to finance an SR project. Moreover, by requiring consortium members to enter into a single transportation agreement with the common operator, with transparency regarding pricing terms and service

requirements, potential concerns regarding the balance of power between the single operator and individual consortium members can effectively be managed.

Second, with respect to the possibility of using the subsidiary of an unaffiliated transportation company to act as operator, we believe this would allow the expertise of transportation companies to be leveraged, freeing the SR client to focus on its main business rather than having to become an expert in railway transportation.

3.1.1 Transportation for a ‘fee’

PRs are defined, in part, by the right to engage in transportation for a ‘fee’. As a result, there is a perception, among certain GOI stakeholders, that SRs cannot charge any ‘fee’ for their services, even though the definition of SR is silent on whether a fee can be charged. While such an interpretation does not create any real difficulty if the SR operator and the client are one and the same legal entity, significant practical and financial problems arise when the SR operator and SR client are distinct but affiliated entities. If the operator and client are unaffiliated, the ability to charge a price for transportation services is essential.

Simply stated, if the SR operator and SR client are distinct entities, it must be legally possible for the two to enter into a long term services contract containing a price provision that will (at minimum) allow the operator fully to recover its costs (including debt service). Similarly, if SR operators are permitted (under Article 374 of PP 56/2009) to enter into interconnection agreements with other railway operators, they must also be legally entitled to charge a fair price for sharing their infrastructure or rolling stock with others, and to pay a fair price for using the infrastructure or rolling stock of others.

It is essential that implementing regulations regarding SRs and networks of SRs allow SR operators to enter into basic transportation contracts with their respective clients, and to charge/pay fair prices to other railway operators for the sharing and maintenance of a common network.

3.2 RESTRICTIONS ON THE SCOPE OF SRS

Article 350 of PP 56/2009, also known as the point-to-point rule, permits transport services between points within a main business area and one destination in a single supporting area or district. Significantly, the point-to-point rule is not mandated under UU 23/2007, but is an added restriction imposed by PP 56/2009.

As the point-to-point rule applies to all industries, the concept of a main business area is inherently vague, though in many cases it would presumably be defined by a license to operate within a specific geographic area. This is the focus of most SR interest in the mining sector, where the license is an IUP for mine development in a rather small

geographic area. It is unrealistically limiting to define service as being between a single IUP area and a single supporting point (e.g., a port terminal).

Ideally, because the 'point-to-point' rule is not required under UU23/2007, the best solution would be to repeal it altogether. This would, however, require an amendment to PP 56/2009. Pending such an amendment, we believe it is still possible to develop feasible implementing regulations for SRs without modifying the 'point-to-point' rule.

If (for instance) the origin and destination could be defined as a mining area and terminal area respectively, the mining operation could load from several locations within a mining area and discharge at several stockpiles within a terminal area. Such flexibility would be very useful. Since terminal property is so valuable, storage areas are often located some distance from the ship or barge loading jetty. It would therefore increase flexibility to allow an SR to unload at a remote storage facility and at the terminal.

Moreover, there is no economic rationale for limiting the type of terminal that can be used by an SR in a supporting area (e.g., a special port terminal). A public port with excess capacity could benefit greatly from traffic brought to it by an SR. Moreover, an SR able to serve an existing public port will shed investment costs and enjoy enhanced project feasibility. The ability of an SR to use public ports will tend to eliminate inefficient, redundant investment that might otherwise result in excessive, underutilised facilities with undue adverse environmental and social impacts. All of these outcomes benefit the public. Wherever possible, revisions of the regulations should eliminate the unfortunate linkages between the two restrictive regulatory regimes.

Where a power plant is built along an SR alignment, it is recommended that the SR be permitted to serve the power plant with coal from the principal owner's mine, whether or not the power plant is a subsidiary of the railway. There is no reason to limit the ability of the SR to serve users of the primary product of the sponsoring mine. This can be clarified in the proposed Permen. Similarly, if a consortium is allowed to be the sponsoring business entity for an SR and if a broader service area is defined, the SR should be able to load at the various locations of the consortium members.

We feel that the Permen can be used effectively to broaden the interpretation of the 'point-to-point' rule. The MoT should consider an explicit interpretation of Article 350 of PP 56/2009 to mean that receiving points owned by third parties along the SR route and interconnections with PRs or other SRs are *not* violations of the single point and supporting area rule.

3.3 UNCERTAINTY OVER INTERCONNECTION

Where a proposed railway is neither linked nor intended to be linked to another railway, it is recommended that the proposed developer be allowed considerable discretion in terms of track standards, gauge, and rolling stock, subject to a

demonstration that the infrastructure design and equipment standards meet generally accepted international standards. This policy will contribute greatly to accelerated project implementation.

Ministerial regulations regarding the treatment of connecting SRs will also help clarify the rights of each SR and result in a more efficient railway infrastructure. SRs should be able to interconnect to other railways without changing their status (see Article 374 of PP 56/2009). SR entities should be able to reach commercial agreements on sharing portions of each other's railway to provide transport services for their respective customers. Such regulations will increase the value of and returns to private investment while providing greater public benefits.

There is a conflicting view, however (based on Article 161 of PP 72/2009) that an SR connecting with another railway becomes integrated with it and, therefore, becomes subject to regulations regarding PRs. There is some ambiguity as to whether regulatory integration requires only compliance with safety, maintenance, equipment and/or operating standards applicable to PRs, or whether it also removes SR exclusivity restrictions and obligates the former SR to provide access to other transporters and to provide services to other clients, publish tariffs, and otherwise behave as a PR. At the end of Phase 2, the FR generally concluded (and we agree) that the integration requirements regarding safety and other technical standards are sound and can be made clear in a draft Permen. However, the latter form of integration – which would fundamentally change the business of an SR by converting it into a PR – is unwise, as it increases investor risk and could amount to a 'taking of property' if assets acquired as private property in the context of an SR project are suddenly converted for general use by the public. While it could be argued that the decision to connect remains within the control of the SR operator, this would not necessarily be the case in all circumstances (e.g., in the context of a request for interconnection based on an anti-monopoly challenge under UU 5/1999). Therefore, we believe that a Permen which preserves the continued private ownership and use of the SR would encourage investment in this sector and ultimately better serve the public interest.

3.4 LACK OF CLARITY OVER NATURE AND OWNERSHIP OF SR ASSETS

From the FR, it appears there is a perception among certain GOI stakeholders that the right to build and operate an SR should be treated as a concession granted by GOI for a limited period of time. This view implies that ownership of the SR should automatically revert to the government at the end of the 'concession'. In fact, some GOI stakeholders expect that this transfer would be made at no cost, on the grounds that the assets would have zero value to the SR company. This is not considered good public policy, however, as it discourages proper maintenance of railway assets. Moreover, this view fails to take into account the residual value of land rights.

After a mining license has ended and there is no more coal to move, the local government might prefer that the SR operator remove the railway line and return its right-of-way to a near natural state so that the land can be used for agriculture or

other purposes. Absent a terminal valuation negotiation process, this is unlikely to happen. Hence, at the end of Phase 2, the FR recommended (and we agree) that the parties should be free to negotiate a terminal valuation procedure, rather than being subject to a rigid regulatory policy.

In fact, the consultant team does not believe that there is any legal requirement under UU 23/2007 for treating the development of an SR as a Government concession rather than regulated private activity, and this view also appears to be shared by DGR (traffic as well as legal division) and MOT's Legal Bureau. So long as the SR is developed entirely by private parties to serve the developer's core business, with no Government assistance of any kind (financial or otherwise), there is no reason to treat the SR operating license as a form of 'concession'. Hence, we believe that the implementing regulations for SRs should provide flexibility in allowing SR proponents and regulators to negotiate what is to happen to the infrastructure at the end of the license term (e.g., transfer to the relevant level of government or its designee at a pre-determined or determinable price, sale to another licensed operator, conversion of SR into a PR, etc.). Also, we believe that SRs developed without any GOI support or guarantees (financial or otherwise) should not be subject to tender requirements under Perpres 67/2005 and Perpres 13/2010 and other constraints under Permen BAPPENAS 4/2010, and that the implementing regulations for SRs should be very clear on this point.

3.5 COMPLEXITY OF LICENSING SYSTEM

In simplifying the current licensing process, care will be needed to ensure that the jurisdictional authority of each tier of Government (central, provincial and local) is respected. For instance, in the case of an SR construction permit to be issued by a local authority (Regent or Mayor), Article 360 of PP 56/2009 requires both a positive recommendation from the provincial authority (Governor) as well as approval by the MOT. However, the bases upon which the issuing authority, the recommending authority, and the approving authority are to make their respective decisions are not spelled out. If the relevant elements to be considered are similar at all levels of Government, an administrative simplification may be possible by establishing a consultation process among the Government decision-makers so that decisions can be made in a coordinated manner, rather than sequentially. Conversely, if the considerations at each decision-making level are different, it may be more difficult to simplify or shorten the administrative process, though it should still be possible to make such process clearer for applicants.

3.6 NEED FOR COORDINATION BETWEEN DGR AND OTHER AGENCIES

Virtually all of the current interest in Special Railways relates to mining operations, specifically coal mining. In January 2009 the GoI enacted UU 4/2009, which transformed the old coal mining concessions (*Kuasa Pertambangan* or KP) into Mining Business Licenses (*Izin Usaha Pertambangan*, or IUP) and substantially simplified the

range of coal extraction agreements. These changes may have a significant impact on how coal transport is conducted.

3.6.1 Mining Regulatory Framework

The definition of mining business under UU 4/2009 covers activities related to research, management and utilisation of minerals or coal, including general investigation, exploration, feasibility studies, construction, mining, utilisation and purification, transportation and sales, and after-mining activities. The law divides a mining business into mineral mining and coal mining.

IUPs are divided into:

- Exploration IUP, including activities of general investigation, exploration, and feasibility study; and
- Production Operation IUP, including activities of construction, mining, utilisation and purification, transportation, and sales.

Every Exploration IUP holder is guaranteed an Operation Production IUP as a continuation of mining activities. IUPs are given to (i) business entities, (ii) corporations and (iii) individuals for only one type of mineral or coal. Business entities wanting to sell extracted minerals and/or coal that are not mining businesses are required to obtain a Production Operation License.

3.6.2 Potential SR Impacts

An SR seeking to purchase the coal it transports, which is a potential option to meet current regulatory requirements for SR operators, would need a Mining Business (Production Operation) License. However, if such a license were obtained by an SR, restrictions on transfer would apply. To transfer ownership and/or shares, the holders must inform the relevant authorities to ascertain that the transfer is agreed by the authorities and does not conflict with the prevailing regulations.

A further complication, which is both an opportunity for and a potential threat to a mining SR, is that IUP license holders are strongly encouraged to use the service of local and/or national mining service companies (IUJPs) to perform certain mining activities, including general investigation, exploration, feasibility studies, mining construction and transportation. An IUP license holder using such a mining service company (IUJP) remains responsible for all mining business activities. However, the regulatory preference for an IUJP that has distinct local ownership may limit the available options for structuring permitted legal relationship between an IUP holder and an SR IUJP holder in compliance with UU 23/2007 and PP 56/2009.

On September 30, 2009, the MEMR issued Permen (MEMR) 28/2009, which implements certain provisions of UU 4/2009 relating to mining service business

activities. To an extent, Permen (MEMR) 28/2009 redefines certain mining service business activities and practices that have been implemented in the Indonesian mining sector. For example, mining companies now have to undertake alone certain coal/mineral extraction and loading activities that have traditionally been contracted to mining contractors.

Local mining contractors are now given preferential treatment over foreign-owned mining contractors in securing mining service contracts within the relevant mining areas, and there are stricter requirements for a mining company using subsidiary/affiliated mining contractors.

Permen (MEMR) 28/2009 still allows a large number of mining activities to be contracted out to mining contractors. However, certain mining activities – namely, coal/mineral extraction and loading – will have to be undertaken by the mining companies themselves. This has raised some concerns for both mining companies and mining contractors. For mining companies, their obligation to undertake their own coal/mineral extraction and loading means that they will have to procure their own mining equipment and make available the necessary manpower and expertise. For mining contractors, this same obligation means that they will lose a portion of their revenues.

A number of alternatives have been considered and discussed by Indonesian mining stakeholders to deal with such matters. One option is to have the mining contractors supply the equipment needed for coal/mineral extraction and loading activities on a 'dry-lease' basis. Effectively, mining contractors lease out the necessary equipment (whether on a fully maintained basis or otherwise) to the mining companies. Manpower would be excluded from such an arrangement because, if supplied, it would appear in substance that the lease arrangement was no different from an actual mining service contract arrangement, which is prohibited under Permen (MEMR) 28/2009. The mining companies would therefore have to provide their own manpower for the coal/mineral extraction and loading activities.

There are ongoing concerns on how to implement this separation of mining activities. Consequently, further changes in mining regulations and their interpretation could impact the relationship of an SR to the primary enterprise in the mining industry. It remains unclear whether an SR should become an IUP or an IUJP, or attempt to operate solely under MOT rules.

To a large extent, these issues must be addressed directly by MEMR as part of sector-specific regulations dealing with the organization of the mining industry, and cannot be resolved by MOT in the context of a Permen dealing with SRs generally. Nevertheless, these issues illustrate the need for close coordination between MOT and other agencies in formulating feasible rules for the establishment and operation of SRs.

CHAPTER 4: CROSS-CUTTING DESIGN ISSUES

Section 6.2 of the TOR for this activity calls for consideration of a number of cross-cutting design issues (Social, gender and disability; governance; environment; and HIV/AIDS and child protection).

4.1 GENDER, ENVIRONMENTAL AND SOCIAL CONCERNS

The main output of this activity is a draft Permen to be issued by MOT, as well as (possibly) amendments to PP 56/2009 and PP 72/2009 to be issued by GOI. Any environmental, gender and social considerations to be taken into account in connection with the application of a PP or Permen must be consistent and in accordance with prevailing Indonesian laws and regulations, under authority of which the Permen and PP will necessarily be issued.

While appropriate references to ‘prevailing laws’ have been incorporated into the draft Permen (particularly with reference to environmental and social issues, which by virtue of PP 56/2009 must be considered as part of the licensing process for SRs), and care has been taken to ensure that license conditions include (among others) compliance with such legislation, as well as compliance with applicable legislation relating to non-discrimination in employment practices, the adequacy of such prevailing laws was not separately evaluated by the consultant team, as it would not be appropriate (or even possible) to vary such laws in the context of implementing regulations emanating from MOT (which is not tasked with elaborating environmental, social, and gender discrimination policy).

As a practical matter, under prevailing Indonesian law dealing specifically with environmental and social issues (e.g., Indonesia’s Environmental Impact Assessment process, known as AMDAL), it is expected that detailed assessments of environmental and social issues will be quite different for a railway in a low population but in a highly environmentally sensitive area, such as East Kalimantan’s forests and wetlands, compared with a railway in a highly populated area in Sumatra with competing transport right-of-way, population and business displacement issues and greater air and noise pollution concerns.

4.2 GOVERNANCE ISSUES

Governance issues are relevant to the development of SRs for at least three important reasons:

- As in any other context where large projects are subject to regulatory approval, the potential for corruption exists.

- Such potential is heightened if licenses are awarded through direct negotiations rather than through a public tender process.
- Railways can, under the wrong circumstances, engage in monopolistic or other anti-competitive behaviour.

While none of the above problems can be eliminated entirely, we believe that a licensing process that provides clear rules regarding applicable filing requirements and decision-making processes, and imposes strict deadlines for agency action, can make it more difficult for corruption to take place. Therefore, we have endeavoured to follow these principles, wherever possible, in our draft Permen.

With respect to our proposal specifically to exempt SRs from public tender requirements (which apply generally to concessions and PPP projects), we believe there is a strong policy argument for exempting from public tender requirements projects involving no public funds and no government support or guarantees of any kind (as these do not really constitute a ‘concession’, but simply a regulated form of private activity). Here again, however, we believe that the best way to minimize the risk of corruption in the licensing process is to make filing requirements and decision-making processes as transparent as possible, and to impose strict deadlines for agency action.

With regard to potential concerns arising under the Anti-Monopoly Law (UU 5/1999), we note that fair competition was an important consideration of DGR, and was also echoed by various other GOI stakeholders during the IAWG meetings. Although a railway (like a telecommunication network or pipeline) can behave as a kind of natural monopoly, we believe that the very nature of the SR (which, by law, must be dedicated to serving a single client) would make it difficult for the SR operator to exert undue power over its client. Where the operator is the same legal entity as the client, or an affiliated entity controlled by, or under common control with, such client, the potential for abuse is effectively eliminated. Even in the case (which we support in our draft Permen) where the client and operator are unaffiliated, the requirement of a long-term *exclusive* transportation agreement makes it possible for the parties effectively to manage the risk of opportunistic behaviour. Unlike the case of a captive shipper (who has no choice but to use a particular railway to move its goods), captivity in the case of an SR goes both ways.

Additional concerns under UU 5/1999 may arise as a result of our proposal to allow a consortium of unaffiliated companies to get together and create a common SR. Here again, however, we believe that a simple rule requiring all consortium members to sign a single, exclusive transportation agreement with the common SR operator (including transparent pricing formulas and basic contractual protection against discrimination) can serve effectively to manage the risk of opportunistic behaviour.

Finally, concerns relating to UU 5/1999 may also arise in the context of interconnection agreements. In order to minimize this risk, we have included in the draft Permen basic provisions requiring interconnection agreements to be approved not only by the SR operator but also by the SR client (when different from the operator). In terms of

ensuring fairness to the third party operator, we also included a provision requiring that costs for infrastructure access be fairly apportioned. We also note that, in the event of abuse, aggrieved parties have the right to challenge unfair agreements (or refusals to deal) to the *Komisi Pengawas Persaingan Usaha* (KPPU), which is in charge of enforcing UU 5/1999.

4.3 HIV/AIDS AND CHILD PROTECTION

As stated in the TOR, it was not expected that this activity would give rise to any issues relating to HIV/AIDS or child protection. We confirm that no such issues have been encountered.

ANNEXE 1: PROPOSED DRAFT MINISTERIAL REGULATION

MINISTER OF TRANSPORTATION

NUMBER PM. ... YEAR ...

ON

IMPLEMENTATION OF SPECIAL
RAILWAYS

BY THE GRACE OF GOD ALMIGHTY

MINISTER OF TRANSPORTATION,

PERATURAN MENTERI PERHUBUNGAN

NOMOR PM. ... TAHUN ...

TENTANG

PENYELENGGARAAN PERKERETAAPIAN
KHUSUS

DENGAN RAHMAT TUHAN YANG MAHA
ESA

MENTERI PERHUBUNGAN,

Whereas: In order to implement the provisions of Article 363, Article 368 and Article 376 of Government Regulation No. 56 of 2009 on Railway Operations, as well as the provisions of Article 163 of Government Regulation No. 72 of 2009 on Railway Traffic and Transportation, it is necessary to promulgate this Regulation of the Minister of Transportation on the Implementation of Special Railways;

Considering:

1. Law No. 23 of 2007 on Railways (the State Gazette of the Republic of Indonesia Year 2007 Number 65 Gazette of the Republic of Indonesia Number 4722);
2. Government Regulation No. 56 of 2009 on Railway Operations (State Gazette of the Republic of Indonesia Year 2009 Number 129 and Supplement No. 5048);

Menimbang: Bahwa untuk melaksanakan ketentuan dalam Pasal 363, Pasal 368 dan Pasal 376 Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Penyelenggaraan Perkeretaapian, dan ketentuan dalam Pasal 163 Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api, perlu menetapkan Peraturan Menteri Perhubungan tentang Penyelenggaraan Perkeretaapian Khusus;

Mengingat:

1. Undang-Undang Nomor 23 Tahun 2007 tentang Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2007 Nomor 65 Tambahan Lembaran Negara Republik Indonesia Nomor 4722);
2. Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Penyelenggaraan Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 129 dan Tambahan Lembaran Negara Nomor 5048);

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| <p>3. Government Regulation No. 72 of 2009 on Railway Traffic and Transportation (State Gazette of the Republic of Indonesia Year 2009 Number 176 Supplement No. 5086);</p> <p>4. Presidential Decree No. 10 of 2005 regarding Organization Unit and Task of Echelon I of State Ministries of the Republic of Indonesia as already amended by Presidential Decree No. 50 of 2008;</p> <p>5. Presidential Regulation No. 47 of 2009 on the Establishment and Organization of the Ministry of State; and</p> <p>6. Regulation of the Minister of Transportation No. KM 43 of 2005 on the Organization and Administration of the Department of Transportation, as last amended by Regulation of the Minister of Transportation No. KM 20 of 2008.</p> | <p>3. Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api (Lembaran Negara Republik Indonesia Tahun 2009 Number 176 dan Tambahan Lembaran Negara Nomor 5086);</p> <p>4. Peraturan Presiden Nomor 10 Tahun 2005 tentang Unit Organisasi dan Tugas Eselon I Kementrian Negara Republik Indonesia sebagaimana telah diubah dengan Peraturan Presiden Nomor 50 Tahun 2008;</p> <p>5. Peraturan Presiden Nomor 47 Tahun 2009 tentang Pembentukan dan Organisasi Kementerian Negara; dan</p> <p>6. Peraturan Menteri Perhubungan Nomor KM 43 Tahun 2005 tentang Organisasi dan Tata Kerja Departemen Perhubungan, sebagaimana diubah terakhir dengan Peraturan Menteri Perhubungan Nomor KM 20 Tahun 2008.</p> |
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TO DECIDE:

To Stipulate: Regulation of the Minister of Transportation on the Implementation of Special Railways:

MEMUTUSKAN:

Menetapkan : Peraturan Menteri Perhubungan tentang Penyelenggaraan Perkeretaapian Khusus:

CHAPTER I
GENERAL PROVISIONS

Article 1

In this Regulation:

BAB I
KETENTUAN UMUM

Pasal 1

Dalam Peraturan ini yang dimaksud dengan:

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| <p>(1) “Railway” refers to an integrated system consisting of train facilities, infrastructures, human resources, norms, criteria, requirements and procedures for operation of train transportation;</p> | <p>(1) “Perkeretaapian” adalah satu kesatuan sistem yang terdiri atas prasarana, sarana, dan sumber daya manusia, serta norma, kriteria, persyaratan, dan prosedur untuk penyelenggaraan transportasi kereta api;</p> |
| <p>(2) “Special Railway” refers to a railway used for supporting the principal business activities of certain business entity and not for public service;</p> | <p>(2) “Perkeretaapian Khusus” adalah suatu perkeretaapian yang digunakan untuk menunjang kegiatan pokok badan usaha tertentu dan tidak digunakan untuk melayani masyarakat umum;</p> |
| <p>(3) “Central Government”, hereinafter called the “Government”, means President Republic of Indonesia who has authority of governing Republic of Indonesia stated in Fundamental Law of Republic of Indonesia year of 1945;</p> | <p>(3) “Pemerintah Pusat”, yang selanjutnya disebut “Pemerintah”, adalah Presiden Republik Indonesia yang memegang kekuasaan pemerintahan negara Republik Indonesia sebagaimana dimaksud dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945;</p> |
| <p>(4) “Regional Government” refers to Governor, Regent/Mayor, and its subordinates as the element of regional government;</p> | <p>(4) “Pemerintah Daerah” adalah Gubernur, Bupati atau Walikota, dan perangkat daerah sebagai unsur penyelenggara pemerintahan daerah;</p> |
| <p>(5) “Minister” means the Ministry of Transportation;</p> | <p>(5) Menteri” adalah Menteri Perhubungan;</p> |
| <p>(6) “Director General” means the Director General of Railways;</p> | <p>(6) “Direktur Jenderal” adalah Direktur Jenderal Perkeretaapian;</p> |

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| <p>(7) “Special Railway User” means a business entity that uses a Special Railway to support its Principal Business Activities; such business entity can be a single legal entity or a consortium of affiliated or unaffiliated legal entities engaged in a common or joint enterprise;</p> | <p>(7) “Pengguna Perkeretaapian Khusus” adalah suatu badan usaha yang menggunakan Perkeretaapian Khusus untuk mendukung Kegiatan Usaha Pokoknya; Badan Usaha yang dimaksud dalam ketentuan ini dapat berupa satu badan hukum atau sebuah konsorsium dari beberapa badan hukum yang terafiliasi atau tidak terafiliasi yang melakukan usaha yang sejenis atau melakukan kegiatan bersama-sama.</p> |
| <p>(8) “Principal Business Activities” means the business activities of a Special Railway User;</p> | <p>(8) “Kegiatan Pokok Usaha” adalah kegiatan usaha utama dari Pengguna Perkeretaapian Khusus;</p> |
| <p>(9) “Special Railway Operator” means the business entity that operates a Special Railway, which may be:</p> <ul style="list-style-type: none"> a. the Special Railway User; b. a legal entity that is directly or indirectly controlled by, or under common control with, the Special Railway User; or c. a controlled affiliate of a transportation company, established for the specific purpose of operating the Special Railway for the exclusive use of the Special Railway User; | <p>(9) “Penyelenggara Perkeretaapian Khusus” adalah badan usaha yang dapat merupakan:</p> <ul style="list-style-type: none"> a. Pengguna Perkeretaapian Khusus; b. badan hukum yang secara langsung atau tidak langsung dikendalikan atau di bawah kendali yang sama dengan Pengguna Perkeretaapian Khusus; atau c. afiliasi dari dan yang dikendalikan oleh sebuah perusahaan angkutan yang hanya didirikan untuk menyelenggarakan Perkeretaapian Khusus untuk digunakan secara eksklusif oleh Pengguna Perkeretaapian Khusus; |
| <p>(10) “Construction Permit” means a permit for the construction of a Special Railway;</p> | <p>(10) “Izin Pembangunan” adalah izin untuk membangun Perkeretaapian Khusus;</p> |
| <p>(11) “Operating Permit” means a permit for the operation of a Special Railway;</p> | <p>(11) “Izin Operasi” adalah izin untuk mengoperasikan Perkeretaapian Khusus;</p> |

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| <p>(12) “In-Principle Approval” means an in-principle approval for the development of a Special Railway;</p> <p>(13) “Station” means any location where a trains departs or stops for loading or unloading, or for operational purposes;</p> <p>(14) “Issuing Authority” means, as the context requires, the level of government responsible for issuing an In-Principle Approval, Construction Permit or Operating Permit, as set out in Governmental Regulation No. 56 of 2009;</p> <p>(15) “In-Principle Operating Approval” means a conditional Operating Permit issued prior to completion of construction, testing and commissioning of the Special Railway infrastructure;</p> <p>(16) “Control” means actual control over a majority of the voting shares of a legal entity, or the contractual right to appoint or remove a majority of the members of the board of directors of such legal entity.</p> | <p>(12) “Persetujuan Prinsip” adalah persetujuan prinsip untuk mengadakan Perkeretaapian Khusus;</p> <p>(13) “Stasiun” adalah setiap lokasi di mana sebuah kereta berangkat atau berhenti untuk memuat atau membongkar, atau untuk tujuan operasional;</p> <p>(14) “Otoritas Penanggungjawab” adalah, sesuai dengan konteks – sebagaimana diperlukan, setiap tingkatan pemerintahan yang berwenang untuk mengeluarkan Persetujuan Prinsip, Izin Pembangunan atau Izin Operasi, sebagaimana dimaksud dalam Peraturan Pemerintah Nomor 56 Tahun 2009;</p> <p>(15) “Izin Penyelenggaraan Prinsip” adalah Izin Penyelenggaraan bersyarat yang diberikan sebelum diselesaikannya pembangunan, uji coba dan pengawasan atas prasarana Perkeretaapian Khusus.</p> <p>(16) “Kendali” adalah kendali yang nyata atas mayoritas saham dengan hak suara dari suatu badan hukum, atau hak yang diberikan berdasarkan suatu perjanjian untuk mengangkat atau memberhentikan mayoritas anggota direksi dari suatu badan hukum.</p> |
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Article 2

- (1) A Special Railway can operate in the areas where the Principal Business Activities are conducted, and can also be used to connect such areas to a terminal Station located outside such areas.

Pasal 2

- (1) Suatu Perkeretaapian Khusus dapat diselenggarakan di kawasan-kawasan dimana Kegiatan Pokok Usaha diselenggarakan, dan dapat juga dipergunakan untuk menghubungkan kawasan-kawasan tersebut dengan suatu Stasiun terminal yang berlokasi di luar kawasan-kawasan tersebut

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| <p>(2) The terminal Station referred to in paragraph (1) can be (among others) a connecting point with another railway, a port or other mode of transportation, or a connecting point with an off-taker, supplier, or service provider with whom the Special Railway User does business.</p> | <p>(2) Terminal stasiun sebagaimana dimaksud pada ayat (1) dapat (antara lain) merupakan titik penghubung dengan perkeretaapian lain, suatu pelabuhan atau sarana transportasi lain dengan off-taker, penyedia barang atau penyedia jasa yang melakukan kegiatan usaha dengan Pengguna Perkeretaapian Khusus.</p> |
| <p>(3) Other Stations can also be located at points between the areas where the Principal Business Activities are conducted and the terminal Station referred to in paragraph (1).</p> | <p>(3) Stasiun-stasiun lain dapat ditempatkan di titik-titik yang terletak di antara kawasan-kawasan dimana Kegiatan Pokok Usaha diselenggarakan dan terminal stasiun sebagaimana dimaksud pada ayat (1).</p> |
| <p>(4) A Special Railway may, as specified in the Operating Permit and subject to compliance with prevailing safety and technical regulations, be used to carry things, persons, or both. Things can include goods and, generally, anything related to the business activities of the Special Railway User, including inputs, raw materials, products, by-products and other things required by or produced as part of the business activities of the Special Railway User.</p> | <p>(4) Perkeretaapian Khusus dapat, seperti yang disebutkan dalam Izin Operasi dan tunduk kepada peraturan keselamatan dan teknis yang berlaku, digunakan untuk pengangkutan benda, orang atau kedua-duanya. Benda dapat berupa seperti barang dan secara umum semua yang berhubungan dengan kegiatan usaha dari Pengguna Perkeretaapian Khusus, termasuk bahan mentah, barang produksi, by-products, atau benda-benda lain yang diperlukan atau diproduksi sebagai bagian dari kegiatan usaha dari Pengguna Perkeretaapian Khusus.</p> |

CHAPTER II IN-PRINCIPLE APPROVAL

Article 3

- (1) The proposed Special Railway Operator must apply for an In-Principle Approval in accordance with the provisions of this Regulation.

BAB II PERSETUJUAN PRINSIP

Pasal 3

- (1) Pihak yang mengajukan permohonan Penyelenggara Perkeretaapian Khusus wajib mengajukan Persetujuan Prinsip sesuai dengan ketentuan dalam Peraturan ini.

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| <p>(2) An application for In-Principle Approval made in accordance with the provisions of this Regulation shall not constitute a form of KPS (<i>Kerjasama Pemerintah dan Swasta</i>) project subject to public tender under relevant regulation relating to cooperation between Government and business entity in the procurement of infrastructure.</p> | <p>(2) Permohonan pengajuan Persetujuan Prinsip yang diajukan sesuai dengan ketentuan dalam Peraturan ini bukan merupakan bentuk proyek KPS (<i>Kerjasama Pemerintah dan Swasta</i>) yang tunduk pada ketentuan mengenai tender dalam peraturan yang mengatur mengenai kerjasama antara pemerintah dengan badan usaha dalam penyediaan infrastruktur</p> |
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[Elucidation: at the time this ministerial regulation is enacted the regulation relating to cooperation between Government and business entity in the procurement of infrastructure is Presidential Regulation No. 67 of 2005 on the Cooperation between Government and Business Enterprises in Infrastructure Procurement (as amended by Presidential Regulation No. 13 of 2010).]

[Penjelasan: Pada saat peraturan menteri ini di undangkan peraturan yang mengatur mengenai kerjasama antara pemerintah dengan badan usaha dalam penyediaan infrastruktur adalah Presiden Nomor 67 Tahun 2005 tentang Kerjasama Pemerintah dengan Badan Usaha dalam Penyediaan Infrastruktur (sebagaimana telah diubah dengan Peraturan Presiden Nomor 13 Tahun 2010).]

Article 4

Pasal 4

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| <p>(1) An application for In-Principle Approval must be submitted to the relevant Issuing Authority as follows:</p> <ul style="list-style-type: none"> a. Minister, for the operation of Special Railway which crosses provincial borders; b. Governor, for the operation of Special Railway which crosses the border of districts/cities within one province, after getting approval from the Minister; | <p>(1) Permohonan pengajuan Persetujuan Prinsip harus diajukan kepada Otoritas Penanggungjawab terkait sebagai berikut:</p> <ul style="list-style-type: none"> a. Menteri, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya melintasi batas wilayah provinsi; b. gubernur, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya melintasi batas wilayah kabupaten/kota dalam satu provinsi setelah mendapat persetujuan dari Menteri; dan |
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| <p>c. Regent/Mayor, for the operation of Special Railway which is located within one district/city, after getting recommendation from the Governor</p> | <p>c. bupati/walikota, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya dalam wilayah kabupaten/kota setelah mendapat rekomendasi gubernur dan persetujuan Menteri.</p> |
| <p>(2) The application referred to in paragraph (1) must be accompanied by each of the following documents</p> | <p>(2) Permohonan pengajuan sebagaimana dimaksud pada ayat (1) harus dilengkapi dengan dokumen-dokumen:</p> |
| <p>a. articles of association of the proposed Special Railway Operator;</p> <p>b. tax payer registration number;</p> <p>c. business license;</p> <p>d. letter of domicile of the proposed Special Railway Operator;</p> <p>e. location map of the Special Railway infrastructure;</p> <p>f. analysis as to the relevance between railway needs and the principal business activities; and</p> <p>g. other information as may be required by this Regulation.</p> | <p>a. akte pendirian dari pemohon Penyelenggara Perkeretaapian Khusus;</p> <p>b. nomor pokok wajib pajak;</p> <p>c. izin usaha;</p> <p>d. surat keterangan domisili dari pemohon Penyelenggara Perkeretaapian Khusus;</p> <p>e. peta lokasi prasarana Perkeretaapian Khusus;</p> <p>f. kajian kesesuaian antara kebutuhan perkeretaapian dan usaha pokoknya; dan</p> <p>g. dokumen lainnya sebagaimana disyaratkan oleh Peraturan ini.</p> |

- (3) The application for In-Principle Approval must state whether the Special Railway Operator will be the same legal entity as the Special Railway User. If the Special Railway Operator will be a legal entity other than the Special Railway User, the proposed Special Railway Operator shall explain the current and (if different) proposed legal relationship between the Special Railway User and the Special Railway Operator.
- (3) Permohonan Persetujuan Prinsip harus dengan jelas menjelaskan apakah Penyelenggara Perkeretaapian Khusus akan merupakan badan hukum yang sama dengan Pengguna Perkeretaapian Khusus. Apabila Penyelenggara Perkeretaapian Khusus akan merupakan suatu badan hukum yang berbeda dengan Pengguna Perkeretaapian Khusus, pemohon Penyelenggara Perkeretaapian Khusus harus menjelaskan hubungan hukum yang ada saat ini dan (dalam hal terdapat perbedaan) rencana hubungan hukum yang akan timbul nantinya antara Pengguna Perkeretaapian Khusus dan Penyelenggara Perkeretaapian Khusus.

[Elucidation: The ‘current legal relationship’ and ‘proposed legal relationship’ refers to a relationship enumerated in Article 1 paragraph (9) of this regulation.]

[Penjelasan: ‘Hubungan hukum yang ada saat ini’ dan ‘rencana hubungan hukum’ adalah hubungan sebagaimana dimaksud di dalam Pasal 1 ayat (9) peraturan ini]

Article 5

Pasal 5

- (1) The letter of domicile referred to in Article 4 paragraph (2) letter d must be issued by the district where the proposed Special Railway Operator is located.
- (1) Surat keterangan domisili sebagaimana yang dimaksud Pasal 4 ayat (2) huruf d harus dikeluarkan oleh pemerintah setempat di tempat kedudukan pemohon Penyelenggara Perkeretaapian Khusus.
- (2) The map referred to in Article 4 paragraph (2) letter e must include:
- (2) Peta lokasi prasarana yang dimaksud oleh Pasal 4 ayat (2) huruf e harus disertai dengan:
- a. scale drawings showing the proposed location of railway lines and Stations;
 - a. skala denah yang menunjukkan rencana lokasi jalur perkeretaapian dan Stasiun;
 - b. a land acquisition and resettlement plan;
 - b. rancangan pengambilalihan dan pemukiman kembali lahan;

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| <p>c. railway survey results indicating the characteristics of the soil (slope, soil conditions, etc.); and</p> <p>d. topographic maps.</p> | <p>c. hasil penelitian jalur perkeretaapian yang menunjukkan karakteristik dari tanah (kemiringan, kondisi tanah, dsb.); dan</p> <p>d. peta topografi.</p> |
| <p>(3) The study referred to in Article 4 paragraph (2) letter f must contain:</p> <p>a. a study of the engineering and economic feasibility of the proposed Special Railway, including an evaluation of other actual or planned transportation alternatives (if any) in the area to be served, taking into account the national, provincial and local railway master plans and relevant spatial plans;</p> <p>b. an evaluation of the anticipated benefits of the project to the Special Railway User, the local community and the public at large, as well as the potential adverse impacts on the environment, the local community and potential competitors;</p> <p>c. an evaluation of the short-term, medium-term and long-term transportation needs of the Special Railway User, the local community, and the public at large, in the area to be served by the Special Railway;</p> | <p>(3) Kajian kesesuaian sebagaimana yang dimaksud pada Pasal 4 ayat (2) huruf f harus berisikan:</p> <p>a. kajian kelayakan rancang bangun dan ekonomi dari rancangan Perkeretaapian Khusus, termasuk penilaian atas alternatif sarana transportasi yang telah ada atau yang telah direncanakan (jika ada) dalam area yang akan dilalui jalur perkeretaapian khusus, dengan memperhatikan rencana induk Perkeretaapian nasional, propinsi dan lokal;</p> <p>b. penilaian atas perkiraan keuntungan yang akan diperoleh dari proyek bagi Pengguna Perkeretaapian Khusus, penduduk setempat, dan masyarakat secara keseluruhan, serta potensi dampak negatif terhadap lingkungan, penduduk setempat dan pesaing usaha;</p> <p>c. penilaian atas kebutuhan sarana transportasi jangka pendek, jangka menengah, dan jangka panjang dari Pengguna Perkeretaapian Khusus, penduduk setempat, dan masyarakat secara keseluruhan, di daerah pelayanan Perkeretaapian Khusus;</p> |

- d. information regarding the financial condition of the Special Railway User and proposed sources of financing for the project.

Article 6

- (1) The Issuing Authority (in consultation with all other relevant levels of government as required under prevailing laws), shall be responsible for reviewing and approving all aspects of the application for In-Principle Approval.
- (2) The Minister (acting through the Director General) shall review for approval all technical aspects of the application.
- (3) The Minister's approval may be conditional upon the applicant meeting certain conditions, in which case the conditions must be clearly stated by the Minister in its approval letter and notified to the proposed Special Railway Operator by the Issuing Authority.

- d. informasi mengenai kondisi keuangan Pengguna Perkeretaapian Khusus dan usulan sumber pendanaan untuk pembiayaan proyek.

Pasal 6

- (1) Otoritas Penanggungjawab (dengan melakukan konsultasi dengan semua tingkatan pemerintahan sebagaimana diwajibkan di dalam ketentuan perundang-undangan yang berlaku) bertanggung jawab untuk melakukan penilaian dan menentukan apakah setiap bagian dari pengajuan permohonan Persetujuan Prinsip dapat diberikan persetujuan.
- (2) Menteri (dalam hal ini bertindak melalui Direktur Jenderal) bertanggung jawab untuk melakukan penilaian dan berdasarkan penilaian memberikan persetujuan sehubungan dengan aspek-aspek teknis dari permohonan.
- (3) Persetujuan menteri dapat disertai dengan syarat-syarat tertentu yang harus terlebih dahulu dipenuhi oleh pemohon, dan syarat-syarat tersebut harus dicantumkan dengan jelas oleh Menteri dalam surat persetujuannya dan diberitahukan kepada pemohon Penyelenggara Perkeretaapian Khusus oleh Otoritas Penanggungjawab.

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| <p>(4) The Issuing Authority shall issue a response to the Special Railway Operator with respect to the application for In-Principle Approval within no more than [60 (sixty) working days] after the request has been received and deemed complete, as evidenced by proof of receipt delivered by the Issuing Authority.</p> | <p>(4) Otoritas Penanggungjawab untuk mengeluarkan tanggapan kepada Penyelenggara Perkeretaapian Khusus atas permohonan Persetujuan Prinsip paling lambat [60 (enam puluh) hari kerja] setelah permohonan diterima dan dinyatakan lengkap, yang dibuktikan dengan tanda bukti penerimaan dari Otoritas Penanggungjawab.</p> |
| <p>(5) If the application for In-Principle Approval is rejected, the Issuing Authority, after conferring with all other relevant levels of government as required under prevailing laws, shall prepare a written notice of rejection stating the specific reasons for the rejection. Such notice of rejection shall be notified to the Special Railway User by the Issuing Authority.</p> | <p>(5) Apabila permohonan Persetujuan Prinsip ditolak, Otoritas Penanggungjawab setelah berkoordinasi dengan semua tingkatan pemerintahan sebagaimana diwajibkan di dalam undang-undangan, berkewajiban menyiapkan suatu pemberitahuan tertulis penolakan yang menyatakan secara jelas alasan penolakan tersebut. Pemberitahuan penolakan tersebut wajib disampaikan kepada Pengguna Perkeretaapian Khusus oleh Otoritas Penanggungjawab.</p> |
| <p>(6) A rejected application referred to in paragraph (3) may be supplemented or re-submitted by the Special Railway User to the Issuing Authority.</p> | <p>(6) Permohonan yang ditolak sebagaimana dimaksud dalam ayat (3) dapat dilengkapi dan diajukan ulang oleh Pengguna Perkeretaapian Khusus kepada Otoritas Penanggungjawab.</p> |

Article 7

The holder of an In-Principle Approval must, prior to applying for a Construction Permit, carry out the following activities:

- a. technical planning;
- b. analysis on the enviromental impact or UKL and UPL; and
- c. land procurement.

Pasal 7

Penerima Persetujuan Prinsip wajib, sebelum mengajukan Izin Pembangunan, melaksanakan kegiatan-kegiatan:

- a. perencanaan teknis;
- b. analisis mengenai dampak lingkungan hidup atau UKL dan UPL; dan
- c. pengadaan tanah.

Article 8

- (1) Technical planning, as referred to in Article 7 letter a, shall mean a set of technical documents, drawings and specifications providing a complete description of the proposed Special Railway infrastructure to be constructed.
- (2) Technical planning shall cover at least the following planning phases:
 - a. pre-design (including pre-feasibility and feasibility);
 - b. design (including survey, investigation, basic plan and detailed plan);
 - c. construction (including technical specifications, physical construction references, performance schedule, work methods and supervision); and
 - d. post-construction (including evaluation of the results and benefits of the project).
- (3) Technical planning as referred to in paragraph (1) must be completed within 2 (two) years from the granting of In-Principle Approval and, thereafter, must be submitted for approval by, the Director General on behalf of the Minister.
- (4) The Issuing Authority shall revoke the In-Principle Approval if the holder fails to complete the technical planning as required under paragraph (2).

Pasal 8

- (1) Perencanaan Teknis, sebagaimana dimaksud dalam Pasal 7 huruf a, adalah terdiri dari serangkaian dokumen, gambaran, dan spesifikasi teknis yang memberikan keterangan lengkap mengenai bagaimana prasarana Perkeretaapian Khusus yang dimohonkan akan dibangun.
- (2) Perencanaan teknis mencakup setidaknya tahapan perencanaan sebagai berikut:
 - a. pradesain (termasuk pra-kelayakan dan kelayakan);
 - b. desain (termasuk survei, penyelidikan, rencana dasar dan rencana mendetil);
 - c. konstruksi (termasuk spesifikasi teknik, acuan konstruksi fisik, jadwal pelaksanaan, metode pengerjaan dan pengawasan); dan
 - d. pascakonstruksi (termasuk evaluasi atas hasil dan manfaat dari proyek).
- (3) Perencanaan Teknis sebagaimana dimaksud dalam ayat (1) harus diselesaikan dalam waktu 2 (dua) tahun sejak dikeluarkannya Persetujuan Prinsip dan, untuk setelahnya, wajib diajukan kepada Direktur Jenderal yang bertindak atas nama Menteri untuk mendapatkan persetujuan.
- (4) Otoritas Penanggungjawab wajib mencabut Persetujuan Prinsip apabila pemegang Persetujuan Prinsip tidak dapat menyelesaikan perencanaan teknis sebagaimana dimaksud dalam ayat (2).

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| <p>(5) Before revoking an In-Principle Approval under paragraph (3), the Issuing Authority shall give the holder two written warnings, each with a grace period of 30 working days, to enable the holder to complete and file the required technical planning.</p> | <p>(5) Sebelum mencabut Persetujuan Prinsip sebagaimana dimaksud dalam ayat (3), Otoritas Penanggungjawab wajib memberikan peringatan tertulis kepada penerima Persetujuan Prinsip sebanyak dua kali, masing-masing dengan jangka waktu selama 30 hari kerja untuk memberikan kesempatan kepada penerima Persetujuan Prinsip untuk menyelesaikan dan mengajukan perencanaan teknis yang diwajibkan.</p> |
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Article 9

- (1) Land procurement, as referred to in Article 7 letter c, shall be conducted in accordance with prevailing laws on commercially reasonable terms in arms-length transactions.

[Elucidation: Land may be acquired in accordance with the provisions of this paragraph from the Government, from a Regional Government, or from any BUMN or BUMD.]

- (2) When the proposed Special Railway Operator has acquired at least 10% of the land rights needed to construct the Special Railway, it shall so notify the Issuing Authority, with all necessary supporting evidence.

Pasal 9

- (1) Pengadaan lahan, sebagaimana dimaksud dalam Pasal 7 huruf c, wajib diselenggarakan sesuai dengan hukum yang berlaku berdasarkan syarat-syarat yang wajar dan didukung dokumen-dokumen yang jelas.

[Penjelasan: pembelian tanah berdasarkan ketentuan ayat ini dapat dilakukan dengan Pemerintah, Pemerintah Daerah, atau dari BUMN atau BUMD manapun.]

- (2) Pemohon Penyelenggara Perkeretaapian Khusus wajib memberikan pemberitahuan kepada Otoritas Penanggungjawab, setelah memperoleh setidaknya 10% dari lahan yang diperlukan untuk membangun Perkeretaapian Khusus, bersama dengan bukti-bukti pendukung yang diperlukan.

Article 10

- (1) Environmental impact analysis referred to in Article 7 letter b should also include a review of social impacts in accordance with prevailing laws, and must be completed within 2 (two) years from the granting of In-Principle Approval.
- (2) The environmental and social impact analysis referred to in paragraph (1) must be submitted to, and approved by, the relevant authorities in accordance with prevailing laws.
- (3) The Issuing Authority shall revoke the In-Principle Approval if the holder fails to complete the environmental and social impact analysis as required under paragraph (1).
- (4) Before revoking an In-Principle Approval under paragraph (2), the Issuing Authority shall give the holder two written warnings, each with a grace period of 30 working days, to enable the holder to complete and file the required environmental and social impact analysis.

Pasal 10

- (1) Analisis mengenai dampak lingkungan hidup sebagaimana dimaksud dalam Pasal 7 huruf b wajib menyertakan tinjauan atas dampak sosial sesuai dengan ketentuan perundang-undangan yang berlaku, dan analisis tersebut untuk diselesaikan paling lambat 2 (dua) tahun dari pemberian Persetujuan Prinsip.
- (2) Analisis mengenai dampak lingkungan hidup dan sosial sebagaimana dimaksud pada ayat (1) wajib diajukan kepada, dan disetujui oleh otoritas terkait sesuai dengan ketentuan perundang-undangan yang berlaku.
- (3) Otoritas Penanggungjawab harus mencabut Persetujuan Prinsip apabila penerima Persetujuan Prinsip tidak dapat melengkapi analisis mengenai dampak lingkungan dan sosial sebagaimana dimaksud pada ayat (1).
- (4) Sebelum mencabut Persetujuan Prinsip yang dimaksud pada ayat (2), Otoritas Penanggungjawab wajib memberikan 2 (dua) peringatan tertulis kepada penerima Persetujuan Prinsip dengan masa tenggang masing-masing 30 (tiga puluh) hari kerja kepada pemiliknya, dengan tujuan memberikan kesempatan kepada penerima Persetujuan Prinsip untuk menyelesaikan dan menyerahkan analisis dampak lingkungan dan sosial yang diperlukan.

Article 11

- (1) The holder of an In-Principle Approval must report to the Issuing Authority every 6 (six) months regarding the implementation of the activities referred to in Article 7.
- (2) The Issuing Authority may revoke the In-Principle Approval if the holder fails to submit any report required under paragraph (1) during a period of more than 9 consecutive months.
- (3) Before revoking an In-Principle Approval under paragraph (2), the Issuing Authority shall give the holder two written warnings, each with a grace period of 30 working days, to enable the holder to file the required report or reports.

Article 12

- (1) Unless earlier terminated in accordance with the provisions of Articles 8, 10 or 11, above, the In-Principle Approval is valid for an initial period of 5 (five) years from the date of its issuance, and may be automatically extended, at the request of the holder, for a further period of 2 (two) years.

Pasal 11

- (1) Penerima Persetujuan Prinsip, wajib memberikan laporan berkala kepada Otoritas Penanggungjawab setiap 6 (enam) bulan sekali mengenai pelaksanaan kegiatan yang dimaksud pada Pasal 7.
- (2) Otoritas Penanggungjawab dapat mencabut Persetujuan Prinsip apabila penerima Persetujuan Prinsip tidak menyerahkan laporan yang diperlukan sebagaimana dimaksud pada ayat (1), dalam jangka waktu lebih dari 9 bulan berturut-turut.
- (3) Sebelum mencabut Persetujuan Prinsip sebagaimana dimaksud pada ayat (2), Otoritas Penanggungjawab wajib memberikan 2 (dua) peringatan tertulis kepada penerima Persetujuan Prinsip dengan masa tenggang masing-masing 30 (tiga puluh) hari kerja, untuk memberikan waktu kepada penerima Persetujuan Prinsip untuk melaksanakan kewajiban pelaporannya.

Pasal 12

- (1) Kecuali dicabut sebagaimana diatur dalam ketentuan Pasal 8, 10 atau 11 Peraturan ini, Persetujuan Prinsip berlaku untuk jangka waktu awal selama 5 (lima) tahun sejak tanggal dikeluarkannya, dan dapat otomatis diperpanjang, atas permohonan dari penerima Persetujuan Prinsip, untuk jangka waktu 2 (dua) tahun berikutnya.

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| <p>(2) If the land procurement set out in Article 7 letter c has not been completed within 7 (seven) years of the issuance of the In-Principle Approval, the holder of the In-Principle Approval may apply to the Issuing Authority for a further extension of up to 3 (three) years.</p> | <p>(2) Dalam hal pengadaan lahan sebagaimana yang dimaksud dalam Pasal 7 huruf c belum dapat diselesaikan dalam waktu 7 (tujuh) tahun sejak dikeluarkannya Persetujuan Prinsip, maka penerima Persetujuan Prinsip dapat mengajukan permohonan perpanjangan waktu Persetujuan Prinsip paling lama untuk jangka waktu 3 (tiga) tahun kepada Otoritas Penanggungjawab.</p> |
| <p>(3) The application referred to in paragraph (2) must be accompanied by updated versions of the information referred to in Article 5 paragraph (3) other than the engineering feasibility study.</p> | <p>(3) Permohonan yang dimaksud dalam ayat (2) wajib disertai dengan keterangan-keterangan terbaru sebagaimana dimaksud dalam Pasal 5 ayat (3) kecuali kajian kelayakan rancang bangun.</p> |
| <p>(4) The provisions of Article 6 shall apply, <i>mutatis mutandis</i>, to the review of an application for extension submitted under paragraph (2).</p> | <p>(4) Ketentuan sebagaimana dimaksud pada Pasal 6 berlaku juga secara <i>mutatis mutandis</i>, bagi proses penilaian permohonan perpanjangan waktu yang dimaksud pada ayat (2).</p> |

CHAPTER III CONSTRUCTION PERMIT

Article 13

When all of the activities set out in Article 7 have been completed in accordance with the provisions of Chapter II, the holder of the In-Principle Approval may apply for a Construction Permit.

Article 14

- (1) An application for a Construction Permit must be submitted to:

BAB III IZIN PEMBANGUNAN

Pasal 13

Dalam hal seluruh kegiatan sebagaimana yang dimaksud dalam Pasal 7 telah selesai dilaksanakan sesuai dengan ketentuan dalam Bab II Peraturan ini, penerima Persetujuan Prinsip dapat mengajukan Izin Pembangunan.

Pasal 14

- (1) Permohonan Izin Pembangunan harus diserahkan kepada Otoritas Penanggungjawab yang berwenang sebagai berikut:

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| <ul style="list-style-type: none"> a. Minister, for the operation of Special Railway which crosses provincial borders; b. Governor, for the operation of Special Railway which crosses the border of districts/cities within one province, after getting approval from the Minister; c. the Regent/Mayor, for the operation of Special Railway located within one district/city, after getting recommendation from the Governor. | <ul style="list-style-type: none"> a. Menteri, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya melintasi batas wilayah provinsi; b. gubernur, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya melintasi batas wilayah kabupaten/kota dalam satu provinsi setelah mendapat persetujuan dari Menteri; dan c. bupati/walikota, untuk penyelenggaraan Perkeretaapian Khusus yang jaringan jalurnya dalam wilayah kabupaten/kota setelah mendapat rekomendasi gubernur dan persetujuan Menteri. |
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| <p>(2) The application referred to in paragraph (1) must be accompanied by:</p> <ul style="list-style-type: none"> a. each of the following documents: <ul style="list-style-type: none"> 1. In-principle Approval for the development of Special Railway; 2. engineering designs made based on calculation; 3. technical drawings; 4. field data; 5. implementation schedule; 6. technical specifications; 7. analysis on environmental impact or UKL and UPL; 8. work methods; 9. bulding permit; 10. any other permits as required under the prevailing laws and regulations; | <p>(2). Permohonan yang dimaksud dalam ayat (1) wajib disertai dengan:</p> <ul style="list-style-type: none"> a. dokumen-dokumen sebagai berikut: <ul style="list-style-type: none"> 1. surat Persetujuan Prinsip pembangunan perkeretaapian khusus; 2. rancang bangun yang dibuat berdasarkan perhitungan; 3. gambar-gambar teknis; 4. data lapangan; 5. jadwal pelaksanaan; 6. spesifikasi teknis; 7. analisis mengenai dampak lingkungan hidup atau UKL dan UPL; 8. metode pelaksanaan; 9. surat izin mendirikan bangunan; 10. surat izin lain sesuai dengan ketentuan peraturan perundang-undangan; |
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| <p>11. recommendation from Regent/Mayor whose territory will be crossed by the railway; and</p> <p>12. evidence of procurement of at least 10% of the total land area required.</p> | <p>11. rekomendasi dari bupati/walikota yang wilayahnya akan dilintasi oleh jalur kereta api; dan</p> <p>12. bukti pengadaan tanah paling sedikit 10% (sepuluh per seratus) dari luas tanah yang dibutuhkan.</p> |
| <p>c. a statement from an authorized representative of the applicant referred to Article 13 paragraph (1) confirming that the Special Railway shall be used exclusively to provide transportation services in support of the Principal Business Activities; and</p> <p>c. such other information as may be required under the provisions of this Regulation.</p> | <p>b. pernyataan dari perwakilan yang berwenang dari pemohon sebagaimana dimaksud dalam Pasal 13 ayat (1) yang menyatakan bahwa Perkeretaapian Khusus hanya digunakan untuk menyediakan jasa transportasi yang mendukung Kegiatan Pokok Usaha; dan</p> <p>c. informasi lainnya yang dapat diperlukan menurut ketentuan dalam Peraturan ini.</p> |
| <p>(3) The Issuing Authority is responsible for coordinating the timely review and approval of the various documents referred to in paragraph (2) by the relevant authorities, as set out in this Regulation.</p> | <p>(3) Otoritas Penanggungjawab bertanggung jawab untuk melakukan koordinasi sehubungan dengan proses peninjauan dan pemberian persetujuan yang tepat waktu terhadap dokumen-dokumen yang dimaksud pada ayat (2) oleh otoritas terkait, sebagaimana diatur dalam Peraturan ini.</p> |

Article 15

- (1) The design referred to in Article 14 paragraph (2) letter a number 2 shall include each of the following:

Pasal 15

- (1) Rancang bangun sebagaimana yang dimaksud dalam Pasal 14 ayat (2) huruf a angka 2 harus disertai semua hal-hal berikut ini:

[NTD: This provision should be further clarified and expanded by DGR. The information provided should be primarily technical and should not duplicate planning studies already done before the In-Principle Approval stage and 'technical planning' activities already done during the In-Principle Approval stage.]

[NTD: Ketentuan ini harus diklarifikasi dan dikembangkan lebih lanjut oleh DGR. Informasi utama yang diberikan harus hanya merupakan informasi teknis dan tidak boleh merupakan pengulangan dari studi perencanaan yang telah dilakukan sebelum tahap Persetujuan Prinsip dan kegiatan 'perencanaan teknis' yang telah dilakukan dalam tahap Persetujuan Prinsip.]

[NTD: The technical information to be provided by applicant should include a program for the testing and commissioning of the SR infrastructure, so that the precise conditions to be met for issuance of the Operating Permit will have been agreed in advance between applicant and Issuing Authority.]

[NTD: Informasi teknis yang disampaikan oleh pemohon harus memasukkan program untuk pengujian dan pengawasan prasarana Perkeretaapian Khusus, sehingga syarat-syarat pasti untuk dapat diterbitkannya Izin Penyelenggaraan akan dapat terlebih dahulu disepakati oleh pemohon dan Otoritas Penanggungjawab.]

- (2) The Director General acting on behalf of the Minister shall review for approval the design referred to in paragraph (1).

- (2) Direktur Jenderal atas nama Menteri memiliki kewenangan untuk melakukan penilaian mengenai rancangan yang dimaksud dalam ayat (1) dan untuk menentukan apakah persetujuan dapat diberikan.

Article 16

- (1) Technical drawings referred to in Article 14 paragraph (2) letter a number 3 shall include each of the following:

[NDT: This provision should be further clarified and expanded by DGR.]

Pasal 16

- (1) Gambar-gambar teknis sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 3 Peraturan Pemerintah Nomor 56 Tahun 2009 wajib disertai dengan:

[NDT: Ketentuan ini harus diklarifikasi dan dikembangkan lebih lanjut oleh DGR.]

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| <p>(2) The Director General acting on behalf of the Minister shall review for approval the technical drawing referred to in paragraph (1).</p> | <p>(2) Direktur Jenderal atas nama Menteri memiliki kewenangan untuk melakukan penilaian terhadap gambar-gambar teknis sebagaimana dimaksud dalam ayat (1) dan untuk menentukan apakah persetujuan dapat diberikan.</p> |
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Article 17

Pasal 17

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| <p>(1) The technical specifications referred to in Article 14 paragraph (2) letter a number 6 shall cover:</p> <ul style="list-style-type: none"> a. roads, bridges and tunnels; b. Stations; c. railroad signaling equipment; d. telecommunications equipment; e. electrical systems and components; and f. special railway facilities. | <p>(1) Spesifikasi Teknis sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 6 wajib memasukkan:</p> <ul style="list-style-type: none"> a. jalan, jembatan-jembatan dan terowongan-terowongan; b. Stasiun; c. peralatan sinyal jalur perkeretaapian; d. peralatan telekomunikasi; e. sistem kelistrikan dan komponen-komponennya; dan f. fasilitas perkeretaapian khusus. |
| <p>(2). The Director General acting on behalf of the Minister shall review for approval the technical specifications referred to in paragraph (1).</p> | <p>(2) Direktur Jenderal atas nama Menteri memiliki kewenangan untuk melakukan penilaian terhadap spesifikasi teknis sebagaimana dimaksud dalam ayat (1) dan untuk menentukan apakah persetujuan dapat diberikan.</p> |

Article 18

Pasal 18

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| <p>(1) Work methods referred to in Article 14 paragraph (2) letter a number 8 shall include:</p> <p><i>[NDT: This provision should be further clarified and expanded by DGR.]</i></p> | <p>(1) Metode Pelaksanaan sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 8 wajib menyertai:</p> <p><i>[NDT: Ketentuan ini harus diklarifikasi dan dikembangkan lebih lanjut oleh DGR.]</i></p> |
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| <p>(2) The Director General acting on behalf of the Minister shall review for approval the work methods referred to in paragraph (1).</p> | <p>(2) Direktur Jenderal atas nama Menteri memiliki kewenangan untuk melakukan penilaian terhadap metode pelaksanaan sebagaimana dimaksud dalam ayat (1) dan untuk menentukan apakah persetujuan dapat diberikan.</p> |
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Article 19

The building permits referred to in Article 14 paragraph (2) letter a number 9 shall include permits required for the construction of any Station, yard, and warehousing facility.

Pasal 19

Izin mendirikan bangunan sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 9 harus meliputi izin-izin yang diperlukan untuk pembangunan setiap Stasiun, lapangan, dan fasilitas penyimpanan.

Article 20

- (1) The other permits referred to in Article 14 paragraph (2) letter a number 10 refers to any permits required under any laws applicable to the Principal Business Activities of the Special Railway User or under any laws applicable to the Special Railway Operator or to the particular areas where the Special Railway will be located.

[NTD: An elucidation will be needed here to give relevant examples.]

Pasal 20

- (1) Izin-izin lain sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 10 mengacu kepada setiap izin yang diperlukan menurut ketentuan yang berlaku untuk Kegiatan Pokok Usaha dari Pengguna Perkeretaapian Khusus atau berdasarakan ketentuan perundangan lainnya yang berlaku untuk Penyelenggara Perkeretaapian Khusus atau sehubungan dengan area tertentu dimana Perkeretaapian Khusus akan berlokasi.

[NTD: bagian penjelasan dari pasal ini dibutuhkan untuk memberikan contoh-contoh yang relevan.]

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| <p>(2) The Issuing Authority, in considering an application for a Construction Permit, shall take into account the requirements imposed by other relevant authorities for the issuance of the other permits referred to in paragraph (1), and shall coordinate with such other relevant authorities to avoid inconsistent or unfair results.</p> | <p>(2) Otoritas Penanggungjawab, dalam mempertimbangkan permohonan Izin Pembangunan, wajib memperhatikan persyaratan yang diberlakukan oleh otoritas lainnya yang terkait untuk dapat dikeluarkannya izin-izin lainnya sebagaimana dimaksud dalam ayat (1), dan wajib untuk berkoordinasi dengan otoritas-otoritas lain tersebut untuk menghindari terjadinya inkonsistensi atau keputusan yang tidak adil.</p> |
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[NTD: An elucidation would be useful here to explain what would qualify as an inconsistent or unfair result.]

[NTD: bagian penjelasan dari Pasal ini perlu memberikan keterangan mengenai apa yang dikualifikasikan sebagai inkonsistensi atau hasil yang tidak adil.]

Article 21

The notification made by the proposed Special Railway Operator pursuant to Article 9 paragraph (2) of this Regulation and accompanied by the sufficient supporting evidence, shall be deemed to comply with the land acquisition information required under Article 14 paragraph (2) letter a number 12.

Pasal 21

Pemberitahuan yang telah dibuat oleh pemohon Penyelenggara Perkeretaapian Khusus sebagaimana dimaksud dalam Pasal 9 ayat (2) Peraturan ini dan apabila telah disertai dengan bukti pendukung yang cukup, dianggap telah memenuhi kewajiban memberikan informasi mengenai perolehan lahan sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 12.

Article 22

The environmental impact analysis submitted to, and approved by, the relevant authority pursuant to Article 10 paragraph (2) shall be deemed to comply with the requirements of Article 14 paragraph (2) letter a number 7.

Pasal 22

Analisis mengenai dampak lingkungan yang telah diajukan kepada dan disetujui oleh otoritas terkait menurut Pasal 10 ayat (2) dianggap telah memenuhi persyaratan sebagaimana dimaksud dalam Pasal 14 ayat (2) huruf a angka 7.

Article 23

- (1) The Issuing Authority shall deliver a formal receipt to the applicant when the Issuing Authority determines (in consultation with the Minister, acting through the Director General) that the application for a Construction Permit is complete.
- (2) The Issuing Authority shall, in all cases, respond to the application within **[90 (ninety) days]** following the issuance of the formal receipt referred to in paragraph (1).
- (3) Before responding to the application, the Issuing Authority shall obtain all necessary approvals, consents and/or recommendations from other relevant levels of government and from the Minister (acting through the Director General) as set out in Articles 358, 359 and 360 of Government Regulation No. 56 of 2009 and in this Regulation.
- (4) The Minister shall, in all cases, be responsible for reviewing and approving all technical submissions contained in the application for Construction Permit.

Pasal 23

- (1) Otoritas Penanggungjawab wajib mengeluarkan tanda terima resmi kepada pemohon pada saat Otoritas Penanggungjawab menentukan (berdasarkan hasil konsultasinya dengan Direktur Jenderal bertindak atas nama Menteri) bahwa permohonan untuk Izin Pembangunan sudah lengkap.
- (2) Otoritas Penanggungjawab wajib, dalam setiap hal, memberikan tanggapan kepada setiap permohonan paling lambat **[90 (sembilan puluh) hari]** setelah dikeluarkannya tanda terima resmi sebagaimana dimaksud dalam ayat (1).
- (3) Sebelum memberikan tanggapan terhadap suatu permohonan, Otoritas Penanggungjawab harus telah memperoleh semua persetujuan, izin dan/atau rekomendasi yang diperlukan dari setiap tingkatan pemerintahan lainnya termasuk dari Menteri (dalam hal ini bertindak melalui Direktur Jenderal) sebagaimana diatur dalam Pasal 358, 359 dan 360 Peraturan Pemerintah Nomor 56 Tahun 2009 dan Peraturan ini.
- (4) Menteri bertanggung jawab untuk melakukan penilaian terhadap pengajuan yang berhubungan dengan teknis yang terkandung di dalam permohonan untuk Izin Pembangunan dan untuk menentukan apakah persetujuan dapat diberikan.

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| <p>(5) The Minister's approval may be conditional upon the applicant meeting certain conditions, in which case the conditions must be clearly stated by the Minister and notified to the applicant by the Issuing Authority as part of the response referred to paragraph (2).</p> | <p>(5) Persetujuan Menteri dapat disertai dengan syarat tertentu yang wajib terlebih dahulu dipenuhi oleh pemohon, yang mana syarat-syarat tersebut wajib dinyatakan dengan jelas oleh Menteri dan diberitahukan kepada pemohon oleh Otoritas Penanggungjawab sebagai bagian dari tanggapan yang dimaksud dalam ayat (2).</p> |
| <p>(6) Unless there is a material difference between the information provided in the application referred to in Article 14 and the basis upon which the In-Principle Approval had previously been granted, the application for Construction Permit shall be granted so long as the technical submissions have been approved by the Minister as referred to in paragraph (3).</p> | <p>(6) Permohonan Izin Pembangunan wajib disetujui selama pengajuan teknis telah mendapat persetujuan dari Menteri sebagaimana dimaksud di dalam ayat (3) ini kecuali apabila terdapat perbedaan yang sifatnya material dalam informasi yang disampaikan dalam permohonan sebagaimana yang dimaksud di dalam Pasal 14 dan dimana informasi tersebut menjadi dasar dalam pemberian izin prinsip yang telah dikeluarkan.</p> |
| <p>(7) If the application for Construction Permit is denied, the Issuing Authority, after conferring with other relevant levels of government as required under prevailing laws, shall draft a written notice stating the specific reasons for the denial. Such notice shall be provided to the applicant by the Issuing Authority.</p> | <p>(7) Apabila permohonan untuk Izin Pembangunan ditolak, Otoritas Penanggungjawab, setelah berdiskusi dengan tingkatan pemerintah lain yang relevan sesuai dengan perundangan yang berlaku, wajib menyusun suatu pemberitahuan tertulis yang menyatakan secara jelas alasan penolakan tersebut. Pemberitahuan tertulis tersebut wajib diberikan kepada pemohon oleh Otoritas Penanggungjawab.</p> |
| <p>(8) A denied application referred to in paragraph (5) may be supplemented or re-submitted by the applicant to the Issuing Authority.</p> | <p>(8) Permohonan yang ditolak sebagaimana dimaksud dalam ayat (5) dapat selanjutnya dilengkapi atau diajukan kembali oleh pemohon kepada Otoritas Penanggungjawab.</p> |

Article 24

The holder of a Construction Permit shall:

- a. commence the construction of the Special Railway infrastructure within 2 (two) years following the issuance of the Construction Permit;
- b. be responsible for environmental impacts arising during the construction of Special Railway infrastructure; and
- c. submit reports to the Issuing Authority every 6 (six) months regarding the status of the construction.

Pasal 24

Pemegang Izin Pembangunan wajib:

- a. memulai pembangunan prasarana Perkeretaapian Khusus dalam jangka waktu 2 (dua) tahun sejak dikeluarkannya Izin Pembangunan;
- b. bertanggung jawab atas dampak lingkungan yang muncul selama pembangunan prasarana Perkeretaapian Khusus; dan
- c. menyerahkan laporan berkala kepada Otoritas Penanggungjawab setiap 6 (enam) bulan sekali mengenai status dari pembangunan.

Article 25

- (1) The Issuing Authority may revoke the Construction Permit of a Special Railway Operator who fails to submit any report required under Article 24 letter c during a period of more than 9 consecutive months, or who fails, without justification, to commence construction of the Special Railway infrastructure within 2 (two) years following the issuance of the Construction Permit.

Pasal 25

- (1) Otoritas Penanggungjawab dapat mencabut Izin Pembangunan dari suatu Penyelenggaran Perkeretaapian Khusus yang tidak menyerahkan laporan yang diperlukan sebagaimana dimaksud dalam Pasal 24 huruf c selama jangka waktu lebih dari 9 bulan berturut-turut, atau yang tidak, tanpa alasan apapun, melaksanakan pembangunan prasarana Perkeretaapian Khusus dalam jangka waktu 2 (dua) tahun sejak dikeluarkannya Izin Pembangunan.

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| <p>(2) Before revoking a Construction Permit under paragraph (1), the Issuing Authority shall give the Special Railway Operator two written warnings, each with a grace period of 30 working days, to enable the Special Railway Operator to file the required report or reports, or to provide the required justification.</p> | <p>(2) Sebelum mencabut suatu Izin Pembangunan sebagaimana dimaksud dalam ayat (1), Otoritas Penanggungjawab wajib memberikan Penyelenggara Perkeretaapian Khusus 2 (dua) peringatan tertulis, masing-masing dengan masa tenggang 30 hari kerja, untuk memberikan kesempatan bagi Penyelenggara Perkeretaapian Khusus untuk menyerahkan laporan yang dibutuhkan, atau untuk memberikan keterangan yang menjelaskan mengenai tidak dilaksanakannya kewajiban.</p> |
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Article 26

Pasal 26

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| <p>(1) Unless earlier terminated in accordance with the provisions of Article 25, above, the Construction Permit is valid for the period of time indicated therein, which shall be at least [6 months longer than] the applicant's estimated timetable for completion of all construction work, testing and commissioning.</p> | <p>(1) Kecuali Izin Pembangunan dicabut sebagaimana diatur dalam ketentuan Pasal 25 Peraturan ini, Izin Pembangunan berlaku untuk jangka waktu yang dinyatakan di dalam Izin Pembangunan tersebut, yang setidaknya mempunyai masa keberlakuan [6 (enam) bulan lebih lama] dari waktu perkiraan pemohon untuk menyelesaikan semua pekerjaan pembangunan, pengujian dan pengawasan.</p> |
| <p>(2) If the Special Railway Operator believes that the construction of the Special Railway infrastructure will not be completed before the expiration of the Construction Permit, it may apply to the Issuing Authority for and extension thereof.</p> | <p>(2) Dalam hal Penyelenggara Perkeretaapian Khusus berpendapat bahwa pembangunan prasarana Perkeretaapian Khusus tidak akan dapat diselesaikan sebelum habisnya masa berlaku Izin Pembangunan, maka permohonan perpanjangan Izin Pembangunan dapat diajukan kepada Otoritas Penanggungjawab oleh Penyelenggara Perkeretaapian Khusus.</p> |

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| <p>(3) A request for extension of the Construction Permit referred to in paragraph (1) shall be filed with the Issuing Authority no later than [6 (six) months] prior to the expiration of the Construction Permit, and shall be accompanied by the following documents:</p> <ul style="list-style-type: none"> a. a detailed report on the status of construction of the Special Railway infrastructure, including the work remaining to be done; b. a report explaining the reasons for the delay in construction; and c. a revised timetable for completion of all construction work. | <p>(3) Permohonan atas perpanjangan Izin Pembangunan sebagaimana dimaksud pada ayat (1) wajib diajukan kepada Otoritas Penanggungjawab paling lambat [6 (enam)] bulan sebelum habisnya masa berlakunya Izin Pembangunan, dan wajib disertai dengan dokumen-dokumen sebagai berikut:</p> <ul style="list-style-type: none"> a. Laporan terperinci mengenai status dari pembangunan prasarana Perkeretaapian Khusus, termasuk pekerjaan yang belum diselesaikan. b. Laporan yang menjelaskan alasan mengenai tertundanya pembangunan; dan c. Revisi jadwal penyelesaian waktu pembangunan. |
| <p>(4) The Issuing Authority shall respond in writing to the request for extension within [30 (thirty)] working days after receipt of the completed application.</p> | <p>(4) Otoritas Penanggungjawab wajib memberikan tanggapan tertulis terhadap permohonan perpanjangan paling lambat [30 (Tiga Puluh)] hari kerja setelah diterimanya permohonan yang lengkap.</p> |
| <p>(5) A good faith request for extension made in compliance with the provisions of paragraph (3) shall not be denied, though the extension may be subject to reasonable conditions imposed by the Issuing Authority.</p> | <p>(5) Permohonan perpanjangan yang dilandasi itikad baik dan sesuai dengan ketentuan dalam ayat (3) wajib diterima, akan tetapi pemberian perpanjangan tersebut tetap tunduk kepada syarat-syarat yang wajar sebagaimana ditetapkan oleh Otoritas Penanggungjawab.</p> |
| <p>(6) Any denial of a request for extension shall be accompanied by detailed reasons therefor.</p> | <p>(6) Penolakan terhadap permohonan perpanjangan wajib disertai dengan alasan penolakan yang jelas.</p> |

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| <p>(7) The extension of the Construction Permit referred to in paragraph (3) shall be valid for the period of time indicated therein, which shall reasonably take into account the applicant's revised timetable for completion of all construction work, testing and commissioning.</p> | <p>(7) Perpanjangan Izin Pembangunan yang mengacu pada ayat (3) berlaku untuk jangka waktu yang dinyatakan di dalam perpanjangan Izin Pembangunan tersebut, dimana penentuan jangka waktu tersebut wajib mempertimbangkan revisi jadwal penyelesaian waktu pembangunan, pengujian dan pengawasan yang diajukan pemohon.</p> |
| <p>(8) The Special Railway Operator may apply for multiple extensions of the Construction Permit in accordance with the provisions of this Article 26.</p> | <p>(8) Penyelenggara Perkeretaapian Khusus dapat mengajukan perpanjangan Izin Pembangunan lebih dari satu kali dengan memperhatikan ketentuan-ketentuan di dalam Pasal 26 ini.</p> |

CHAPTER IV OPERATING PERMIT

Article 27

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| <p>(1) A Special Railway Operator may, at any time after issuance of the Construction Permit and prior to completion of construction of the Special Railway infrastructure, submit to the Issuing Authority:</p> <ul style="list-style-type: none"> a. the relevant information regarding systems, operating procedures, examination and maintenance of the special railway infrastructure and facilities; b. a proposed plan for the procurement of rolling stock referred to in Article 365 letter a of Government Regulation No. 56 of 2009; | <p>(1) Penyelenggara Perkeretaapian Khusus dapat, setiap saat setelah dikeluarkannya Izin Pembangunan dan sebelum selesainya pembangunan prasarana Perkeretaapian Khusus, menyerahkan kepada Otoritas Penanggungjawab:</p> <ul style="list-style-type: none"> a. informasi mengenai sistem dan prosedur pengoperasian, pemeriksaan, dan perawatan prasarana dan sarana perkeretaapian khusus; b. usulan rencana untuk pengadaan lokomotif dan kereta api yang mengacu pada Pasal 365 huruf a Peraturan Pemerintah Nomor 56 Tahun 2009; |
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BAB IV IZIN OPERASI

Pasal 27

- c. a proposed plan for the recruitment of qualified personnel referred to in Article 365 letter c of Government Regulation No. 56 of 2009; and
 - d. if the Special Railway Operator is a separate legal entity referred to in Article 4 paragraph (3), a copy of the transportation services agreement to be entered into between the Special Railway Operator and the Special Railway User, which may include a price provision for the performance of services, and shall include a provision stating that the Special Railway shall be used exclusively to provide transportation services in support of the Principal Business Activities.
 - e. If the Special Railway User referred to in letter d is a consortium, there shall be a single transportation services agreement applicable to all consortium members, and such agreement shall provide for a fair and non-discriminatory allocation of costs and services among the consortium members in compliance with prevailing laws.
- c. usulan rencana perekrutan personil yang berkualifikasi yang mengacu pada Pasal 365 huruf c Peraturan Pemerintah Nomor 56 Tahun 2009; dan
 - d. apabila Penyelenggara Perkeretaapian Khusus adalah badan hukum yang berbeda sebagaimana dimaksud dalam Pasal 4 ayat (3), salinan perjanjian pelayanan transportasi antara Penyelenggara Perkeretaapian Khusus dan Pengguna Perkeretaapian Khusus yang dapat meliputi ketentuan-ketentuan sehubungan dengan harga yang dibayarkan untuk pemberian pelayanan dan harus termasuk ketentuan yang menyatakan bahwa Perkeretaapian Khusus hanya digunakan secara eksklusif untuk menyediakan layanan transportasi sebagai pendukung dari Kegiatan Pokok Usaha.
 - e. Apabila Pengguna Perkeretaapian Khusus sebagaimana dimaksud pada huruf d adalah sebuah konsorsium, harus terdapat satu perjanjian pelayanan transportasi yang berlaku untuk semua anggota konsorsium dan perjanjian tersebut harus memasukkan ketentuan mengenai alokasi biaya dan pelayanan yang adil dan tidak membedakan antara para anggota konsorsium sesuai dengan hukum yang berlaku.

- (2) If, upon review and approval of the information submitted by the Special Railway Operator pursuant to paragraph (1), the Issuing Authority, after consultation with the Minister, determines that the requirements of paragraph (1) have been met, except for the successful testing and commissioning of the Special Railway infrastructure and implementation of the approved plans for the procurement of rolling stock and recruitment of qualified personnel, the Issuing Authority shall issue to the Special Railway Operator an In-Principle Operating Approval.
- (2) Apabila, setelah penilaian dan persetujuan sehubungan dengan informasi yang diajukan oleh Penyelenggara Perkeretaapian Khusus sebagaimana dimaksud pada ayat (1), Otoritas Penanggungjawab, setelah berkonsultasi dengan Menteri, menetapkan bahwa persyaratan pada ayat (1) telah dipenuhi, kecuali sehubungan dengan keberhasilan pengujian dan *commissioning* prasarana Perkeretaapian Khusus dan pelaksanaan dari rencana pengadaan gerbong dan lokomotif yang telah disetujui dan perekrutan personil yang berkualifikasi, Otoritas Penanggungjawab wajib menerbitkan Izin Operasi Prinsip kepada Penyelenggara Perkeretaapian Khusus.
- (3) If an In-Principle Operating Approval cannot be granted on the basis of the information provided by the Special Railway Operator pursuant to paragraph (1), the Issuing Authority, after consultation with the Minister, shall provide the Special Railway Operator with a written notice setting out the additional information needed for the issuance of the In-Principle Operating Approval, and the Special Railway Operator may thereafter supply the Issuing Authority with such additional information.
- (3) Apabila Izin Operasi Prinsip tidak dapat diberikan dengan didasarkan pada informasi yang diserahkan oleh Penyelenggara Perkeretaapian Khusus sebagaimana dimaksud pada ayat (1), Otoritas Penanggungjawab, setelah berkonsultasi dengan Menteri, wajib memberikan pemberitahuan tertulis kepada Penyelenggara Perkeretaapian Khusus mengenai tambahan informasi yang diperlukan untuk penerbitan Izin Operasi Prinsip, dan Penyelenggara Perkeretaapian Khusus dapat kemudian memberikan informasi tambahan yang diminta tersebut kepada Otoritas Penanggungjawab.

Article 28

- (1) An In-Principle Operating Approval gives the Special Railway Operator, upon written request to the Issuing Authority, the right to obtain an Operating Permit subject to fulfillment of the following conditions:
- successful testing and commissioning of the Special Railway infrastructure in accordance with the testing and commissioning program previously submitted by the Special Railway Operator and approved as part of the Construction Permit;
 - successful implementation of the rolling stock procurement plan previously submitted and approved pursuant to Article 27; and
 - successful implementation of the qualified personnel recruitment plan previously submitted and approved pursuant to Article 27.
- (2) A written request referred to in paragraph (1) shall be accompanied by documents establishing the fulfillment of each of the conditions referred to paragraph (1) letters a, b and c.

Pasal 28

- (1) Izin Operasi Prinsip, memberikan hak kepada Penyelenggara Perkeretaapian Khusus, setelah mengajukan permohonan tertulis kepada Otoritas Penanggungjawab, untuk memperoleh Izin Operasi setelah memenuhi persyaratan-persyaratan sebagai berikut:
- berhasilnya pengujian dan pengawasan atas prasarana Perkeretaapian Khusus sesuai dengan program pengujian dan pengawasan yang sebelumnya telah diajukan oleh Penyelenggara Perkeretaapian Khusus dan telah mendapatkan persetujuan sebagai bagian dari Izin Pembangunan;
 - telah dilaksanakannya rencana pengadaan lokomotif dan gerbong sebagaimana yang sebelumnya telah diajukan dan disetujui menurut ketentuan Pasal 27; dan
 - telah dilaksanakannya rencana perekrutan personil yang berkualifikasi yang sebelumnya telah diajukan dan disetujui menurut ketentuan Pasal 27.
- (2) Permohonan tertulis yang dimaksud pada ayat (1) wajib disertai dengan dokumen-dokumen yang menyatakan telah dipenuhinya setiap syarat yang dimaksud pada ayat (1) huruf a, b dan c.

- (3) If the Special Railway Operator is a separate legal entity referred to in Article 4 paragraph (3), the written request shall also include a fully executed copy of the agreement referred to in Article 27 paragraph (1) letter d of this Regulation.
- [NDT: This provision should be further clarified and expanded by DGR.]**
- (4) Compliance with each of the conditions referred to in paragraph (1) letters a, b and c shall be verified by the Issuing Authority within **[90 days]** of submission of the written request referred to in paragraph (1).
- (5) If the Issuing Authority confirms that each of the conditions referred to in paragraph (1) letters a, b and c have been fulfilled, the Issuing Authority shall issue the Operating Permit.
- (6) If the Issuing Authority (after consultation with the Director General) requires additional technical, safety or operational information from the Special Railway Operator, it shall directly provide the Special Railway Operator with a written notice setting out the additional information needed (with copy to the Director General), and the Special Railway Operator may thereafter supply the Issuing Authority with such additional information.
- (3) Apabila Penyelenggara Perkeretaapian Khusus adalah badan usaha yang berbeda sebagaimana dimaksud dalam Pasal 4 ayat (3), permohonan tertulis wajib menyertakan salinan perjanjian yang telah ditandatangani sebagaimana yang dimaksud dalam Pasal 27 ayat (1) Peraturan ini.
- [NDT: Ketentuan ini harus diklarifikasi dan dikembangkan lebih lanjut oleh DGR.]**
- (4) Pemenuhan atas setiap syarat yang dimaksud dalam ayat (1) huruf a, b dan c wajib diverifikasi oleh Otoritas Penanggungjawab paling lambat **[90 hari]** sejak diajukannya permohonan tertulis sebagaimana dimaksud pada ayat (1).
- (5) Apabila Otoritas Penanggungjawab menegaskan bahwa setiap persyaratan yang dimaksud dalam ayat (1) huruf a, b dan c telah dipenuhi, Otoritas Penanggungjawab wajib menerbitkan Izin Operasi.
- (6) Apabila Otoritas Penanggungjawab (setelah berkonsultasi dengan Direktur Jenderal) membutuhkan tambahan informasi yang terkait dengan teknis, keselamatan atau operasional dari Penyelenggara Perkeretaapian Khusus, maka Otoritas Penanggungjawab wajib memberitahukan secara tertulis kepada Penyelenggara Perkeretaapian Khusus yang menyatakan tambahan informasi yang dibutuhkan (dengan salinannya kepada Direktur Jenderal), dan Penyelenggara Perkeretaapian Khusus dapat setelahnya memberikan tambahan informasi tersebut kepada Otoritas Penanggungjawab.

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| <p>(7) If the Issuing Authority determines that one or more of the conditions referred to in paragraph (1) letters a, b or c have not yet been fulfilled, the Issuing Authority shall send the Special Railway Operator a written notice stating the specific reasons for the determination, and the Special Railway Operator may thereafter supplement or re-submit its application to the Issuing Authority.</p> | <p>(7) Apabila Otoritas Penanggungjawab menentukan bahwa salah satu atau lebih dari persyaratan yang dimaksud dalam ayat (1) huruf a, b atau c belum dipenuhi, Otoritas Penanggungjawab, wajib mengirim pemberitahuan tertulis kepada Penyelenggara Perkeretaapian Khusus yang menyatakan alasan spesifik atas penentuan tersebut dan Penyelenggara Perkeretaapian Khusus dapat setelahnya melengkapi atau mengajukan kembali permohonannya kepada Otoritas Penanggungjawab.</p> |
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Article 29

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| <p>(1) If the Principal Business Activities served by the Special Railway may only be carried out for a limited period of time, the Operating Permit shall expire when the Principal Business Activities can no longer be carried out (taking into account all permitted extensions or renewals of the authority under which the Principal Business Activities are carried out under prevailing laws).</p> | <p>(1) Apabila Kegiatan Pokok Usaha yang dilayani oleh Perkeretaapian Khusus hanya boleh dilaksanakan untuk periode waktu tertentu, maka Izin Operasi akan habis masa berlakunya pada saat Kegiatan Pokok Usaha tidak lagi dapat dilaksanakan (dengan memperhatikan setiap perpanjangan atau pembaharuan dari otoritas yang terkait dengan pelaksanaan Kegiatan Pokok Usaha berdasarkan peraturan perundang-undangan).</p> |
| <p>(2) If the Principal Business Activities served by the Special Railway may be continue indefinitely, the Operating Permit shall remain in effect for a minimum period of [20 years], and may be extended thereafter, subject only to:</p> <p>a. the Special Railway Operator's continued compliance with the terms of the Operating Permit; and</p> | <p>(2) Apabila Kegiatan Pokok Usaha yang dilayani oleh Perkeretaapian Khusus dapat terus dilaksanakan tanpa batas waktu, maka Izin Operasi berlaku untuk jangka waktu setidaknya [20 tahun], dan dapat diperpanjang setelahnya, dengan ketentuan:</p> <p>a. tetap tunduknya Penyelenggara Perkeretaapian Khusus kepada ketentuan-ketentuan dari Izin Operasi; dan</p> |

- b. the continued operation of the Principal Business Activities served by the Special Railway.

[NTD: The validity period of the Operating Permit should at least cover the repayment period of the senior debt used to finance the construction of the Special Railway.]

- (3) No later than **[3 years]** prior to the expiration of an Operating Permit, the Special Railway Operator shall either submit a written request to the Issuing Authority for an extension of the Operating Permit pursuant to paragraph (1) or paragraph (2), or provide the Issuing Authority with a plan for the proposed future use of the Special Railway infrastructure and rolling stock.

[NTD: The proposed plan can include (for instance) the sale of infrastructure and/or rolling stock to a private third party operator or to a State-owned entity, the conversion of the Special Railway Operator into a public railway operator, or even (where appropriate) the sale of the underlying land or land rights for re-development.]

- b. dilanjutkannya penyelenggaraan Kegiatan Pokok Usaha yang dilayani oleh Perkeretaapian Khusus.

[NTD: Jangka waktu keberlakuan Izin Operasi seharusnya termasuk periode pembayaran kembali dana pinjaman yang digunakan untuk mendanai pembangunan Perkeretaapian Khusus.]

- (3) Penyelenggara Perkeretaapian Khusus wajib mengajukan permohonan tertulis kepada Otoritas Penanggungjawab untuk perpanjangan Izin Operasi sebagaimana dimaksud pada ayat (1) atau ayat (2), atau memberikan usulan penggunaan prasarana Perkeretaapian Khusus dan lokomotif dan gerbong, kepada Otoritas Penanggungjawab, selambat-lambatnya **[3 tahun]** sebelum habisnya masa berlaku Izin Operasi.

[Catatan untuk pembahasan: Usulan penggunaan dapat termasuk (contohnya) penjualan atas prasarana dan/atau lokomotif dan gerbong kepada operator swasta pihak ketiga atau kepada Badan Usaha Milik Negara, perubahan status Penyelenggara Perkeretaapian Khusus menjadi penyelenggara Perkeretaapian Umum, atau bahkan (apabila memungkinkan) penjualan hak atas tanah/lahan untuk pengembangan kembali.]

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| <p>(4) A plan referred to in paragraph (3) shall be subject to approval by the Issuing Authority, upon consultation with the Minister, and taking into account the national, provincial and local railway master plans.</p> | <p>(4) Usulan yang dimaksud pada ayat (3) harus mendapatkan persetujuan Otoritas Penanggungjawab, setelah melakukan konsultasi dengan Menteri, dan dengan memperhatikan rencana induk Perkeretaapian nasional, propinsi dan lokal.</p> |
| <p>(5) A plan approved by the Issuing Authority in accordance with paragraph (4) shall not deprive private parties of property rights or interests without just compensation in accordance with prevailing laws.</p> | <p>(5) Usulan yang telah disetujui oleh Otoritas Penanggungjawab berdasarkan ketentuan pada ayat (4) tidak boleh berupa usulan pengambilalihan hak atas properti atau kepentingan suatu pihak tanpa adanya kompensasi yang layak sesuai dengan hukum yang berlaku.</p> |
| <p>(6) A written request for an extension referred to in paragraph (3) must be accompanied by updated versions of the information referred to in Article 4 paragraph (3) (other than the engineering feasibility study).</p> | <p>(6) Permohonan tertulis untuk perpanjangan izin sebagaimana dimaksud pada ayat (3) harus disertai dengan informasi sebagaimana dimaksud pada Pasal 4 ayat (3), yang telah diperbaharui (selain kajian kelayakan rancang bangun).</p> |
| <p>(7) The terms of the Operating Permit may be adjusted at the time of the extension, based on the results of the updated information referred to paragraph (6).</p> | <p>(7) Jangka waktu Izin Operasi dapat disesuaikan pada saat perpanjangan, dengan memperhatikan isi dari informasi yang telah diperbaharui sebagaimana dimaksud pada ayat (6).</p> |

Article 30

- (1) If the Principal Business Activities served by the Special Railway are transferred by the Special Railway User to another legal entity, the Operating Permit may be transferred directly to the acquirer of the Principal Business Activities or to a separate legal entity meeting the requirements of this Regulation.

Pasal 30

- (1) Apabila Kegiatan Usaha Pokok yang dilayani oleh Perkeretaapian Khusus dialihkan oleh Pengguna Perkeretaapian Khusus kepada badan hukum lainnya, maka Izin Operasi dapat langsung dialihkan kepada pihak yang melakukan pengambil alihan Kegiatan Usaha Pokok atau kepada badan hukum berbeda lainnya yang memenuhi ketentuan dalam Peraturan ini.

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| <p>(2) The transfer referred to in paragraph (1) shall be subject to the prior approval of the Minister, which approval shall be conditional upon fulfillment, by the proposed transferee, of the conditions set out in Article 365 letters b and c of Government Regulation No. 56 of 2009, as well as such other technical, safety and operational requirements as the Minister may reasonably impose.</p> | <p>(2) Pengalihan yang dimaksud pada ayat (1) wajib mendapat persetujuan terlebih dahulu dari Menteri, yang mana persetujuan tersebut tergantung kepada pemenuhan syarat yang dimaksud dalam Pasal 365 huruf b dan c Peraturan Pemerintah Nomor 56 Tahun 2009 oleh calon pengambil alih, serta syarat-syarat lainnya seperti syarat teknis, keselamatan dan operasional yang secara wajar dapat diterapkan oleh Menteri.</p> |
| <p>(3) The transfer referred to in paragraph (1) shall also be subject to the contractual rights of other users of the Special Railway infrastructure pursuant to interconnection agreements entered into in accordance with the provisions of this Regulation.</p> | <p>(3). Pengalihan yang dimaksud pada ayat (1) wajib pula memperhatikan hak-hak pengguna prasarana Perkeretaapian Khusus lainnya yang timbul dari perjanjian interkoneksi yang sesuai dengan ketentuan dalam Peraturan ini.</p> |

Article 31

- (1) An Operating Permit may be terminated by the Issuing Authority:
- a. following the permanent cessation of the Principal Business Activities served by the Special Railway;
 - b. upon a written determination by the Minister that the Special Railway Operator is in material or persistent violation of the terms of the Operating Permit or any implementing regulation promulgated under Law No. 23 of 2007 on Railways; or

Pasal 31

- (1) Izin Operasi dapat dicabut oleh Otoritas Penanggungjawab:
- a. sebagai tindak lanjut atas terhentinya Kegiatan Pokok Usaha yang dilaksanakan dengan Perkeretaapian Khusus;
 - b. atas keputusan tertulis dari Menteri yang menyatakan bahwa Penyelenggara Perkeretaapian Khusus melakukan pelanggaran material atau pelanggaran yang terus-menerus terhadap ketentuan dalam Izin Operasi atau peraturan pelaksana lainnya yang dibuat berdasarkan Undang-Undang Nomor 23 Tahun 2007 tentang Perkeretaapian; atau

- c. upon the written request of the Special Railway Operator.
 - d. If the Special Railway Operator referred to in letter c is a separate legal entity referred to in Article 4 paragraph (3) of this Regulation, the written request must also be approved in writing by the Special Railway User (or by each consortium member if the Special Railway User is a consortium).
- c. atas permohonan tertulis dari Penyelenggara Perkeretaapian Khusus.
 - d. Apabila Penyelenggara Perkeretaapian Khusus adalah badan hukum yang berbeda sebagaimana dimaksud pada huruf Pasal 4 ayat 3 huruf c, permohonan tertulis harus disetujui secara tertulis oleh Pengguna Perkeretaapian Khusus (atau oleh setiap anggota konsorsium dalam hal Pengguna Perkeretaapian Api Khusus berbentuk konsorsium).
- (2) Prior to any termination referred to in paragraph (1) letters a or c, the Special Railway Operator shall submit to the Issuing Authority a plan for the future use of the Special Railway infrastructure and rolling stock referred to in Article 29 paragraph (3), and the provisions of Article 29 paragraphs (4) and (5) shall apply, *mutatis mutandis*.
- (2) Sebelum dilakukan pencabutan izin sebagaimana dimaksud dalam ayat (1) huruf a atau c, Penyelenggara Perkeretaapian Khusus wajib menyerahkan usulan penggunaan prasarana Perkeretaapian Khusus serta lokomotif dan gerbong di masa yang akan datang, yang mengacu pada ketentuan dalam Pasal 29 ayat (3), dan ketentuan dalam Pasal 29 ayat (4) dan (5) juga berlaku secara *mutatis mutandis*.

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| <p>(3) Before determining that the Special Railway Operator is in material or persistent violation of the terms of the Operating Permit under paragraph (1) letter b, the Minister shall give the Special Railway Operator [two] written warnings, each with a grace period of at least [30 working days], to enable the Special Railway Operator reasonably to respond the Minister's concerns and correct any noted deficiencies. The Minister may reduce or eliminate the applicable grace period in the event of a material violation that poses a risk to human health and safety.</p> <p><i>[Elucidation: The grace period should be reasonable in light of the nature of the deficiency and the time reasonably needed to correct the problem.]</i></p> <p>(4) Each of the written warnings referred to in paragraph (3) shall set out the details of each violation noted by the Minister and the action required by the Special Railway Operator to correct the deficiency.</p> | <p>(3) Sebelum menentukan apakah Penyelenggara Perkeretaapian Khusus melakukan pelanggaran material atau pelanggaran yang terus-menerus terhadap ketentuan dalam Izin Operasi sebagaimana diatur dalam ayat (1) huruf b, Menteri wajib memberikan Penyelenggara Perkeretaapian Khusus [dua] peringatan tertulis, dengan masa tenggang masing-masing setidaknya [30 hari kerja], untuk memberikan kesempatan bagi Penyelenggara Perkeretaapian Khusus menanggapi hal-hal yang menjadi perhatian Menteri, dan memperbaiki kekurangan yang ada. Menteri berhak untuk mengurangi atau meniadakan masa tenggang yang berlaku apabila terdapat pelanggaran material yang mengandung resiko terhadap kesehatan atau keselamatan manusia.</p> <p><i>[Penjelasan: Masa tenggang harus diberikan dengan wajar dengan memperhatikan dasar dari kekurangan-kekurangan yang ada dan waktu yang diperlukan untuk memperbaiki masalah yang ada.]</i></p> <p>(4) Setiap peringatan tertulis sebagaimana dimaksud dalam ayat (3) wajib menyatakan rincian pelanggaran yang dimaksud oleh Menteri, serta tindakan yang harus dilakukan oleh Penyelenggara Perkeretaapian Khusus untuk memperbaiki kekurangan yang ada.</p> |
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| <p>(5) In the event of a termination of the Operating Permit referred to in paragraph (1), the Issuing Authority shall take reasonable measures to preserve the contractual rights of other users of the Special Railway infrastructure pursuant to interconnection agreements entered into in accordance with the provisions of Chapter V of this Regulation.</p> | <p>(5) Dalam hal terjadinya penghentian Izin Operasi sebagaimana dimaksud dalam ayat (1), Otoritas Penanggungjawab wajib mengambil tindakan-tindakan yang dianggap perlu untuk menjaga hak-hak pengguna prasarana Perkeretaapian Khusus lainnya yang timbul akibat adanya perjanjian interkoneksi yang sesuai dengan ketentuan dalam Bab V Peraturan ini.</p> |
| <p>(6) In the event of a termination referred to in paragraph (1) letter b, the Issuing Authority, after conferring with the Special Railway Operator and the Minister, shall prepare a plan for the future use of the Special Railway infrastructure taking into account the national, provincial and local railway master plans. Such plan shall not deprive private parties of property rights or interests without just compensation in accordance with prevailing laws.</p> | <p>(6) Dalam hal terjadinya pencabutan sebagaimana dimaksud dalam ayat (1) huruf b, Otoritas Penanggungjawab, setelah berunding dengan Penyelenggara Perkeretaapian Khusus dan Menteri, wajib menyusun usulan penggunaan prasarana Perkeretaapian Khusus di masa yang akan datang, dengan memperhatikan rencana induk nasional, propinsi dan daerah. Usulan tersebut tidak boleh berupa usulan pengambilalihan hak atas properti atau kepentingan suatu pihak tanpa adanya kompensasi yang layak sesuai dengan hukum yang berlaku</p> |

Article 32

- (1) In the event of a temporary cessation of the Principal Business Activities, the Special Railway Operator shall notify the Issuing Authority of the anticipated duration of the cessation.

Pasal 32

- (1) Dalam hal terjadinya penghentian sementara Kegiatan Pokok Usaha, Penyelenggara Perkeretaapian Khusus wajib memberitahukan kepada Otoritas Penanggungjawab perkiraan jangka waktu penghentian tersebut.

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| <p>(2) During a temporary cessation referred to in paragraph (1), the Special Railway Operator shall continue to operate and maintain the Special Railway infrastructure, and the contractual rights of other users of the Special Railway infrastructure pursuant to interconnection agreements entered into in accordance with the provisions of Chapter V of this Regulation shall be maintained.</p> | <p>(2) Selama penghentian sementara sebagaimana dimaksud dalam ayat (1), Penyelenggara Perkeretaapian Khusus wajib untuk terus mengoperasikan dan memelihara prasarana Perkeretaapian Khusus, dan menjaga hak-hak pengguna prasarana Perkeretaapian Khusus lainnya yang timbul akibat adanya perjanjian interkoneksi sesuai dengan ketentuan dalam Bab V Peraturan ini.</p> |
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Article 33

Pasal 33

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| <p>(1) The holder of an Operating Permit shall:</p> <ul style="list-style-type: none"> a. comply with the terms of Law No. 23 of 2007 and its implementing regulations; b. comply with legislations in the field of environmental conservation; c. remain responsible for the operation of the Special Railway; d. submit annual reports to the Issuing Authority; and e. comply with legislation in relation to manpower as so that any hiring shall be based on character and abilities, not such things as ethnic background, age, sexual/gender orientation. <p>(2) Responsibility for the operation of a Special Railway, as referred to in paragraph (1) letter c, includes:</p> | <p>(1) Pemilik Izin Operasi wajib:</p> <ul style="list-style-type: none"> a. mematuhi ketentuan-ketentuan dalam Undang-undang Nomor 23 Tahun 2007 dan peraturan pelaksanaanya; b. mematuhi peraturan yang terkait dengan kelestarian lingkungan hidup; c. tetap bertanggung jawab atas penyelenggaraan Perkeretaapian Khusus; dan d. menyerahkan laporan tahunan kepada Otoritas Penanggungjawab; dan e. mematuhi peraturan yang terkait dengan tenaga kerja sehingga setiap penerimaan karyawan didasarkan pada karakter dan kemampuan dan tidak berdasarkan latar belakang suku, usia dan jenis kelamin. <p>(2) Tanggung jawab atas penyelenggaraan Perkeretaapian Khusus, sebagaimana dimaksud pada ayat (1) huruf c, termasuk:</p> |
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| <ul style="list-style-type: none"> a. responsibility for the operation and maintenance of the Special Railway infrastructure; b. responsibility for the personnel who operate and maintain the Special Railway infrastructure; c. responsibility for the crew and other personnel who operate the rolling stock or any Station facility; and d. responsibility for any losses suffered by third parties arising out of the operation of the Special Railway. | <ul style="list-style-type: none"> a. tanggung jawab atas penyelenggaraan dan pemeliharaan prasarana Perkeretaapian Khusus; b. tanggung jawab atas personil yang mengoperasikan dan memelihara prasarana Perkeretaapian Khusus; c. tanggung jawab atas awak dan personil lainnya yang mengoperasikan lokomotif dan gerbong atau fasilitas Stasiun lainnya; dan d. tanggung jawab atas kehilangan yang diderita oleh pihak ketiga akibat penyelenggaraan Perkeretaapian Khusus. |
| <p>(3) Responsibility for the personnel and crew referred to in paragraph (2) letters b and c includes the obligation to provide insurance in accordance with prevailing laws.</p> | <p>(3) Tanggung jawab atas personil dan awak sebagaimana dimaksud dalam ayat (2) huruf b dan c termasuk kewajiban untuk menyediakan asuransi sesuai dengan ketentuan perundang-undangan yang berlaku.</p> |
| <p>(4) The annual report referred to in paragraph (1) letter d must at least contain data regarding:</p> <ul style="list-style-type: none"> a. the number of trains operated; b. frequency of train travel; c. traffic capacity; d. interruptions in service; e. accidents; f. inspections and maintenance for Special Railway infrastructure and rolling stock; | <p>(4) Laporan tahunan yang dimaksud pada ayat (1) huruf d harus mengandung data mengenai:</p> <ul style="list-style-type: none"> a. jumlah kereta yang beroperasi; b. frekuensi perjalanan kereta; c. kapasitas lalu lintas; d. gangguan pelayanan; e. kecelakaan; f. pemeriksaan dan pemeliharaan prasarana Perkeretaapian Khusus serta lokomotif dan gerbong; |

- g. railworthiness testing records for Special Railway infrastructure and rolling stock; and
- h. human resources records, including qualifications and training records.

- g. catatan pengujian kelaikan prasarana Perkeretaapian Khusus serta lokomotif dan kereta api; dan
- h. catatan mengenai sumber daya manusia, termasuk kualifikasi dan catatan pelatihan.

CHAPTER V

INTERCONNECTION OF SPECIAL RAILWAYS

Article 34

- (1) A Special Railway Operator may, subject to approval by the Minister, enter into interconnection agreements with other railway operators.
- (2) If the Special Railway Operator referred to in paragraph (1) is a separate legal entity referred to in Article 4 paragraph (3) of this Regulation, the interconnection agreement must also be approved by the Special Railway User (or by each consortium member if the Special Railway User is a consortium).
- (3) A request for approval referred to in paragraph (1) must include all relevant technical information requested by the Minister to ensure the safety and security of the proposed interconnection.

BAB V

INTERKONEKSI PERKERETAAPIAN KHUSUS

Pasal 34

- (1) Penyelenggara Perkeretaapian Khusus dapat, dengan persetujuan Menteri, melakukan perjanjian interkoneksi dengan penyelenggara kereta api lainnya.
- (2) Dalam hal Penyelenggara Perkeretaapian Khusus sebagaimana dimaksud pada ayat (1) adalah badan hukum yang berbeda sebagaimana dimaksud pada Pasal 4 ayat (3) maka perjanjian interkoneksi harus mendapat persetujuan dari Pengguna Perkeretaapian Khusus (atau oleh setiap anggota konsorsium dalam hal Pengguna Perkeretaapian Khusus berbentuk konsorsium).
- (3) Permohonan persetujuan yang dimaksud dalam ayat (1) wajib disertai dengan seluruh informasi teknis terkait yang diminta oleh Menteri untuk memastikan keselamatan dan keamanan dari usulan interkoneksi tersebut.

- (4) An agreement referred to in paragraph (1) may contain provisions allowing a Special Railway Operator to:
- access the infrastructure of the other railway operator (and any other infrastructure to which the other railway operator has access rights) for the purpose of providing services in support of the Principal Business Activities;
 - arrange for the other railway operator (if it is a public railway operator) to provide transportation services in support of the Principal Business Activities over the other railway's infrastructure and any other infrastructure to which the other railway operator has access rights; and
 - grant the other railway operator the right to access the Special Railway Operator's infrastructure for any purpose consistent with the other railway operator's business.
- (5) If the other railway operator referred to in paragraph (1) is a public railway operator:
- (4) Perjanjian sebagaimana dimaksud dalam ayat (1) dapat mengandung ketentuan-ketentuan yang memperbolehkan Penyelenggaran Perkeretaapian Khusus untuk:
- mengakses prasarana penyelenggara perkeretaapian lainnya (dan prasarana lainnya yang mana penyelenggara perkeretaapian lainnya tersebut memiliki hak untuk mengaksesnya) dengan tujuan menyediakan layanan untuk mendukung Kegiatan Pokok Usaha;
 - mengatur agar supaya penyelenggara perkeretaapian lainnya (apabila merupakan perkeretaapian umum) untuk menyediakan layanan transportasi untuk mendukung Kegiatan Pokok Usaha dengan menggunakan prasarana kereta api dari penyelenggara kereta lainnya tersebut maupun prasarana-prasarana lainnya yang mana penyelenggara perkeretaapian lainnya tersebut memiliki hak untuk mengaksesnya; dan
 - memberikan hak akses untuk menggunakan prasarana Penyelenggara Perkeretaapian Khusus bagi penyelenggara perkeretaapian lainnya untuk tujuan apapun yang sesuai dengan usaha penyelenggara perkeretaapian lainnya tersebut.
- (5) Apabila penyelenggara perkeretaapian lainnya sebagaimana dimaksud dalam ayat (1) adalah penyelenggara perkeretaapian umum, maka:

- a. the agreement referred to in paragraph (1) may allow the public railway operator to access the Special Railway Operator's infrastructure to operate a public railway service, provided that such infrastructure meets all applicable safety and other technical standards for public railways; and
 - b. any use of the public railway's infrastructure by the Special Railway Operator must also comply with all applicable safety and other technical standards for public railways, as well as Ministerial regulations regarding interconnection agreements with public railways.
- a. perjanjian sebagaimana yang disebutkan pada ketentuan ayat (1) dapat memperbolehkan penyelenggara perkeretaapian umum untuk mengakses prasarana Penyelenggara Perkeretaapian Khusus untuk mengoperasikan layanan perkeretaapian umum, sepanjang prasarana yang ada telah memenuhi seluruh standar keselamatan dan standar teknis lainnya untuk perkeretaapian umum; dan
 - b. segala penggunaan prasarana umum oleh Penyelenggara Perkeretaapian Khusus juga harus tunduk kepada seluruh standar keselamatan dan standar teknis perkeretaapian umum, begitu juga dengan peraturan Kementerian terkait mengenai perjanjian interkoneksi perkeretaapian umum.
- (6) The agreement referred to in paragraph (1) shall provide for a fair allocation of costs among the users of any shared infrastructure.
- (6) Perjanjian sebagaimana dimaksud dalam ayat (1) wajib mengatur mengenai pembagian biaya yang wajar di antara pengguna prasarana bersama.
- (7) Access charges for the use of any public railway infrastructure by the Special Railway Operator shall be in accordance with prevailing laws and regulations regarding public railways.
- (7) Biaya akses atas penggunaan segala prasarana perkeretaapian umum oleh Penyelenggara Perkeretaapian Khusus harus sesuai dengan peraturan dan perundangan yang berlaku di bidang perkeretaapian umum.

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| <p>(8) The agreement referred to in paragraph (1) shall not change the nature of the Special Railway, and the Special Railway Operator shall remain responsible for maintaining and operating its infrastructure and rolling stock in accordance with the terms of the Operating Permit, and in accordance with Law No. 23 of 2007 regarding Railways and its implementing regulations.</p> | <p>(8) Perjanjian sebagaimana dimaksud dalam ayat (1) tidak boleh mengubah sifat dari Perkeretaapian Khusus, dan Penyelenggara Perkeretaapian Khusus tetap bertanggung jawab untuk memelihara dan mengoperasikan prasarana serta lokomotif dan gerbongnya berdasarkan ketentuan yang dinyatakan di dalam Izin Operasi, dan berdasarkan Undang-undang Nomor 23 Tahun 2007 tentang perkeretaapian serta peraturan pelaksanaannya.</p> |
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Article 35

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| <p>(1) If the proposed interconnection referred to in Article 34 paragraph (1) requires an expansion of the length of the Special Railway line, the request for an agreement referred to in Article 34 paragraph (1) may be made at the same time as an application for expansion of the Special Railway referred to in Article 37 paragraph (1) letter a.</p> | <p>(1) Apabila usulan interkoneksi sebagaimana dimaksud pada Pasal 34 ayat (1) memerlukan perpanjangan atas jalur Perkeretaapian Khusus, permohonan atas perjanjian sebagaimana dimaksud dalam Pasal 34 ayat (1), dapat dibuat bersamaan dengan pengajuan perpanjangan jalur Perkeretaapian Khusus sebagaimana dimaksud dalam Pasal 37 ayat (1) huruf a.</p> |
| <p>(2) In such case, in addition to the requirement referred to in Article 37 paragraph (2), the Special Railway Operator shall include all necessary information referred to in Article 34 paragraph (1), including a copy of the proposed agreement, along with a statement from the other railway operator confirming that it is willing to enter into the proposed agreement.</p> | <p>(2) Dalam situasi tersebut, sebagai tambahan atas persyaratan yang dimaksud dalam Pasal 37 ayat (2), Penyelenggara Perkeretaapian Khusus wajib menyertakan segala informasi yang dibutuhkan sebagaimana yang disebut di dalam Pasal 34 ayat (1), termasuk salinan atas usulan perjanjian, serta pernyataan dari penyelenggara perkeretaapian lainnya yang menyatakan keinginannya untuk ikut dalam usulan perjanjian tersebut.</p> |

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| <p>(3) A request for an agreement referred to in Article 34 paragraph (1) may be made by a proposed Special Railway Operator at the same time as an application for In-Principal Approval referred to in Article 4. In such case, in addition to the application materials submitted to the Issuing Authority and referred to in Article 4 paragraph (2), the proposed Special Railway Operator shall submit to the Minister (with copy to the Issuing Authority) all necessary information referred to in Article 34 paragraph (1), including a copy of the proposed agreement, along with a statement from the other railway operator confirming that it is willing to enter into the proposed agreement.</p> | <p>(3) Permohonan atas perjanjian sebagaimana dimaksud dalam Pasal 34 ayat (1), dapat dibuat oleh pemohon Penyelenggara Perkeretaapian Khusus bersamaan dengan pengajuan Persetujuan Izin Prinsip sebagaimana yang dimaksud dalam Pasal 4. Dalam hal tersebut, sebagai tambahan dari dokumen-dokumen pendukung dari permohonan yang telah diajukan kepada Otoritas Penanggungjawab dan sebagaimana disebutkan di dalam Pasal 4 ayat (2), pemohon Penyelenggara Perkeretaapian Khusus wajib mengajukan kepada Menteri (dengan salinan kepada Otoritas Penanggungjawab) segala informasi yang diperlukan menurut ketentuan Pasal 34 ayat (1), termasuk salinan atas usulan perjanjian, serta pernyataan dari penyelenggara perkeretaapian lainnya yang menyatakan keinginannya untuk ikut dalam usulan perjanjian tersebut.</p> |
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Article 36

- (1) In considering whether to approve an agreement referred to in Article 34 paragraph (1), the Minister shall first ensure compliance with the terms and conditions of Article 34 of this Regulation.

Pasal 36

- (1) Menteri, dalam mempertimbangkan untuk memberikan persetujuan atau memberikan penolakan atas perjanjian sebagaimana dimaksud pada Pasal 34 ayat (1), wajib memastikan terlebih dahulu kepatuhan terhadap syarat dan ketentuan dalam Pasal 34 Peraturan ini.

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| <p>(2) If the Minister determines that the proposed agreement does not comply with the terms and conditions of Article 34, the Minister shall notify the Special Railway Operator, setting out the specific reasons for the determination, and the Special Railway Operator may thereafter re-submit a revised agreement to the Minister for approval.</p> | <p>(2) Apabila Menteri memutuskan bahwa usulan perjanjian tidak mematuhi syarat dan ketentuan sebagaimana dimaksud pada Pasal 34, Menteri wajib memberitahukan kepada Penyelenggara Perkeretaapian Khusus, mengenai alasan spesifik yang mendasari keputusan tersebut, dan Penyelenggara Perkeretaapian Khusus dapat setelahnya mengajukan kembali perjanjian yang telah direvisi kepada Menteri untuk disetujui.</p> |
| <p>(3) If the Minister determines that the proposed agreement complies with the provisions of Article 34, the Minister shall notify the Special Railway Operator, and the Special Railway Operator shall thereafter cause a public notice of the proposed agreement to be published in a nationally circulated newspaper.</p> | <p>(3) Apabila Menteri memutuskan bahwa usulan perjanjian telah memenuhi ketentuan sebagaimana dimaksud pada Pasal 34, Menteri wajib memberitahukan Penyelenggara Perkeretaapian Khusus, dan Penyelenggara Perkeretaapian Khusus wajib setelahnya melakukan pemberitahuan publik atas usulan perjanjian tersebut, untuk diumumkan dalam surat kabar nasional.</p> |
| <p>(4) The public notice referred to in paragraph (3) shall provide an opportunity for any interested person to object to the proposed agreement within a period of 30 days from the date of the public notice.</p> | <p>(4) Pengumuman kepada publik sebagaimana dimaksud pada ayat (3) wajib memberikan kesempatan kepada pihak yang memiliki kepentingan untuk menyatakan keberatan atas usulan perjanjian paling lambat 30 hari dari tanggal pengumuman tersebut.</p> |
| <p>(5) All objections shall be made in writing to the Minister, with copy to the Special Railway Operator, and shall state the name of the objector and the basis for the objection.</p> | <p>(5) Setiap keberatan wajib dinyatakan secara tertulis kepada Menteri, dengan salinannya kepada Penyelenggara Perkeretaapian Khusus, dan wajib menyatakan nama dari pihak yang menyatakan keberatan dan alasan mengajukan keberatan.</p> |

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| <p>(6) If no objection has been received by the Minister within the period referred to in paragraph (4), the agreement shall be approved.</p> | <p>(6) Apabila tidak ada keberatan yang diterima oleh Menteri selama periode yang dimaksud pada ayat (4), perjanjian tersebut wajib untuk disetujui.</p> |
| <p>(7) If one or more objections have been received by the Minister within the period referred to in paragraph (4), the Minister may, after considering each objection:</p> <ul style="list-style-type: none"> a. approve the proposed agreement; b. approve the proposed agreement subject to conditions; c. reject the proposed agreement; or d. refer one or more objections to the KPPU (<i>Komisi Pengawas Persaingan Usaha</i>) for further consideration | <p>(7) Apabila satu atau lebih keberatan diterima oleh Menteri selama periode yang dimaksud pada ayat (4), Menteri dapat, setelah mempertimbangkan setiap keberatan:</p> <ul style="list-style-type: none"> a. menyetujui usulan perjanjian; b. menyetujui usulan perjanjian dengan syarat-syarat tertentu; c. menolak usulan perjanjian; or d. meneruskan satu atau lebih keberatan kepada KPPU (<i>Komisi Pengawas Persaingan Usaha</i>) untuk pertimbangan lebih lanjut. |
| <p>(8) A decision to reject a proposed agreement pursuant to paragraph (6) letter c or to approve a proposed agreement subject to conditions pursuant to paragraph (6) letter b shall not be made before giving the Special Railway Operator an opportunity to respond in writing to the objections received by the Minister.</p> | <p>(8) Keputusan untuk menolak usulan perjanjian sebagaimana dimaksud pada ayat (6) huruf c atau untuk menyetujui usulan perjanjian sebagaimana dimaksud pada ayat (6) huruf b tidak boleh dikeluarkan sebelum memberikan Penyelenggara Perkeretaapian Khusus kesempatan untuk menanggapi secara tertulis keberatan yang diterima oleh Menteri.</p> |
| <p>(9) A decision to refer one or more objections to the KPPU pursuant to paragraph (6) letter d shall be made only if the Minister determines that such objections raise issues falling within the competence of the KPPU under prevailing laws and regulations.</p> | <p>(9) Keputusan untuk meneruskan satu atau lebih keberatan kepada KPPU sebagaimana dimaksud pada ayat (6) huruf d wajib dikeluarkan hanya apabila Menteri memutuskan bahwa keberatan tersebut memunculkan permasalahan yang berada dalam kewenangan KPPU menurut ketentuan peraturan dan perundangan yang berlaku.</p> |

- (10) In such case, the Special Railway Operator's application shall be held in abeyance pending the decision of the KPPU.
- (10) Dalam hal Menteri meneruskan keberatan kepada KPPU sebagaimana dimaksud pada ayat 9, permohonan Penyelenggara Perkeretaapian Khusus harus ditangguhkan sementara menunggu keputusan dari KPPU.

CHAPTER VI

EXPANSION OR IMPROVEMENT OF SPECIAL RAILWAYS

Article 37

- (1) A Special Railway Operator may, during the term of the Operating Permit, apply for a permit to:
- expand the length of the Special Railway line; and/or
 - improve existing Stations or add additional Stations.
- (2) A request for expansion referred to in paragraph (1) letter a shall be submitted to the relevant Issuing Authority as set out in Article 14, and shall follow, *mutatis mutandis*, the requirements for an In-Principle Approval and Construction Permit referred to in Chapters II and III of this Regulation.
- (1) Penyelenggara Perkeretaapian Khusus dapat, selama jangka waktu Izin Operasi, mengajukan izin untuk:
- memperpanjang jalur Perkeretaapian Khusus; dan/atau;
 - memperbaiki dan meningkatkan Stasiun yang telah ada atau menambah Stasiun.
- (2) Permohonan perluasan sebagaimana dimaksud pada ayat (1) huruf a wajib diajukan kepada Otoritas Penanggungjawab terkait sebagaimana diatur dalam Pasal 14, dan persyaratan untuk Persetujuan Prinsip dan Izin Pembangunan yang dimaksud dalam Bab II dan III Peraturan ini berlaku *mutatis mutandis*.

BAB VI

PERLUASAN ATAU PERBAIKAN PERKERETAAPIAN KHUSUS

Pasal 37

- (3) If the Issuing Authority for the expansion referred to in paragraph (1) letter a is different from the Issuing Authority for the Special Railway Operator's Operating Permit, jurisdiction over the Operating Permit shall be transferred to the Issuing Authority for the expansion upon issuance of the In-Principal Approval for the expansion, and the Issuing Authority for the Special Railway Operator's Operating Permit shall not be required to approve the granting of the In-Principle Approval for the proposed expansion.
- (4) A request for improvement referred to in paragraph (1) letter b shall be submitted to the Issuing Authority of the Operating Permit and shall follow, *mutatis mutandis*, the requirements for an In-Principle Approval and Construction Permit referred to in Chapters II and III of this Regulation, except that the applicant for the In-Principal Approval shall, in all cases, be the Special Railway Operator.
- (5) The Issuing Authority may waive the requirement for a new planning study if the nature and/or scope of the improvement project does not justify it, and the Issuing Authority may waive the requirement for a new environmental/social study if such study is not required under prevailing laws given the nature and scope of the proposed improvement project.
- (3) Apabila Otoritas Penanggungjawab untuk perluasan sebagaimana dimaksud pada ayat (1) huruf a berbeda dari Otoritas Penanggungjawab untuk Izin Operasi Penyelenggara Perkeretaapian Khusus, kewenangan atas Izin Operasi wajib dialihkan kepada Otoritas Penanggungjawab untuk perluasan setelah dikeluarkannya Persetujuan Prinsip untuk perluasan, dan Otoritas Penanggungjawab untuk Izin Operasi Penyelenggara Perkeretaapian Khusus tidak diwajibkan untuk menyetujui pemberian Persetujuan Prinsip untuk usulan perpanjangan.
- (4) Permohonan untuk penambahan sebagaimana dimaksud dalam ayat (1) huruf b wajib diajukan kepada Otoritas Penanggungjawab Izin Operasi dan wajib mengikuti, secara *mutatis mutandis*, persyaratan Persetujuan Prinsip dan Izin Pembangunan yang mengacu pada Bab II dan III Peraturan ini, kecuali bahwa pemohon Persetujuan Prinsip wajib, dalam setiap keadaan, adalah merupakan Penyelenggara Perkeretaapian Khusus.
- (5) Otoritas Penanggungjawab dapat mengesampingkan persyaratan sehubungan dengan analisis rencana baru apabila sifat dan/atau ruang lingkup dari pengembangan proyek tidak memerlukan hal tersebut, dan Otoritas Penanggungjawab dapat mengesampingkan persyaratan mengenai analisis dampak lingkungan/sosial apabila analisis tersebut diwajibkan dalam peraturan perundang-undangan dengan memperhatikan sifat dan ruang lingkup dari pengembangan proyek yang diusulkan.

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| <p>(6) If the Special Railway Operator is a separate legal entity referred to in Article 4 paragraph (3), the request for expansion or improvement referred to in paragraph (1) must also be approved by the Special Railway User (or by each consortium member if the Special Railway User is a consortium).</p> | <p>(6) Apabila Penyelenggara Perkeretaapian Khusus adalah badan hukum yang berbeda sebagaimana dimaksud dalam Pasal 4 ayat (3), pengajuan perluasan atau perbaikan, peningkatan dan penambahan yang dimaksud dalam ayat (1) juga harus disetujui oleh Pengguna Perkeretaapian Khusus (atau oleh tiap anggota konsorsium jika Pengguna Perkeretaapian Khusus adalah suatu konsorsium).</p> |
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CHAPTER VII

CONVERSION OF SPECIAL RAILWAYS

Article 38

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| <p>(1) A Special Railway may be converted into a public railway, with the approval of the Minister, under the following circumstances:</p> <ul style="list-style-type: none"> a. at the request of the Special Railway Operator; b. If the Special Railway Operator referred to in letter a is a separate legal entity referred to in Article 4 paragraph (3), the request for conversion must also be approved by the Special Railway User (or by each consortium member if the Special Railway User is a consortium).] | <p>(1) Perkeretaapian Khusus dapat berubah status menjadi perkeretaapian umum, berdasarkan persetujuan Menteri, dengan ketentuan sebagai berikut:</p> <ul style="list-style-type: none"> a. atas permintaan Penyelenggara Perkeretaapian Khusus; b. Apabila Penyelenggara Perkeretaapian Khusus yang dimaksud di dalam huruf a adalah sebuah badan hukum yang terpisah sebagaimana dimaksud dalam Pasal 4 ayat (3), permohonan perubahan status juga harus disetujui oleh Pengguna Perkeretaapian Khusus (atau oleh setiap anggota dari konsorsium jika Pengguna Perkeretaapian Khusus adalah suatu konsorsium). |
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BAB VII

PERUBAHAN STATUS PERKERETAAPIAN KHUSUS

Pasal 38

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| <p>c. upon the expiration of the Operating Permit, provided that such conversion is contemplated in the plan referred to in Article 29 paragraph (3); or</p> <p>d. upon the termination of the Operating Permit referred to Article 31, provided that such conversion is contemplated in the plan referred to in Article 31 paragraph (2) or in Article 31 paragraph (6).</p> | <p>c. dikarenakan habis berlakunya Izin Operasi, dengan syarat bahwa perubahan status tersebut dicantumkan ke dalam rancangan yang dimaksud dalam Pasal 29 ayat (3); atau</p> <p>d. setelah penghentian Izin Operasi sebagaimana dimaksud dalam Pasal 31 Peraturan ini, dengan syarat bahwa perubahan status tersebut dicantumkan ke dalam rancangan sebagaimana dimaksud pada Pasal 31 ayat (2) atau Pasal 31 ayat (6).</p> |
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- (2) Additional rules regarding the conversion of Special Railways into public railways shall be included in a Ministerial Regulation on public railways.
- (2) Ketentuan tambahan mengenai perubahan status Perkeretaapian Khusus menjadi perkeretaapian umum akan diatur di dalam Peraturan Kementerian mengenai perkeretaapian umum.

CHAPTER VIII
USE OF SPECIAL RAILWAYS
TO SERVE THE PUBLIC INTEREST

Article 39

- (1) In the event of a natural disaster or similar emergency, the Issuing Authority can request that a Special Railway be used temporarily to serve the public interest.
- (2) A request referred to in paragraph (1) shall be based on a finding, by the Issuing Authority, of a pressing and temporary need for transportation of public goods or persons for which the Special Railway could be used.

BAB VIII
PENGUNAAN PERKERETAAPIAN
KHUSUS UNTUK MELAYANI
KEPENTINGAN UMUM

Pasal 39

- (1) Dalam hal terjadi bencana alam atau keadaan darurat yang serupa, Otoritas Penanggungjawab dapat meminta suatu Perkeretaapian Khusus untuk sementara waktu melayani kepentingan umum.
- (2) Permintaan sebagaimana dimaksud pada ayat (1) wajib didasarkan pada temuan-temuan dari Otoritas Penanggungjawab bahwa terdapat kebutuhan yang mendesak dan bersifat sementara untuk pengangkutan barang umum dan orang yang mana dapat dilakukan oleh Perkeretaapian Khusus.

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| <p>(3) The use of a Special Railway to serve the public interest as referred to in paragraph (1) can take the form of a cooperation agreement between the Special Railway Operator and the Issuing Authority, or a direct order issued by the Issuing Authority.</p> | <p>(3) Menggunakan suatu Perkeretaapian Khusus untuk melayani kepentingan umum sebagaimana dimaksud pada ayat (1) dapat berbentuk suatu perjanjian kerjasama antara Penyelenggara Perkeretaapian Khusus dan Otoritas Penanggung jawab, atau dalam bentuk perintah langsung yang dikeluarkan oleh Otoritas Penanggungjawab.</p> |
| <p>(4) The cooperation agreement or direct order referred to in paragraph (3) shall be valid for a period of not more than 15 days, unless extended by agreement among the Issuing Authority, the Special Railway Operator and the Special Railway User.</p> | <p>(4) Perjanjian kerjasama atau perintah langsung sebagaimana dimaksud pada ayat (3) berlaku untuk jangka waktu tidak lebih dari 15 hari, kecuali diperpanjang berdasarkan persetujuan antara Otoritas Penanggungjawab, Penyelenggara Perkeretaapian Khusus dan Pengguna Perkeretaapian Khusus.</p> |
| <p>(5) The Special Railway Operator shall be entitled to fair compensation for the use of its infrastructure and/or rolling stock in the public interest.</p> | <p>(5) Penyelenggara Perkeretaapian Khusus berhak untuk mendapatkan imbalan yang wajar atas pemakaian infrastruktur dan/atau gerbong, lokomotifnya untuk kepentingan umum.</p> |

CHAPTER IX
FINAL PROVISIONS
Article 40

This Regulation shall come into effect on the date of its promulgation.

BAB IX
KETENTUAN PENUTUP
Pasal 40

Peraturan ini mulai berlaku pada tanggal ditetapkan.

ANNEXE 2: PROPOSED AMENDMENTS TO GOVERNMENT REGULATIONS

AMENDMENT TO GOVERNMENT REGULATION NO 56 OF 2009 ON RAILWAY OPERATIONS

BY THE GRACE OF GOD ALMIGHTY
PRESIDENT OF THE REPUBLIC OF INDONESIA

Whereas:

- a. the development of certain business activities and investment in certain areas in Indonesia are dependent on the existence of reliable transportation infrastructure specifically for the purpose of transporting products to be further carried using different modes of transportation or for further processing
- b. the involvement and participation of the private sector in the development of Special Railways is considered an urgent matter to be dealt with as Special Railways are a solution to the limited transportation infrastructures currently available in Indonesia
- c. based on the above considerations and to provide a clear legal basis and guidelines for the development and implementation of Special Railways it is therefore deemed necessary to promulgate an amendment to Government Regulation No. 56 of 2009 on Railway Operations

Considering:

1. Article 5 (2) of the 1945 Constitution
2. Law No. 23 of 2007 on Railways (the State Gazette of the Republic of Indonesia Year 2007 Number 65 Gazette of the Republic of Indonesia Number 4722);

PERUBAHAN ATAS PERATURAN PEMERINTAH NOMOR 56 TAHUN 2009 TENTANG PENYELENGGARAAN PERKERETAAPIAN

DENGAN RAHMAT TUHAN YANG MAHA ESA
PRESIDEN REPUBLIK INDONESIA

Menimbang:

- a. perkembangan beberapa kegiatan usaha dan penanaman modal di beberapa bidang tergantung dari keberadaan infrastruktur yang dapat diandalkan khususnya untuk tujuan mengangkut barang yang selanjutnya akan menggunakan sarana transportasi lainnya atau untuk proses produksi selanjutnya
- b. keterlibatan dan partisipasi dari sektor swasta dalam pengembangan Perkeretaapian Khusus dianggap sebagai masalah yang penting untuk ditangani dikarenakan Perkeretaapian Khusus merupakan sebuah jalan keluar akan sarana transportasi terbatas yang ada di Indonesia
- c. berdasarkan pertimbangan di atas dan untuk memberikan dasar hukum yang jelas dan panduan untuk pengembangan dan penerapan Perkeretaapian Khusus dianggap perlu menetapkan perubahan atas Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Penyelenggaraan Perkeretaapian

Mengingat:

1. Pasal 5 (2) Undang-undang Dasar Negara Republik Indonesia Tahun 1945;
2. Undang-undang Nomor 23 Tahun 2007 tentang Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2007 Nomor 65 Tambahan Lembaran Negara Republik Indonesia Nomor 4722);

3. Government Regulation No. 56 of 2009 on Railway Operations (State Gazette of the Republic of Indonesia Year 2009 Number 129 and Supplement No. 5048);

3. Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Penyelenggaraan Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 129 dan Tambahan Lembaran Negara Nomor 5048);

TO DECIDE

MEMUTUSKAN

To promulgate:

Menetapkan:

GOVERNMENT REGULATION ON
AMENDMENT TO GOVERNMENT
REGULATION NO 56 of 2009 ON RAILWAY
OPERATIONS

PERATURAN PEMERINTAH TENTANG
PERUBAHAN ATAS PERATURAN PEMERINTAH
NOMOR 56 TAHUN 2009 TENTANG
PENYELENGGARAAN PERKERETAAPIAN

Article I

Pasal 1

To amend some provisions of Government Regulation No. 56 of 2009 on Railway Operations ((State Gazette of the Republic of Indonesia Year 2009 Number 129 and Supplement No. 5048) as follows:

Beberapa ketentuan dalam Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 129 dan Tambahan Lembaran Negara Nomor 5048) diubah sebagai berikut:

1. To amend the whole Article 350 as follows:

1. Mengubah seluruhnya Pasal 350 sehingga berbunyi sebagai berikut:

“Article 350

“Pasal 350

- (1) Special Railway connects one or more areas of the business it serves and can also include one or more stations located outside of such areas.
- (2) A station referred to in paragraph (1) can include another area used as part the principal business activities served by a special railway, a connecting point with another railway or other mode of transportation, or a connecting point to an off-taker, supplier, or service provider of the special railway user.”

- (1) Perkeretaapian Khusus menghubungkan satu atau lebih wilayah dari usaha yang dilayaninya dan dapat meliputi satu atau lebih stasiun yang bertempat di luar wilayah tersebut.
- (2) Stasiun sebagaimana dimaksud dalam ayat (1) dapat meliputi wilayah lainnya yang digunakan sebagai bagian dari kegiatan usaha pokok yang dilayani oleh suatu perkeretaapian khusus, suatu titik penghubung dengan jalur kereta api lainnya atau sarana transportasi lainnya, atau suatu titik penghubung kepada pembeli, pemasok atau pemberi jasa dari pengguna perkeretaapian khusus.”

Article 2

This Regulation shall come into effect on the date of its promulgation.

Pasal 2

Peraturan ini mulai berlaku pada tanggal ditetapkan.

AMENDMENT TO GOVERNMENT
REGULATION NO 72 OF 2009 ON
RAILWAY TRAFFIC AND OPERATIONS

BY THE GRACE OF GOD ALMIGHTY
PRESIDENT OF THE REPUBLIC OF
INDONESIA

Whereas:

- a. the development of certain business activities and investment in certain areas in Indonesia are dependent on the existence of reliable transportation infrastructure specifically for the purpose of transporting products to be further transported using other means of transportation modes or for further processing
- b. the involvement and participation of the private sector in the development of Special Railways is seen as an urgent matter to be dealt with as Special Railways are a solution to the limited transportation infrastructures currently available in Indonesia
- c. based on the above considerations and to provide clear legal basis and guidelines for the development and implementation of Special Railways it is therefore deemed necessary to promulgate the amendment to Government Regulation No. 72 of 2009 on Railway Traffic and Operations

Considering:

1. Article 5 (2) of the 1945 Constitution

PERUBAHAN ATAS PERATURAN
PEMERINTAH NOMOR 72 TAHUN 2009
TENTANG LALU LINTAS DAN ANGKUTAN
KERETA API

DENGAN RAHMAT TUHAN YANG MAHA
ESA
PRESIDEN REPUBLIK INDONESIA

Menimbang:

- a. perkembangan beberapa kegiatan usaha dan penanaman modal di beberapa bidang tergantung dari keberadaan infrastruktur yang dapat diandalkan khususnya untuk tujuan mengangkut barang yang selanjutnya akan menggunakan sarana transportasi lainnya atau untuk proses produksi selanjutnya
- b. keterlibatan dan partisipasi dari sektor privat dalam pengembangan Perkeretaapian Khusus dianggap sebagai masalah yang penting untuk ditangani dikarenakan Perkeretaapian Khusus merupakan sebuah jalan keluar akan sarana transportasi terbatas yang ada di Indonesia
- c. berdasarkan pertimbangan di atas dan untuk memberikan dasar hukum yang jelas dan panduan untuk pengembangan dan penerapan Perkeretaapian Khusus dianggap perlu menetapkan perubahan atas Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api

Menimbang:

1. Pasal 5 (2) Undang-undang Dasar Negara Republik Indonesia Tahun 1945;

- | | |
|---|--|
| <p>2. Law No. 23 of 2007 on Railways (the State Gazette of the Republic of Indonesia Year 2007 Number 65 Gazette of the Republic of Indonesia Number 4722);</p> <p>3. Government Regulation No. 72 of 2009 on Railway Traffic and Operations (State Gazette of the Republic of Indonesia Year 2009 Number 176 and Supplement No. 5086);</p> | <p>2. Undang-undang Nomor 23 Tahun 2007 tentang Perkeretaapian (Lembaran Negara Republik Indonesia Tahun 2007 Nomor 65 Tambahan Lembaran Negara Republik Indonesia Nomor 4722);</p> <p>3. Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api (Lembaran Negara Republik Indonesia Tahun 2009 Number 176 dan Tambahan Lembaran Negara Nomor 5086);</p> |
|---|--|

TO DECIDE

To promulgate:

GOVERNMENT REGULATION ON AMENDMENT TO GOVERNMENT REGULATION NO 72 of 2009 ON RAILWAY TRAFFIC AND OPERATIONS

Article I

To amend a provision of Government Regulation No. 72 of 2009 on Railway Operations ((State Gazette of the Republic of Indonesia Year 2009 Number 176 and Supplement No. 5086) as follows:

1. To amend paragraphs (2), (3), (4) and (5) of Article 161 as follows:

“Article 161

(1) **[no change]**

(2) Transportation services by Special Railway shall, unless otherwise directed by the Minister, comply with general safety, environmental and operational requirements applicable to public railways.

MEMUTUSKAN

Menetapkan:

PERATURAN PEMERINTAH TENTANG PERUBAHAN ATAS PERATURAN PEMERINTAH NOMOR 72 TAHUN 2009 TENTANG LALU LINTAS DAN ANGKUTAN KERETA API

Pasal 1

Mengubah ketentuan dalam Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api (Lembaran Negara Republik Indonesia Tahun 2009 Number 176 dan Tambahan Lembaran Negara Nomor 5086) sebagai berikut:

1. Mengubah ayat (2), (3), (4) dan (5) dari Pasal 161 sebagai berikut:

“Pasal 161

(1) **[tidak berubah]**

(2) Pelayanan angkutan Perkeretaapian Khusus wajib, kecuali dalam hal ditentukan selainnya oleh Menteri, mematuhi ketentuan-ketentuan sehubungan dengan keselamatan, lingkungan dan operasi yang berlaku untuk perkeretaapian umum.

- (3) Transportation services by Special Railway referred to in paragraph (1) can be integrated with other Special Railway networks and public railway networks.
- (4) In the event that Special Railway transportation services are integrated with a public railway network as referred to in paragraph (3), approval must be received from:
- a. the Minister for national railway track network;
 - b. the governor for provincial railway track network; or
 - c. the regent/mayor for regency/city railway track network.
- (5) In the event that Special Railway transportation services are integrated with another Special Railway network as referred to in paragraph (3), approval must be received from:
- a. the Minister, for integration with the network of another special transportation service connecting provinces;
 - b. the governor, for integration with the network of another special railway transportation service connecting regencies/cities within one (1) province; or
- (3) Pelayanan angkutan Perkeretaapian Khusus sebagaimana dimaksud pada ayat (1) dapat diintegrasikan dengan jaringan pelayanan Perkeretaapian Khusus lainnya dan jaringan pelayanan perkeretaapian umum.
- (4) Dalam hal pelayanan angkutan Perkeretaapian Khusus diintegrasikan dengan jaringan pelayanan perkeretaapian umum sebagaimana dimaksud pada ayat (3), harus mendapat persetujuan dari:
- a. Menteri, pada jaringan jalur perkeretaapian nasional;
 - b. gubernur, pada jaringan jalur perkeretaapian provinsi; atau
 - c. bupati/walikota, pada jaringan jalur perkeretaapian kabupaten/kota.
- (5) Dalam hal pelayanan angkutan Perkeretaapian Khusus diintegrasikan dengan jaringan pelayanan Perkeretaapian Khusus lainnya sebagaimana dimaksud pada ayat (3), harus mendapat persetujuan dari:
- a. menteri, untuk pengintegrasian dengan jaringan pelayanan angkutan perkeretaapian khusus lainnya yang menghubungkan antarprovinsi;
 - b. gubernur, untuk pengintegrasian dengan jaringan pelayanan angkutan perkeretaapian khusus lainnya yang menghubungkan antarkabupaten/kota dalam 1 (satu) provinsi; atau

c. the regent/mayor, for integration with the network of another special railway transportation service connecting services within one (1) regency/city.”

Article 2

This Regulation shall come into effect on the date of its promulgation.

c. bupati/walikota, untuk pengintegrasian dengan jaringan pelayanan angkutan perkeretaapian khusus lainnya yang menghubungkan pelayanan dalam 1 (satu) kabupaten/kota.”

Pasal 2

Peraturan ini mulai berlaku pada tanggal ditetapkan.

ANNEXE 3: MINUTES OF STAKEHOLDER MEETINGS

Meeting with Nugroho Indrio (MOT offices, Jakarta) - 6 April 2011

Nugroho Indrio (Secretary of the DGR), Asenar Nangtjik Rekap, Efi Novara, Benny Bernarto, Guy Des Rosiers

An explanation was provided by Pak Efi and M&T to Pak Nugroho as to the purpose of the meeting and that the study has now reached Phase III whereby the new team established by IndII will work on preparing drafts amendments to the current PPs as well as a new Permen relating to SRs.

In respect of the list of preliminary questions prepared by M&T, Pak Nugroho said that in this meeting he will not discuss the substance of the questions but more to provide a general idea. In principle, Pak Nugroho seems to approve the idea of not only developing a new Permen but also amending the relevant PPs and asked the team to provide an idea/argument to support the proposal for amendments for consideration. Pak Nugroho will support and assist the consultant team in convincing other agencies to accept the proposed amendments if the presented reasons for amendments are acceptable to him.

The establishment of an IAWG was discussed and Pak Nugroho's office will arrange for an invitation letter to be issued to the relevant agencies invited to join the IAWG.

Meeting at IndII Offices (Jakarta) - April 11, 2011

Efi Novara, Shirley M. Oroh, David Lupton, Asenar Nangtjik Rekap, Benny Bernarto, Guy Des Rosiers, Revie Hamzah, Umi Kulsum

Pak Efi opened the meeting by introducing everyone and setting out a tentative schedule for upcoming stakeholder meetings. M&T distributed a draft form of term sheet (for illustrative purposes only) and a preliminary list of legal and policy issues for further consideration.

The schedule for upcoming stakeholder meetings and the proposed composition of the inter-agency working group (IAWG) were discussed, as well as the schedule for various deliverables and IAWG meetings.

The discussion next turned to whether one or two draft PPs would be needed. After some discussion, the group agreed that PP 56/2009 and 72/2009 already constitute all necessary implementing Government Regulations; therefore, we need to propose amendments to the existing regulations rather than drafting an entirely new PP. Therefore, the consultant team will propose amendments to existing PP 56/2009 and 72/2009, together with a draft Permen.

There was a brief discussion regarding the draft Permen prepared by DGR in 2010.

A general discussion ensued on a number of legal issues requiring further investigation, including the definition of exclusivity and what the Railway Law actually requires, and whether SPVs can be used to establish SRs. The discussion also covered whether a SR should be able to charge a 'fee', and what rules should apply when an SR connects with another railway. Finally, the concept of LPR was discussed, particularly in connection with the requirement for public tender under Perpres 67/2005 (as amended by Perpres 13/2010).

Meeting with MEC Coal (Plaza Marein, Jakarta) - 11 April 2011

Mezra Esa (VP Development, MEC Coal), Gaylord Watkins (board member and legal consultant, MEC Coal), Rafael Hari Wijayanto (General Manager – Legal, MEC Coal), Febrina Danuningrat (Director, TOP), Naveen Chandralal (CEO, MEC Coal), Graham Gleave (AusAID M&E), Efi Novara, Shirley Oroh, Asenar Nangtjik Rekap, David Lupton, Benny Bernarto, Guy Des Rosiers

The first part of the meeting was led by Graham Gleave and focused on M&E issues relating to Phase II of the project and MEC Coal's comments on the FR.

With respect to specific proposals contained in the FR, MEC Coal noted that the end of life recommendations (particularly the terms governing a possible hand-over of the SR to the Government at the end of the license period) would be useful to implement, as these issues were largely left open in negotiations between MEC Coal and regulators. MEC Coal also mentioned that there were open issues regarding proper coordination between the term of the coal IUP and the term of the SR license, which should ideally be harmonized in an implementing regulation. The company also noted that the recommendations in the FR with respect to SRs, if implemented, would solve most of MEC Coal's remaining problems, so the new concept of LPRs would not be particularly relevant to the company's situation. MEC Coal further noted, however, that recommendations in the FR regarding minority shareholdings or control through contractual provisions would be very useful if implemented in the form of new regulations.

The company offered to provide the consultant team with assistance and relevant documents regarding the background of MEC Coal's discussions with regulators, as well as the process leading to the issuance of the regulatory approvals to TKK.

The discussion then turned to the issue of exclusive use and MEC Coal's shareholding structure. The company noted the existence of 2004 BKPM Guidelines which allow 95% foreign ownership of an SR. The company also confirmed that MOT was comfortable in issuing an in-principle license to TKK based on the fact that TKK and TOP (the IUP holder) were under indirect common control by a single offshore (Singapore) entity. As part of the license conditions, however, MOT insisted that TOP take a 5% holding in TKK, and that the companies enter into a 'Deed' confirming that TKK will only transport materials produced by TOP. MEC also confirmed that the common control scenario

accepted by MOT for SR licensing purposes was equally acceptable to MEMR for purposes of Permen 28.

MEC Coal now considers the railway project to be bankable based on the approvals received from MOT.

With respect to future issues, MEC Coal has discussed with MOT the possibility of expanding the use of the SR to allow for the transportation of aluminum ore for another company that is part of a same corporate group. While the terms of the license are so far restricted to the activities of TOP, the MOT seems open to further discussion on this issue.

With respect to possible future requests by third parties for access to the rail infrastructure, the company stated that MOT requests for such access would be considered, provided they are both feasible and mutually beneficial. However, no real thought has been given so far to this issue.

As a practical matter, the company noted that under the current PP 56/2009, a construction license for an SR can be obtained only after at least 10% of the land has been acquired and the company has obtained an IMB. However, the company cannot realistically obtain an IMB if only 10% of the land has been acquired. Therefore, the license conditions should be made more practical and realistic. The company offered to provide other practical suggestions with respect to improving the licensing process.

The land acquisition process remains difficult and time consuming. A business to business scheme with the land owners has been adopted. Liaison with the relevant authorities has also been conducted to ensure that the land to be acquired has not been allocated by the authorities for other projects.

Meeting with Dr Indra Darmawan (BKPM offices, Jakarta) - 14 April 2011

Dr Indra Darmawan (Director of Capital Investment Deregulation), Shirley M. Oroh, Asenar Nangtjik Rekap, David Lupton, Benny Bernarto

Dr Indra Darmawan explained that his directorate is dealing with various investment matters, including railways. With respect to SRs, he explained that he was directly involved in MEC Coal's railway project and participated in the discussions with MOT. Although BKPM is of the view that SRs can be operated by a separate special purpose vehicle, MOT was apparently of the view that the SR operator should be the entity undertaking the core business which the SR is intended to serve, as in MOT's view the SR is not a profitable enterprise and thus should be linked to the core business (in the case of MEC Coal, the business of the coal mining concession holder, TOP). MOT, upon consultation with BKPM and the Ministry of Economic Affairs, finally agreed to issue the in-principle license to TKK (the special purpose railway affiliate of MEC Coal) on the condition that the concession holder take a small shareholding in the SR operator.

The difficulty in convincing MOT was due to differences of opinion within the MOT as to the interpretation of the provisions of UU 23/2007, PP 56/2009 and PP 72/2009, in particular with respect to SRs.

Dr Darmawan further pointed out that, in his view, should other business entities be interested in establishing a special SR operator, the entity should take a direct shareholding in the SR Operator. Dr Darmawan supports the development of SRs as this will attract more investors. Some foreign investors have already approached BKPM for the possibility of developing SRs along the model used in the case of MEC Coal.

As to foreign ownership in the SR, Dr Darmawan explained that there is no restriction in the foreign ownership and thus foreign shareholders should be allowed to own majority shares in the SR. The 2004 BKPM application guideline, which allows 95% foreign ownership in SRs, should have been replaced by the Negative List of Investment, which does not mention any restrictions or limitations regarding SRs.

Dr Darmawan approved the idea of establishing an IAWG and agreed to participate.

Meeting with BKPM (BKPM Offices, Jakarta) - 14 April 2011

Rudy Salahuddin (Director of Exhibition and Promotion Media), Muhammad Nasir Udin Latief (Deputy Director for Mineral Resources Affairs, Directorate of Planning for Agribusiness and Natural Resources), Shirley Oroh, Asenar Nangtjik Rekap, David Lupton, Benny Bernarto

Ir. Tamba Hutapea, the Deputy Head of Investment Planning could not attend the meeting due to another engagement.

With respect to the question whether SR must be owned and operated by the same entity that carries out the 'main activity' that the SR is intended to support, Muhammad Nasir explained that following the case of MEC Coal, the SR may be owned and operated by a different entity. During the meeting, BKPM used the presentation materials prepared in relation to MEC Coal. With respect to other questions that have been raised in our letter, they said that they will further study the questions and provide a written response. However, the general view is that it appears BKPM is open with the idea of amending the SR regulation if that would mean more foreign investment in Indonesia.

When asked about the possibility of an unsolicited project under Perpres 67/2005 (as amended by Perpres 13/2010) to be conducted through direct appointment, BKPM stated that the issue is subject to the view of the MOF, which seems to believe that if a project only attracts a single vendor, it should not be covered under Perpres 67/2005. BKPM also informed us that the agency (together with Bapenas, MOF, etc.) are working to further amend Perpres 67/2005 in the near future.

To date it appears that MEC Coal is the only foreign investment in SRs that BKPM has handled, although we were also informed that they have been in discussion with a Russian company for the development of another SR to support a coal business located in Central and East Kalimantan.

Meeting with Bambang Gatot Ariyono (MEMR offices, Jakarta) – 15 April 2011

Bambang Gatot Ariyono (Director General), Glaham Gleave (AusAID M&E), Asenar Nangtjik Rekap, Shirley Oroh, David Lupton, Benny Bernarto, Guy Des Rosiers

The first part of the meeting was led by Graham Gleave and focused on M&E issues relating to Phase II of the project.

As a matter of policy, MEMR would be consulted for any changes in UU 23/2007, to avoid conflicts between UU 23/2007 and UU 4/2009. The Director General expressed his support for efforts to relax existing requirements relating to SRs.

The case of PT Bukit Asam was mentioned as a precedent for the concept of a cooperation between a coal mining company and a railway company. The subject of Permen 28 and restrictions on transactions between IUP holders and affiliated mining services companies was also briefly discussed.

The Director General mentioned that tender is the general rule for contracts with mining services companies (whether affiliated or not). With respect to transactions between IUP holders and affiliated mining services companies, the issue of profits and transfer pricing is an important consideration for MEMR.

The Director General expressed the view that multiple IUP holders should be served by a single SR, and that MEMR would have no problem supporting such a proposal.

With respect to the proposed IAWG, the Director General indicated that he would send a member of his legal team, and will be awaiting a formal request from IndII for this purpose.

Meeting with DGR (Karya Building, Jakarta) – 15 April 2011

Asril Syafei (Director of Railways Traffic and Transport), Prasetyo (DGR Traffic), Bernadette E.S. Mayashanti (DGR Traffic), Efi Novara, Shirley M. Oroh, David Lupton, Guy Des Rosiers, and other members of the DGR team

Pak Asril was very supportive of reform in the area of SRs, provided that such reform could be done within the limits of what is permitted under UU 23/2007. He stressed that proposed changes should have a very clear basis and be accompanied by explanations. He also believes that the role of Government with respect to SRs should

be clearly spelled out (e.g., regulatory control over safety and operational issues). There is some concern on DGR's side that SRs should not feel as though they can operate outside of Government control.

Pak Asril also expressed concerns about the concept of LPR, as set out in the FR. His view is that UU 23/2007 allows only for two types of railway: SRs and PRs, and he doubts whether a third category can be created without amending UU 23/2007.

M&T explained that something close to an LPR could be set up without changing the essential nature of a SR. Article 374 of PP 56/2009 could be used as basis for establishing a set of interconnection rules that would allow multiple SR operators to share a network without jeopardizing the nature of the SR. M&T also indicated that the exclusive use rule should be relaxed by allowing SR operators to be affiliated with the core business they serve, and that the point-to-point rule (Article 350 of PP 56/2009) should also be relaxed. Moreover, SRs should not be subject to tender under Perpres 67/2005 (as amended by Perpres 13/2010).

Pak Asril seemed receptive to these ideas, but stressed that we should focus primarily on the new Permen, and only secondarily on amendments to the existing PPs. He also asked the consultant team to consider other options involving the use of BUMNs.

Other members on Pak Asril's team expressed concern that interconnection rules could lead to large SR networks that present both jurisdictional issues and problems with respect to planning. A suggestion was also made about incorporating anti-monopoly provisions in the new Permen or through amendments to the existing PPs.

With respect to the complexity of the current licensing scheme, Pak Asril mentioned that a simplification would be feasible, but would have to be done very carefully.

In terms of logistics, Pak Asril seemed very happy with the idea of setting up an IAWG, and wants his team to be closely involved. He proposed that the working group should not be too big, so that progress can be made quickly. He emphasized the importance of timing in producing the new Permen.

Meeting with BAPPENAS (BAPPENAS offices, Jakarta) – 15 April 2011

Ikhwan Hakim (Directorate of Transportation), Dr. Petrus Sumarsono (Directorate of Transportation), Shirley Oroh, David Lupton, Guy Des Rosiers

M&T explained the work to be completed in Phase III, and the proposed approach to: (a) relax exclusive use requirements to expressly permit certain affiliates to act as SR operators; (b) develop simple interconnection rules based on Article 374 of PP 56/2009 to allow for the development of shared SR networks; (c) relax the point-to-point rule of Article 350 of PP 56/2009; (d) provide for flexible end-of-term provisions that allow MOT and the SR developer to negotiate what will happen to the infrastructure at the end of the license; (e) simplify the SR licensing procedures; (f) clarify that SRs are

exempt from Perpres 67/2005 tender requirements; and (g) coordinate the term of the SR license with the term of the license applicable to the core business.

BAPPENAS indicated that it would support reforms in the SR sector to encourage greater private infrastructure development.

Meeting with DGR Traffic (Karya Building, Jakarta) – 21 April 2011

Pak Prasetyo (DGR - Promotion and Business Development), Israfuhyat (MOT - Head of Road Transport and Railway Regulation), Efi Novara, Asenar, David Lupton, Shirley M. Oroh, Benny Bernarto, Guy Des Rosiers, and other DGR staff.

The meeting opened with a brief presentation by Asenar on the results from Phase 2 of the project and the subsequent peer review process.

DGR observed that Phase 2 was focused mostly on policy, and that what is needed in Phase III is a way to implement needed policy changes in a manner that is consistent with Indonesian law.

Outside of MOT, there is a perception that MOT is reluctant to implement the Railway Law. From MOT's point of view, however, the key regulatory issues are complex, the existing law and regulations are often difficult to understand and apply, and drafting the implementing regulations amounts at times to an exercise in guesswork. There is a perception within MOT that the department's hands are largely tied because of the restrictive language contained in the law and regulations.

M&T then made a presentation outlining in some detail the specific reforms proposed by the consultant team.

DGR asked if it would be possible to implement needed reforms through a Permen, without amending the law or existing PPs. M&T responded that probably 90% of the team's proposed reforms could be implemented through a new Permen, but that a few targeted changes to existing PPs (e.g., to relax the point-to-point rule) would also be highly desirable.

The idea that an SR could be interconnected to other railways without losing its status was greeted positively, as was the idea that an SR operator need not be the actual client served by the SR, but could be a separate entity controlled by, or under common control with, the actual client.

The idea that an SR could be formed by a consortium of businesses was perceived as being somewhat more controversial, though DGR seemed prepared to consider it with an open mind.

DGR seemed preoccupied by the thought that an SR might end up exerting too much power over its client unless the terms of the contract (especially the price) were

carefully controlled. The consultant team acknowledged that competition law issues could arise in certain cases, but that a simple mechanism to address egregious cases would be preferable to tight controls over commercial contract terms.

The consultant team suggested that state control should be limited as much as possible to issues of safety, environmental, technical and competition. In other areas, SRs should be given the flexibility needed to operate.

Pak Israful asked the consultant team to explain in writing the difference between the proposed interconnection rules and the proposed rule regarding consortiums.

DGR asked whether the Government could request the use of an SR's infrastructure. The consultant team responded that, under the proposed approach, the Government should be able to enter into an interconnection agreement with an SR just like anyone else.

M&T asked why the current license approval process was so complicated. DGR agreed that the process was complicated, and that timing of the approval process could be streamlined. However, the number of required approvals cannot be cut.

Various other issues were then brought up for discussion by DGR, including whether MOT should give reasons for rejecting an application, and whether the Government should receive a 'royalty' from railway operations whenever there is more than one client involved.

Meeting with Tulus Hutagulung (CMEA offices, PAIK Building, Jakarta) - 27 April 2011

Tulus Hutagulung (Assistant Deputy for Transportation Infrastructure), Asenar, Benny Bernarto, Guy Des Rosiers.

Pak Tulus referred to a recent (early April) article in an IRAI supplement to Tempo Magazine in which Deputy Minister Bambang Susantono apparently mentioned that SRs are not subject to tender requirements. He also described for us the role of the CMEA.

M&T then explained the purpose of Phase III, described the salient points of our proposed approach to reform, and expressed the consultant team's intention to work closely with DGR in drafting proposed implementing regulations.

Pak Tulus also raised the issue of PP 38 of 2008 (which amends PP 6 of 2006 on the Management of State and Regional Assets) and its impact on infrastructure development.

Meeting with DGR (Karya Building, Jakarta) – 4 May 2011

Pak Prasetyo, Pak Setyo Gunawan, Pak Kurniawan Agung S., Asenar, Efi Novara, Revie, Umi, Benny Bernarto, Guy Des Rosiers

The meeting was announced as one of many regular meetings with DGR to coordinate our efforts in drafting implementing regulations for SRs. M&T reminded DGR of the limited time for this project, and the need to have draft implementing regulations prior to the first scheduled FGD on 18 May. M&T also announced that a preliminary draft Permen was already nearing completion, and that it was hoped the draft could be shared with DGR sometime next week.

DGR mentioned two recent applications for SR. One was received from the Adani Group (India), which intends to carry coal from a PTBA mine in Tanjung Enim (South Sumatra) to Tanjung Carat, where the Adani Group intends to build a port. Per the proposed agreement, it is expected that the SR will purchase 60% of the mine's coal and carry it to the port. In addition, the SR will also carry coal on behalf of PTBA. The second application involved a Bakrie real estate development project, which plans to develop a small SR to connect several buildings. The SR in this case would be built and operated by third party having to relationship with the developer.

The case of PTBA and BATR was also briefly mentioned, particularly with respect to the practical difficulty of transferring an in-principle license from PTBA to BATR (which is expected to act as the SR operator).

With respect to end-of-project life issues, DGR mentioned that certain regional governments were keen to get hold of SR assets at the end of the license period. The consultant team discussed its basic proposal for end-of-project life issues (i.e., that the SR operator should be free to dispose of the assets at the end of the license), and explained that flexibility could be built into the implementing regulations (e.g., the infrastructure could be put to public use, provided that fair compensation is paid to the SR operator).

The formation of the inter-ministerial working group was also briefly discussed.

It was agreed that another meeting with DGR would be held next week.

Meeting with DGR Traffic (MOT Offices, Jakarta - 10 May 2011)

Prasetyo, Imelda, Kurniawan Agung S. (and one other DGR Traffic staff), Shirley M. Oroh, Benny Bernarto, Guy Des Rosiers.

GOI policy is to encourage investors to enter the railway business. However, it is important that draft Permen be based on the existing Railway Law.

When consultant team explained part of the proposal to separate SR Proponent from SR Operator, with the possibility of issuing In-Principal Approval to one entity and Permits to the other, DGR suggested instead that we find a way of transferring In-Principal Approval to proposed operator (if different), rather than having 2 different licensees (which may require amendment of PP).

The consultant team also suggested a workable test to determine actual control, which could be used as a basis for setting out the permitted relationship between SR client and SR operator. The issue of whether anything other than majority shareholding should be considered was discussed, with consultant team explaining that a flexible test based on actual control is common in many commercial contracts. The key for DGR should be that actual control can be verified (e.g., by requiring parties to submit shareholders agreement). If parties do not want to submit governance documents, they can also ensure majority shareholding as a substitute. The point is not to be overly accommodating to investors, but to offer a viable choice of alternative models. Actual control can be a workable alternative to majority shareholding, but DGR must be able to verify that actual control exists.

One issue brought up time and again by DGR is the fear that SR should not exert too much power over its client. In practice, this issue should not pose any real problem, as SR can only serve one client (captive). Moreover, so long as ‘actual’ control is the litmus test, client (or its parent) will always be in a position to ensure that SR does not abuse its position.

DGR brought up an interesting example from the aviation industry, where Garuda, which is not allowed by law to operate a charter business, is nevertheless allowed to operate charter flights to “support” its main business. This suggests a precedent for a broad interpretation of the concept of “support” to mean something other than “operational” support. If this concept can be extended to SRs, this could mean that a transportation company could, in theory, run an SR to “support” its main business (suggesting that a client and operator could be two entirely unaffiliated legal entities, so long as the contractual relationship between them is exclusive).

Meeting with Mr. Baitul Ikhwan, Head of the Legal Division of the Directorate General of Railways, Ministry of Transportation - Karsa Building, 2nd Floor, 30 May 2011

Mr. Baitul Ikhwan, Mr. Rusno (Legal Section, Directorate General of Railways), Ms. Mariana (Legal Section, Directorate General of Railways), Mr. Darwin Djajawinata (Ministry of Transportation), Guy Des Rosiers, Benny Bernarto, Efi Novara, Asenar, Shirley M. Oroh, David Lupton

The meeting was opened by the consultant team explaining that, following the first Focus Group Discussion (FGD) held on 20 May 2011, the next step would be to establish a working group consisting of representatives from various ministries as well as from the private sector.

Mr. Baitul stated that he welcomed the proposals from the consultant team and that his team would study the proposals. He added that actually his legal division was currently preparing a draft ministerial regulation on Special Railways (SR). It is understood by the consultant team that the draft mentioned by Mr. Baitul as being prepared by his team is different from the draft provided to the IndII team dated November 2010. However, the team was informed by Mr. Baitul that at this stage the draft could not yet be shared as his team was still collecting comments from various parties.

In relation to the draft regulations prepared by the consultant team which were presented during the first FGD on 20 May 2011, Mr. Baitul said that they would review the proposed drafts and to the extent possible would combine the proposals with the draft ministerial regulation that he and his team were currently working on.

The consultant team then explained to Mr. Baitul regarding the main key issues and proposals provided in the proposals prepared by the consultant team, among others, the consortium, SR Proponent concept and the point-to-point rule. Mr. Baitul and his team seemed to generally accept the proposed SR Proponent and consortium concept as well as the proposal that the holder of the in-principle permit (ie the SR proponent) could appoint/use a different entity as the holder of the construction and operating licenses so long as a certain relationship and means of control was established between the holder of the in-principle permit and the holder of the construction and operating licenses. In relation to the point-to-point rule, the case of PT BATR was given as an example by Mr. Baitul that he was generally of the same view and he explained that they were also considering the possibility of allowing the SR (in the case of PT BATR) to also serve the interests of the affiliated company of PT Bukit Asam. Nevertheless, Mr. Baitul also emphasized that there needed to be a certain limitation as to the point-to-point rule, but they would certainly consider the consultant team's drafts. He pointed out the history of SRs, which were mainly used previously in sugar plantations and thus served only limited areas.

In respect of the issue of interconnection, Mr. Baitul explained the different views within the Ministry of Transportation regarding the status of an SR if it interconnects with a PR. The first view (which seems to be endorsed by Mr. Baitul) was that the SR would remain an SR. However, its operation would be subject to the regulations on PRs. The second view was that in the event of interconnection (between an SR and a PR) the SR would become a PR.

On the proposed amendments to the Government Regulations, Mr. Baitul in general supported the idea, but felt that the process will take some time. He explained the difficulties encountered in developing the regulation on SRs and pointed out that to date the ministry had issued approximately 39 ministerial regulations, but none of them were related to SRs.

Finally, Mr. Baitul appreciated the involvement of and proposals provided by the consultant team and said that he and his team would study and consider the proposals. He pointed out that he was well aware of the problems currently faced by investors as he has also been involved in intensive discussions with the relevant investors. In this

regard, he expected that the consultant team could come up with new and ‘fresh’ ideas that can effectively and widely address all the issues related to SRs, not just dealing with the specific issues encountered by certain investors.

Mr. Baitul closed the discussion with a message that his team would be happy to have subsequent discussions with the consultant team on the draft regulations.

Meeting with MEC - Aston Kuningan Apartment, 31 May 2011

Mezra Esa (MEC, VP Development), Rafael Hari Wijayanto (MEC General Manager - Legal), Guy Des Rosiers, Asenar, Benny Bernarto

At DGR’s request, the consultant team met with MEC on 31 May 2011 for additional feedback on the drafts presented during the first Focus Group Discussion (FGD).

Mr. Mezra said that MEC is generally happy with the drafts. He pointed out, however, the necessity to liaise with other ministries to ensure the effective implementation of the proposed draft regulation. The given example which seemed to be their main concern is the regulation of the Ministry of Energy and Mineral Resources (MEMR) restricted the use of affiliated company in providing services to holders of mining license (IUP). In addition, Mr. Hari also suggested we coordinate with the Ministry of Law and Human Rights (MOLHR) as approval from the MOLHR is required in respect of changing and/or determining the purposes and objectives of a limited liability company. This relates to the line of business of the holder of the SR operating permit.

During the meeting, Mr. Mezra also presented some suggestions from MEC relating in particular to the definition of control, and asking that the term specifically refer to ‘direct and indirect’ control. MEC is particularly interested in the idea of a consortium as the SR proponent, as it appears that MEC intends, in the future, to have the SR serve other affiliated companies.

When asked about their view relating to the status of assets of SR following the expiration of its license (including if the assets were to be assigned to the government with or without compensation), Mr. Mezra said that currently MEC does not have any particular view and should be flexible, so long as the requirement relating to the status of the assets is stipulated in the beginning of the project. This way, MEC should be able to prepare and adjust their plan relating to the SR to accommodate the relevant situation. However, Mr. Mezra added that a distinction might be made between the underlying land rights (which will still have value at the end of the term) and the railway assets.

In relation to the land acquisition process, Mr. Hari and Mr. Mezra admitted that private one-on-one negotiations with landowners can sometimes be difficult. With regard to the requirement to provide evidence of 10% of land as a requirement to obtain the construction license, Mr. Mezra believes that 10% is sufficient.

With respect to interconnection, MEC raised the issue of whether an SR proponent could obtain a permit to construct a siding and make use of another party's rolling stock. The consultant team explained that, within the framework of the draft Permen, the SR licensee is required to obtain both a construction permit as well as an operating permit. As a practical matter, however, the essential obligations of the licensee under the operating permit could be to maintain and operate the infrastructure (i.e., the siding), while making use of another operator's rolling stock pursuant to an interconnection agreement approved by MoT.

Lastly, the consultant team suggested that MEC check with its lenders as to any requirements relating to the timeframe for obtaining the operating permit following the issuance of the construction permit. Mr. Mezra agreed to check, and was further informed by the consultant team that the current proposed draft already contains a provision that would enable the holder of a construction license to 'pre-qualify' itself as holder of the operation license, subject to the fulfillment of specific conditions.

Meeting with the Ministry of Agriculture - Legal Division of the Ministry of Agriculture, Jl Harsono RM no 3 Ragunan, Jakarta Selatan Building A, 5th floor, 6 June 2011

Suharyanto (Head of Legal Bureau), Pujiyanto Ramlan, Novianto, Guy Des Rosiers, Shirley M. Oroh, Benny Bernarto.

The consultant team met with the Ministry of Agriculture for feedback on the drafts presented during the first Focus Group Discussion (FGD).

Mr. Suharyanto explained that in the agricultural sector the common and preferred method of transportation is using public roads. The reason for this is that using public roads is affordable for small scale farmers (which the majority of Indonesian farmers are). Nevertheless, the Ministry of Agriculture was interested in knowing more about the SR concept and whether it could be used for transporting agricultural products.

Mr. Suharyanto pointed out certain difficulties in using SR for transporting agricultural products and livestock. The first difficulty is the land acquisition process for the railway, in particular on the island of Java. It is also the case that in Java most agricultural businesses are small scale businesses and therefore the SR concept may not be workable for small scale farmers as the cost would be too high for them. He added that for agricultural and livestock products there is only a limited number of points of entry and departure for the required quarantine. A special port used by a mining company may not be approved by the Ministry of Agriculture as a point of entry or departure for agricultural and livestock products. There is also an issue of contamination if agricultural products and/or livestock are transported together with other products such as coal. The Ministry imposes certain requirements in relation to the transportation of livestock and certain agricultural products.

In relation to the land acquisition process, Mr. Suharyanto and his team pointed out that in developing SR, the operator should take into account Law No. 41 of 2009 regarding the Protection of Sustainable Food Agricultural Land. The law provides that land which has been determined to be Sustainable Food Agricultural Land is protected and its function may not be changed. The only exception is when it comes to the public interest. For the public interest, the function of Sustainable Food Agricultural Land can be changed under the prevailing laws and regulations. Government Regulation No. 1 of 2011 regarding the Determination and Change of Function of Sustainable Food Agricultural Land (“**GR 1/2011**”) as the implementing regulation of Law No. 41/2009, allows a change of function for land procurement for the public interest.

Meeting with MEMR (7th floor Jl Merdeka Selatan no 18, Jakarta Pusat) – 7 June 2011

Arif Indarto (MEMR), Guy des Rosiers, Benny Bernarto, Asenar

The consultant team provided explanations to Mr. Arif as to the background and purpose of the discussion, as well as background in relation to the special railway project in particular, and the involvement of IndII in prior phases.

Mr. Arif welcomed the idea of establishing SRs particularly for the purpose of transporting coal from mining area to a designated destination. He addressed three issues of which SR operators should be aware when developing the SR, namely: the railway capacity (taking into account the volume of coal to be transported), environmental and social issues (he pointed out the necessity to conduct environmental analysis), and the issue in relation to protected forests. Mr. Arif further stated that the issues that he mentioned required coordination with certain relevant authorities and thus he pointed out that the development of SR regulation and its implementation should be in coordination with other relevant ministries and authorities.

When asked about the issues regarding affiliation as provided in Permen MEMR 28/2009 and the issues of the transportation fees (whether such can be considered as a cost component by the mining license (IUP) holders being the SR’s client), Mr. Arif believes that the two issues require coordination with the Directorate General of Mineral and Coal as well as coordination with other relevant ministries.

Meeting with MOT (Karya Building, 11th Floor) – 7 June 2011

Prasetyo, Israfulhayat, staff of Mr. Baitul, Efi Novara, Suyono Dikun, Guy Des Rosiers, Benny Bernarto, Shirley M. Oroh, Asenar

The consultant team explained the schedule in relation to Phase 3 and the tight timeframe for finalization of the draft implementing regulations, including the proposed schedules for FGDs and IAWG meetings. Mr. Prasetyo explained the schedule

of certain officials of the MOT, and the discussion led to the adjustment of some of the proposed schedules. The team further explained the meetings that the team had recently had with MEC, ESDM and the Ministry of Agriculture, as well as the proposed meetings to be held with PT INKA (Persero), PT Adani Global and BATR.

The meeting discussed, among other things, issues relating to consortiums, affiliation and control. Mr. Israful addressed his suggestion that there should be a limit to the number of businesses that could be allowed to form a consortium, as well as the number of clients that an SR should be permitted to serve. His suggestion was in the event that there is no SR already in existence, then there should be no limitation as to the members of the consortium. However, if a special railway has already been established, then a limitation should be provided to limit the number of additional businesses that may later on join as part of the consortium.

In relation to the status of special railway at the end of its use, it was suggested by Mr. Israful that the assets/infrastructure should be delivered to the government without compensation. Otherwise the operation shall be responsible for dismantling the infrastructure. The team believed that the draft Permen should provide greater flexibility as to the status of the assets, and that the status should be subject to discussions between the operator and the relevant authorities a few years before the end of the life of the asset (as a SR). It was agreed, however, that the SR should not be treated as a concession.

Meeting with PT INKA (Persero) (M&T offices) – 7 June 2011

Surjanto (GM Business Development); Sigit Sugiarto ST (Business Development Division), Guy Des Rosiers, Benny Bernarto, Shirley M. Oroh, Asenar

PT INKA is in the business of manufacturing railway products and providing engineering, trade and maintenance services. As explained by Mr. Surjanto, INKA is also looking to expand its business to include integrated provider solutions, the purpose of which is to assist businesses that do not want to be directly involved in the transportation business, but which require transportation services, including construction and financing of transportation infrastructure and facilities.

Mr. Surjanto explained to the team several projects that INKA is currently involved with and/or in the process of discussing with potential clients/partners. The primary issue that INKA is facing in developing the structure for the interest of their prospective clients is that it is understood that INKA cannot be the holder of the SR operation license as the license should be held by the client. The projects that were mentioned by Mr. Surjanto are the Bakrie Epicentrum project in which Bakrie intends to install a 1 km railway located within the property. The infrastructure in relation to railway will be owned by a subsidiary of Bakrie, and INKA will be the proposed operator of the railway. Another project is in respect of a palm oil plantation owned by PT Astra Agro Lestari, where the owner of the plantation requires an SR to transport the palm oil to its processing plant.

The team explained that, in its view, INKA may be able to establish a special purpose vehicle (SPV), either alone or in a joint venture with the client, and that such SPV could serve as the SR operator and license holder. Upon learning of the concept, Mr. Surjanto further explained that the difficulties in following the team's concept is that the clients do not want to be involved in the transportation activities at all, and prefer to leave the transportation activities to INKA. In addition, according to Mr. Surjanto, it is difficult for INKA to establish a subsidiary SPV, as the establishment must first be approved by the Minister of BUMN, being the shareholder of INKA. If INKA is to establish more than one SPV, each to serve a different client, then Mr. Surjanto predicted that the process of obtaining the required approval would be time-consuming and there is no guarantee that the approval will eventually be granted.

Meeting with PT Adani Global (M&T offices) – 8 June 2011

Ganeshan V (President Director); Satish Yanmandra (GM Railway Project), Guy Des Rosiers, Benny Bernarto, Shirley M. Oroh

The meeting began with a presentation of the Adani Group in general and a description of their businesses in Indonesia and elsewhere. PT Adani Global at the moment has mining blocks in East Kalimantan and South Sumatra.

PT Adani is planning to build infrastructure to move coal to the vessel, and beyond onto the high seas. Thus Special Railway infrastructure is only a part of PT Adani's overall plan. The future plan is to carry 35 million tons/annum for the next 20 – 30 years. At the moment an SPV had been established, PT. Adani Sumsel. The shares are 98% owned by Adani Global and the remaining 2% are owned by the South Sumatra Government.

They understand the Railway Law of 2007 as being quite flexible and as permitting PT. Adani Sumsel to execute its plan as a mining transportation services company, with all coal coming exclusively from a single client, namely PT. Bukit Asam. For that reason they have acquired a Mining Services Business Permit for Transportation using Railway from the South Sumatra Governor.

As regards the status of the project, PT Adani has entered into a Heads of Agreement with PT. Bukit Asam and the South Sumatra Government to serve as the basis for the Railway project to transport coal from PT. Bukit Asam in the South Sumatra region. PT Adani has also conducted the Feasibility Studies for their 290 KM length Railway.

They have submitted a request for In-Principle Approval to the Governor in September 2010, and the application is still pending.

PT Adani consider that the Special Railway infrastructure should be treated as a private asset (not a concession). As to what should happen to the assets after they are no longer used for their intended purpose, they oppose any automatic transfer to the

government, but would consider a negotiated transfer based on a residual value calculation.

They provided the consultants with copies of their Head of Agreement, Mining Services Business Permit, and also an approval from BKPM for the establishment of PT Adani Sumsel.

Meeting with DGR Legal Division – 13 June 2011 – Gedung Karsa 2nd Floor

Baitul Ihwan – Head of DGR Legal Division; Prawoto – Deputy of DGR Legal Division; Chusnul (DGR Legal Division); Rizki H. Basuki (DGR Legal Division); Guy Des Rosiers; Asenar; Shirley Oroh; and other members of DGR Legal Division staff.

Pak Prawoto, on behalf of the Legal Division, informed the consultant team of the Legal Division's views as follows:

1. In respect of who that can operate/develop an SR:
 - a. A company which has the main business activity; or
 - b. An affiliated company. Affiliated company means a subsidiary company with majority shares of more than 50% own by the company being served or a company controlled by other company by means of voting rights in general meeting of shareholders.
2. In respect of who can be served by the special railways:
 - a. A company which has the main business activity; or
 - b. Members of the same corporate Group or affiliated companies which have the same main business activity or the same commodity;

Legal Division disagrees with the concept of consortium, or the idea that an SR can serve members of the same corporate group but with different main business activities or commodities.

3. In respect of limitation of “main business activity”:
 1. Mining services business cannot be considered as main business activity under the regulations on railways;
 2. Coal trading business cannot be considered as main business activity under the regulations on railways;

The Legal Division explained that the above views were based on the consideration that PP 56/2009 requires a company to have specific area of main business. Mining service business and coal trading business do not have any specific area of business. The main business activity is also in reference to the elucidation of Article 161 PP 72/2009 and so far is rather limited to the sectors of coal mining business, plantation, and tourism.

4. By the closing of the meeting Pak Baitul perceived that this kind of discussion was helpful in order to exchange ideas and thoughts thus proposing an intensive meeting of one or two days between IndII consultant and DGR Legal Bureau. This proposal is also in response to the consultant team's request to see a copy of the Legal Division's own Permen Draft, so that both approaches can be harmonized. Such meeting is proposed to take place in part during a weekend to assure full concentration and to avoid distractions from the Legal Division's regular work.

Meeting with BATR (BATR Offices, Jakarta) – 13 June 2011

Rudiantara, Amir Faisol, Shirley M. Oroh, Guy Des Rosiers

Mr. Rudiantara provided corporate information regarding BATR, then explained his view that the sustainability of the proposed regulatory framework is vital for the development of SRs.

With respect to the nature of SRs, Mr. Rudiantara agreed with the consulting team's view that an SR should not be treated as a concession. As regards the proposal for SR operator to submit a plan for future use of the assets, Mr. Rudiantara generally agreed with the idea, but suggested that such plan be submitted 3 years prior to the intended end of the SR operation (instead of 2).

Mr. Rudiantara also expressed the view that the Permen should make clear that the SR operator may charge a fee to the client, as such provision is essential for the successful financing of SR projects.

From a mining law perspective, Mr. Rudiantara did not believe that transportation services would fall under the tender requirements of Permen (MEMR) 28/2009.

Meeting with DGR (Karya Building, 11th Floor) – 14 June 2011

Retno Sari, Kurniawan Agung, Eddy, Shirley Oroh, Guy Des Rosiers

The consultant team went over the draft Permen with DGR staff page by page (using an overhead projector) and addressed various technical, legal and language questions requiring clarification.

Meeting with DGR Legal Division (Novus Hotel) – 17-18 June 2011

Bpk. Baitul, Prawoto, Agus, Mariana, Kusno, Efi Novara, Shirley M. Oroh, Asenar, Darwin Djajawinate, Benny Bernarto, Guy Des Rosiers

Opening speech by Bpk. Efi

Bpk. Baitul and Bpk. Prawoto delivered their remarks as follows:

- a. Bpk. Baitul stated that the meeting was useful for his department to be able to study and consider which proposals from the IndII team can be included in the draft of the Ministerial Regulation (“**Permen**”) currently being prepared by the legal division. Bpk. Baitul stated that the draft Permen would be issued by his department and thus any proposals from the consultant team to be included in the draft Permen must first be understood and accepted by the legal division.
- b. Bpk. Prawoto stated that this discussion should always take into account regulations higher in the hierarchy. He also stated that there must be a distinction between Public Railways (PR) and Special Railways (SR). This distinction is required to prevent a Special Railway being used as a facility for certain parties who wish to operate a PR in order to avoid tender requirements.

The consultant team (Guy and Ms. Shirley) then explained the 6 (six) main constraints in a special railway (using a slide presentation delivered to the Working Group meeting) and the proposed solutions for the constraints presented during the meeting.

Bpk. Baitul then stated that these proposals were interesting and it would be good to discuss them in further in detail. He then stated that the proposals could be merged with concepts from the legal division. For example, in the legal division concept, assets are not treated as a concession and it would be very interesting to discuss this matter further regarding what will occur to the assets after the expiry of the license.

Bpk. Prawoto conveyed that a further detailed discussion could take place after the lunch break.

Bpk. Prawoto then stated that in principle he agreed to open the investment. In the case of BATR, he stated that a Special Railway can serve a company and its affiliate as long as (the company) is the majority shareholder of its affiliate. He further proposed with regard to the point-to-point rule that the Special Railway would pass several points. The legal division had already prepared a draft which could be shared later. He then stated that an amendment to Government Regulation No. 56 of 2009 regarding the Operation of a Railway (“**PP 56/2009**”) with regard to the point-to-point rule was not yet necessary.

With regard to interconnection, there were differences regarding the legal basis upon which the legal division based the interconnection: the Railway Law as opposed to Article 374 of PP 56/2009.

With regard to the status of the assets, a special railway is not a concession. Therefore, it would need to be discussed whether after the expiry of the operational term the assets would be transferred to the government or become a public railway, which were the current alternatives available.

With regard to licensing, the legal division proposed a specific time limit within which to issue a license. In the event of any differences with the regional government, the difficulty would be to have a discussion with the regional government to resolve the

differences. (Thus it would be necessary) to grant authority to the regional government.

With regard to the interconnection, it could change its status to become a public railway. However, this was still being discussed internally by the Ministry of Transportation due to a conceptual difference.

Further, initially Special Railways were available, but only in specific areas – this concept has been adopted as the basis for the legal division's consideration.

Discussion:

With regard to the Legal Entity – the participants had no issues with proposals 1 and 2 of slide 20 – point 2 being similar to the current case. With regard to point 3 (i.e., possibility of using an unaffiliated operator), it is similar in the legal division's view to a Public Railway where a Public Railway can cooperate with other parties for its operation and maintenance.

With regard to Article 5 – a certain business entity is a business entity which has a business not outside its main business.

In Bpk. Prawoto's view, with regard to Article 33 (1), the definition of a business entity is different from the definition under Article 1(10). – Note that the capitalized terms have different meanings. The definition of a business entity is a business entity which has a main business (and not a business entity outside the business entity which has the main business).

In BATR's case, it is possible to interpret that the case does not fall under Articles 5 (3) and 33 (1) but under a policy. There must be a connection between the client and the operator in relation to the main business. If it is based only on a contract/agreement, there will be a lack of connection. With regard to a public railway, entering into an agreement with any other parties is not an issue.

Bpk. Prawoto also said that the definition under Articles 5(3) and 33(1) is a business entity with the same main business and the same business entity. Basically the intention of the Railway Law is that the same business entity would be acting as the client and the operator. Therefore, only two licenses would be required compared to a Public Railway.

In principle, the license holder can cooperate with another party in its operation and maintenance. However, the responsibility will be fully that of the license holder.

Initially, BATR was given to PT BA due to financing difficulties and therefore PT BA requested that the in-principle approval be transferred to PT BA. It was not possible to transfer the license, therefore the Ministry of Transportation issued a new license to BATR and revoked the license which had been issued to PT BA. However, the in-principle approval, construction license and operating license were issued to one entity due to the transfer of licenses (if the in-principle approval was issued to the client first).

The Status of Assets

In principle, an agreement had been reached that the Special Railway would not be treated as a concession. The matter that needed further discussion was the status of the assets after the expiry of the operating license.

Bpk. Baitul stated that no agreement had been reached on the steps to be taken. There was an idea that the licenses would be issued according to the mine's period of production (in the case of a mining company). When mining production ends, the license also expires.

The status of the assets was still being discussed, the ideas available included (among others) that the asset would be taken over or the government would play a role in this matter. According to Bpk. Prawoto, the Special Railway was possibly not regulated under presidential regulation 67/2005 and he agreed that it was not a concession. If any agreement was entered into by the Government as proposed, the government would likely object, especially in relation to the budget. Another possibility was that the assets/infrastructure could be auctioned off by the Government and the winner would be required to pay compensation. The Government could also assign KAI to engage in activities as a Public Railway. Regardless of the above proposal, Bpk. Prawoto assured the meeting that if the government had to pay a certain amount of money and considering that the price would possibly be high, the government would object.

Bpk. Darwin stated that there were two alternatives in this matter. The first alternative was that the operation would be suspended or transferred to the government if the license expired. In the event its operation was transferred to the government, the terms and conditions regarding the transfer, including with regard to the residual value, would have to be specified. After being transferred, the Government would hold an auction and the winner would have to pay compensation to the owner of the Special Railway.

The consultant team stated that the team had obtained feedback from the stakeholders who felt that it would be difficult to predict future conditions in 20 to 30 years time and therefore it was important to implement a flexible regulation based on clear basic principles. If the regulation is too rigid (e.g., government takes over the assets in all cases), the government may be burdened with assets which are no longer in good condition. In relation to this, the cases of INKA and Bakrie (where the SR is expected to operate only within the boundaries of privately owned land) provided clear examples why flexibility is needed.

Another issue to consider other than the asset value is the value of the underlying land, which will still be worth something even if the railway itself has little or no residual value.

According to Bpk. Prawoto, the assets were supposed to be still in good condition due to the operator's obligation to perform maintenance and consequently periodical inspections of the assets would be conducted. He further stated that the Permen may set out options with regard to the status of the assets.

Bpk Darwin then raised the following two questions with regard to the transfer of assets:

- would the government be obliged to pay the maintenance costs if the assets were transferred to the government? and
- after the assets are delivered to the government, would they automatically be recorded as government assets by the state treasury?

Bpk. Prawoto also stated that with regard to the land title it was not clear what kind of land title would be granted by the land office; whether it would be right to manage (*hak pengelolaan*) or a right to use (*hak guna bangunan*) and this issue would need to be discussed further with the land office. Further in the discussion on the draft land law, the idea of restricting the area was put forward. However, the Ministry of Transportation had suggested removing the restriction for a railway.

The consultant team then showed Article 28 of their draft Permen, and the legal division, after reviewing the draft, agreed in principle with the general rule proposed (i.e., that within 3 years of the end of the SR client's use of the assets, the operator would propose a plan to the issuing authority, and the parties would then consider and negotiate what to do with the assets. The plan would be subject to approval by the issuing authority, with the only condition that any transfer of the assets should be based on fair compensation in accordance with prevailing laws).

Licensing

Bpk. Baitul stated that the regulation would set out the time period required to issue a license and by when the license would be deemed approved. The Ministry of Transportation has programmed the simplification of licensing related to transportation.

Bpk. Prawoto also stated that if the license was deemed to have been approved by the expiry of the time limit, the investor could take the next legal steps and commence activities, such as construction or operation. The Government would then have no grounds for accusing the investor of violating the law.

If track was extended to go across regencies, it would be under the authority of the governor.

The consultant team then described the proposal under Article 26 of the draft Permen with regard to conducting a prequalification to obtain an operating license. According to Bpk. Baitul, if an in-principle license has been issued, a construction and operating license will also be issued subject to satisfying the requirements. In the event some items remain uncompleted, they can be corrected or completed later. Bpk. Prawoto confirmed this and there were therefore no concerns on this matter.

Given the explanation provided to the team, the team was of the view that the prequalification proposal might not be required.

Coordination between Government Agencies

The main issue in this matter was the restriction regarding affiliates under Minister of Energy and Mineral Resources Regulation No. 28 of 2009. This issue needed to be coordinated further with the Ministry of Energy and Mineral Resources, especially with the Directorate General of Minerals, Coal and Geothermal Resources.

Bpk. Prawoto responded to a question from the private investors regarding what kinds of goods could be carried by a Special Railway. According to him, the legal division's concept as set out in the draft Permen listed the following goods as freight to be carried: (i) production goods; (ii) raw materials; (iii) equipment and manpower. The consultant team also suggested that if possible, there should be no restriction on the goods that can be carried as long as they are related to the main business. The legal division agreed with this suggestion.

Bpk. Baitul stated that the social issues arising from this matter were that the community living near the railway would suffer such impacts as air and noise pollution. These impacts needed to be considered, although according to the consultant team, these impacts were inevitable. Bpk. Prawoto also stated that the PP obliges a Special Railway to serve the public interest in the event of an emergency. However, according to the consultant team, if it is necessary to add provisions with regard to a Special Railway's obligation to serve the public interest if there are no public services, the PP would need to be amended.

June 18 Session

Bpk. Efi addressed the following issues that needed to be discussed in the working group meeting:

- In relation to the resolution of disputes, the consultant team stated that the dispute resolution method should be determined between the parties under a contract, since a Special Railway is not a concession. With regard to a possible dispute between the operator and the Directorate General of Railways/Ministry of Transportation, a provision on the applicable sanctions in the event of a violation of the regulation could be included. Bpk. Prawoto supported the suggestion proposed by the consultant team, even though, according to him, in the event of a violation, the Railway Law provided the Government the right to impose administrative sanctions. Basically, the government's involvement would only be that of the coordinator, if necessary.
- In the event construction is suspended, the Government will only revoke the license. The asset will still be managed by the developer. The development of Special Railways is not in the national master plan and thus will not interfere with development under the master plan. The Special Railway will be the private investor's responsibility. Further, to prevent the project being abandoned, both the consultant team and the legal division team suggested that a review of its

economic feasibility and financial ability of the SR client must be included as part of the in-principle licensing approval process.

- In relation to the question raised by BKPM regarding the foreign shareholding composition, the consultant team suggested that it did not need to be regulated under the draft Permen since it was already covered under the regulations on investment. Bpk. Baitul supported this proposal.

Miscellaneous

With regard to people's mining, a possible issue was raised by people's mining and needed to be considered.

The draft Permen provided by the legal division did not regulate the interconnection, only 'connection'.

In drafting the Permen, the team should refer to Law No. 10 of 2004.

Restrictions with regard to Affiliates

With regard to the restriction on the types of goods that may be transported in the event subsidiaries have different business activities, Bpk. Baitul stated that currently in general only one type of good was considered. For example, agricultural goods cannot be combined with coal.

With regard to whether the proponent concept was acceptable, Bpk. Baitul understood this concept, but did not think it was necessary. Bpk. Prawoto reiterated that this proposal was similar to a Public Railway. Bpk. Baitul further stated that the proposal from the consultant team and the process involved including in relation to a tender were not regulated under the Permen. (The tender procedure and appointment would not be regulated under the Permen)

Bpk. Baitul stated that with regard to the licensing procedure in relation to the proposal regarding prequalification proposed by the consultant team, during construction the Government had an obligation to conduct periodic monitoring to ensure that the construction met the required technical specifications.

The consultant team then showed the legal division a table summarizing the results of discussions so far, and stating the parties' views on the key aspects of the draft Permen. The parties went over the table item by item to confirm the positions of each party with respect to each of the points listed.

In Bpk. Efi's closing remarks he stated that, among other things, Phase 3 would end this June, but the Government had allowed the IndII program to be extended for a further 4 years.

Bpk. Baitul conveyed a positive response regarding this meeting and expressed his gratitude for the good proposals from IndII. The legal division was to submit a report to the Director General, the Director and the relevant authority so they can make

decisions based on the results of the discussions. The issues discussed in this meeting were also to be discussed in the meeting on the finalization of the draft Permen by the legal division. The legal division also agreed to share with the consultant team a copy of the draft Permen prepared by them.

Meeting with MOT (Karya Building, 11th Floor) – 23 June 2011

Prasetyo and his team (including a representative from the DGR Legal Division); Guy Des Rosiers, Benny Bernarto, Asenar, Efi Novara, David Lupton

The consultant team explained the three remaining issues in respect of the discussion of the draft Permen, namely the point-to-point rule, interconnection and the definition of legal entity. The team explained their view that because the point-to-point rule is not stipulated in Railway Law, it should be possible to expand its meaning under PP 56/2009. The discussion regarding the point-to-point rule further led to a discussion regarding the definition of ‘supporting area’ and the view of the DGR legal division. The team addressed its view that as the term ‘supporting area’ is not a defined term under UU 23/2007 or even PP 56/2009, there should be no need to provide further restrictions in the draft Permen.

Mr. Prasetyo in general can accept the consultant team’s view. Nevertheless, he suggested that there should be some form of clear definition provided in the draft Permen in regard to the matter, so as to provide certainty.

In relation to the issue of interconnection between a PR and an SR, Mr. Prasetyo stated that interconnection should be made possible, provided that the technical requirements applicable to PR can be met by the operator of SR in the event an SR is to be interconnected to a PR.

The team further explained the concept of legal entity and, in particular, the concept of ‘control’. The team explained that control can be exerted not only through a majority of the voting shares of a legal entity, but also through the ability (e.g., by contract) to appoint a majority of the members of the board of directors of a company. Mr. Prasetyo and his team asked whether the latter is a common accepted concept. The team explained that such is a common recognized concept, including under generally accepted Indonesian accounting principles.

The discussion also touched upon the requirement for SRs to provide public services for limited time during emergency or natural disaster. Mr. Prasetyo in particular requested that the draft Permen include such provisions, as he believed that this is quite important.

Lastly, the team also explained its view in relation to issues regarding mining licenses, and explained that this would require inter-ministerial coordination as there is only so much that the draft Permen could cover (as a product of MOT).

Meeting of 29 July 2011 with MoT Legal Bureau (Cipta Building, Jakarta)

Saptandri, Imelda, Efi Novara, Shirley M. Oroh, Benny Bernarto, Darwin Djawinata, Guy Des Rosiers, and additional MoT staff.

Mr. Saptandri opened the meeting by introducing himself as the new Head of Road Transport and Railways Regulations of the Bureau of Legal Affairs and International Cooperation.

Mr. Efi introduced the team and provided Mr. Saptandri with an overview of IndII Special Railways program, up to the end of Phase 3 (*i.e.*, preparation of draft ministerial regulations and amendments to government regulations together with the Legal Division and Directorate General of Railways). From the discussions with several government stakeholders, there remained a few outstanding items (notably the point-to-point rule, the consortium concept, and the interconnection rules) on which the consultant team's views differed from those of DGR Legal Division, and the purpose of this brief extension is to further discuss these outstanding point with a view to reaching common ground.

The team explained the point-to-point rule to Mr. Saptandri, with an example. If PT X builds a Special Railway for its coal transportation in its main business area and PT A, PT B and PT C reside near PT A's main business area, can PT A, PT B and PT C also use PT A's Special Railway (SR)? Is it also possible for PT X, PT A, PT B and PT C to establish a consortium?

Mr. Saptandri expressed support for the consortium concept. What mattered to him is that the operator of the SR must be a single entity. According to Mr. Saptandri, the "single-operator" principle must be implemented in the SR, so that the responsibility for management, maintenance and operations are all under one entity. The operator will be assessed and the Minister of Transportation will decide whether the operator has met the requirements needed to be the SR operator or not based on the assessment result.

Another point that has not been resolved yet is if, for example, PT X has built and been operating the special railway for 10 years, and now PT A, B, and C would like to join and use PT A's infrastructure, how can these matters be regulated under the draft regulation?

Mr. Saptandri expressed the view that PT X should not reject PT A, B, and C's request to join it and use its infrastructure with due regard for the prevailing Indonesian Anti-Monopoly Law. However, the parties should determine their rights and obligations and obtain approval from the Government, ie the Ministry of Transportation. The consultant team pointed out that there may be circumstances where PT X may have valid reasons to reject the other companies' request to join it and use its infrastructure (*e.g.*, if the goods or commodities to be transported are not compatible with PT X's infrastructure, or if the additional traffic would unduly disrupt PT X's operations).

Mr. Saptandri responded that several points need to be determined in the draft regulations; what the companies are allowed to do and what obligations they must comply with. They also need a recommendation from the Government to join PT X and use the existing SR infrastructure. PT X (or if different, its operator) should not reject PT A, B and C's request if they meet the criteria and have been assessed by the government (if the results of the assessment are good, the government will issue the recommendation). If later the operator and the joining companies cannot reach an agreement, this will no longer be a concern of the Government.

The consultant team noted that under the IndII team's draft regulation, the interconnection agreement between the parties must be submitted to the Government for approval, and Mr. Saptandri agreed.

Mr. Saptandri also expressed the view that SR operators should conduct CSR activities for the local community. Passenger transportation may be an option (for example, if the SR operates 7 times a week, then companies must provide passenger transportation on the SR railway twice a week). Mr. Darwin responded that freight and passenger transportation activities were completely different, and this could result in conflicting operations plan. He also asked if the passenger transportation would be free of charge, as part of the companies' CSR. Mr. Guy added that if the SR could transport the general public (not only goods), it would not be different from a public railway. Mr. Efi also suggested that the CSR could involve (for instance) building public roads.

Mr. Saptandri answered that the passenger transportation should not be operated commercially. Passengers could be charged for using the SR, but the amount should not be significant. He added that in his opinion, passenger transportation could be an option; however, as it is mandatory for the companies to conduct CSR activities, this concept should be included in the draft regulations. The main principle in implementing CSR is that the local communities living near the SR benefit from the establishment of the SR. Also to be taken into account is that in this case, CSR would be opening up isolated areas.

He reiterated that private investment should not be restricted by the laws and regulations. The important thing in drafting a regulation is that it must not conflict with higher laws or regulations. Adding to this comment, Mr. Darwin said that the Directorate General of Mineral and Coal has stated that transportation may not generally be provided by an affiliated company. This has the potential to create conflict between the mining regulations and the draft railway regulations.

Mr. Guy then added that all matters related to the implementation of the SR must be well planned to provide investors and financiers with legal certainty. The companies should plan what will be done with the infrastructure, including unused infrastructure once the SR is no longer in operation.

Mr. Saptandri stated that once the SR is no longer in operation, the infrastructures could have been used for a number of years and then would no longer be useful. Therefore, this should not be a problem so the team should focus on other more important issues.

Mr. Saptandri closed the meeting with some final remarks.

Meeting of 2 August 2011 with MoT Legal Bureau (IndII Offices, Jakarta)

Saptandri, Imelda, Efi Novara, Shirley M. Oroh, Benny Bernarto, Darwin Djajawinata, Guy Des Rosiers, and additional MoT staff.

Mr. Efi opened the meeting and asked the team to deliver the presentation. Mr. Benny delivered the presentation, starting with the background to the Special Railway (SR), and then went straight into the point-to-point rules. Mr. Guy continued the presentation by explaining the differences in the interpretation of “main business” between the Legal Division and the IndII team, as well as the interconnection rules.

Several agreements had been reached by the Legal Division and the IndII team, one of which was that Government Regulations Nos. 56 and 72 of 2009 (“**GR**”) will not be amended. Now, the question was how to implement the point-to-point rule in the new Ministerial Regulation (“**MR**”).

In response, Mr. Saptandri said that Indonesia has a hierarchy of laws and regulations. The IndII team and the Legal Division should be aware that the Ministerial Regulation they had prepared should not be in conflict with higher laws and regulations. In the railway sector, there are prevailing laws and regulations which are higher than the Ministerial Regulation, namely Law No. 23 of 2007 on Railways (“**Railway Law**”) and Government Regulation No. 56 of 2009 on Railway Operations (“**GR 56**”) and Government Regulation No. 72 of 2009 on Railway Traffic and Transportation (“**GR 72**”). The team and the Legal Division must identify any possible conflict between the draft Ministerial Regulation (“**MR**”) and the Railway Law, GR 56 and GR 72. Any conflicting provision must be revised and both teams (IndII team and the Legal Division) must find the best solution. Both teams also have to identify other things that need to be included in the draft MR.

Mr. Guy said that, in the consultant team’s view, the provisions of the IndII proposal do not conflict with the provisions of Railway Law and the GRs. However, both GRs may have different provisions on implementing the Railway Law, and the meaning is not always clear.

Mr. Saptandri then said that he and his staff members were most likely involved in implementing policy determined by higher officials, such as the Director General, the Deputy Minister or the Secretary General. Once they have determined basic policy for this SR, he and his staff members, including the Legal Division, will have to comply and prepare the draft regulation according to that policy.

The following important points regarding the SR need to be explained:

- The possibility of a joint company operating the SR.
- Sharing the SR infrastructure.

- Simplifying the bureaucracy or the procedure for obtaining a permit.
- The single responsibility
- The prohibition against charging commercial tariffs for using the SR
- Government Intervention regarding safety procedures
- The government being allowed to use the SR with certain specifications and conditions.

He added that in the discussions with higher officials, it would be better to address the SR policy development issues, rather than the technicalities of the draft regulation.

Mrs. Shirley stated that IndII team agrees that the MR must not conflict with any higher laws or regulations. However, during the discussion with the Legal Division several differences in their interpretation of the provisions of the Railway Law and GRs surfaced. For example, the Legal Division insisted that a SR can only operate in 4 business sectors (namely mining, plantations, agriculture and tourism). The IndII team proposed that instead of restricting the SR only to those 4 business sectors, the draft regulation could use the term “inter alia”, or “among others” to open up to other business areas not specified in the draft regulation. The Legal Division argued that restricting it to 4 business sectors was to provide investors legal certainty. However, on the other side, the IndII team felt that this restriction would discourage investors from establishing SRs.

Mr. Saptandri agreed that restricting SR to only 4 business sectors would discourage investors. He reiterated that “business matters” should be left to the companies to decide on, while the government should only take care of the technical aspects.

Ms. Imelda raised the issue of concessions. She asked what would happen to the infrastructure once the SR is no longer in operation, whether the companies would be able to sell the infrastructure or not. And what if the SR is built on private land?

In response, Mr. Saptandri said that the SR assets of could not be sold to other parties. If the infrastructure is no longer being used, the government could take it over and transfer it to other parties. A change of shareholders in the company owning the SR would not be a problem. Even if the SR is built on a private land, the companies cannot sell the land to other parties. The rules on this must be rigid, but the implementation may be flexible.

Mr. Saptandri said that the main point is not to cause any negative effect on the public. The aspects to be concerned about were the theoretical, philosophical, national political and sociological aspects. All parties should take these aspects into account when implementing SRs.

He also asked the IndII team to set up a matrix comparing the DGR’s Draft and the IndII teams’ draft, to make it easier to identify which provisions differ from each other. The team agreed and promised to provide a matrix as soon as possible.



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Special Railways Phase 3 (extension)

Jakarta 2 August 2011



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The Need for Special Railways

1. Indonesia's transportation infrastructure must be developed quickly in order to keep up with projected economic growth
2. Roads alone can no longer carry 90% of goods and commodities produced
3. Activities along major economic corridors are mostly commodities-based, with clusters of industrial, plantation, and mining complexes, each of which could be well-served by rail




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The Need for Special Railways

1. Only a fraction of railway infrastructure costs can be borne by the Government and State-Owned Enterprises
2. The majority of funds must come from private investment
3. Government need not spend public funds to develop railways that will serve one or a handful of industrial clients
4. The private sector has a strong incentive to build railway infrastructure for industrial clients that can provide a stable, long-term source of revenue


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The Economic Benefits of Special Railways

1. More goods and commodities will be able to get to market, providing a stable engine for growth and an increased source of revenue for the State
2. The construction of new rail infrastructure will bring indirect economic benefits as well


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The Role of the Regulator

1. Although the business case for Special Railways is clear, the vast capital resources needed for such investments will not be committed without a clear regulatory framework.
2. At minimum, the Government must provide assurances that, subject to compliance with reasonable regulatory constraints (technical, safety, environmental, etc.), the railway will be able to operate as intended for a sufficiently long period of time.


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Main Regulatory Challenges

1. Lack of clarity over who can use/operate a special railway
2. Restrictions on the scope of special railways
3. Uncertainty over interconnection
4. Lack of clarity over nature and ownership of special railway assets
5. Complexity of licensing system


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Proposed Solutions


A new Ministerial Regulation will clarify and implement the Railway Law and existing Government Regulations (PP 56/2009 and PP 72/2009)


No changes to existing Government Regulations are proposed

No changes to the Railway Law are needed – all of the proposed regulations are consistent with the Railway Law


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1. Lack of clarity as to who can use/operate a Special Railway

Client Rule: a Special Railway can only be used by a business entity to support its main activities (Article 5(3) of the Railway Law)

Operator Rule: a Special Railway can only be operated by a business entity to support its main activities (Article 33(1) of the Railway Law)

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Who is the 'business entity'?

Client:

- a single legal entity
- two or more affiliated legal entities
- a consortium of unaffiliated legal entities

Operator:

- same legal entity as client
- affiliate of client
- unaffiliated entity with exclusive contract

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Affiliation through actual control

'Control' can be defined broadly to include either ownership of a majority of the voting shares **OR** the power to appoint or remove a majority of the directors of a company

The ability to exercise control of a company through contractual rights (e.g., shareholders agreement) is a widely accepted legal and commercial practice, and is also reflected in generally accepted Indonesian accounting principles (e.g., PSAK 38).

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Consortium rule: rationale

MoT's main concern appears to be the potential for unequal treatment of smaller clients as a result of allowing multiple entities to form a single special railway

We believe this concern can effectively be managed if the multiple clients are members of a single consortium


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Consortium rule: rationale

The consortium rule means that multiple customers must act as a single business entity with a common purpose, thereby reducing the opportunity for discrimination

Risks relating to unequal treatment can effectively be managed in the consortium agreement

If contractual safeguards are insufficient, parties still have recourse to applicable anti-monopoly laws


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What are the 'main activities'?

Client: Any type of business that can legitimately claim to need a Special Railway for support

Operator: same main activity as client (if the operator is the same legal entity as client or an affiliate of client) **OR** a transportation company (if the operator is unaffiliated to the client but has an exclusive transportation contract with client)



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2. Restrictions to the scope of the railway

Point-to-Point Rule: a Special Railway can only operate within the area of the client's main activities, and from that area to a single point in a support area (Article 350 of PP 56/2009)

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Rationale for Modifying P2P Rule



The point to point rule significantly restricts the usefulness of a special railway, making it more difficult to justify the considerable initial investment

Relaxation of the rule would enable the railway to carry products to and from several customers or suppliers of the client company

The point to point rule is not a requirement of the Railway Law, but exists only in PP 56/2009


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Rationale for Keeping P2P Rule

There is a difference of opinion within MoT as to whether the Point-to-Point Rule restricts the Railway Law or expands it.

Those who view the Point-to-Point Rule as expansive do not want to relax it any further.


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Compromise: a proposal to interpret P2P Rule

The point to point rule can be interpreted broadly:

- to allow different types of 'supporting areas' (e.g., transportation points, off-takers, raw materials suppliers, etc.)
- to provide flexibility in the use of infrastructure at points between the 'area of main activities' and the 'supporting area'.

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3. Uncertainty over Interconnection


Connection: A Special Railway may, with approval from the relevant authority, be connected to a public railway or a special railway network (Article 52 of UU 23/2007) and the transportation services may be merged (Article 149(2) of UU 23/2007)


Cooperation: A Special Railway operator may, with the approval of MoT, enter into a cooperation agreement with another railway operator without changing the nature of the Special Railway (Article 374 of PP 56/2009)

Integration: A Special Railway may, with approval from the relevant authority, be integrated with the network of another railway operator, but the rules applicable to public railways shall apply (Article 161 of PP 72/2009)


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Interconnection rules: rationale

Allowing special railways to interconnect and share infrastructure or rolling stock (by agreement) has potential to increase efficiency, reduce costs, and prevent unfair competition


Each railway continues to serve its own client, but cooperation between operators is allowed


The resulting network would provide specialist services to a limited number of large customers.

We think that this is the model we need to encourage private investment in railways


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Proposal for Interconnection rules

Implement cooperation rules under Article 374 of PP 56/2009 to enable several special railway operators (each serving their respective client) to share infrastructure and rolling stock without losing the status of special railway

Implement integration rules under Article 161 of PP 72/2009 to make clear that integration of special railway infrastructure with public railway infrastructure can only occur if technical requirements applicable to public railway infrastructure are met.

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What happens if railways interconnect ?

We propose that an interconnection agreement should allow the first operator to:

- access the infrastructure of the other operator for the purpose of providing services in support of the first operator's client
- arrange for the other operator (if it is a public operator) to provide services in support of the first operator's client
- grant the other operator access to the first operator's infrastructure for any purpose consistent with the other operator's business

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Interconnection – Differing Views


There are differing views within MoT as to whether Article 374 of PP 56/2009 can be used as a basis for implementing interconnection rules.


Some view the rule in Article 161 of PP 72/2009 as requiring that any integration of rail infrastructure between a Special Railway and another railway results in the conversion of the Special Railway into a public railway.

We believe that Article 161 of PP 72/2009 can be read to require the application of public railway **technical rules** to certain types of interconnection, without changing the **legal status** of a Special Railway.


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4. Lack of clarity over nature and ownership of special railway assets


Special Railways are developed by private parties for a private purpose using only private funds


We believe there is nothing in the Railway Law or PPP regulations that requires special railways to be treated as a form of 'concession'

We propose that end-of-project-life issues be freely negotiated at the appropriate time between operator and regulator as part of the special railway license terms, from the starting point that the assets are to be treated as private property


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5. Complexity of the licensing system

The procedures for obtaining licences are overly complex

We think they can be simplified and streamlined without reducing their effectiveness or limiting regional autonomy

We believe this simplification can be done through a Permen.

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Conclusions

The objective of increased private sector involvement is not being achieved because of a number of constraints

We believe these constraints can effectively be addressed through a new Ministerial Regulation, and without changes to the existing Railway Law and Government Regulations




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Perkeretaapian Khusus Tahap III (Lanjutan)



Jakarta 2 Agustus 2011






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Kebutuhan atas Perkeretaapian Khusus

1. Infrastruktur transportasi Indonesia harus dengan segera dikembangkan untuk mengikuti pertumbuhan ekonomi yang telah diproyeksikan
2. Prasarana jalan raya sendiri tidak bisa menampung 90% barang dan komoditas yang telah diproduksi
3. Kegiatan dalam sektor ekonomi sebagian besar merupakan kegiatan yang didasarkan pada komoditas, dengan berbagai macam industri, perkebunan dan pertambangan yang akan sangat membutuhkan kereta api.

2

Kebutuhan atas Perkeretaapian Khusus

4. Hanya sebagian dari biaya perkeretaapian khusus yang dapat didanai oleh Pemerintah dan BUMN.
5. Sebagian besar dana harus berasal dari pihak swasta.
6. Pemerintah tidak perlu mengeluarkan uang rakyat untuk mengembangkan perkeretaapian yang akan melayani satu atau beberapa industri.
7. Pihak swasta memiliki motif yang kuat untuk membangun infrastruktur perkeretaapian bagi sektor industri yang dapat menjadi sumber pendapatan jangka panjang yang stabil.


3


Manfaat Ekonomi dari Perkeretaapian Khusus

1. Banyaknya barang dan komoditas yang masuk ke pasar, akan memberikan fondasi yang kuat untuk perkembangan dan merupakan penambahan sumber pendapatan bagi Negara.
2. Pembangunan infrastruktur rel kereta api yang baru akan memberikan manfaat ekonomi secara tidak langsung


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Peran Regulator

1. Walaupun tujuan dari Perkeretaapian Khusus telah diketahui dengan jelas, sumber dana yang besar yang dibutuhkan untuk investasi tersebut tidak akan mengalir masuk tanpa adanya kerangka perundang-undangan yang jelas.
2. Setidaknya, Pemerintah untuk memberikan jaminan bahwa dengan tunduk kepada peraturan yang memberikan batasan-batasan (teknis, keselamatan, lingkungan, dll), perkeretaapian dapat beroperasi sesuai dengan tujuannya untuk waktu yang lama.


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Tantangan Bagi Peraturan Utama

1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus
2. Pembatasan terhadap lingkup perkeretaapian khusus
3. Ketidakpastian mengenai interkoneksi
4. Ketidakjelasan atas sifat dan kepemilikan dari aset perkeretaapian khusus
5. Kerumitan sistem perizinan

6

Usulan Penyelesaian

Suatu Peraturan Menteri yang baru akan memperjelas dan melaksanakan Undang-undang Perkeretaapian dan Peraturan Pemerintah yang telah ada (PP 56/2009 dan PP 72/2009)

Tidak diperlukan perubahan terhadap Peraturan Pemerintah yang telah ada saat ini

Tidak diperlukan perubahan terhadap Undang-undang Perkeretaapian – segala perubahan terhadap peraturan yang telah diusulkan konsisten dengan Undang-undang Perkeretaapian

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1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus


Aturan Klien: Perkeretaapian Khusus hanya dapat **digunakan** oleh suatu **badan usaha** untuk mendukung **kegiatan pokoknya** (Pasal 5(3) Undang-undang Perkeretaapian)

Aturan Penyelenggara: Perkeretaapian Khusus hanya dapat **diselenggarakan** oleh suatu **badan usaha** untuk mendukung **kegiatan pokoknya** (Pasal 33(1) Undang-undang Perkeretaapian)


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Siapakah yang dimaksud dengan ‘badan usaha’?

Klien:


- badan usaha tunggal
- dua atau lebih badan usaha yang terafiliasi
- sebuah konsorsium dari badan usaha yang tidak terafiliasi


Penyelenggara:

- badan usaha yang sama dengan klien
- afiliasi dari klien
- badan usaha yang tidak terafiliasi yang memiliki kontrak eksklusif


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Afiliasi melalui kendali nyata

“Kendali” dapat diartikan secara luas untuk meliputi kepemilikan atas mayoritas saham dengan hak suara ATAU kemampuan untuk menunjuk atau mengganti mayoritas direksi perseroan

Kemampuan untuk melaksanakan kendali terhadap suatu perusahaan melalui hak-hak yang diatur di dalam perjanjian (contohnya Perjanjian Pemegang Saham) merupakan praktek yang secara hukum dan komersial diterima luas dan juga tercermin di dalam Pernyataan Standar Akuntansi Keuangan (PSAK 38)

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Dasar Alasan dari Aturan Konsorsium

Hal yang menjadi kekhawatiran utama Kementerian Perhubungan adalah potensi perlakuan yang tidak adil terhadap badan usaha kecil sebagai akibat dari diperbolehkannya beberapa badan usaha untuk membentuk suatu perkeretaapian khusus tunggal.

Kami yakin bahwa kekhawatiran ini dapat diatasi secara efektif apabila badan usaha tersebut merupakan anggota dari suatu konsorsium tunggal

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Dasar Alasan Aturan Konsorsium



Aturan konsorsium berarti bahwa beberapa pengguna/klien harus bertindak sebagai satu badan usaha dengan tujuan yang sama, yang dengan demikian mengurangi kemungkinan terjadinya diskriminasi

Resiko terkait dengan perlakuan yang tidak adil dapat diatasi secara efektif dengan perjanjian konsorsium

Jika jaminan dengan perjanjian masih belum cukup, terdapat perlindungan lain bagi para pihak melalui undang-undang anti monopoli

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Apa yang dimaksud dengan 'kegiatan pokok'?

Klien: Segala jenis usaha yang secara sah dapat meminta pengadaan Perkeretaapian Khusus sebagai dukungan terhadap usahanya tersebut

Penyelenggara: kegiatan usaha yang sama dengan klien (jika penyelenggara adalah badan usaha yang sama dengan klien atau afiliasi dari klien) **ATAU** suatu perusahaan yang bergerak di bidang transportasi (jika penyelenggara tidak terafiliasi dengan klien tetapi memiliki perjanjian transportasi eksklusif dengan klien)



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2. Pembatasan terhadap lingkup perkeretaapian

Aturan “titik ke titik”: Perkeretaapian Khusus diselenggarakan terbatas dalam kawasan yang merupakan wilayah kegiatan pokok badan usaha, dan dari kawasan kegiatan pokok ke satu titik di wilayah penunjang (Pasal 350 PP 56/2009)


14

Dasar Alasan Mengubah Peraturan “titik ke titik”

Pengaturan ini sangat membatasi penggunaan dari perkeretaapian khusus, sehingga menyulitkan dalam mendapatkan investasi

Dengan memperlunak pengaturan maka akan memungkinkan perkeretaapian khusus untuk membawa produk-produk kepada dan dari beberapa konsumen atau penyedia barang dari klien

Aturan titik ke titik tidak diatur di dalam Undang-undang Perkeretaapian, dan hanya ada di dalam PP 56/2009

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Dasar Alasan Mempertahankan Pengaturan “titik ke titik”

Terdapat perbedaan pendapat di dalam Kementerian Perhubungan mengenai apakah peraturan Titik ke Titik membatasi atau memperluas Undang-undang Perkeretaapian.

Bagi mereka yang berpendapat bahwa peraturan Titik ke Titik sudah memperluas ketentuan Undang-undang Perkeretaapian, tidak ingin lebih lanjut memberikan kelonggaran.

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Jalan tengah: Usulan sehubungan interpretasi Peraturan “Titik ke Titik”

Peraturan “titik ke titik” dapat secara luas diartikan sebagai berikut:

- Memperbolehkan terdapatnya ‘wilayah-wilayah penunjang’ yang berbeda jenis (contohnya titik pengangkutan, off-takers, supplier barang mentah, dsb)
- Memberikan fleksibilitas penggunaan infrastruktur pada titik titik yang terletak di antara ‘kawasan kegiatan pokok’ dan ‘wilayah penunjang’


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3. Ketidakpastian mengenai interkoneksi

Penyambungan: Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, disambungkan dengan jaringan perkeretaapian umum atau jaringan perkeretaapian khusus (Pasal 52 UU 23/2007) dan pelayanan angkutan tersebut dapat diintegrasikan (Pasal 149(2) UU 23/2007)

Kerjasama: Suatu penyelenggara Perkeretaapian Khusus dapat, dengan persetujuan dari Kementerian Perhubungan, melakukan perjanjian kerjasama dengan penyelenggara perkeretaapian lain tanpa mengubah status dari Perkeretaapian Khusus (Pasal 374 PP 56/2009)

Peraturan Integrasi: Suatu Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, diintegrasikan dengan jaringan angkutan perkeretaapian lainnya, dengan ketentuan bahwa pengaturan mengenai perkeretaapian umum akan berlaku (Pasal 161 PP 72/2009)


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Dasar Alasan Peraturan Interkoneksi

Memberikan kemungkinan bagi Perkeretaapian Khusus untuk melakukan interkoneksi dan berbagi infrastruktur dan gerbong (berdasarkan perjanjian) akan dapat meningkatkan efisiensi, mengurangi biaya dan mencegah persaingan tidak sehat

Masing-masing penyelenggara tetap melayani kliennya tetapi kerjasama antara penyelenggara diperbolehkan

Jaringan yang dibentuk akan memberikan layanan bersifat khusus dan terbatas hanya kepada beberapa pelanggan besar.

Kami berpendapat bahwa inilah konsep yang diperlukan untuk mendorong pihak swasta berinvestasi di sektor perkeretaapian

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Usulan Peraturan Interkoneksi


melaksanakan ketentuan kerja sama yang disebut dalam Pasal 374 PP 56/2009 yang memperbolehkan beberapa penyelenggara perkeretaapian khusus (masing-masing melayani kliennya sendiri) berbagi infrastruktur dan lokomotif, gerbong tanpa harus kehilangan statusnya sebagai perkeretaapian khusus

Melaksanakan ketentuan integrasi dalam Pasal 161 PP 72/2009 untuk secara jelas menyatakan bahwa integrasi antara infrastruktur perkeretaapian khusus dengan infrastruktur perkeretaapian umum hanya dapat terjadi apabila persyaratan teknis yang berlaku untuk perkeretaapian umum telah dipenuhi.


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Apa yang terjadi apabila perkeretaapian terinterkoneksi ?


Kami mengusulkan agar perjanjian interkoneksi memperbolehkan penyelenggara pertama untuk :

- Mengakses infrastruktur penyelenggara lain untuk tujuan memberikan jasa pelayanan yang mendukung klien penyelenggara pertama tersebut
- Mengatur penyelenggara lain (apabila penyelenggara umum) untuk menyediakan layanan yang menunjang klien penyelenggara pertama
- Memberikan akses terhadap penyelenggara lain untuk menggunakan infrastruktur penyelenggara pertama untuk tujuan apapun yang sesuai dengan usaha penyelenggara lain tersebut


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Interkoneksi – Perbedaan Pendapat

Terdapat perbedaan pendapat dalam Kementerian Perhubungan mengenai apakah Pasal 374 PP 56/2009 dapat digunakan sebagai dasar untuk menerapkan peraturan interkoneksi.

Terdapat pendapat bahwa aturan dalam Pasal 161 PP 72/2009 mempunyai pengertian bahwa setiap integrasi infrastruktur perkeretaapian antara Perkeretaapian Khusus dengan perkeretaapian lainnya mengakibatkan terjadinya perubahan status dari Perkeretaapian Khusus menjadi perkeretaapian umum.

Kami berpendapat bahwa Pasal 161 PP 72/2009 dapat diartikan sebagai mewajibkan penerapan ketentuan-ketentuan teknis dari perkeretaapian umum dalam beberapa jenis interkoneksi tanpa mengubah status hukum dari perkeretaapian khusus.

22

4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset perkeretaapian khusus

Perkeretaapian khusus dibangun oleh pihak swasta untuk tujuan pribadi dengan menggunakan hanya dana pribadi

Kami berpendapat bahwa baik di UU Perkeretaapian atau peraturan infrastruktur (PPP) tidak terdapat pengaturan bahwa perkeretaapian khusus dianggap sebagai suatu bentuk 'konsensi'

Kami mengusulkan bahwa hal-hal yang berhubungan dengan apa yang akan terjadi setelah proyek berakhir untuk secara bebas dinegosiasikan pada waktu yang pantas antara penyelenggara dan pemerintah sebagai bagian dari ketentuan perizinan, dengan pemahaman bahwa aset untuk diperlakukan sebagai milik pribadi

23

5. Kerumitan sistem perizinan


Prosedur untuk mendapatkan izin terlalu berbelit-belit


Kami berpendapat bahwa proses tersebut dapat disederhanakan dan dipersingkat tanpa mengurangi efektifitas atau membatasi otonomi daerah

Kami berpendapat penyederhanaan ini dapat dilakukan melalui suatu Permen,


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Kesimpulan

Tujuan ditingkatkannya keterlibatan pihak swasta belum tercapai karena terdapatnya berbagai hambatan

Kami berpendapat bahwa hambatan-hambatan ini dapat secara efektif diatasi melalui Peraturan Menteri yang baru, dan tanpa dilakukan perubahan terhadap Undang-undang Perkeretaapian dan Peraturan-peraturan Pemerintah yang telah ada saat ini.

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Meeting of 3 August 2011 with DGR Legal Division (Karsa Building, Jakarta)

Baitul Ihwan, Prawoto, Chusnul, Efi Novara, Shirley M. Oroh, Benny Bernarto, Guy Des Rosiers, and additional DGR staff

Mr. Efi opened the meeting and stated that IndII will continue to help the DGR formulate the draft Ministerial Regulation (“**MR**”) until the end of next week. The three main points of disagreement (ie, the point-to-point rule, the interconnection rules and the definition of “business entities”) should be the main items to be discussed.

Mr. Baitul started by saying that the Legal Division has made several changes to the draft MR following the full-day discussion between the IndII team and the Legal Division last month. Generally, the three points have been agreed internally by the Legal Division, but Mr. Baitul and his team would not announce this yet since the points would be discussed further the following day with the Legal Bureau, the Assessment Division (*Bagian Kajian*) and the Research and Development Division (*Bagian Litbang*).

Mr. Prawoto then added that from the regulatory side, if the purpose is to open up private investment in the railway sector, it must be in the public railway sector, not in special railways. The obstacle to private investment in public railways is the obligation to conduct a tender.

In response, Mr. Guy stated that the distinction between public and special railways has always been a key focus of the IndII team. The differences between public railways and SRs are not only with respect to tender requirement, but also with respect to the underlying economics and risk profile. For public railways, the operator depends on many different passengers to generate revenue, while tariffs are controlled by the Government. For SRs, there is an exclusive client that is bound to the SR operator by way of a long-term contract (which the parties are free to negotiate). Thus, it is easy to distinguish public railways from SRs. Public railways serve and operate for the public interest, whereas a special railway serves only its client.

Moving on to the point-to-point rules, Mr. Prawoto stated that it is possible to unload goods at certain points in the support area. However, the allowed certain points must be determined clearly beforehand. Regarding the definition of “main business”, the Legal Division insisted that only 4 types of main businesses can operate an SR, although the Government Regulation does not restrict it to only those 4 types of main business. Nevertheless, the Legal Division is open to IndII team’s suggestion that any other type of main business may need a special railway. However, in the Legal Division’s view, transportation services must not be included in the definition of “main business”, as only businesses that produce goods can use and operate SRs.

Regarding the consortium rule, Mr. Prawoto added that the Legal Division stands by its first opinion, not to include the consortium in the draft MR. Their concern is that establishing a consortium may lead to the companies which build the special railway charging other users fares, whereas according to them no fares should be charged for

using the SR. However, it would be possible for affiliate companies to use the special railway, too.

On the interconnection rules, the Legal Division argued that it is only possible to interconnect a public railway and an SR, and not an SR with another SR. An SR may use the public railways infrastructure under a certain arrangement (ie regarding track access charges and timetables). Having an interconnection between the public railway and the SR will not affect the status of the SR.

In response to both the consortium issue, Mr. Guy stated that, under the IndII proposal, a consortium can be established by unaffiliated companies appointing a single special railway operator, provided that the companies have a joint purpose or enterprise. For example, a consortium between an IUP holder and an IPP could be established on the basis of a joint venture agreement whereby the IUP holder sells coal and the IPP holder buys coal from the IUP holder for the common purpose of generating and selling electricity to PLN. Another example would be if three unaffiliated companies holding IUPs and operating in the same area wished to establish an SR to be used by all of them to transport their coal to a common port. A service charge could be imposed by agreement among the parties (for example, depending on the volume of goods to be transported), which may differ from one company to another, provided that the service charges must be fair and non-discriminatory. Under the IndII proposal, the government would see the terms of the consortium agreement, so that the government can verify that the proposed service charge structure is fair and non-discriminatory.

Mr. Chusnul repeated that no fare should be charged on the SR, and the SR should only be used by affiliated companies. The DGR's reasoning is that if the special railway only serves affiliated companies, no service charge is needed.

In response, Mr. Guy said that as long as the client and operator are different, by ability to include a service charge (in any form or name) must be available. If no service charge can be imposed, financing options for the SR will be extremely limited.

In Mr. Baitul's opinion, the money to repay the cost of the special railway should come from the sales of the companies' products, not charging other users a service charge. Mr. Prawoto reiterated that as long as there is a fare or service charge, the special railway will be the same as a public railway.

Regarding the client and the operator having different main businesses, DGR expressed the view that Articles 5(3) and 33(1) of the Railway Law, as implemented under Government Regulation Number 56 of 2009, require the main businesses of the client and the operator to be the same.

On the main business issue, the IndII team's approach was to interpret the articles from another point of view, in order to seek another possibility so that the transportation company can be involved in the SR sector (e.g., through a special purpose subsidiary) and contribute its expertise. The consultant's team's rationale was that mining or other companies engaged in the four sectors may have neither the

expertise nor the desire to operate an SR on their own. Prohibiting them from leveraging the expertise of existing railway companies to establish and operate SRs on an exclusive basis would be inefficient.

Mr. Efi added that the aim of SRs was to generate private investment in costly, long-term infrastructure. If the draft MR cannot address the interests of the private sector, then they will be discouraged from investing in SRs.

Mr. Baitul responded by saying that actually the Railway Law opens up an opportunity for private investment in public infrastructure, but very few investors have responded because goods and services must be procured through a tender. The basic concept of a special railway is actually to provide train transportation only within the main business area. For instance, a train to transport sugar cane only operates within the sugar cane plantation, or the train to transport passengers inside Taman Mini Indonesia Indah for tourism. Therefore, if the train will be used to provide transport to an area outside the main business area, companies can use the public railway under a special arrangement.

In addition, Mr. Prawoto said that if the infrastructure is built for the public interest, the government may interfere. However, if the infrastructure is built as a private investment, government will only provide guidance and supervise the SR. Another important point was that for the establishment of an SR the social and economic effects must be considered, to make sure the community around the special railway is not affected negatively.

The meeting was closed by Pak Efi at 15.30.

Meeting of 10 August 2011 with DGR Traffic (Karya Building, Jakarta)

Asril Syafei, Prasetyo, Efi Novara, Valiska Nathania, Guy Des Rosiers, and additional DGR staff

Mr. Efi opened the meeting and informed Mr. Asril and Mr. Prasetyo that the team had already held meetings with Mr. Saptandri and his staff members, and Mr. Baitul, Mr. Prawoto and his staff members. The results of the meetings were that the team had agreed to prepare a matrix comparing the DGR's latest draft, provided by the Legal Division after their internal discussion, and the IndII team's draft. The matrix was given to Mr. Asril and Mr. Prasetyo in the meeting.

Mr. Asril explained that the Railway Law has made it possible for private investors to be involved in the development of special railways. This is supported by the implementing regulations, *i.e* the Government Regulation on Railway Operations, which has opened even greater possibilities. Therefore, in his opinion, care must be taken in the Ministerial Regulation to avoid blurring the distinction between SRs and public railways.

In response, Mr. Guy said that as long as an SR serves a single client and is built without public support or guarantees, the SR will be different from a public railway.

The participants discussed various differences between the DGR draft and the IndII proposal, including whether the business sectors that can apply for an SR should be limited (as proposed by the Legal Division), and whether the consortium concept should be included in the draft regulation.

In general, Mr. Asril showed support for IndII's position on a number of issues, but cautioned that if the regulation allows for greater freedom in the development of SRs, the Government must retain the ability to control SR development. The consultant team explained that, as part of the IndII proposal, all proposed interconnection agreements, as well as all proposals by consortium members for the establishment of SRs, would be subject to review and approval by the Government. In addition, the IndII proposal made clear that planning issues must be carefully considered at the very outset of any SR project. These tools would allow the Government to ensure proper control over the development of SR networks.

The participants then discussed whether government intervention should allow SRs to be used in the public interest. The consultant team indicated that this was expressly contemplated in the current government regulations, but only in the event of an emergency. If the Government retains the power to order an SR to serve the public for an indefinite amount of time, this could create a significant regulatory risk for prospective investors; on the other hand, if the power is limited, but can be extended with the consent of the SR operator, this could provide added flexibility in the operation of SRs.

The consultant team then drew DGR's attention to an important concern raised during the most recent meeting with DGR Legal Division, *i.e.*, the proposed prohibition on the SR operator's ability to charge for transportation services. On this point, the consultant team explained the specific differences between the DGR draft and the IndII proposal, as well as the economic rationale for allowing the SR operator to charge a fee for its services.

The consultant team then proceeded to discuss specific examples of SR structures and how they would be treated under the DGR draft and the IndII proposal. In the course of reviewing the various examples provided by the consultant team, Mr. Asril raised the issue of whether an SR could transport goods into a public port (instead of a special port). The consultant team explained the rationale for allowing public ports to be used as support areas for SRs.

Mr. Asril also stressed the importance of understanding the legal basis for IndII's proposals, so that the policy decisions and implementing rules ultimately adopted by DGR can be defended and explained.

ANNEXE 4: MINUTES AND OTHER MATERIALS FROM FIRST FGD

Minutes of Meeting – FGD-1 – Special Railway Phase 3

Date : 20 May 2011

Time : 13:00 – 17:00

Venue : Millennium Hotel. 3rd floor, Irian Room

Attendees:

The first FGD was attended by 47 people from various ministries and private sectors. Please refer to the separate attendees list as attached to the minutes.

Opening Speech by Mr. Asril Syafei – The Director of Railway Traffic and Transportation of the Directorate General of Railways

Mr. Asril briefly explained the history of the special railway (SR); that the concept was introduced in the previous railway law and was used mostly for sugar plantations and tourism. He then explained the primary principle governing the operation of special railways, namely that a SR should be in line with the national and regional transportation plan. The primary obstacle preventing the development of railways in general is that to date railways are still seen as only an alternative transportation solution. Mr. Asril believes that railways should be seen as the only transportation solution (in Indonesia).

He is hopeful that the proposed draft regulations being addressed by the IndII team can solve the issues relating to the implementation of SR. Thus the main purpose of the FGD is to elicit and collect inputs and comments from the relevant authorities as well as from business players.

Presentation by IndII Team

While Guy Des Rosiers gave the presentation in English, the presentation materials were in both Indonesian and English. Pak Asenar also assisted by providing a brief summary of the presentation in Indonesian.

The presentation lasted for approximately 40 minutes.

Discussion Session

1. Mr. Indra Darmawan (the Director of Capital Investment Deregulation) of the Capital Investment Board (BKPM)
 - a. Mr. Indra addressed the issue that the current Negative List of Investment does not restrict foreign ownership in the SR sector. Therefore, the logical

interpretation is that the SR sector is open for 100% foreign capital investment. He suggested that the draft Permen should stipulate the foreign shareholding requirement.

Response:

According to Mr. Asril, a Permen would normally only refer to other regulation(s) and may not directly regulate the shareholding requirement of SR operators. It is also possible that the Negative List of Investment will be reviewed in the future.

- b. Interconnection and multiple users – regarding the arrangement in respect of how multiple users can have the right to share the use of the SR infrastructure; the question is whether the arrangement should be based on share ownership in the SR operator or through cooperation (ie a purely contractual relationship).

Response:

Under the proposed draft Permen, the arrangement may be based on a contractual arrangement between the parties.

- c. Harmonization with other regulations – Mr. Indra brought up the divestment requirement under the mining regulations which require IUP holders to divest 20% of their foreign capital to local shareholder(s). His query was whether the divestment will have any impact on the SR operator. He suggested that consultation with the MEMR (and other regulators/authorities) is necessary.

Response:

The above issue will be discussed with the MEMR in the working group meeting to be held following the FGD.

2. Miss Eka - PT Bukit Asam Transpacific Railways

- a. Miss Eka's question was in relation to the concept of 'controlled by or under common control with'. She wanted to know whether this means that a SR proponent must hold majority shares in the operator and why?

Response:

Under the proposed draft Permen, a minority shareholding could still qualify if there is actual (contractual) control over the appointment of a majority of the members of the board of directors. The general principle is that there must be actual control and that such control must be capable of objective verification by the regulator.

- b. She was not entirely clear in respect of the definition of 'consortium'. In particular she wanted to know what the acceptable shareholding composition in a consortium is.

Response:

The concept of consortium is still being discussed and clarified internally. The basic idea is that a group of businesses involved in a joint enterprise (e.g. a

mine supplying ore to a nearby smelting facility) should be able to count as a single 'business enterprise' for purposes of creating an SR.

- c. The next question was in relation to the operating and production IUP. Generally, her question was whether an IUP holder is also required to hold a SR Operating license?

Response:

Mr. Asril responded that this issue will also be discussed with the MEMR at the working group level. However, the general principle is that IUP holders are also required to obtain a SR operating license.

3. Ms. [Handani] - PT Priayamanaya Djan International

She raised the importance of standardization between railways (i.e., amongst SRs and PRs) in relation to the interconnection. The government needs to stipulate the standardization requirements in the draft regulation to enable interconnection.

Response:

Mr. Asril acknowledged the necessity for standardization. However, he was questioning whether the standardization needs to be specifically regulated in the Permen. The issue will be further discussed in the working group discussion.

4. PT Adani Global

The representative from PT Adani admitted that one of the main obstacles is determining which party is qualified to act as a SR operator. If we were to follow the definition of SR under the current regulations, then there could be thousands of SR operators in the mining sector, as each IUP holder could apply to become a SR operator.

Specifically for Adani, the question was whether Adani, as a holder of an IUP for Transportation, whose main business is in the field of transporting coal, can become an SR operator.

Adani suggested that in relation to the validity period of the operating license (taking the example of the special port license), it should follow the license with the longest validity period.

Response:

The draft Permen is being prepared based on the existing law with the understanding that as few changes as possible will be made to the existing GRs. The team will consider and discuss the question raised by Adani taking into account the existing law and GRs.

5. MEC

The question raised was whether a consortium may consist of entities engaged in different principal businesses.

Response:

Yes

6. Mr. Djoni Gondo P - PT Priayamanaya Djan International
 - a. Mr. Djoni stated that the Law and the current GRs do not yet address matters relating to the establishment of a consortium.
 - b. The licensing process should be within the regional governments, only.
 - c. Mr. Djoni pointed out that the development of SR should be co-related with the long term plan.
 - d. Mr. Djoni raised the question of whether a consortium may consist of entities engaged in different principal businesses.

Response

In responding to these questions (a) Mr. Asril stated that the current GRs may be amended, if necessary, so as not to delay the development of SR. In relation to (b), Mr. Asril pointed out that the involvement of the central government is still necessary and important so as to provide control and supervision for the local governments.

7. Mr. Novianto – The Ministry of Agriculture
 - a. What will the ownership status of the SR infrastructure be following the expiry of the license?

Response:

The draft Permen is based on the premise that the infrastructure, at the outset, will be treated as privately owned property (rather than State owned property). The draft Permen provides a flexible mechanism for dealing with end-of-project-life issues that allows the operator and regulator to negotiate appropriate terms as part of the licensing process.

- b. Protection of agricultural land – Mr. Novianto brought up law No. 41 of 2009 on the Protection of Agricultural Land and whether the draft Permen already addresses the issue of the development of SR partly using land covered under this law.

Response:

The issue will be further discussed in the working group meeting.

- c. Can SR also transport other goods, i.e., products of local businesses located along the SR railway, e.g., from a palm oil plantation?

Response:

To be further discussed in the working group meeting.

8. E. Michael Johnson – PT Harvard International

The company has been conducting a feasibility study for PRs for the last 4 years and acknowledged that one of the biggest obstacles is the requirement to tender.

Closing

At 17.00 Mr. Asril closed the FGD and said that there will be further discussions to be held by the Indll team during the working group meetings and that any comments, inputs, suggestions from all parties are welcome and may be further addressed in the working group meeting. Mr. Asril also mentioned that there will be a subsequent FGD.

Berita Acara Rapat – FGD – Perkeretaapian Khusus Tahap 3

Tanggal : 20 Mei 2011

Waktu : 13:00 – 17:00

Tempat : Hotel Millennium. Lantai 3, Ruang Irian

Hadir :

FGD pertama dihadiri oleh 47 orang dari berbagai kementerian dan pihak swasta. Daftar dari peserta yang hadir terdapat pada lampiran dari berita acara ini.

Kata Pembukaan oleh Bapak Asril Syafei – Direktur Lalu Lintas dan Angkutan Kereta Api, Direktorat Jenderal Perkeretaapian

Bapak Asril dengan singkat menjelaskan sejarah dari Perkeretaapian Khusus (PK); bahwa konsep PK diperkenalkan dalam undang-undang perkeretaapian yang sebelumnya dan umumnya digunakan pada perkebunan gula dan pariwisata. Beliau lebih lanjut menjelaskan mengenai prinsip utama dalam mengatur penyelenggaraan PK, yaitu bahwa PK harus diselenggarakan selaras dengan rancangan induk transportasi nasional dan daerah. Secara umum, hambatan utama pembangunan perkeretaapian sampai saat ini adalah bahwa kereta api masih dipandang sebagai sarana transportasi alternatif. Bapak Asril berpendapat bahwa kereta api seharusnya dipandang sebagai satu-satunya solusi sarana transportasi (di Indonesia).

Beliau berharap bahwa rancangan peraturan yang diajukan oleh tim IndII dapat menyelesaikan isu-isu yang terkait dengan pelaksanaan PK. Oleh karena itu, tujuan utama dari FGD adalah untuk memperoleh dan menghimpun masukan dan komentar yang datang dari lembaga-lembaga yang berwenang serta dari para pelaku usaha.

Presentasi oleh Tim IndII

Presentasi mengenai rancangan peraturan yang diajukan oleh tim IndII diberikan oleh Guy Des Rosiers dalam bahasa Inggris dibantu oleh Bapak Asenar. Materi presentasi disajikan dalam bahasa Indonesia dan bahasa Inggris. Bapak Asenar membantu dengan memberikan rangkuman dalam bahasa Indonesia atas presentasi yang diberikan.

Presentasi berlangsung selama kurang lebih 40 menit.

Sesi Diskusi

1. Bapak Indra Darmawan (Direktur Deregulasi Badan Penanaman Modal) dari Badan Koordinasi Penanaman Modal (BKPM)
 - a. Bapak Indra menyampaikan isu mengenai Daftar Negatif Investasi yang saat ini tidak membatasi kepemilikan saham asing dalam sektor PK. Dengan demikian, secara logis dapat ditafsirkan bahwa sektor PK terbuka 100% untuk penanaman

modal asing. Beliau mengusulkan bahwa rancangan Permen harus mengatur mengenai persyaratan penanaman modal asing.

Tanggapan:

Menurut Bapak Asril, suatu Permen biasanya hanya akan merujuk kepada peraturan lain dan tidak secara langsung mengatur mengenai persyaratan penanaman modal pada penyelenggara PK. Terdapat kemungkinan untuk melakukan tinjauan kembali atas Daftar Negatif Investasi di kemudian hari.

- b. Interkoneksi dan pengguna lebih dari satu – mengenai pengaturan bagaimana para pengguna PK dapat memperoleh haknya untuk bersama-sama menggunakan infrastruktur PK; pertanyaannya adalah apakah pengaturannya didasari oleh kepemilikan saham oleh para pengguna pada penyelenggara PK ataupun melalui suatu kerjasama (i.e murni berdasarkan perjanjian).

Tanggapan:

Di dalam usulan rancangan Permen, pengaturannya dapat didasarkan pada perjanjian antara para pihak.

- c. Keselarasan dengan peraturan-peraturan lainnya – Bapak Indra mengangkat perihal persyaratan divestasi dalam peraturan pertambangan yang mewajibkan pemegang IUP untuk melakukan divestasi sebesar 20% modal asingnya kepada pemilik saham dalam negeri. Pertanyaannya adalah apakah divestasi tersebut akan memberikan dampak terhadap penyelenggara PK. Beliau memandang perlunya konsultasi dengan Kementerian Energi dan Sumber Daya Mineral (serta otoritas lainnya).

Tanggapan:

Isu diatas akan dibahas dengan Kementerian Energi dan Sumber Daya Mineral di dalam pertemuan kelompok kerja yang akan diadakan setelah FGD.

2. Ibu Eka - PT Bukit Asam Transpacific Railways

- a. Pertanyaan Ibu Eka terkait dengan konsep ‘dikendalikan atau di bawah kendali yang sama’. Beliau ingin mengetahui apakah ini berarti bahwa Pemrakarsa PK harus memiliki saham mayoritas dalam penyelenggara PK dan apa alasannya?

Tanggapan:

Di dalam usulan rancangan Permen, pemegang saham minoritas masih dapat memenuhi syarat apabila terdapat suatu kendali nyata atas penunjukan mayoritas anggota dewan direksi. Prinsip umumnya adalah bahwa harus terdapat kendali nyata dan kendali tersebut harus bisa dibuktikan secara objektif oleh pembuat undang-undang.

- b. Beliau masih belum sepenuhnya mengerti tentang istilah ‘konsorsium’. Secara khusus beliau ingin mengetahui bagaimana komposisi pemegang saham yang dapat diterima dalam suatu konsorsium.

Tanggapan:

Konsep konsorsium sampai saat ini masih dibicarakan dan perlu mendapatkan deklarifikasi secara internal. Ide pokoknya ialah bahwa konsorsium merupakan suatu kelompok usaha yang terjalin dalam suatu gabungan perusahaan (e.g. pertambangan yang memberikan pasokan kepada peleburan terdekat) yang dapat dianggap sebagai satu 'badan usaha' yang bertujuan untuk mendirikan suatu PK.

- c. Pertanyaan selanjutnya terkait dengan IUP operasi dan produksi. Secara umum, pertanyaan beliau adalah apakah pemegang IUP juga diwajibkan untuk memiliki izin Operasi PK?

Tanggapan:

Bapak Asril memberikan tanggapan bahwa isu ini juga akan dibahas dengan Kementerian Energi dan Sumber Daya Mineral pada tingkat kelompok kerja. Akan tetapi, prinsip umumnya adalah bahwa pemegang IUP juga harus memperoleh izin Operasi PK.

3. Ibu Handani - PT Priayamanaya Djan International

Beliau mengangkat perihal pentingnya standarisasi antara perkeretaapian (i.e., antara PK dan perkeretaapian umum) terkait dengan interkoneksi. Pemerintah perlu menetapkan persyaratan standarisasi dalam rancangan peraturan sehingga interkoneksi dapat terlaksana.

Tanggapan:

Bapak Asril menyadari perlunya standarisasi. Akan tetapi, beliau mempertimbangkan apakah standarisasi tersebut perlu untuk secara khusus diatur di dalam Permen. Isu ini akan dibahas lebih lanjut di dalam pertemuan kelompok kerja.

4. PT Adani Global

Perwakilan dari PT Adani mengakui bahwa salah satu hambatan utama adalah menentukan pihak mana yang memenuhi kualifikasi untuk bertindak sebagai penyelenggara PK. Jika mengikuti pengertian PK di dalam peraturan yang ada saat ini, bisa terjadi dimana terdapatnya ribuan penyelenggara PK di sektor pertambangan, karena setiap pemegang IUP dapat mengajukan diri untuk menjadi penyelenggara PK.

Khusus untuk Adani, pertanyaannya adalah apakah Adani, sebagai pemegang IUP untuk Pengangkutan, yang usaha utamanya bergerak di bidang pengangkutan batu bara, dapat menjadi penyelenggara PK.

Adani menyarankan bahwa terkait dengan periode berlakunya izin operasi (sebagai contoh izin pelabuhan khusus), seharusnya mengikuti izin dengan periode berlaku yang paling lama.

Tanggapan:

Rancangan Permen dipersiapkan berdasarkan undang-undang yang berlaku dengan pengertian bahwa akan diadakan perubahan seminimal mungkin terhadap PP yang sudah ada. Tim akan mempertimbangkan dan membahas pertanyaan

yang diangkat oleh Adani dengan memperhatikan undang-undang dan PP yang sudah ada.

5. MEC

Pertanyaan yang dimunculkan adalah apakah bisa sebuah konsorsium terdiri dari badan usaha yang terlibat dalam bidang usaha pokok yang berbeda.

Tanggapan:

Bisa.

6. Bapak Djoni Gondo P - PT Priayamanaya Djan International

- a. Bapak Djoni menyatakan bahwa Undang-Undang Perkeretaapian dan PP yang ada saat ini belum mengatur hal-hal mengenai pembentukan konsorsium.
- b. Proses perizinan seharusnya hanya berada di lingkup pemerintah daerah.
- c. Bapak Djoni menyatakan bahwa pembangunan PK seharusnya berkaitan dengan rencana jangka panjang.
- d. Bapak Djoni mempertanyakan apakah bisa sebuah konsorsium terdiri dari badan usaha yang terlibat dalam bidang usaha pokok yang berbeda.

Tanggapan:

Untuk menanggapi pertanyaan di atas, (a) Bapak Asril menyatakan bahwa PP yang ada saat ini dapat diamanatkan, jika diperlukan, agar tidak menghambat pembangunan PK. Untuk pertanyaan (b), Bapak Asril menyatakan bahwa keterlibatan pemerintah pusat masih diperlukan dan penting untuk mengontrol dan mengawasi pelaksanaan PK oleh pemerintah daerah.

7. Bapak Novianto – Kementrian Pertanian

- a. Bagaimanakah status kepemilikan dari infrastruktur PK setelah habis masa berlakunya izin?

Tanggapan:

Rancangan Permen didasarkan pada prinsip bahwa pada awalnya infrastruktur akan dianggap sebagai properti milik pihak swasta (dan bukan properti milik Negara). Rancangan Permen mengajukan suatu mekanisme yang tidak kaku untuk menghadapi masalah yang mungkin timbul pada saat berakhirnya proyek, yang dapat memberikan kesempatan bagi pihak penyelenggara dan pembuat undang-undang untuk merundingkan aturan-aturan yang sesuai sebagai bagian dari proses perizinan.

- b. Perlindungan terhadap lahan pertanian – Bapak Novianto mengangkat keberadaan Undang-Undang Nomor 41 Tahun 2009 tentang Perlindungan Lahan Pertanian Pangan Berkelanjutan dan apakah rancangan Permen telah mengangkat masalah pembangunan PK dalam hal sebagian dari PK akan menggunakan lahan sebagaimana yang dimaksud dalam Undang-undang ini.

Tanggapan:

Masalah ini akan dibahas lebih lanjut di dalam pertemuan kelompok kerja.

- c. Dapatkah PK mengangkut juga barang-barang lainnya, i.e., produk usaha lokal yang terletak sepanjang jalur PK, e.g., dari sebuah perkebunan minyak kelapa sawit?

Tanggapan:

Akan dibahas lebih lanjut di dalam pertemuan kelompok kerja.

8. E. Michael Johnson – PT Harvard International

Perusahaannya telah melakukan studi kelayakan terhadap perkeretaapian umum selama 4 tahun dan menyadari bahwa hambatan terbesar adalah keharusan untuk melakukan tender.

Penutup

Pukul 17.00 Bapak Asril menutup FGD dan mengatakan bahwa akan ada pembahasan lanjutan yang akan diselenggarakan oleh tim IndII selama pertemuan kelompok kerja dan bahwa setiap komentar, saran dan masukan dari seluruh pihak akan diterima dan akan dibahas lebih lanjut di dalam pertemuan kelompok kerja. Bapak Asril juga menyebutkan bahwa akan ada FGD lanjutan ke depannya.

INDONESIA INFRASTRUCTURE INITIATIVE

An Australian Government Initiative



Activity number and title	: #229 - Special Railway Phase 3	Coordinator LFV : Coordinator WG4 :
Title of meeting	: FGD I - Special Railway Phase III	
Date and place	: 20 May 2011 Millenium Hotel 3th Floor, Irian Room	


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50	Benny Bernarto	Consultant	Makarim & Taira S	benny.bernarto@makarim.com	0815 19056658
51	Annelty Ngabito	Consultant	IndII	-	
52	Revy Petrigradia	Consultant	IndII	-	


		KEMENTERIAN PERHUBUNGAN DIREKTORAT JENDERAL PERKERETAAPIAN	
GEDUNG KARYA JL. MERDEKA BARAT NO. 8 JAKARTA 10110		TEL : (021) 3506204, 385683 3505557, 3505558 3505559, 3506526	FAX : (021) 3506204, 3813972

Nomor : 74/Und/K2/DJKA/V/2011 Lampiran : 2 (dua) lembar Perihal : Undangan <i>Focus Group Discussion</i> (FGD)	Jakarta, 12 Mei 2011 Kepada Yth. (Daftar terlampir) di Tempat
--	---

1. Dalam rangka mendapatkan masukan untuk Pengembangan Regulasi Perkeretaapian Khusus dan Perkeretaapian Umum Terbatas – Tahap III, Direktorat Jenderal Perkeretaapian bekerjasama dengan Konsultan Indonesia Infrastructure Initiative (IndII) akan menyelenggarakan Focus Group Discussion (FGD), yang akan dilaksanakan pada:

Hari/ Tanggal : Senin, 16 Mei 2011
 Pukul : 08.30 WIB – selesai
 Tempat : Hotel Millennium, Sumatera Bali Room Lt. 3
 Jl. Fachrudin 3 Jakarta Pusat 10250
 Acara : Focus Group Discussion dengan tema
 "Pembahasan Regulasi Penyelenggaraan Perkeretaapian Khusus di Indonesia"

2. Demikian disampaikan, atas perhatian dan kerjasamanya diucapkan terima kasih.

A.n. DIREKTUR JENDERAL PERKERETAAPIAN
 Direktur Lalu Lintas dan Angkutan Kereta Api

ASRI SYAFEI
 Pembina Utama Madya (IV/d)
 NIP. 19540410 197703 1 001

Tembusan Yth.:
 Direktur Jenderal Perkeretaapian.

Lampiran I Undangan Rapat

Nomor : 74 /und / K2 / D3KA / V / 2011

Tanggal : 12 Mei 2011

Kepada Yth :

1. Asisten Deputi Urusan Infrastruktur Transportasi, Kementerian Koordinator Bidang Perekonomian;
2. Direktur Transportasi, Bappenas;
3. Deputi Bidang Perencanaan Penanaman Modal, Badan Koordinasi Penanaman Modal;
4. Direktur Deregulasi Penanaman Modal, Badan Koordinasi Penanaman Modal;
5. Kepala Biro Perencanaan, Kementerian Perhubungan;
6. Kepala Pusat Kajian Kemitraan Pelayanan Jasa Transportasi, Kementerian Perhubungan;
7. Sekretaris Direktorat Jenderal Perkeretaapian, Kementerian Perhubungan
8. Direktur Prasarana, Direktorat Jenderal Perkeretaapian, Kementerian Perhubungan;
9. Direktur Sarana, Direktorat Jenderal Perkeretaapian, Kementerian Perhubungan;
10. Direktur Keselamatan, Direktorat Jenderal Perkeretaapian, Kementerian Perhubungan;
11. Kepala Biro Perencanaan dan Kerjasama, Kementerian Energi dan Sumber Daya Mineral;
12. Kepala Biro Hukum dan Informasi Publik, Kementerian Pertanian;
13. Kepala Bagian Peraturan Transportasi Darat dan Perkeretaapian, Biro Hukum dan Kerjasama Luar Negeri, Kementerian Perhubungan;
14. Kepala Bagian Hukum – Ditjen Perkeretaapian, Kementerian Perhubungan;
15. Kasubdit Investasi – Ditjen Perkeretaapian, Kementerian Perhubungan;
16. Kasubdit Jaringan – Ditjen Perkeretaapian, Kementerian Perhubungan;
17. Kasubdit Lalu Lintas – Ditjen Perkeretaapian, Kementerian Perhubungan;
18. Kasubdit Angkutan – Ditjen Perkeretaapian, Kementerian Perhubungan;
19. Direksi PT. INKA (Persero);
20. Direksi PT. KAI (Persero);
21. Direksi PT. Adani Global;
22. Direksi PT. Harvard International;
23. Direksi PT. Minerals Energy Commodities (MEC Coal);
24. Direksi PT. Tambang Batubara Bukit Asam (Persero), Tbk;
25. Direksi PT. Bukit Asam TransPacific Railways (BATR);
26. Direksi PT. Priamanaya Djan International;
27. Gus Des Rosiers, Konsultan Makarim & Taira S;
28. Shirley M.M Oroh, Konsultan Indll.
29. Setyo Gunawan, Ditjen Perkeretaapian;
30. Tanti Ferasari, Ditjen Perkeretaapian;

31. Kurniawan Agung Santoso, Ditjen Perkeretaapian;
32. Retno Sari Sunarto, Ditjen Perkeretaapian;
33. Amir Rifai, Ditjen Perkeretaapian;
34. Adrianto Budi P, Ditjen Perkeretaapian;
35. Ridho Fahmi, Ditjen Perkeretaapian;
36. Eddy Susanto, Ditjen Perkeretaapian;
37. M. Imsa Romadhon, Ditjen Perkeretaapian.

Lampiran II Undangan Rapat

Nomor : 74 /Und /Ka /DjKA/V/20

Tanggal : 12 Mei 2011

Agenda – Focus Group Discussion

Hari / Tanggal : Senin / 16 Mei 2011

Tempat : Hotel Millennium, Sumatera Bali Room Lt. 3
Jl. Fachrudin 3 Jakarta Pusat 10250

Narasumber : Direktur Lalu Lintas dan Angkutan Kereta Api

Waktu	Acara
08.30 – 09.00	Registrasi
09.00 – 09.20	Sambutan dan Pembukaan (Sekretaris Direktorat Jenderal Perkeretaapian)
09.20 – 10.00	Presentasi Konsultan SR-3 IndII
10.00 – 12.00	Diskusi
12.00 – 13.00	Penutupan & Makan Siang


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Special Railways Phase III

Proposed approach to regulatory changes


Jakarta 20 May 2011







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Overview of IndII Special Railway Program

1. Identify need for changes in rail sector regulations to encourage private sector investment (Phase I – early 2010)
2. Identify specific policy and regulatory changes needed to achieve desired results (Phase II – late 2010)
3. Assist GoI to develop and implement regulatory reforms (Phase III – April to June 2011).



2

Key Objectives of Phase III

1. Clarify and improve current Special Railway provisions through a draft Ministerial Regulation (Permen)
2. Expand railway investment opportunities through targeted amendments to existing Government Regulations (PP 56/2009 and PP 72/2009)



3

Timing of Phase III

1. Initial term sheets submitted on 21 April 2011
2. Inception Report finalized on 26 April 2011
3. Draft regulatory proposals submitted on 13 May 2011
4. Final draft regulatory proposals to be submitted by 15 June 2011
5. Final Technical Report due by late June


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The Main Challenges

1. Lack of clarity over who can operate a special railway
2. Restrictions on the scope of special railways
3. Uncertainty over interconnection
4. Need for public tender under the PPP process
5. Complexity of licensing system
6. Lack of coordination between special railways and other regulatory licensing schemes



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The Main Constraints

1. Lack of clarity over who can operate a special railway

This affects both the willingness of investors to invest and the willingness of administrators to issue licenses



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The Main Constraints

2. Restrictions on the scope of special railways

The 'point to point' rule appears to restrict railways from serving intermediate customers or terminals

The 'one customer' rule appears to prevent a special railway from serving a group of similar industries

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The Main Constraints

3. Uncertainty over interconnection

There is concern that if a special railway connects to another special railway or to a public railway, the rights of the investor may be compromised. This discourages the creation of efficient railway networks.

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The Main Constraints



4. The need for tenders under the PPP process

Private sector interests are discouraged from promoting railways because they need to be tendered under the PPP provisions.



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The Main Constraints

5. Complexity of the licensing system

The process of getting all the required licences appears overly complex and time consuming



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The Main Constraints

6. Lack of coordination between special railways and other regulatory licensing schemes

Proper linkages between special railway licensing and other relevant licensing schemes (e.g., mining, agriculture) must be put in place to avoid delays or inconsistent results



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Proposed Solutions

A new Permen will clarify the Railway Law and the existing Government Regulations (PP 56 and PP 72)

Some minor changes to existing government regulations are also desirable but not strictly necessary to implement the proposed Permen

No changes to the Railway Law are needed – all of the proposed regulations are consistent with the Railway Law



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1. Lack of clarity as to who can operate a Special Railway

We propose that the Permen describe more precisely the permitted relationship between the operator and the business it serves

It is suggested that the Permen require the main business to have a controlling interest in, or be under common control with, the operator

Control can be defined to include ownership of a majority of the voting shares or the ability to appoint or remove a majority of the directors of a company

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2. Restrictions to the scope of the railway

We propose three solutions to this issue

- defining client to permit a consortium of users
- defining rules for interconnection
- relaxing the point-to-point rule

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Definition of Client

Define Special Railway client to include a consortium of businesses, essentially allowing them to form and operate a common special railway serving their respective businesses.



15


Defining the interconnect rules


Define interconnection rules under Article 374 of PP 56 to enable several special railway operators (each serving their respective client) to share infrastructure and rolling stock without losing the status of special railway




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Amending the point to point rule


Amend article 350 of PP 56/2009 to relax existing 'point-to-point' restrictions so that several terminal points can be served (so long as such service remains related to the client's main business)

This would require an amendment to PP 56/2009


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3. What happens if railways interconnect

For the most part, we can define what happens in a Permen.

Interconnection should not affect the status of a special railway (see previous comments on Article 374 of PP 56/2009). However, an amendment to Article 161(3) of PP 72/2009 would also be useful to eliminate any confusion on this point.

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What happens if railways interconnect

We propose that an interconnection agreement should allow the first operator to:

- access the infrastructure of the other operator for the purpose of providing services in support of the first operator's client
- arrange for the other operator (if it is a public operator) to provide services in support of the first operator's client
- grant the other operator access to the first operator's infrastructure for any purpose consistent with the other operator's business

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4. The need for tender under the PPP process

Concern about the need to use a PPP process (with its requirement for the rail concession to be tendered) arises because this is seen as the only way of serving multiple customers

This restriction can be loosened by allowing special railways to interconnect and by allowing a single special railway to serve a consortium of businesses

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5. Complexity of the licensing system

The procedures for obtaining licences are overly complex



We think they can be simplified and streamlined without reducing their effectiveness or limiting regional autonomy

Much of this simplification can be done through a Permen, though minor amendments to PP 56/2009 would also be desirable.



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Proposals to Simplify the licensing system

Planning issues should be addressed and resolved at in-principle approval stage (not later)

Reviews by various levels of government should be coordinated and conducted simultaneously to avoid delays and inconsistent decisions

Operator should be able to 'pre-qualify' itself during construction stage to ensure that operating permit will be issued later, subject only to meeting clear conditions



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6. Coordination between special railways and other regulatory licensing schemes

Proposed reforms includes option for special railway client to use an affiliate as operator (to facilitate financing)

Restrictions on affiliated transactions in certain industries (e.g., mining) must be taken into account

If special railway licensee must also obtain other licenses, proper coordination among relevant agencies must be ensured to avoid delays and inconsistent results

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Conclusions

The objective of increased private sector involvement is not being achieved because of a number of constraints

We believe these constraints can effectively be addressed through regulatory provisions within the current Railway Law

Most can be achieved through a new Permen, though targeted amendments of the existing PP 56/2009 and PP 72/2009 would also be desirable.

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The way forward

Term sheets – set out the broad principles for drafting the Permen and amendments to PP 56/2009 and PP 72/2009

Draft Permen and Amendments to PPs – the consultant team’s initial proposal for reform, based on the term sheets and initial discussions with MoT

Working group – established to coordinate government input to the process and achieve broad consensus

Close liaison – between our legal team and the MoT

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Perkeretaapian Khusus Fase III

Pendekatan yang diusulkan terhadap perubahan peraturan

Jakarta 20 Mei 2011



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Gambaran Umum Program Perkeretaapian Khusus IndII

1. Mengidentifikasi kebutuhan untuk perubahan pada peraturan sektor perkeretaapian untuk mendorong investasi sektor swasta (Fase I – awal 2010)
2. Mengidentifikasi kebijakan khusus dan perubahan peraturan yang diperlukan untuk mencapai hasil yang diinginkan (Fase II – akhir 2010)
3. Membantu Pemerintah Indonesia untuk mengembangkan dan menerapkan reformasi peraturan (Fase III – April sampai Juni 2011).


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Tujuan Utama Fase III

1. Mengklarifikasi dan memperbaiki ketentuan Perkeretaapian Khusus saat ini melalui rancangan Peraturan Menteri (Permen)
2. Mengembangkan kesempatan investasi perkeretaapian melalui perubahan yang ditargetkan terhadap Peraturan Pemerintah yang ada saat ini (PP 56/2009 dan PP 72/2009)


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Pengaturan Waktu Fase III

1. Usulan rancangan awal diajukan pada tanggal 21 April 2011
2. Laporan awal diselesaikan pada tanggal 26 April 2011
3. Rancangan usulan peraturan diajukan pada tanggal 13 Mei 2011
4. Rancangan akhir usulan peraturan akan diajukan pada tanggal 15 Juni 2011
5. Laporan teknis akhir akan diajukan paling lambat akhir Juni

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Tantangan Utama

1. Kurangnya kejelasan mengenai siapa yang bisa menyelenggarakan perkeretaapian khusus
2. Pembatasan terhadap lingkup perkeretaapian khusus
3. Ketidakpastian mengenai interkoneksi
4. Perlunya mengikuti tender umum berdasarkan proses Peraturan Infrastruktur
5. Kerumitan sistem perizinan
6. Kurangnya koordinasi antara perkeretaapian khusus dan skema perizinan peraturan lain

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Kendala Utama


1. Kurangnya kejelasan mengenai siapa yang bisa menyelenggarakan perkeretaapian khusus

Hal ini mempengaruhi niat investor untuk berinvestasi administrator untuk menerbitkan izin


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Kendala Utama


2. Keterbatasan lingkup perkeretaapian khusus


Peraturan ‘titik ke titik’ tampak membatasi perkeretaapian untuk menunjang pelanggan atau stasiun yang terletak di antara ‘titik ke titik’

Peraturan “satu pelanggan” menghalangi perkeretaapian khusus untuk melayani sekelompok industri yang sejenis


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Kendala Utama

3. Ketidakpastian mengenai interkoneksi

Terdapat kekhawatiran bahwa apabila perkeretaapian khusus terinterkoneksi dengan perkeretaapian khusus lainnya atau dengan perkeretaapian umum, akan berdampak pada hak para investor dapat dikompromikan. Hal ini menghambat pembuatan jaringan perkeretaapian yang efisien.

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Kendala Utama

4. Perlunya mengikuti tender umum berdasarkan proses Peraturan Infrastruktur

Keinginan sektor swasta untuk memajukan perkeretaapian terhambat keharusan mengikuti tender berdasarkan ketentuan Peraturan Infrastruktur.

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Kendala Utama

5. Kerumitan sistem perizinan

Proses untuk mendapatkan seluruh izin yang diperlukan berbelit-belit dan memakan waktu

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Kendala Utama



6. Kurangnya koordinasi antara perkeretaapian khusus dan ketentuan perizinan peraturan lain

Hubungan yang layak antara perizinan perkeretaapian khusus dengan ketentuan perizinan peraturan lain (contoh, pertambangan, pertanian) harus diatur untuk menghindari keterlambatan atau hasil yang tidak konsisten



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Solusi yang Diusulkan

Permen baru akan memperjelas Undang – Undang Perkeretaapian dan Peraturan Pemerintah yang ada saat ini (PP 56 and PP 72)

Beberapa perubahan kecil terhadap peraturan pemerintah yang ada saat ini juga sebaiknya dilakukan tetapi tidak sepenuhnya diperlukan untuk menerapkan Permen yang diusulkan

Tidak diperlukan perubahan terhadap Undang – Undang Perkeretaapian – seluruh peraturan yang diusulkan konsisten dengan Undang – Undang Perkeretaapian



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1. Kurangnya kejelasan mengenai siapa yang dapat menyelenggarakan Perkeretaapian Khusus

Permen untuk menjelaskan secara lebih akurat mengenai hubungan yang diperbolehkan antara penyelenggara dan usaha yang ditunjangnya

Diusulkan agar Permen mensyaratkan usaha pokok untuk memiliki kendali dalam, atau berada di bawah pengendalian bersama dengan, penyelenggara

Pengendalian dapat berarti kepemilikan atas mayoritas saham dengan hak suara atau kemampuan untuk menunjuk atau mengganti mayoritas direksi perseroan

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2. Pembatasan terhadap lingkup perkeretaapian

Kami mengusulkan tiga solusi terhadap masalah ini

- Memberikan definisi terhadap 'klien' (pengguna jasa) untuk memperbolehkan beberapa pengguna tergabung dalam bentuk konsorsium
- Menjelaskan peraturan interkoneksi
- Melonggarkan peraturan titik-ke-titik

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Definisi klien

Memberikan definisi terhadap klien Perkeretaapian Khusus yang memuat konsorsium usaha, yang intinya memperbolehkan usaha-usaha tersebut untuk membentuk dan menyelenggarakan suatu perkeretaapian khusus bersama yang menunjang usaha mereka masing-masing.

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Menjelaskan peraturan interkoneksi

Menjelaskan peraturan interkoneksi berdasarkan Pasal 374 PP 56 untuk memungkinkan beberapa penyelenggara perkeretaapian khusus (masing-masing menunjang kliennya) untuk berbagi infrastruktur dan lokomotif, gerbong tanpa kehilangan status sebagai perkeretaapian khusus

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Mengubah peraturan titik ke titik

Merubah pasal 350 PP 56/2009 untuk melonggarkan batasan 'titik ke titik' yang ada saat ini sehingga beberapa titik stasiun dapat ditunjang (sepanjang pelayanan tersebut tetap berhubungan dengan usaha pokok klien)

Hal ini memerlukan perubahan terhadap PP 56/2009

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3. Apa yang terjadi apabila perkeretaapian terinterkoneksi

Untuk sebagian besar, kita dapat menjelaskan apa yang terjadi di dalam Permen.

Interkoneksi tidak akan mempengaruhi status perkeretaapian khusus (lihat komentar sebelumnya terhadap Pasal 374 PP 56/2009). Namun, perubahan terhadap Pasal 161(3) PP 72/2009 juga akan berguna untuk menghilangkan keraguan pada hal ini.

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Apa yang terjadi apabila perkeretaapian terinterkoneksi

Kami mengusulkan agar perjanjian interkoneksi memperbolehkan penyelenggara pertama untuk :

- memiliki akses terhadap infrastruktur penyelenggara lain dengan tujuan untuk menyediakan layanan dalam menunjang klien penyelenggara pertama
- Mengatur penyelenggara lain (apabila penyelenggara umum) untuk menyediakan layanan yang menunjang klien penyelenggara pertama
- Memberikan akses terhadap penyelenggara lain untuk menggunakan infrastruktur dan penyelenggara pertama untuk tujuan apapun yang konsisten dengan usaha penyelenggara lain

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4. Perlunya mengikuti tender berdasarkan proses Peraturan Infrastruktur

Kekhawatiran mengenai perlunya menggunakan proses Peraturan Infrastruktur (dengan persyaratannya agar konsesi perkeretaapian ditenderkan) timbul karena hal ini dilihat sebagai satu-satunya cara untuk melayani lebih dari satu pelanggan

Pembatasan ini dapat diperlonggar dengan memperbolehkan perkeretaapian khusus untuk memiliki interkoneksi dan dengan memperbolehkan suatu perkeretaapian khusus untuk melayani beberapa usaha yang tergabung dalam suatu konsorsium

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5. Kerumitan sistem perizinan

Prosedur untuk mendapatkan izin terlalu berbelit-belit

Kami berpendapat bahwa proses tersebut dapat disederhanakan dan dipersingkat tanpa mengurangi efektifitas atau membatasi otonomi daerah

Banyak dari penyederhanaan ini dapat dilakukan melalui Permen, walaupun perubahan kecil terhadap PP 56/2009 juga diinginkan.

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Usulan untuk menyederhanakan sistem perizinan



Masalah perencanaan harus dibahas dan diselesaikan pada tahap persetujuan prinsip (bukan pada tahap selanjutnya)

Pemeriksaan dari berbagai tingkat pemerintahan harus dikoordinasikan dan dilakukan secara bersamaan untuk menghindari keterlambatan dan keputusan yang tidak konsisten

Penyelenggara harus dapat melakukan 'pre-kualifikasi' sendiri selama tahap pembangunan untuk memastikan bahwa izin operasi akan diterbitkan kemudian, apabila telah memenuhi persyaratan yang jelas

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6. Koordinasi antara perkeretaapian khusus dan ketentuan perizinan peraturan lain



Pilihan untuk pengguna perkeretaapian untuk menggunakan afiliasi sebagai penyelenggara (untuk mempermudah pembiayaan)

Larangan untuk transaksi terafiliasi dalam industri tertentu (contoh, pertambangan) harus dipertimbangkan

Apabila pemegang izin perkeretaapian khusus juga harus mendapatkan izin lain, koordinasi yang layak antar institusi terkait harus dipastikan untuk menghindari keterlambatan dan keputusan yang tidak konsisten

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Kesimpulan

Tujuan meningkatkan keterlibatan sektor swasta belum dapat dicapai karena sejumlah kendala

Kami berpendapat bahwa kendala-kendala ini dapat secara efektif diatasi melalui pembuatan ketentuan peraturan-peraturan yang didasarkan pada Undang – Undang Perkeretaapian yang berlaku saat ini

Sebagian besar dapat dicapai melalui Permen baru, walaupun beberapa perubahan terhadap PP 56/2009 dan PP 72/2009 yang berlaku saat ini juga sebaiknya dilakukan.

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Langkah selanjutnya

Usulan rancangan– menyatakan prinsip-prinsip yang umum dalam menyusun Permen dan perubahan terhadap PP 56/2009 dan PP 72/2009

Rancangan Permen dan Perubahan terhadap kedua PP – usulan awal dari team adalah, didasarkan pada usulan rancangan dan diskusi awal dengan Kementerian Perhubungan

Kelompok kerja– dibentuk untuk mengkoordinasikan masukan pemerintah terhadap proses dan mencapai kesepakatan

Pembahasan yang terus menerus– antara team hukum kami dengan Kementerian Perhubungan



Kementerian Perhubungan
Direktorat Jenderal Perkeretaapian

PENGATURAN LEBIH LANJUT MENGENAI PERKERETAAPIAN KHUSUS DI INDONESIA

disampaikan oleh:

ASRIL SYAFEI

Direktur Lalu Lintas dan Angkutan Kereta Api
Direktorat Jenderal Perkeretaapian

pada:

FGD "Pembahasan Regulasi Penyelenggaraan Perkeretaapian Khusus
di Indonesia".

Jakarta, 20 April 2011



Kementerian Perhubungan
Direktorat Jenderal Perkeretaapian

1

Dasar Hukum Perkeretaapian Khusus

- a. Undang-Undang Nomor 23 Tahun 2007 tentang Perkeretaapian.
- b. Peraturan Pemerintah Nomor 56 Tahun 2009 tentang Penyelenggaraan Perkeretaapian.
- c. Peraturan Pemerintah Nomor 72 Tahun 2009 tentang Lalu Lintas dan Angkutan Kereta Api.



Definisi sesuai Peraturan Perundang-undangan

▪ **Pasal 1 (6) UU No. 23/2007 dan Pasal 1 (14) PP No. 56/2009:**

“Jalur kereta api khusus adalah jalur kereta api yang digunakan secara khusus oleh badan usaha tertentu untuk menunjang kegiatan pokok badan usaha tersebut.”

Penjelasan:

“Yang dimaksud dengan “perkeretaapian khusus” adalah perkeretaapian yang hanya digunakan untuk menunjang kegiatan pokok badan usaha tertentu dan tidak digunakan untuk melayani masyarakat umum.”

▪ **Pasal 1 (3) PP No. 56/2009:**

“Perkeretaapian khusus adalah perkeretaapian yang hanya digunakan untuk menunjang kegiatan pokok badan usaha tertentu dan tidak digunakan untuk melayani masyarakat umum.”



Latar Belakang

- a. Peningkatan peran serta swasta dalam pembangunan infrastruktur di bidang perkeretaapian.
- b. Mendukung peningkatan distribusi logistik dari badan usaha (antara lain: pertambangan, perkebunan, pertanian dan pariwisata) dengan kapasitas yang lebih besar, lebih efisien serta dapat diandalkan.
- c. Mendukung peningkatan perekonomian secara nasional maupun global.



Kementerian Perhubungan
Direktorat Jenderal Perkeretaapian

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Usulan Perkeretaapian Khusus sampai saat ini (1)

- a. Pembangunan Jalur Perkeretaapian Angkutan Batubara dari Tanjung Enim (Prov. Sumatera Selatan) menuju Kota Padang (Prov. Bengkulu) sepanjang \pm 350 Km oleh PT. Pathaway International.
- b. Pembangunan Jalur Perkeretaapian Angkutan Batubara dari Tanjung Enim (Prov. Sumatera Selatan) menuju Srengsem (Prov. Lampung) sepanjang \pm 300 Km oleh PT. Tambang Batubara Bukit Asam (Persero), Tbk (PT. Bukit Asam Transpacific Railways (PT. BATR)).
- c. Pembangunan Jalur Perkeretaapian Angkutan Batubara dari Muara Wahau menuju Lubuk Tutung di Kabupaten Kutai Timur (Prov. Kalimantan Timur) sepanjang \pm 150 Km oleh PT. Trans Kutai Kencana (Group MEC).



Kementerian Perhubungan
Direktorat Jenderal Perkeretaapian

5

Usulan Perkeretaapian Khusus sampai saat ini (2)

- d. Pembangunan Jalur Perkeretaapian Angkutan Batubara antara Lahat – Patra Tani di Prov. Sumatera Selatan oleh PT. Priamanaya Djan International.
- e. Pembangunan Jalur Perkeretaapian Angkutan Batubara dari Tanjung Enim menuju Tanjung Api-Api di Prov. Sumatera Selatan oleh PT. Adani Global.
- f. Pembangunan Jalur Perkeretaapian Khusus di beberapa lokasi oleh PT. INKA (Persero).



Prinsip-prinsip Penyelenggaraan (1)

- a. Menunjang kegiatan usaha pokok;
- b. Tidak bertentangan dengan Rencana Induk Perkeretaapian Nasional, RTRW Provinsi serta RTRW Kota/Kabupaten.
- c. Hanya di kawasan wilayah kegiatan usaha pokok atau dari wilayah kegiatan usaha pokok menuju satu titik di wilayah penunjang, berupa antara lain pelabuhan/terminal khusus.
- d. Prasarana perkeretaapian tidak dapat dimiliki tetapi hanya dapat dikelola dalam jangka waktu tertentu sesuai dengan rencana bisnis, kecuali untuk penyelenggaraan perkeretaapian khusus di dalam kawasan.



Prinsip-prinsip Penyelenggaraan (2)

- e. Tidak memerlukan dukungan Pemerintah, biaya seluruhnya oleh investor dan tidak melalui proses pelelangan.
- f. Tidak memerlukan perizinan yang bersifat khusus antara lain tidak melalui kawasan hutan lindung.
- g. Diperlukan sosialisasi kepada masyarakat di sepanjang rencana jalur perkeretaapian khusus terkait proses pembebasan tanah (untuk perkeretaapian khusus di luar wilayah kegiatan badan usaha).
- h. Pemrakarsa perkeretaapian khusus adalah:
 - 1) Pemegang izin usaha pokok;
 - 2) Anak perusahaan dari pemegang izin usaha pokok;
 - 3) Badan hukum yang tidak memiliki izin usaha pokok tetapi hanya melayani satu badan usaha pemegang izin usah pokok (**sebagai bahan diskusi**)



Kementerian Perhubungan
Direktorat Jenderal Perkeretaapian

8

Peningkatan Peluang

- a. Kementerian Perhubungan dalam hal ini Direktorat Jenderal Perkeretaapian mendukung investasi di bidang perkeretaapian umum maupun khusus, sehingga secara umum industri perkeretaapian di Indonesia semakin berkembang.
- b. Mendukung program Pemerintah dalam pengurangan beban angkutan jalan raya.
- c. Diperlukan pengaturan lebih lanjut mengenai perkeretaapian khusus melalui peraturan menteri maupun usulan perubahan peraturan pemerintah agar dapat diterapkan dengan prinsip-prinsip yang dapat dipertanggungjawabkan.



ANNEXE 5: MINUTES AND OTHER MATERIALS FROM FIRST IAWG MEETING

Working Group – 10 June 2011 – MOT-Gedung Karsa 2nd Floor – Majapahit Room

Attendees: List attached

Mr. Asril made the opening speech explaining in brief the purpose of having the working group Meeting. Mr. Suyono from the consultant team continued by providing explanation as to the economics rationale of developing SRs. Radical and expeditious development if possible, including when necessary to amend the relevant regulations (shouldn't be 'business as usual' if we want to make progress).

MR. Efi also from the consultant team explained the status and progress of INDII program, namely that currently INDII has reached phase III assisting the government in developing the regulations relating to SR. The team will work in its maximum capacity until end of this June including to continue the discussion with various stakeholders.

The consultant team (Mr. Guy) explained the current rules relating to the railway laws and the proposed amendments and implementing regulations.

Discussions:

Mr. Asril continued to explain the background of the concept 'consortium' as proposed by the consultant team. He admitted that historically SR was only limited to a certain area; however, the concept has evolved due to increase demand. Many investors have approached MOT with common problems, i.e. that they do not have the required expertise or experience to conduct transportation business/activity but desperately require good and reliable transportation facilities.

Following the opening discussion by Pak Asril, Pak Suyono continued by asking the floor whether Perpres 13/2010 regarding infrastructure is of relevance to SRs. He proposed the idea of amending Perpres 13/2010 to clarify the treatment of private investment using only private funds.

Other discussion:

1. Pak Arief Indarto (ESDM) –

Pak Arief explained that the ESDM is not too concerned about regulations relating to SRs. However, their main concern is to be able to provide a timely transportation ability to support the mining business. He was hopeful that the draft Permen would be able to support the needs.

He asked whether the concept of a single client is feasible. In his view, if the SR is restricted only to serve one client then the establishment and operation of SR may not be economically feasible.

Validity period of SR Operating License – He asked what would be the ideal validity term for the SR license (mining license (IUP) is valid for 20 years). He proposed that the term of SR operating license should follow the validity of the IUP served by the SR.

Dispute resolution – As the SR activities will involve various private parties, there could be possible disputes between the parties involved. He proposed to include a provision to name an authority to settle disputes.

Sanctions – Mr. Arief also suggested that sanctions and penalties should be imposed for failure to comply with the requirements.

Fees - Mr. Arief also suggested that there should be a fee in relation to the use of the transportation facilities owned by an SR operator.

Competence – Mr. Arief questioned whether specific certification from the relevant authorities would be required to operate the SR .

2. Pak Israful (MOT)

Mr. Israful expressed that he was 85% in agreement with the concept of draft Permen. Nevertheless he has some comments in relation to the draft.

In relation to Slide 20 of the presentation, he stated that the legal entity should be an existing operator that has been appointed and to serve only the entity that it has been serving.

Mr. Israful addressed that in his view interconnection and contract with third parties were not issues. In relation to the status of assets of SR, he stated that in his view the SR is not a concession.

In relation to the proposed concept of 'Railway Proponent', Mr. Israful addressed that the concept of 'proponent' was not recognized in the current implementing regulations.

3. Pak Imam (BKPM):

Mr. Imam addressed to the form whether he could raised questions related to the technical aspects of the SR in the working group meeting. His questions were as follows:

- i. Can a foreign investment company (PMA) be an SR operator?
- ii. Can a PMA holder of IUP be an SR operator, and can such activity be conducted separate from the mining business?
- iii. Shareholding composition: BKPM proposed that foreign investor can own up to 95% shares. Mr. Imam in particular also would like to know whether the draft Permen would also cover the issue relating to shareholding.

- iv. Further, in relation to mining business, he asked whether mining companies should be issued with Transportation and Sale IUP (in addition to the Production IUP). He also questioned whether companies not in possession of a mining concession (mining license) can be granted an IUPJL. He also queried whether the draft Permen would also cover regarding the requirements of the parties that will undertake the SR activities.
- v. In relation to the period of the SR operating license, he expressed that the validity of the license should be in line with the principal business, or if the arrangement is based on an agreement then it should be as stated in the agreement.

4. Pak Novianto – Ministry of Agriculture

Mr. Novianto expressed that, as the Ministry of Agriculture mostly deals with small scale farmers, thus the development of SR may not be directly relevant to the agricultural section. However, he stated that, if possible, the SR can also be operated to transport agricultural products of small scale farmers and thus improve the welfare of small scale farmers.

Period of the SR license – Mr. Novianto stated that following the expiration of the SR operating license (if it is not extended), the assets should be transferred to the government and used for the welfare of the public. Further, in relation to the validity period, he stated that if the SR is to be used to serve a palm oil plantation, then the validity of the SR license may extend to a period of more than 70 years. His concern was that a railway should be used for the welfare of the public.

5. Pak Prawoto – MOT - Dirjen Perkeretaapian – Biro Hukum

The drafts still need to be further discussed (long discussion). The draft Permen should be based on the existing regulations. SR and PR should be treated differently as otherwise it will be ‘dangerous’ as PR is subject to tender whilst SR is not.

In relation to proposal to amend the Government regulations, he asked whether now is the right time as some implementing regulations of the GR have been issued. He was questioning whether proposal to amend Article 374 is correct/necessary and mentioned that the draft Permen still need to be further discussed and will take some time.

Point to point rule – GR 56 introduces the point to point rule. He objected to the idea of establishing multiple supporting points/terminals outside the area of the primary business (for loading and unloading) as in this case SR will be similar to PR. He addressed issues regarding supervision.

On interconnection, Pak Prawoto again questioned the consultant team’s reliance on article 374 of GR 56, though his explanation on this point, as well as on the intended meaning of Article 161 of GR 72, was not fully understood by the

consultant team and requires further clarification. Interconnection should not always be interpreted as interconnection of the railway network as the specification must be the same before railways can interconnect. He mentioned that we should differentiate the meaning of 'jaringan kereta api' (railway network) and 'jaringan pelayanan' (service network).

With reference to Article 362 (a) of PP 56 in Article 23 of the Draft Permen, he expressed the view that the term of 2 years in Article 362 (a) should mean that within 2 years the holder of the construction permit should have started the construction work, and does not mean that the work should be completed by then.

Use of affiliated companies – he did not object to this concept. However, he made reference to ownership of a majority of the shares.

Consortium – he did not fully understand the consultant team's proposed concept of 'consortium' – and expressed concern that SRs should not become confused with PRs. He agreed that SRs should be developed, but there should be limitations and restrictions.

Proponent – He did not understand the separation between railway proponent and the operator (and questioned whether this separation is permitted under the current regulations).

Concession – he agreed that an SR should not be treated as concession, as SR is not included under the Perpres and thus is not subject to tender requirements. However, the status of the assets needs to be further discussed, i.e. whether government can take over the assets.

In sum, Pak Prawoto did not want SRs to become indistinguishable from PRs.

6. Ibu Maya - MOT - Kepala Sub Direktorat Jaringan Lalulintas DGR

In her view, there should not be a need for government to negotiate with the SR operator regarding the status of the assets following the expiry of the license.

Also, a body should be established to supervise the operation of SRs. In other transport sectors, government has a port administrator and an airport administrator to monitor the operation of ships and aircraft, but there is no such agency in the railway sector.

7. Bappenas (Pak Ichwanul Hakim)

The representative from Bappenas agreed with the proposed plan to develop SRs. He was aware of differences of opinion relating to SRs and suggested that the parties look back on the basic principles which differentiate SRs from PRs to be able to settle the difference.

8. CMEA (Pak Aldian)

The most important issue is to protect the public interest (inter-modal transportation, land use, environment, etc.). Possible monopoly in the railway sector is a possible concern. Thus the existence of a body to supervise the operation of SRs is necessary.

Private interests must be supported, while maintaining price and quality.

It was also proposed that there should be a consequence imposed to the SR operator in the event of its failure to complete the construction process whilst land acquisition has been conducted. The way out must be properly stated (including when railways will not be operated in the future – the failed monorail project is a case in point).

Pak Asril closed the working group meeting by addressing that although SR was used for limited purpose in sugar plantation and tourism industries, however, when the current railway law was in process by the Parliament there were some discussions to extent the applicability of SR. Nevertheless although supporting the development of SR, Mr. Asril agreed that there should be a mechanism, at later stage, to convert SR to become PR, as there should not be too many SR. Perpres 67 already regulates the involvement of parties in the railway sector, albeit through a tender process. The current railway law should not be used as a mechanism by certain parties to avoid the tender requirement by using SRs as the way out. To the extent possible, the current government regulations should remain as they are now.

Mr. Suyono, in his closing remarks, expressed that the consultant team was aware of the matters discussed and the importance to prevent the occurrence of monopoly and unfair business practice. Nevertheless, there should be a compromise to achieve the intended goal. The consultant team can only make a proposal regarding the draft Permen to be considered by the Government, taking into account that SRs should not be used by parties who wish to invest in PRs but do not want to go through the tender requirement.

Pertemuan Kelompok Kerja – 10 Juni 2011 – Kementerian Perhubungan – Gedung Karsa Lantai 2 – Ruang Majapahit

Peserta : [daftar hadir terlampir]

Bapak Asril menyampaikan kata pembuka dengan memberikan penjelasan singkat mengenai tujuan diadakannya pertemuan kelompok kerja. Bapak Suyono dari tim konsultan melanjutkan dengan memberikan penjelasan tentang landasan ekonomis pengembangan Perkeretaapian Khusus (PK). Pengembangan yang radikal dan cepat sangat diperlukan apabila dimungkinkan, termasuk bila perlu, mengubah peraturan-peraturan terkait (perlu menerapkan konsep '*not business as usual*' apabila kita ingin berkembang).

Bapak Efi dari tim konsultan INDII menjelaskan mengenai status dan perkembangan dari program INDII, yaitu bahwa saat ini INDII telah mencapai tahap III dalam membantu pemerintah mengembangkan peraturan-peraturan yang terkait dengan PK. Tim akan bekerja dengan semaksimal mungkin sampai dengan akhir bulan Juni ini, termasuk melanjutkan diskusi dengan berbagai pihak yang berkepentingan.

Tim konsultan (Mr. Guy) menjelaskan tentang aturan-aturan yang berlaku saat ini yang terkait dengan hukum dan peraturan mengenai perkeretaapian serta usulan amandemen dan peraturan-peraturan pelaksana.

Sesi diskusi:

Bapak Asril melanjutkan dengan menjelaskan latar belakang dari konsep 'konsorsium' sebagaimana diusulkan oleh tim konsultan. Beliau mengakui bahwa dalam sejarahnya PK hanya terbatas untuk area-area tertentu; namun, konsep tersebut telah berkembang sesuai dengan tingginya permintaan. Banyak investor yang telah melakukan pendekatan kepada Kementerian Perhubungan dengan permasalahan yang sama, misalnya bahwa mereka tidak memiliki kemampuan atau pengalaman yang memadai untuk melaksanakan usaha/kegiatan transportasi tetapi sangat membutuhkan fasilitas transportasi yang baik dan dapat diandalkan.

Menindaklanjuti diskusi pembukaan dengan Bapak Asril, Bapak Suyono melanjutkan dengan melemparkan pertanyaan kepada hadirin apakah Perpres 13/2010 mengenai infrastruktur relevan dengan PK. Beliau juga menyampaikan usulan untuk mengubah Perpres 13/2010 untuk mengklarifikasi perlakuan terhadap investasi swasta yang hanya menggunakan dana dari swasta.

Diskusi lainnya:

1. Bapak Arief Indarto (ESDM) –

Bapak Arief menjelaskan bahwa ESDM tidak terlalu terfokus dengan peraturan yang terkait dengan PK. Namun, perhatian utama mereka adalah untuk dapat menyediakan transportasi yang tepat waktu sebagai dukungan terhadap kegiatan

usaha pertambangan. Beliau berharap usulan rancangan Permen dapat menunjang kebutuhan tersebut.

Beliau menyampaikan pertanyaan apakah konsep klien tunggal dapat direalisasikan. Menurut pandangannya, apabila PK dibatasi hanya untuk melayani satu klien maka pembentukan dan pengoperasian PK dapat menjadi tidak realistis secara ekonomis.

Periode keberlakuan Ijin Operasi – Beliau menanyakan berapa lamakah jangka waktu keberlakuan ijin PK yang ideal (Ijin Usaha Pertambangan (IUP) berlaku untuk 20 tahun). Beliau mengajukan bahwa keberlakuan Ijin Operasi PK idealnya mengikuti jangka waktu keberlakuan IUP dari perusahaan tambang yang dilayani oleh PK.

Penyelesaian Perselisihan – Dikarenakan kegiatan PK akan melibatkan berbagai pihak swasta, terdapat kemungkinan terjadinya perselisihan di antara mereka. Beliau mengusulkan untuk draft Permen mengatur mengenai sebuah otoritas yang ditunjuk untuk menyelesaikan perselisihan.

Sanksi – Bapak Arief juga menyarankan agar sanksi dan denda diterapkan dalam hal terjadi pelanggaran dan/atau kegagalan untuk memenuhi persyaratan-persyaratan.

Biaya – Bapak Arief juga menyarankan agar terdapat suatu biaya yang harus dikenakan terkait dengan penggunaan fasilitas transportasi yang dimiliki oleh penyelenggara PK.

Kompetensi – Bapak Arief mempertanyakan apakah diperlukan suatu sertifikasi khusus dari otoritas yang terkait untuk menyelenggarakan PK.

2. Bapak Israful (Kementerian Perhubungan)

Bapak Israful menyatakan bahwa beliau pada prinsipnya 85% setuju dengan usulan rancangan Permen. Akan tetapi, beliau memiliki beberapa komentar terkait dengan rancangan tersebut.

Terkait dengan *Slide* 20 pada presentasi, beliau menyatakan bahwa badan hukum yang dimaksud harus merupakan penyelenggara yang sudah ada sebelumnya yang telah ditunjuk dan melayani hanya badan yang telah dilayani sebelumnya.

Bapak Israful menyampaikan bahwa dalam pandangannya, interkoneksi dan perjanjian dengan pihak ketiga bukan merupakan masalah. Mengenai status dari aset PK, beliau menyampaikan bahwa menurut pendapatnya, PK bukanlah merupakan sebuah konsesi.

Terkait dengan usulan konsep ‘Pemrakarsa Perkeretaapian’, Bapak Israful menyampaikan bahwa konsep ‘pemrakarsa’ tidak dikenal dalam peraturan pelaksana yang ada saat ini.

3. Bapak Imam (BKPM):

Bapak Imam menyampaikan apakah beliau dapat mengajukan pertanyaan terkait dengan aspek-aspek teknis dari PK di dalam pertemuan kelompok kerja. Pertanyaannya adalah sebagai berikut:

- i. Dapatkah sebuah perusahaan penanaman modal asing (PMA) menjadi penyelenggara PK?
- ii. Dapatkah sebuah PMA yang memiliki IUP menjadi penyelenggara PK, dan dapatkah kegiatan tersebut dilaksanakan terpisah dari usaha pertambangannya?
- iii. Komposisi pemegang saham - BKPM berpendapat bahwa penanam modal asing dapat memiliki saham sampai dengan 95%. Bapak Imam secara khusus juga ingin mengetahui apakah rancangan Permen dapat juga memasukkan ketentuan mengenai pemegang saham.
- iv. Lebih lanjut, dalam kaitannya dengan usaha pertambangan, beliau mempertanyakan apakah IUP Transportasi dan Penjualan juga harus dikeluarkan untuk perusahaan pertambangan (sebagai tambahan atas IUP Produksi). Beliau juga mempertanyakan apakah perusahaan yang tidak mempunyai konsesi pertambangan (ijin pertambangan) dapat diberikan IUPJL. Serta, apakah rancangan Permen juga akan memasukkan mengenai persyaratan-persyaratan yang harus dipenuhi para pihak yang akan menjalankan kegiatan PK.
- v. Terkait dengan jangka waktu ijin operasi PK, beliau menyatakan bahwa keberlakuan ijin harus sesuai dengan usaha pokok, atau apabila pengaturannya didasarkan kepada perjanjian, maka hal tersebut harus disebutkan di dalam perjanjian.

4. Bapak Novianto – Kementerian Pertanian

Bapak Novianto menyatakan bahwa, dikarenakan Kementerian Pertanian sebagian besar berurusan dengan petani kecil, maka pembangunan PK tidak secara langsung relevan dengan bagian pertanian. Namun, beliau menyatakan, apabila dimungkinkan, PK dapat juga beroperasi untuk mengangkut hasil pertanian dari petani-petani kecil dan dengan demikian memperbaiki kesejahteraan dari para petani kecil.

Keberlakuan ijin PK – Bapak Novianto menyatakan bahwa setelah habis berlakunya ijin operasi PK (apabila tidak diperpanjang), aset-asetnya sebaiknya dialihkan kepada pemerintah dan digunakan untuk kesejahteraan masyarakat. Lebih lanjut, terkait dengan masa berlakunya, beliau menyatakan apabila PK akan digunakan untuk melayani perkebunan kelapa sawit, maka keberlakuan ijin PK dapat diperpanjang untuk jangka waktu yang lama sampai lebih dari 70 tahun. Yang harus menjadi perhatian adalah bahwa perkeretaapian harus dapat digunakan untuk kesejahteraan masyarakat.

5. Bapak Prawoto – Kementerian Perhubungan - Dirjen Perkeretaapian – Biro Hukum

Beliau berpendapat bawa rancangannya Permen masih harus didiskusikan lebih lanjut (diskusi yang tidak dapat diselesaikan dalam waktu yang singkat). Rancangan Permen harus didasarkan kepada peraturan yang berlaku saat ini. PK dan perkeretaapian umum harus diperlakukan berbeda karena apabila tidak, akan menjadi ‘berbahaya’ sebab perkeretaapian umum harus melakukan tender sedangkan PK tidak.

Terkait dengan usulan untuk mengubah Peraturan Pemerintah, beliau mempertanyakan apakah saat ini adalah saat yang tepat karena beberapa peraturan pelaksana telah dikeluarkan. Beliau mempertanyakan apakah usulan untuk mengubah Pasal 374 itu benar atau perlu dan menyebutkan bahwa rancangan Permen masih harus didiskusikan lebih lanjut dan akan memakan waktu.

Aturan dari satu titik ke titik lain – PP 56 memperkenalkan aturan tentang dari satu titik ke titik lain. Beliau menolak ide pembangunan titik-titik/stasiun pendukung di luar daerah usaha pokok (untuk bongkar muat) yang dapat mengakibatkan PK menjadi sama dengan perkeretaapian umum. Beliau menyampaikan isu mengenai pengawasan.

Mengenai interkoneksi, Bapak Prawoto mempertanyakan kembali ketergantungan tim konsultan kepada Pasal 374 dari PP 56, walaupun penjelasannya mengenai hal ini, sebagaimana pada arti dalam Pasal 161 dari PP 72, tidak sepenuhnya dimengerti oleh tim konsultan dan memerlukan klarifikasi lebih lanjut. Interkoneksi tidak melulu harus diartikan sebagai interkoneksi dari jaringan kereta api karena spesifikasinya harus sama sebelum kereta api-kereta api dapat melakukan interkoneksi. Beliau menyebutkan bahwa kita harus membedakan arti dari ‘jaringan kereta api’ dengan ‘jaringan pelayanan’.

Dengan acuan kepada Pasal 362 (a) dari PP 56 dalam Pasal 23 Rancangan Permen, beliau menyatakan pandangannya bahwa jangka waktu 2 tahun dalam Pasal 362 (a) harus berarti bahwa dalam waktu 2 tahun pemegang ijin pembangunan harus sudah memulai pekerjaan pembangunannya, dan tidak berarti bahwa pekerjaannya harus sudah selesai dalam jangka waktu tersebut.

Penggunaan perusahaan terafiliasi – beliau tidak menolak konsep ini. Namun, beliau memberikan referensi kepada kepemilikan mayoritas atas saham.

Konsorsium – beliau tidak sepenuhnya mengerti usulan konsep ‘konsorsium’ yang diajukan oleh tim konsultan – dan menyatakan perhatiannya bahwa PK seharusnya tidak dicampuradukan dengan perkeretaapian umum. Beliau setuju bahwa PK seharusnya dikembangkan, tetapi dengan berbagai pembatasan.

Pemrakarsa – Beliau tidak mengerti pemisahan antara pemrakarsa dengan penyelenggara perkeretaapian (dan mempertanyakan apakah pemisahan ini diperbolehkan berdasarkan ketentuan hukum yang berlaku).

Konsesi – beliau setuju bahwa PK tidak seharusnya diperlakukan sebagai konsesi, sebagaimana PK tidak termasuk di dalam Perpres dan oleh karenanya, tidak diharuskan untuk melakukan tender. Namun, status dari asetnya harus didiskusikan lebih lanjut, seperti misalnya apakah pemerintah dapat mengambilalih aset tersebut.

Secara keseluruhan, Bapak Prawoto tidak ingin PK menjadi tidak dapat dibedakan dengan perkeretaapian umum.

6. Ibu Maya – Kementerian Perhubungan - Kepala Sub Direktorat Jaringan Lalulintas Dirjen Perkeretaapian

Menurut pandangannya, tidak seharusnya pemerintah melakukan negosiasi dengan pihak penyelenggara PK mengenai status dari aset setelah habis masa berlakunya.

Beliau juga menyampaikan bahwa sebuah badan harus didirikan untuk mengawasi penyelenggaraan PK. Dalam sektor transportasi lainnya, pemerintah mendirikan otoritas pelabuhan dan otoritas bandara untuk mengawasi penyelenggaraan kapal dan pesawat, tetapi tidak ada otoritas semacam itu pada sektor perkeretaapian.

7. Bappenas (Bapak Ichwanul Hakim)

Perwakilan dari Bappenas pada prinsip mendukung usulan rencana pengembangan PK. Beliau menyadari adanya perbedaan pendapat mengenai PK dan menyarankan agar para pihak melihat kembali kepada prinsip dasar yang membedakan PK dari perkeretaapian umum untuk dapat menyelesaikan perbedaan tersebut.

8. Kementerian Koordinator Bidang Perekonomian (Bapak Aldian)

Isu yang paling penting ialah untuk melindungi kepentingan masyarakat (transportasi antar moda, penggunaan tanah, lingkungan, dsb). Kemungkinan monopoli dalam sektor perkeretaapian menjadi satu hal yang harus menjadi perhatian. Oleh karena itu, perlu adanya suatu badan yang bertugas untuk mengawasi penyelenggaraan PK.

Keberadaan pihak swasta harus didukung, dengan tetap mempertahankan harga dan kualitas.

Diusulkan juga bahwa seharusnya terdapat sanksi yang harus diterapkan kepada penyelenggara PK apabila penyelenggara PK gagal untuk menyelesaikan pembangunan kereta api sementara akuisisi lahan sudah dilakukan. Solusi atasnya harus dengan jelas dinyatakan (termasuk ketika kereta api tidak akan beroperasi di masa yang akan datang – proyek *monorail* yang gagal merupakan salah satu contoh).

Bapak Asril menutup pertemuan kelompok kerja dengan menyampaikan bahwa walaupun dahulu PK digunakan untuk tujuan tertentu pada perkebunan tebu dan industri pariwisata, namun, ketika undang-undang mengenai perkeretaapian yang berlaku saat ini sedang dikaji oleh DPR, terdapat pembahasan untuk memperluas penerapan PK. Namun, walaupun Bapak Asril mendukung pengembangan PK, beliau setuju bahwa seharusnya terdapat suatu mekanisme, pada tahap selanjutnya, untuk mengalihkan PK menjadi perkeretaapian umum, dan bahwa seharusnya tidak terdapat terlalu banyak PK. Perpres 67 telah mengatur mengenai keterlibatan dari para pihak dalam sektor perkeretaapian, walaupun harus melalui proses tender. Peraturan perundangan mengenai perkeretaapian yang berlaku saat ini seharusnya tidak digunakan sebagai sebuah mekanisme oleh berbagai pihak untuk menghindari keharusan tender dengan menggunakan PK sebagai jalan keluarnya. Sebagaimana dimungkinkan, peraturan pemerintah yang ada saat ini harus tetap berlaku sebagaimana sudah berlaku saat ini.

Bapak Suyono, melalui kata penutupnya, menyatakan bahwa tim konsultan menyadari masalah yang telah diperbincangkan dan pentingnya mencegah timbulnya monopoli dan persaingan usaha tidak sehat. Namun, harus terdapat suatu kompromi untuk mencapai tujuan yang dimaksud. Tim konsultan hanya dapat membuat usulan mengenai rancangan Permen untuk dipertimbangkan oleh Pemerintah, dengan memperhatikan bahwa PK seharusnya tidak digunakan oleh para pihak yang ingin menanamkan modalnya pada perkeretaapian umum tetapi tidak ingin melakukannya melalui proses tender.

INDONESIA INFRASTRUCTURE INITIATIVE

An Australian Government Initiative



Activity number and title	: #229 - Special Railway Phase 3	Coordinator LFV : Coordinator WG4 :
Title of meeting	: Working Group I - Discussion of the Special Railway Regulation	
Date and place	: 10 June 2011 Gd. Karsa 2 nd Floor, Majapahit Room, MOT	

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36	Ikhwan Hakim		Bappenas	-	
37	Amilia Aldian		Kementerian Perekonomian	-	
38	Retno Sari		Dit. LLAKA, MOT	-	
39	Made Happy		Dit. LLAKA, MOT	-	



**KEMENTERIAN PERHUBUNGAN
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Lampiran : -
Perihal : Undangan Rapat

Jakarta, 8 Juni 2011

K e p a d a

Yth. (Daftar terlampir)

di -

Tempat

1. Dalam rangka mendapatkan masukan untuk Pengembangan Regulasi Perkeretaapian Khusus – Tahap III, Direktorat Jenderal Perkeretaapian bekerjasama dengan Konsultan *Indonesia Infrastructure Initiative (IndII)* dengan ini mengundang Bapak/Ibu untuk hadir dalam rapat yang akan diselenggarakan pada:

Hari/ Tanggal : Jumat, 10 Juni 2011
Pukul : 09.00 WIB – 11.30 WIB
Tempat : RR. Majapahit, Gd. Karsa, Lantai 2,
Kementerian Perhubungan
Acara : Pembahasan Penyusunan Rancangan Peraturan
Menteri Perhubungan tentang Perkeretaapian
Khusus

Pimpinan Rapat : Direktur Lalu Lintas dan Angkutan Kereta Api

2. Demikian disampaikan, atas perhatian dan kerjasamanya diucapkan terima kasih.

DIREKTUR
LALU LINTAS DAN ANGKUTAN KERETA API
Pelaksana Harian



TOTOK LUKITO
Pembina Tingkat I (IV/b)
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Tembusan, Yth.:

1. Direktur Jenderal Perkeretaapian;
2. Sekretaris Direktorat Jenderal Perkeretaapian.



Australia Indonesia Partnership
Kemitraan Australia Indonesia



Special Railways Phase III

Proposed approach to regulatory changes

Jakarta 10 June 2011



INDONESIA
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INITIATIVE

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INFRASTRUCTURE
INITIATIVE



Australia Indonesia Partnership
Kemitraan Australia Indonesia



Rationale for Special Railways

1. Indonesia's economy is projected to grow at 7-8% p.a. for many years to come
2. In longer term, Indonesia is projected to be a developed economy
3. Economic mobility would increase significantly and road can no longer carry the burden of 90% of the economic movements
4. Goods and commodities would be more efficiently transported by rail instead

2

INDONESIA
INFRASTRUCTURE
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Australia Indonesia Partnership
Kemitraan Australia Indonesia





The Economic Corridors

1. Government launched the master plan for six economic corridors
2. The majority of the economic activities along the corridors is commodity-based and clusters of industrial, plantation, and mining complexes
3. Infrastructure is at the core of the corridors
4. Railway would be the backbone of corridor economic movements


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The Financial Burdens

1. Only about 10% of the corridor development costs would be financed by government investment
2. About 55% must come from private investment
3. SOEs and other schemes would probably contribute about 35%
4. Special Railways, a private financing initiative to build mostly freight rail, would be rather imperative

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Regulatory changes

1. Law 23/2007 mandates the establishment of special railways
2. To accelerate private investment in special railways, MoT needs to adopt implementing regulations
3. Changes to current Government regulations (PP 56/2009, PP 72/2009) must also be considered
4. Perpres 13/2010 applies to unsolicited PPP projects, but does not take into consideration purely private financing initiatives such as special railways

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Overview of IndII Special Railway Program

1. Identify need for changes in rail sector regulations to encourage private sector investment (Phase I – early 2010)
2. Propose policy and regulatory changes to achieve desired results (Phase II – late 2010)
3. Assist GoI in developing and implementing regulatory reforms (Phase III – April to June 2011).

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Key Objectives of Phase III

1. Implement and clarify current Special Railway provisions through a Ministerial Regulation (Permen)
2. Expand railway investment opportunities through targeted amendments to existing Government Regulations (PP 56/2009 and PP 72/2009)




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Timing of Phase III

1. Initial term sheets submitted on 21 April 2011
2. Inception Report finalized on 26 April 2011
3. Draft regulatory proposals submitted on 13 May 2011
4. Final regulatory proposals to be submitted by 17 June 2011
5. Final Technical Report due by late June



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Rationale for Encouraging Greater Private Investment in Special Railways

- Government has no interest in spending public funds on railways that will only benefit one or a small number of private parties
- If private parties want to use their own funds to fill this infrastructure gap, Government should welcome this


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Rationale for Encouraging Greater Private Investment in Special Railways

- New infrastructure will have a positive impact on local, regional and national development
- To encourage massive investments needed to fund such projects, Government must provide certainty that the project can be operated as intended for a long time


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The Main Challenges

1. Lack of clarity over who can operate a special railway
2. Restrictions on the scope of special railways
3. Uncertainty over interconnection
4. Lack of clarity over nature and ownership of special railway assets
5. Complexity of licensing system
6. Lack of coordination between special railways and other regulatory licensing schemes


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The Main Constraints

1. Lack of clarity over who can operate a special railway

This affects both the willingness of investors to invest and the willingness of administrators to issue licenses

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The Main Constraints

2. Restrictions on the scope of special railways

'Point to point' rule (Article 350 of PP 56/2009) restricts operation of special railway to the area of main business activities and a single point in a supporting area

'One customer' rule appears to prevent a special railway from serving a group of similar industries

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The Main Constraints

3. Uncertainty over interconnection

There is concern that if a special railway connects to another special railway or to a public railway, the rights of the investor may be compromised. This discourages the creation of efficient railway networks.

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The Main Constraints

4. Lack of clarity over nature and ownership of special railway assets

There appears to be uncertainty as to whether a special railway should be treated as a concession (*i.e.*, the grant of a temporary privilege by the government) or a regulated form of private property


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The Main Constraints

5. Complexity of the licensing system

The process of getting all the required licences appears overly complex and time consuming


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The Main Constraints

6. Lack of coordination between special railways and other regulatory licensing schemes

Proper linkages between special railway licensing and other relevant licensing schemes (e.g., mining, agriculture) must be put in place to avoid delays or inconsistent results



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Proposed Solutions

A new Permen will clarify and implement the Railway Law existing Government Regulations (PP 56/2009 and PP 72/2009)



Some minor changes to existing government regulations are also desirable but not strictly necessary to implement the proposed Permen

No changes to the Railway Law are needed – all of the proposed regulations are consistent with the Railway Law




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1. Lack of clarity as to who can operate a Special Railway

We propose that the Permen describe more precisely the permitted relationships between the operator and the business it serves


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1. Lack of clarity as to who can operate a Special Railway

It is suggested that the Permen allow the main business:

- to be the same entity as the operator
- to be a separate entity having a controlling interest in, or being under common control with, the operator, or
- to be a separate entity having an exclusive long-term contractual relationship with a single-purpose (unaffiliated) operator


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1. Lack of clarity as to who can operate a Special Railway

'Control' can be defined broadly to include either ownership of a majority of the voting shares or the ability to appoint or remove a majority of the directors of a company



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1. Rationale

Examples exist internationally of 'single customer' lines where the railway is a subsidiary or related company (e.g., Pilbara lines in Australia) but also of contracts between independent companies (US 'short' lines, Queensland coal railways)



The 'one customer' rule in the Indonesian Railway Law puts negotiating power squarely in the hands of the customer (rather than the rail operator)

We nevertheless believe contracts could and would be negotiated freely without the need for detailed Government supervision



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2. Restrictions to the scope of the railway



We propose three solutions to this issue

- defining client to permit a consortium of users
- defining rules for interconnection
- relaxing the point-to-point rule



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Definition of Client

Define Special Railway client to include either a single legal entity or a consortium of affiliated or unaffiliated legal entities engaged in a common or joint enterprise

It would be preferable for this definition to be included in PP 56/2009



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Consortium rule: rationale

MoT's main concern appears to be the potential for unequal treatment of smaller clients as a result of allowing multiple entities to form a single special railway

We believe this concern can effectively be managed if the multiple clients are members of a single consortium

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Consortium rule: rationale



The consortium rule means that multiple customers must act as a single business entity with a common purpose, thereby reducing the opportunity for discrimination

Risks relating to unequal treatment can effectively be managed in the consortium agreement

If contractual safeguards are insufficient, parties still have recourse to applicable anti-monopoly laws


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Interconnection rules

Define interconnection rules under Article 374 of PP 56/2009 to enable several special railway operators (each serving their respective client) to share infrastructure and rolling stock without losing the status of special railway


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Interconnection rules: rationale

Allowing special railways to interconnect and share resources (by agreement) has potential to increase efficiency, reduce costs, and prevent unfair competition

Each railway continues to serve its own client, but cooperation between operators is allowed

This effectively implements key aspects of the 'limited public railway' concept (proposed in Phase II) in a way that is entirely consistent with the existing Railway Law


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Amending the point to point rule

Amend Article 350 of PP 56/2009 to relax existing 'point-to-point' restrictions so that several terminal points can be served (so long as such service remains related to the client's main business)

This would require an amendment to PP 56/2009

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Amending point to point rule: rationale



The point to point rule significantly restricts the usefulness of a special railway, making it more difficult to justify the considerable initial investment

The point to point rule is not a requirement of the Railway Law

It is reasonable for special railway clients to connect to more than one remote point (e.g., to a power station and a port)

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3. What happens if railways interconnect ?

For the most part, we can define what happens in a Permen by implementation of Article 374 of PP 56/2009

An amendment to Article 161(3) of PP 72/2009 would also be useful to eliminate any confusion regarding the effects of interconnection on a special railway's status



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What happens if railways interconnect

We propose that an interconnection agreement should allow the first operator to:

- access the infrastructure of the other operator for the purpose of providing services in support of the first operator's client
- arrange for the other operator (if it is a public operator) to provide services in support of the first operator's client
- grant the other operator access to the first operator's infrastructure for any purpose consistent with the other operator's business



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4. Lack of clarity over nature and ownership of special railway assets

Special railways are developed by private parties for a private purpose using only private funds

We believe there is nothing in the Railway Law or PPP regulations that requires special railways to be treated as a form of 'concession'

We propose that end-of-project-life issues be freely negotiated at the appropriate time between operator and regulator as part of the special railway license terms, from the starting point that the assets are to be treated as private property

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5. Complexity of the licensing system



The procedures for obtaining licences are overly complex

We think they can be simplified and streamlined without reducing their effectiveness or limiting regional autonomy

Much of this simplification can be done through a Permen, though minor amendments to PP 56/2009 would also be desirable.

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Proposals to Simplify the licensing system

Planning issues should be addressed and resolved at in-principle approval stage (not later)

Reviews by various levels of government should be coordinated and conducted simultaneously to avoid delays and inconsistent decisions

Operator should be able to 'pre-qualify' itself during construction stage to ensure that operating permit will be issued later, subject only to meeting clear conditions

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6. Coordination between special railways and other regulatory licensing schemes

Proposed reforms includes option for special railway client to use an affiliate as operator (to facilitate financing)

Restrictions on affiliated transactions in certain industries (e.g., mining) must be taken into account

If special railway licensee must also obtain other licenses, proper coordination among relevant agencies must be ensured to avoid delays and inconsistent results

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Conclusions

The objective of increased private sector involvement is not being achieved because of a number of constraints

We believe these constraints can effectively be addressed through regulatory provisions within the current Railway Law

Most can be achieved through a new Permen, though targeted amendments of the existing PP 56/2009 and PP 72/2009 would also be desirable.

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The way forward

The consultant team's proposals for reform build on the outputs of Phase I and Phase II and are based on initial discussions with, and feedback from, MoT and other stakeholders

Inter-ministerial working group established to coordinate government input to the process and achieve broad consensus

Close liaison throughout Phase III between IndII consultant team and the MoT

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Perkeretaapian Khusus Fase III



Pendekatan yang diusulkan terhadap perubahan peraturan

Jakarta 10 Juni 2011



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Rasional penggunaan Perkeretaapian Khusus

1. Perekonomian di Indonesia kedepannya diproyeksikan untuk tumbuh 7-8% per tahun
2. Diharapkan Indonesia akan dapat menjadi negara maju
3. Pertumbuhan ekonomi yang pesat akan menyebabkan jalan raya tidak mampu lagi menampung 90% beban pergerakan ekonomi
4. Kereta api dapat secara lebih efisien melakukan proses pengangkutan barang-barang dan komoditas

2

Koridor-koridor Ekonomi

1. Pemerintah membuat rencana induk untuk enam koridor ekonomi
2. Sebagian besar kegiatan ekonomi untuk koridor tersebut adalah bersifat komoditas dan sisanya terbagi dalam bidang industri, perkebunan dan pertambangan
3. Infrastruktur adalah inti dari koridor ekonomi
4. Perkeretaapian dapat menjadi tulang punggung pergerakan ekonomi dari koridor-koridor ekonomi tersebut


3


Beban Pembiayaan

1. Hanya 10% dari biaya pembangunan koridor akan dibiayai oleh pemerintah
2. 55% membutuhkan pembiayaan dari pihak swasta
3. BUMN dan lainnya diperkirakan akan membiayai sekitar 35%
4. Perkeretaapian Khusus, yang merupakan inisiatif pembiayaan swasta untuk membangun pengangkutan barang seharusnya dapat menjadi pilihan yang tepat


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Perubahan Peraturan

1. UU Nomor 23/2007 memberikan mandat pembangunan Perkeretaapian Khusus
2. Untuk dapat menarik investasi swasta di Perkeretaapian Khusus pemerintah perlu melakukan perubahan terhadap beberapa peraturan
3. Peraturan-peraturan yang ada (antara lain PP56, PP 72) idealnya perlu diubah
4. Walaupun Perpres 13/2010 mengatur mengenai 'unsolicited project' namun tidak meliputi proyek yang dibangun dengan pembiayaan swasta


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Gambaran Umum Program Perkeretaapian Khusus IndII

1. Mengidentifikasi kebutuhan untuk perubahan pada peraturan sektor perkeretaapian untuk mendorong investasi sektor swasta (Fase I – awal 2010)
2. Usulan kebijakan khusus dan perubahan peraturan yang diperlukan untuk mencapai hasil yang diinginkan (Fase II – akhir 2010)
3. Membantu Pemerintah Indonesia untuk mengembangkan dan menerapkan reformasi peraturan (Fase III – April sampai Juni 2011).

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Tujuan Utama Fase III

1. Mengklarifikasi dan memperbaiki ketentuan Perkeretaapian Khusus saat ini melalui rancangan Peraturan Menteri (Permen)
2. Mengembangkan kesempatan investasi perkeretaapian melalui perubahan yang ditargetkan terhadap Peraturan Pemerintah yang ada saat ini (PP 56/2009 dan PP 72/2009)


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Pengaturan Waktu Fase III

1. Usulan rancangan awal diajukan pada tanggal 21 April 2011
2. Laporan awal diselesaikan pada tanggal 26 April 2011
3. Rancangan usulan peraturan diajukan pada tanggal 13 Mei 2011
4. Rancangan akhir usulan peraturan akan diajukan pada tanggal 17 Juni 2011
5. Laporan teknis akhir akan diajukan paling lambat akhir Juni


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Rasional untuk Mendukung Pertambahan Investasi Swasta di bidang Perkeretaapian Khusus

1. Pemerintah tidak akan membangun perkeretaapian yang hanya menguntungkan satu atau sejumlah kecil pihak swasta dengan menggunakan uang rakyat
2. Apabila pihak swasta bermaksud menggunakan dana sendiri untuk memenuhi kebutuhan sarana infrastruktur mereka, maka Pemerintah seharusnya mendukung langkah tersebut




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Rasional untuk Mendukung Pertambahan Investasi Swasta di bidang Perkeretaapian Khusus

1. Adanya infrastruktur baru akan memberikan dampak positif pada perkembangan daerah dan nasional
2. Untuk menarik investasi dalam jumlah yang besar yang dibutuhkan, Pemerintah harus memberikan kejelasan bahwa proyek dapat dioperasikan sesuai dengan tujuannya untuk waktu yang lama



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Kendala Utama

1. Kurangnya kejelasan mengenai siapa yang bisa menyelenggarakan perkeretaapian khusus
2. Pembatasan terhadap lingkup perkeretaapian khusus
3. Ketidakpastian mengenai interkoneksi
4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset-aset suatu perkeretaapian khusus
5. Kerumitan sistem perizinan
6. Kurangnya koordinasi antara perkeretaapian khusus dan skema perizinan peraturan lain

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Kendala Utama

1. Kurangnya kejelasan mengenai siapa yang bisa menyelenggarakan perkeretaapian khusus

Hal ini mempengaruhi keinginan investor untuk berinvestasi dan hambatan bagi administrator untuk menerbitkan izin

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Kendala Utama



2. Keterbatasan lingkup perkeretaapian khusus

Peraturan ‘titik ke titik’ (Pasal 350 PP56/2009) membatasi kegiatan perkeretaapian khusus hanya pada daerah yang merupakan daerah usaha pokok dan pada satu titik di daerah penunjang

Peraturan “satu pelanggan” menghalangi perkeretaapian khusus untuk melayani satu kelompok yang terdiri dari industri yang sejenis

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Kendala Utama

3. Ketidakpastian mengenai interkoneksi

Terdapat kekhawatiran bahwa apabila perkeretaapian khusus terinterkoneksi dengan perkeretaapian khusus lainnya atau dengan perkeretaapian umum, akan berdampak negatif pada hak para investor. Hal ini menghambat pembuatan jaringan perkeretaapian yang efisien.

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Kendala Utama

4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset-aset suatu perkeretaapian khusus

Tidak terdapat kejelasan apakah suatu perkeretaapian khusus diperlakukan sebagai suatu konsensi (mendapatkan suatu keistimewaan dari pemerintah) atau merupakan bentuk kepemilikan swasta yang diatur

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Kendala Utama

5. Kerumitan sistem perizinan

Proses untuk mendapatkan seluruh izin yang diperlukan berbelit-belit dan memakan waktu

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Kendala Utama

6. Kurangnya koordinasi antara perkeretaapian khusus dan ketentuan perizinan peraturan lain

Koordinasi yang efektif antara perizinan perkeretaapian khusus dengan ketentuan perizinan peraturan lain (contoh, pertambangan, pertanian) harus diatur untuk menghindari keterlambatan atau hasil yang tidak konsisten

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Solusi yang Diusulkan

Permen baru akan memperjelas Undang – Undang Perkeretaapian dan Peraturan Pemerintah yang ada saat ini (PP 56 and PP 72)

Beberapa perubahan kecil terhadap peraturan pemerintah yang ada saat ini juga sebaiknya dilakukan tetapi tidak sepenuhnya diperlukan untuk menerapkan Permen yang diusulkan

Tidak diperlukan perubahan terhadap UU Perkeretaapian – seluruh peraturan yang diusulkan konsisten dengan UU Perkeretaapian

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1. Kurangnya kejelasan mengenai siapa yang dapat menyelenggarakan Perkeretaapian Khusus

Permen untuk menjelaskan secara lebih akurat mengenai hubungan yang diperbolehkan antara penyelenggara dan usaha yang ditunjangnya



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1. Kurangnya kejelasan mengenai siapa yang dapat menyelenggarakan Perkeretaapian Khusus



Diusulkan untuk Permen memperbolehkan usaha pokok:

- Merupakan badan usaha yang sama dengan penyelenggara
- Merupakan badan usaha terpisah yang memiliki kendali terhadap atau berada di bawah kendali yang sama dengan penyelenggara, atau
- Merupakan badan usaha terpisah yang mempunyai suatu perjanjian jangka panjang yang eksklusif dengan satu penyelenggara yang terdedikasi (yang tidak terafiliasi)




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1. Kurangnya kejelasan mengenai siapa yang dapat menyelenggarakan Perkeretaapian Khusus

“Kendali” dapat diartikan secara luas untuk meliputi kepemilikan atas mayoritas saham dengan hak suara atau kemampuan untuk menunjuk atau mengganti mayoritas direksi perseroan



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1. Rasional

Terdapat contoh di dunia internasional untuk ‘satu konsumen’ dimana penyelenggara perkeretaapian merupakan anak perusahaan atau perusahaan terkait (contohnya jalur Pilbara di Australia) tetapi juga dapat berdasarkan perjanjian dengan perusahaan-perusahaan yang tidak terkait (contohnya US ‘short’ lines, Queensland coal railways)

Pengaturan ‘satu konsumen’ di dalam UU Perkeretaapian Indonesia mengarahkan kekuatan negosiasi sepenuhnya di tangan konsumen (dan bukan di penyelenggara)

Kami berpendapat bahwa perjanjian dapat dan seharusnya secara bebas dinegosiasikan tanpa perlu pengawasan mutlak dari Pemerintah



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2. Pembatasan terhadap lingkup perkeretaapian

Kami mengusulkan tiga solusi terhadap masalah ini

- Memberikan definisi terhadap 'klien' (pengguna) untuk memperbolehkan beberapa pengguna tergabung dalam bentuk konsorsium
- Menjelaskan peraturan interkoneksi
- Melonggarkan peraturan titik-ke-titik

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Definisi klien

Memberikan definisi terhadap klien Perkeretaapian Khusus untuk meliputi satu badan usaha atau satu konsorsium yang dapat terdiri dari badan-badan hukum yang terafiliasi atau tidak saling terafiliasi usaha baik yang melakukan kegiatan usaha yang sama atau melakukan usaha secara bersama-sama

Adalah lebih baik apabila definisi ini dapat dimasukkan ke dalam PP 56/2009

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Rasional dari penggunaan Konsorsium



Yang menjadi perhatian utama dari Departemen Perhubungan seperti halnya dalam hal terjadi perlakuan yang tidak adil terhadap klien-klien kecil sebagai akibat diperbolehkannya lebih dari satu badan usaha untuk mendirikan satu perkeretaapian khusus

Menurut kami permasalahan tersebut dapat secara efektif diselesaikan apabila satu konsorsium terdiri dari lebih dari satu klien



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Rasional dari penggunaan Konsorsium

Peraturan konsortium berarti lebih dari satu konsumen harus bertindak sebagai satu badan usaha yang mempunyai tujuan yang sama sehingga mengurangi kemungkinan terjadinya diskriminasi

Resiko sehubungan dengan perlakuan yang tidak adil dapat diselesaikan secara efektif di dalam perjanjian konsortium

Apabila ketentuan-ketentuan di dalam kontrak dianggap tidak cukup, para pihak mempunyai hak lain sebagaimana diatur di dalam undang-undang anti monopoli



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Menjelaskan peraturan interkoneksi

Menjelaskan peraturan interkoneksi berdasarkan Pasal 374 PP 56/2009 untuk memungkinkan beberapa penyelenggara perkeretaapian khusus (masing-masing menunjang kliennya) untuk berbagi infrastruktur dan lokomotif, gerbong tanpa kehilangan status sebagai perkeretaapian khusus

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Rasional dari peraturan interkoneksi


Apabila perkeretaapian khusus dimungkinkan untuk terinterkoneksi dan berbagi fasilitas (berdasarkan perjanjian) akan dapat meningkatkan efisiensi, mengurangi biaya dan mencegah persaingan tidak sehat


Masing-masing penyelenggara tetap melayani kliennya tetap kerjasama antara penyelenggara diperbolehkan

Konsep ini secara efektif melaksanakan hal-hal utama dari konsep 'perkeretaapian umum terbatas' (yang diusulkan dalam Fase II) dengan cara pelaksanaan yang sepenuhnya konsisten dengan peraturan Perkeretaapian Khusus yang ada.


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Mengubah peraturan titik ke titik


Merubah pasal 350 PP 56/2009 untuk melonggarkan batasan ‘titik ke titik’ yang ada saat ini sehingga beberapa titik stasiun dapat ditunjang (sepanjang pelayanan tersebut tetap berhubungan dengan usaha pokok klien)

Hal ini memerlukan perubahan terhadap PP 56/2009


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Rasional Mengubah peraturan titik ke titik

Pengaturan ini sangat membatasi kegunaan dari perkeretaapian khusus, sehingga menyulitkan dalam mendapatkan investasi

Pengaturan ini tidak diatur di dalam UU Perkeretaapian

Adalah masuk akal untuk perkeretaapian khusus untuk terhubung dengan satu atau lebih titik di luar daerah usaha pokok (contohnya terhubung dengan pembangkit list dan pelabuhan)

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3. Apa yang terjadi apabila perkeretaapian terinterkoneksi

Untuk sebagian besar, kita dapat menjelaskan apa yang terjadi di dalam Permen dengan melaksanakan ketentuan Pasal 374 dari PP 56/2009

Perubahan terhadap Pasal 161(3) PP 72/2009 juga akan berguna untuk menghilangkan keraguan mengenai akibat dari interkoneksi terhadap status dari perkeretaapian khusus

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Apa yang terjadi apabila perkeretaapian terinterkoneksi

Kami mengusulkan agar perjanjian interkoneksi memperbolehkan penyelenggara pertama untuk :

- memiliki akses terhadap infrastruktur penyelenggara lain dengan tujuan untuk menyediakan layanan dalam menunjang klien penyelenggara pertama
- Mengatur penyelenggara lain (apabila penyelenggara umum) untuk menyediakan layanan yang menunjang klien penyelenggara pertama
- Memberikan akses terhadap penyelenggara lain untuk menggunakan infrastruktur dan penyelenggara pertama untuk tujuan apapun yang konsisten dengan usaha penyelenggara lain

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4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset perkeretaapian khusus



Perkeretaapian khusus dibangun oleh pihak swasta untuk tujuan pribadi dengan menggunakan hanya dana pribadi

Kami berpendapat bahwa baik di UU Perkeretaapian atau peraturan infrastruktur (PPP) tidak terdapat pengaturan bahwa perkeretaapian khusus dianggap sebagai suatu bentuk 'konsensi'

Kami mengusulkan bahwa hal-hal yang berhubungan dengan apa yang akan terjadi setelah proyek berakhir untuk secara bebas dinegosiasikan pada waktu yang pantas antara penyelenggara dan pemerintah sebagai bagian dari ketentuan perizinan, dengan pemahaman bahwa aset untuk diperlakukan sebagai milik pribadi

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5. Kerumitan sistem perizinan

Prosedur untuk mendapatkan izin terlalu berbelit-belit

Kami berpendapat bahwa proses tersebut dapat disederhanakan dan dipersingkat tanpa mengurangi efektifitas atau membatasi otonomi daerah

Banyak dari penyederhanaan ini dapat dilakukan melalui Permen, walaupun perubahan kecil terhadap PP 56/2009 juga diinginkan.

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Usulan untuk menyederhanakan sistem perizinan

Masalah perencanaan harus dibahas dan diselesaikan pada tahap persetujuan prinsip (bukan pada tahap selanjutnya)

Pemeriksaan dari berbagai tingkat pemerintahan harus dikoordinasikan dan dilakukan secara bersamaan untuk menghindari keterlambatan dan keputusan yang tidak konsisten

Penyelenggara harus dapat melakukan 'pre-kualifikasi' atas statusnya sendiri selama tahap pembangunan untuk memastikan bahwa izin operasi akan diterbitkan kemudian, apabila telah memenuhi persyaratan yang jelas

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6. Koordinasi antara perkeretaapian khusus dan ketentuan perizinan peraturan lain


Usulan yang diajukan antara lain pilihan untuk klien perkeretaapian khusus menggunakan afiliasi sebagai penyelenggara (untuk mempermudah pembiayaan)


Larangan untuk transaksi terafiliasi dalam industri tertentu (contoh, pertambangan) harus dipertimbangkan

Apabila pemegang izin perkeretaapian khusus juga harus mendapatkan izin lain, koordinasi yang efektif antar institusi terkait harus dipastikan untuk menghindari keterlambatan dan keputusan yang tidak konsisten


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Kesimpulan


Tujuan meningkatkan keterlibatan sektor swasta belum dapat dicapai karena sejumlah kendala


Kami berpendapat bahwa kendala-kendala ini dapat secara efektif diatasi melalui pembuatan ketentuan peraturan-peraturan yang didasarkan pada Undang – Undang Perkeretaapian yang berlaku saat ini

Sebagian besar dapat dicapai melalui Permen baru, walaupun beberapa perubahan terhadap PP 56/2009 dan PP 72/2009 yang berlaku saat ini juga sebaiknya dilakukan.


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Langkah selanjutnya

Proposal dari tim konsultan untuk reformasi peraturan didasarkan hasil yang diperoleh dari Fase I dan Fase II dan didasarkan pada diskusi awal dengan dan tanggapan dari Kementerian Perhubungan dan stakeholder lain

Kelompok kerja antar kementerian dibentuk untuk mengkoordinasikan masukan pemerintah terhadap proses dan mencapai kesepakatan

Pembahasan yang terus menerus dalam Fase III ini antara tim konsultan InDII dengan Kementerian Perhubungan

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ANNEXE 6: MINUTES AND OTHER MATERIALS FROM SECOND FGD

Minutes of Meeting – 2nd FGD – Special Railway

Date : 21 June 2011

Time : 9.00 – 12.00

Venue : Alila Hotel -Jakarta

Attendees:

The second FGD was attended by 55 people from various ministries and the private sector. The majority of attendees were from the private sector, including executives of the entities wishing to develop a Special Railway (SR).

Opening Speech by Mr. Asril Syafei – The Director of Railway Traffic and Transportation of the Directorate General of Railways

Mr. Asril opened the second FGD and briefly explained that there were already Laws and Government Regulations (PP) on Special Railways, but no ministerial regulation has been issued. Regarding the Ministerial Regulation (Permen), the government, through the Ministry of Transportation in cooperation with the IndII consultancy team, would further explain the proposed draft Permen. He also enlightened the audiences on the TransAsia Railway meeting he attended in Bangkok, in which the attending countries agreed to develop and use a joint network. In addition, it was agreed on the meeting that goods transportation by railway is faster than transportation by ship. Therefore, railway transportation must be seen as the only solution of transportation and not an alternative.

Presentation by IndII Team

Mr. Suyono stated that the existence of Permen is important to private investment in Indonesia. Mr. Efi continued by providing a brief explanation of IndII's program and Phase 3 of the Special Railway project.

Guy Des Rosiers delivered a presentation on the draft Permen proposed by the IndII team in English, while the materials were in Bahasa Indonesia. Prior to the presentation, he stated that after the first FGD, the team had held a meeting and discussion with various parties and stakeholders, resulting in positive inputs. The materials and explanations to be delivered in this second FGD were based on the discussion.

The presentation lasted approximately 35 minutes.

Mr. Suyono added that in this meeting, the issue regarding the amendment of the PP was not going to be discussed yet, and more likely the focus would be on the basic principles of the Permen. The Permen was something new, and therefore might lead to different points of view. However, the consultancy team, government and interested parties had agreed on several issues. The two main issues that needed to be discussed were 'point-to-point' and interconnection rules. He hoped that a solution to these issues could be found since the regulations on special railways were considered urgent.

Discussion Session

1. Mr. Robert Head of Energy and Mining Services Office, South Sumatra Province

South Sumatra has 48% of the national coal reserves or more than 22 billion tons, while production is only 15 million. The main issue was the transportation of coal which is currently served only by trucks, resulting on traffic jams. Options available are to build private roads or railways. If the Permen was implemented, these options would no longer be available. He referred to the existing permit, namely the IUP. There are two kinds of IUP; IUPs issued by the regent/mayor which only permit coal to be transported and sold in the issuing area, and IUPs for transportation and sales under which coal can be transported and sold outside of the issuing area.

For example, PT Bukit Asam currently has more than one IUP issued by the Regent or Minister. The only coal that can be transported out of the mining area is the one produced under the IUP issued by the Minister. Another example is Primanaya whose IUP was issued by the Lahat Regent. Primanaya may not transport or sell its coal outside of the Lahat Regency. He stated that coordination on regulations is needed to avoid restrictions being placed on implementation.

He argued that there was no way the SR used only to carry coal under one IUP issued by the Minister. The President of the Republic of Indonesia and the President of the Republic of India had witnessed the signing of the SR agreement that is expected to be implemented soon. Coordination was needed to make everything go smoothly.

Mr. Suyono concluded from Mr. Robert's opinion that Mr. Robert did not object to the SR. Guy Des Rosiers stated that he understood the issues regarding the regulations issued by other ministries, especially in the mining sector. He then said that not all the issues could be resolved through the Permen, and as stated previously, effective coordination was badly needed, especially in the mining sector to coordinate regarding the regulations issued by ESDM.

2. Mr. Joni Gondo – Priyamanaya

His questions were as follows:

Regarding to the interconnection between an SR and a PR and the purpose of access to a PR, was there any plan to change the infrastructure as there were difference in the specifications?

In relation to the procedures for obtaining a license (PP 56/2009), was it possible to grant certification or authorization to the regional government; even if the licenses are legalized by the Minister?

A SR is evaluated once every 5 years and can be converted to a PR – the question is which concept (BOT or BOO) should be implemented so that, in the future, the development of SR can also stimulate regional development?

David Lupton from the consultancy team said that the Permen will not regulate differences in specifications between an SR and a PR. Guy Des Rosiers argued in favour of addressing technical issues on a case-by-case basis (depending on the intended use of the SR). Regarding the interconnection, the team agreed that it would be possible to interconnect a PR and an SR even if this issue had not been resolved yet.

With regard to the role of the regional government, in principle licensing was to be delegated to regional governments, following the team's discussions with the MOT.

On BOT or BOO, the team argued that basically, a SR is not a concession and a transfer of assets is not supposed to happen automatically after it is no longer in use or the license expires. Any transfer should be negotiated among the interested parties and the land rights and residual value of the assets should be considered.

Bpk. Asril added with regard to the interconnection that there were several technical restrictions, but they should not be a problem since the development of technology would enable technical compatibility. With regard to licensing, PP 56/2009 clearly states that it is under the regional government's authority. A recommendation is still required from the Minister as a supervisory action. About the concession, he stated that coordination with the *Badan Pertahanan Nasional* had taken place under PP 56/2009. Mr. Asril argued that option available is to wait until the issuance of the land regulations' amendments, to have a clear understanding of the land's status.

3. Mr. Ganeshan V – President Director of PT Adani Global

Mr. Ganeshan stated that Adani had signed a contract with Bukit Asam under which both parties desired to develop the SR, but still have to review other related regulations. He argued that under the Investment Law (UU 25/2007) business entities involved in a SR were clearly defined, namely limited liability companies, foreign investment companies, etc. In relation to business activities, every company states its business activities in its Articles of Association. There are many laws which regulate what a business entity should or should not do; therefore, a specific regulation was not needed.

In his opinion, the new Permen covers too many issues, and may harm Adani. A definition of a business entity is not needed, since it is defined in other regulations. Concern as to which SR could lead to the possibility of discrimination is somewhat confusing since their intention is only to develop the SR specifically from the Bukit Asam coal mine for export purpose. Adani also questioned why SR had to be treated specially. For example, nowadays coal is being transported by barge; why do the regulations on SR not apply to owners of barges. The MOT and Permen are not supposed to regulate matters regarding business entities and their main activities.

Mr. Suyono and Guy Des Rosiers stated that in fact, the purpose of the Permen was different. The purpose of proposed Permen is not to define what is a business entity, but to spell out the possible relationships between SR operator and SR client as broadly as possible so that the parties can secure funding. The team had tried to accommodate every structure suggested by the parties, given the constraints provided under the Law. The intention was not to limit the definition of a business entity or its main activities, but to provide flexibility within the Law.

Mr. Robert from the Energy and Mining Services Office, South Sumatra Province, added that PT BA could not develop an SR since it only has one IUP issued by the Minister and it cannot transport and sell coal for export purpose outside its issuing area. Mr. Robert also pointed out the prohibition against an IUP holder using an affiliate.

Mr. Israful from MOT stated that an IUP should not be seen from a technical point of view. If ESDM determined that there are two main types of IUP, then the MOT should consider its main activities legal as long as the IUP was obtained under the prevailing laws. He further stated that the background to the current regulation was that transportation is at the core of the nation's economy. A company should not let the transportation owner control the mining. He then asked why not become a PR? If this is needed, the regulations on PRs could also be amended.

Mr. Ganeshan from Adani responded to the question and explained why Adani is not investing in PRs. This was because the SR provides a sustainable and significant source of revenue with economic feasibility. This is seen to comfort lenders because source of income to repay the debt is assured. The same would not be the case if it were a PR, given the fact that it would be more difficult to secure funding unless it was operated by the Government.

4. Mr. Rudiantara – PT BATR

According to Bpk. Rudiantara, there have been several positive developments, although a few issues remain to be resolved. He thanked MOT, IndII and other parties involved in the regulations reformation. He proposed that the concept of a commercial operation be included in the Permen since the lenders will consider the cash flow of their clients.

He suggested including a provision under which operators can determine the commercial aspects (ie fees) with their clients on a business-to-business basis so that operators can enter into agreements that are going to be used as a base to secure funding. Since the commercial aspects are not regulated under the Permen, Bpk. Rudiantara argued that therefore this is prohibited. The key is the use of 'can' in the provision.

5. Mr. Hari – MEC

Regarding the issue of affiliation raised by Mr. Robert, Mr. Hari argued that there is some exclusion in the provisions of the ESDM, namely exclusions with Ministerial approval. The prohibition against the use of affiliates was based on the ESDM's concerns regarding transfer pricing.

He also suggested harmonization with BKPM on the definition of business activities, including with MOLHR to ensure that ESDM and MOLHR have the same perception on determining business activities classifications.

6. Priyamanaya

She asked if the Government wished to establish a special body as a regulator of transportation sector as in the Oil and Gas sector (BP Migas). As to electric power, even though there is no regulator yet, electric power tariffs are decided by the Minister.

Mr. Rudiantara responded by stating his opinion on the electric power tariffs being determined by the Minister. In his opinion, electric power and transportation are quite different. Electric power relates to the public interest and therefore is subsidized by Government. Establishing a regulatory body to regulate tariffs might be relevant if applied to mass transport railways, while it would be better for SR to operate on a 'business-to-business' basis.

Mr. Asril responded that for SRs, the establishment of a regulatory body should wait until there are many operators, to comply with the purpose of the Railway Law which is to establish multiple operators. For example, he explained that Japan has 200 operators and Korea has 9 operators. So far, he reckoned that this could still be covered by the MOT and Railways Directorate.

Closing and Conclusion

David Lupton stated that what needed to be done was to study the existing regulations to determine whether the purposes of the Permen can be achieved through these regulations.

The team thanked the participants for their positive inputs and hoped that the IndII team could provide the government with useful inputs for their consideration.

Bpk. Suyono stated that, based on the existing regulations, PRs will develop in the next 10 – 15 years. Waiting for 10-15 years until the private sector can enter the PR business

is somehow unacceptable. Therefore, the development of SRs is the only opportunity the private sector has to get involved in the railway sector. Therefore, a regulation needed to be issued to be used as guidelines so that the private sector can enter the SR sector.

Mr. Asril closed the second FGD by thanking the attendees and stating that further discussions as a continuation of this second FGD was needed, one of them to be a working group meeting with several government institutions.

Berita Acara-FGD Kedua –Perkeretaapian Khusus

Tanggal : 21 Juni 2011

Waktu : 9.00 – 12.00

Tempat : Alila Hotel -Jakarta

Peserta:

FGD kedua dihadiri oleh 55 peserta dari berbagai kementerian dan pihak swasta. Dalam FGD kedua ini banyak dihadiri oleh pihak swasta termasuk diantaranya dihadiri oleh beberapa pimpinan dari pihak swasta yang bermaksud membangun perkeretaapian khusus.

Kata Pembukaan oleh Bapak Asril Syafei – Direktur Lalu Lintas dan Angkutan Kereta Api, Direktorat Jenderal Perkeretaapian

Pak Asril membuka FGD kedua dan dengan singkat memberikan sambutan bahwa sehubungan dengan Perkeretaapian Khusus (PK) sudah ada Undang-undang dan Peraturan Pemerintah tetapi belum terdapat Peraturan Menteri (Permen). Sehubungan dengan Permen, pemerintah dalam hal ini Kementerian Perhubungan (Kemenhub) dibantu oleh tim konsultan IndII yang akan lebih lanjut memaparkan mengenai usulan rancangan Permen. Beliau juga menyampaikan mengenai pertemuan Trans-Asia Railway yang beliau hadiri dimana negara-negara sepakat untuk membuat dan menggunakan jaringan bersama. Di dalam pertemuan tersebut disampaikan bahwa pengangkutan barang melalui kereta api lebih cepat dari melalui kapal. Oleh karena itu beliau berpendapat bahwa angkutan kereta api seharusnya bukan sebagai alternatif pengangkutan tapi merupakan solusi.

Presentasi oleh Tim IndII

Sebelum tim konsultan memaparkan penjelasan mengenai usulan regulasi terlebih dahulu Pak Suyono dari tim konsultan IndII menyampaikan terlebih dahulu bahwa pembuatan dari Permen sangat penting untuk mendorong 'private investment' di Indonesia. Pak Efi melanjutkan dengan memberikan penjelasan singkat mengenai program IndII dan phase III dari proyek Perkeretaapian Khusus ini.

Presentasi mengenai rancangan regulasi (Permen) yang diajukan oleh tim IndII diberikan oleh Guy Des Rosiers. Presentasi diberikan dengan menggunakan bahasa inggris dimana materi presentasi disajikan dalam bahasa Indonesia. Pertama kali beliau menyampaikan bahwa setelah FGD yang pertama pada tanggal 20 Mei 2011, tim telah melakukan pertemuan-pertemuan dan pembahasan lebih lanjut dengan berbagai pihak baik dari kalangan pemerintah maupun swasta dan telah mendapatkan masukan-masukan yang menarik dan sangat berguna dalam proses pembuatan rancangan Permen. Materi presentasi dan penjelasan yang akan diberikan di dalam FGD kedua ini adalah didasarkan antara lain pembahasan-pembahasan yang telah dilakukan tersebut.

Presentasi berlangsung selama kurang lebih 35 menit.

Sebelum memasuki sesi diskusi Pak Suyono lebih lanjut menyampaikan sebagai tambahan bahwa untuk saat ini belum membahas soal perubahan peraturan pemerintah tapi akan lebih fokus pada prinsip-prinsip dasar dari pembuatan Permen ini. Permen ini adalah suatu hal yang baru sehingga dapat dimengerti apabila terdapat perbedaan pendapat. Akan tetapi untuk sebagian besar hal pada dasarnya antara tim konsultan, pemerintah dan pihak-pihak yang berkepentingan telah terdapat kesepakatan dan persamaan pandangan. Dua hal yang utama yang masih perlu dibahas adalah mengenai ketentuan 'titik ke titik' dan juga mengenai interkoneksi. Perbedaan pendapat ini akan dibahas lebih lanjut sehingga diharapkan dapat mencapai titik temu karena keberadaan peraturan perkeretaapian khusus sudah menjadi hal yang sangat diperlukan.

Sesi Diskusi

1. Bapak Robert Kepala Dinas pertambangan dan energi propinsi Sumatera Selatan

Sumatera Selatan memiliki 48% cadangan batubara nasional atau lebih dari 22 milyar ton. Sementara produksi batubara saat ini baru mencapai 15 juta ton. Permasalahan utama terletak di sarana transportasi yang saat ini dilakukan hanya dengan truk sehingga menimbulkan kemacetan yang luar biasa di jalan raya. Pilihan yang ada adalah dengan membangun jalan khusus atau kereta api. Beliau mengungkapkan kekhawatirannya bahwa apabila Permen diberlakukan maka tidak akan bisa diterapkan. Menurut beliau hal ini disebabkan karena sistem perizinan yang berlaku sekarang adalah IUP dimana terdapat dua jenis yaitu IUP operasi produksi dan IUP pengangkutan dan penjualan. IUP dikeluarkan oleh tiap-tiap tingkatan pemerintah. IUP yang dikeluarkan oleh bupati/walikota atau gubernur batubara hanya boleh diangkut dan dijual di wilayah dari otoritas yang menerbitkan IUP. Dalam hal batubara untuk diangkut dan dijual keluar dari daerah IUP maka diperlukan suatu IUP khusus pengangkutan dan penjualan.

Sebagai contoh adalah PT Bukit Asam (PT BA), PT BA saat ini memiliki lebih dari satu IUP yang antara lain dikeluarkan oleh bupati dan ada juga yang dikeluarkan oleh menteri. Hanya batubara dari IUP yang dikeluarkan oleh Menteri yang dapat dibawa dan dijual keluar dari daerah kabupaten. Contoh lain adalah Primanaya yang menurut beliau hanya mempunyai IUP yang dikeluarkan oleh bupati Lahat. Beliau berpendapat bahwa Primanaya tidak boleh membawa dan menjual batubara keluar dari kabupaten Lahat. Beliau menegaskan sehubungan dengan hal-hal tersebut maka perlu terdapat koordinasi terutama dari segi pembuatan peraturan-peraturan sehingga Permen perkeretaapian khusus tidak mendapat halangan dalam pelaksanaannya.

Menurut beliau tidak mungkin membangun perkeretaapian khusus hanya untuk mengangkut batubara dari satu wilayah IUP yang dikeluarkan oleh Menteri. Beliau lebih lanjut menyampaikan bahwa Presiden RI dan Presiden India telah menyaksikan penandatanganan suatu memorandum of understanding mengenai perkeretaapian

husus sehingga diharapkan penandatanganan ini dapat dilaksanakan. Untuk dapat berjalan dan terlaksana perlu diadakan koordinasi.

* * *

Pak Suyono dalam merangkum pendapat Pak Robert memahami bahwa Pak Robert pada prinsipnya tidak mempunyai keberatan dengan pembuatan regulasi mengenai perkeretaapian khusus. Pak Guy lebih lanjut menyampaikan bahwa tim konsultan memahami permasalahan yang dihadapi sehubungan dengan peraturan-peraturan dari kementerian lain terutama sehubungan dengan pertambangan. Beliau menyampaikan bahwa kemampuan untuk menyelesaikan semua permasalahan melalui Permen adalah sangat terbatas. Perlu dilakukan koordinasi dan hal ini telah disampaikan oleh tim konsultan bahwa koordinasi yang efektif sangat diperlukan. Koordinasi dengan Kementerian Pertambangan menjadi hal yang pertama untuk dilakukan terutama sehubungan dengan peraturan ESDM yang telah dikeluarkan.

2. Bapak Joni Gondo– Priyamanaya

Pertanyaan yang beliau ajukan adalah sebagai berikut:

Sehubungan dengan interkoneksi antara perkeretaapian khusus dan perkeretaapian umum, untuk akses2 perkeretaapian umum apakah ada rencana untuk mengubah infrastruktur karena terdapat perbedaan spesifikasi.

Sehubungan dengan proses perizinan (PP 56/2009) walaupun perizinan disahkan oleh Menteri apakah kelembagaan di pemerintah daerah dalam hal ini termasuk sertifikasi /kompetensi apakah juga akan diberikan kepada daerah PK dievaluasi 5 tahun sekali dan dapat ditingkatkan status menjadi perkeretaapian umum – pertanyaan beliau apakah konsep BOT atau BOO yang akan diterapkan dalam perkeretaapian khusus sehingga kedepannya pertumbuhan perkeretaapian khusus dapat membantu pertumbuhan daerah juga?

* * *

David Lupton dari tim konsultan menyampaikan bahwa Permen tidak membahas mengenai perbedaan spesifikasi antara perkeretaapian khusus dengan perkeretaapian umum. Guy lebih lanjut berpendapat bahwa mengenai permasalahan yang berhubungan dengan teknis seharusnya dapat diselesaikan kasus per kasus. Secara umum tim berpendapat bahwa seharusnya dimungkinkan untuk melakukan interkoneksi antara perkeretaapian khusus dengan perkeretaapian umum walaupun pendapat ini belum menjadi kesepakatan bersama.

Sehubungan dengan peranan pemerintah daerah, pengertian tim berdasarkan diskusi dengan MOT bahwa pada prinsipnya sesuai dengan semangat desentralisasi untuk perizinan didelegasikan kepada pemerintah daerah bila pembangunan perkeretaapian khusus tersebut dibangun di tataran pemerintah daerah.

Mengenai BOT atau BOO tim berpendapat bahwa pada prinsipnya perkeretaapian khusus bukanlah merupakan konsesi dan seharusnya tidak terjadi pengalihan secara otomatis terhadap asset dari perkeretaapian khusus setelah berakhirnya perizinan atau penggunaan. Pengalihan harus didasarkan pada persetujuan para pihak dengan mempertimbangkan hak atas tanah yang ada termasuk residual value.

Pak Asril memberikan tambahan mengenai interkoneksi bahwa memang terdapat pembatasan-pembatasan dalam hal-hal teknis tetapi seharusnya tidak menjadi penghalang karena perkembangan teknologi akan memungkinkan terjadinya compability secara teknis. Mengenai perizinan di dalam PP 56/2009 telah dengan jelas menyebutkan kewenangan pemerintah daerah. Rekomendasi dari Menteri tetap diperlukan sebagai bentuk pengawasan. Sehubungan dengan konsensi, beliau menyampaikan bahwa dalam pembuatan PP 56/2009 telah berkonsultasi dengan Badan Pertanahan Nasional. Pak Asril berpendapat bahwa salah satu pilihan adalah untuk menunggu sampai dikeluarkan perubahan peraturan mengenai pertanahan (yang saat ini sedang dibuat) untuk mengetahui secara lebih jelas mengenai status tanah.

3. Pak Ganeshan V - Presiden Direktur PT Adani Global

Beliau menyampaikan bahwa Adani telah tandatangani perjanjian pengangkutan batubara dengan PT BA dan pada prinsipnya berkeinginan untuk mendorong perkeretaapian khusus tapi terbentur pada ketentuan peraturan. Sehubungan dengan pemaparan yang diberikan oleh tim konsultan, menurut beliau sudah jelas apayang dimaksud badan usaha dalam perkeretaapian khusus yaitu dengan mengacu pada Undang-undang penanaman modal (UU 25/2007) yaitu antara lain perseroan terbatas, PMA, dan lain-lain. Sehubungan kegiatan usaha maka kegiatan tersebut sudah jelas disebutkan di dalam anggaran dasar perusahaan. Sudah terdapat peraturan perundang-undangan yang mengatur mengenai apa yang dimaksud dengan badan usaha dan kegiatan pokok yang bisa dilakukan oleh badan usaha sehingga Permen tidak lagi diperlukan untuk memberikan pengaturan yang bersifat berbeda atau khusus.

Berdasarkan pemahaman beliau atas presentasi dari tim konsultan beliau berpendapat bahwa Permen baru cukup berat dan dapat merugikan terutama sehubungan dengan Adani. Secara umum badan usaha tidak perlu didefinisikan lagi karena sudah diatur di peraturan-peraturan lain. Beliau juga menyampaikan bahwa kekhawatiran bahwa perkeretaapian khusus dapat menimbulkan potensi ketidakadilan adalah membingungkan karena keinginan Adani adalah hanya untuk membangun perkeretaapian untuk mengangkut batubara dari PT BA untuk tujuan ekspor. Beliau mempertanyakan kenapa perkeretaapian khusus ini harus diperlakukan sebagai suatu hal yang aneh. Beliau mengambil contoh bahwa saat ini di Kalimantan batubara diangkut melalui tongkang kenapa pemilik tongkang tidak dikenakan ketentuan yang sama dengan perkeretaapian khusus yaitu juga harus memiliki lokasi tambang. Pada prinsipnya beliau berpendapat bahwa Kemenhub dan Permen perkeretaapian khusus seharusnya tidak menyentuh hal-hal yang berhubungan dengan badan usaha dan kegiatan pokok.

* * *

Pak Suyono dan Pak Guy menyampaikan bahwa tujuan dari Permen yang diajukan oleh tim adalah untuk memberikan kejelasan atas hubungan yang diperbolehkan sehingga para pihak dapat memperoleh pembiayaan. Tim berusaha memberikan definisi yang seluas-luasnya berdasarkan pengertian yang ada di UU perkeretaapian untuk mengakomodir stuktur yang dapat diajukan oleh berbagai pihak. Tim tidak bermaksud membatasi definisi mengenai badan usaha ataupun mengenai kegiatan pokok dan sebaliknya untuk menciptakan fleksibilitas sejauh tidak bertentangan dengan UU perkeretaapian.

* * *

Pak Robert dari Dinas pertambangan dan energi propinsi Sumatera Selatan menambahkan bahwa PT BA tidak mungkin membangun perkeretaapian khusus hal itu karena PT BA hanya mempunyai satu IUP yang dikeluarkan oleh Menteri sehingga tidak bisa membawa dan menjual batubara untuk tujuan ekspor dari wilayah wilayah IUP yang izinnya dikeluarkan oleh bupati/walikota dan/atau Gubernur. Menanggapi pertanyaan dari tim mengenai apakah larangan yang disebutkan Pak Robert diatur di dalam peraturan tertentu, beliau menyampaikan bahwa larangan tersebut diatur di dalam UU dan PP minerba. Selain itu Pak Robert menyampaikan juga larangan mengenai penggunaan afiliasi oleh pemegang IUP.

* * *

Pak Israful dari Kemenhub menyampaikan bahwa izin usaha sebaiknya jangan dilihat terlalu teknis. Apabila ESDM menetapkan bahwa ada dua izin usaha pokok maka seharusnya akan dapat diterima oleh Kemenhub sebagai kegiatan pokok yang sah selama diperoleh sesuai dengan ketentuan yang berlaku. Beliau lebih lanjut menyampaikan bahwa latar belakang peraturan-peraturan yang ada sekarang ini adalah karena pengangkutan adalah urat nadi perekonomian oleh karena itu jangan sampai pemilik usaha pengangkutan menguasai/mengendalikan pemilik tambang. Beliau juga menambahkan kalau memang di wilayah tersebut ada banyak kebutuhan pengangkutan, maka perlu dipertimbangkan untuk membangun perkeretaapian umum dibanding membangun perkeretaapian khusus. Sehubungan dengan diskusi ini, Pak Asril menanyakan kepada forum kenapa para pengusaha tidak mau melakukan investasi di perkeretaapian umum saja? Beliau berpendapat bahwa kalau memang diperlukan maka ketentuan perkeretaapian umum dapat untuk diubah juga.

Sehubungan dengan pertanyaan Pak Israful mengenai mengapa tidak melakukan investasi di perkeretaapian umum Pak Ganeshan dari Adani menanggapi bahwa hal tersebut karena di dalam perkeretaapian khusus terdapat satu sumber pendapatan yang jelas dan bersifat pasti dan berbeda dengan perkeretaapian umum. Hal ini memberikan kepastian kepada pihak-pihak penyandang dana karena ada kepastian pendapatan untuk membayar pinjaman. Untuk perkeretaapian umum menurut beliau akan sulit mendapatkan pembiayaan kecuali dilakukan oleh pemerintah.

4. Pak Rudiantara – PT BATR

Menurut beliau terlihat ada perkembangan di bidang perkeretaapian khusus yang bagus dibanding dengan beberapa tahun yang lalu terlepas dari masih terdapatnya isu-isu yang belum diselesaikan. Beliau menyampaikan terima kasih kepada Kemenhub dan IndII serta pihak-pihak lain yang terlibat dalam proses perubahan regulasi ini. Satu usulan yang diajukan oleh beliau adalah untuk menyertakan di dalam rancangan Permen pengaturan mengenai aspek komersial dari perkeretaapian khusus. Hal ini penting menurut beliau karena pihak penyedia dana terutama akan melihat kemampuan 'cash flow' dari klien.

Beliau mengusulkan untuk dimasukkan bahwa penyelenggara dapat menetapkan dan mengadakan kesepakatan mengenai aspek komersil (harga/biaya) dengan klien berdasarkan business to business. Bentuk kesepakatan inilah yang akan digunakan sebagai dasar/bukti kepada penyandang dana untuk mendapatkan pembiayaan. Karena ketentuan mengenai penetapan aspek komersil belum diatur didalam Permen maka menurut Pak Rudiantara apabila suatu hal tidak diatur maka diartikan sebagai tidak diperbolehkan. Pak Rudiantara berpendapat bahwa penggunaan kata 'dapat' adalah kuncinya.

5. Pak Hari Wijayanto – MEC

Mengenai isu afiliasi yang diangkat oleh Pak Robert, Pak Hari berpendapat bahwa terdapat pengecualian dalam peraturan ESDM yang memungkinkan penggunaan afiliasi yaitu setelah mendapatkan persetujuan Menteri. Larangan penggunaan afiliasi adalah karena terdapat kekhawatiran ESDM mengenai transfer pricing.

Beliau menyampaikan bahwa selain koordinasi dengan ESDM, adalah penting untuk melakukan koordinasi dan harmonisasi dengan BKPM mengenai definisi pengertian kegiatan usaha. Selain itu beliau juga mengusulkan dilakukan koordinasi dengan Kementerian Hukum dan Hak Asasi Manusia untuk memastikan adanya kesamaan persepsi dalam menentukan klasifikasi kegiatan usaha.

6. PT Priyamanaya

Perwakilan dari PT Priyamanaya menanyakan apakah ada keinginan pemerintah untuk mendirikan badan khusus sebagai regulator dalam bidang transportasi seperti halnya dalam Migas (BP Migas). Beliau juga mencontohkan bagaimana gas dari berbagai sumber dapat dihantarkan memakai pipa yang sama dan berpikir prinsip yang sama juga dapat diaplikasikan di perkeretaapian khusus. Contoh lain yang disampaikan adalah dalam bilang kelistrikan dimana walaupun belum terdapat badan regulator tapi tariff listrik harus terlebih dahulu mendapat persetujuan dari Menteri.

Pak Rudiantara memberikan tanggapan mengenai penetapan harga listrik oleh Menteri. Menurut beliau terdapat perbedaan antara listrik dengan pengangkutan. Dalam listrik persetujuan adalah perlu karena penyediaan listrik berhubungan dengan kepentingan umum dan juga dalam penetapan harga listrik terdapat faktor subsidi dari negara. Pembentukan suatu badan regulator untuk mengatur tarif dalam

perkeretaapian mungkin akan lebih relevan kalau diperlakukan untuk perkeretaapian yang mengangkut penumpang. Untuk perkeretaapian khusus adalah lebih baik melalui 'business to business'.

Pak Asril memberikan tanggapan bahwa pembentukan suatu badan regulator dalam perkeretaapian tergantung dari banyaknya operator. Sesuai dengan amanat UU perkeretaapian yang diinginkan adalah tercapainya multiple operator. Sebagai contoh beliau menyebutkan bahwa Jepang mempunyai 200 operator dan Korea mempunyai 9 operator. Sampai sejauh ini menurut beliau pengaturan dan pengawasan masih dapat ditangani oleh Kemenhub melalui Direktorat Jendral Perkeretaapian.

* * *

Penutup dan Kesimpulan

Tim konsultan menyampaikan bahwa yang kita perlu lakukan adalah mempelajari peraturan-peraturan yang kita miliki untuk mengetahui apakah tujuan yang diinginkan akan dapat dicapai berdasarkan peraturan-peraturan tersebut. Tim menyampaikan terimakasih atas masukan-masukan yang diberikan dan berharap tim konsultan dan IndII akan dapat memberikan masukan yang berguna untuk pemerintah dan dapat digunakan oleh pemerintah.

Sebagai penutup Pak Suyono berpendapat bahwa untuk perkeretaapian umum sepertinya bahwa dengan mengandalkan peraturan yang ada saat ini terdapat kemungkinan bahwa perkeretaapian secara umum baru akan dapat berkembang dalam waktu 10 – 15 tahun kemudian. Bahwa tidak mungkin menunggu 10-15 tahun sampai swasta bisa masuk oleh karena itu perkembangan perkeretaapian khusus adalah merupakan kesempatan bagi swasta untuk bisa masuk kedalam perkeretaapian. Untuk itu diperlukan sekali suatu regulasi yang dapat digunakan sebagai acuan bagi masuknya swasta dalam perkeretaapian khusus.

Pak Asril menutup FGD kedua dengan menyampaikan ucapan terima kasih kepada para peserta dari FGD ke dua ini dan bahwa masih terdapat kelanjutan dari FGD kedua ini yaitu dengan akan dilakukannya pertemuan group kerja (working group) dengan instansi-instansi pemerintah terkait.

INDONESIA INFRASTRUCTURE INITIATIVE

An Australian Government Initiative



Activity number and title	: #229 - Special Railway Phase 3	Coordinator LFV : Coordinator WG4 :
Title of meeting	: FGD II - Special Railway Phase III	
Date and place	: 21 June 2011 Alila Hotel 3th Floor, Olio Elan Room	

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Perihal : Undangan Rapat

Jakarta, 15 Juni 2011

Kepada

Yth. (Daftar terlampir)

di -

Tempat

1. Dalam rangka mendapatkan masukan untuk Pengembangan Regulasi Perkeretaapian Khusus – Tahap III, Direktorat Jenderal Perkeretaapian bekerjasama dengan Konsultan *Indonesia Infrastructure Initiative* (IndII) dengan ini mengundang Bapak/Ibu untuk hadir dalam rapat yang akan diselenggarakan pada:

Hari/ Tanggal : Selasa, 21 Juni 2011
Pukul : 08.30 WIB s/d Selesai
Tempat : Hotel Alila Ruang Olio Elan Lantai 3
Jl. Pecenongan Kav 7 -17, Jakarta Pusat
Acara : Pembahasan Penyusunan Rancangan Peraturan
Menteri Perhubungan tentang Perkeretaapian
Khusus di Indonesia
Pimpinan Rapat : Direktur Lalu Lintas dan Angkutan Kereta Api

2. Demikian disampaikan, atas perhatian dan kerjasamanya diucapkan terima kasih.

a.n DIREKTUR JENDERAL PERKERETAAPIAN
DIREKTUR
LALU LINTAS DAN ANGKUTAN KERETA API
Pelaksana Harian


Ir. Bernadette E.S. Mayashanti
Penata Tingkat I (III/d)
NIP. 19690803 199803 2 001

Tembusan, Yth.:
Direktur Jenderal Perkeretaapian (sebagai laporan);


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Special Railways Phase III

The Road to Regulatory Reform

Jakarta 21 June 2011






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The Need for Special Railways

1. Indonesia's transportation infrastructure must be developed quickly in order to keep up with projected economic growth
2. Roads alone can no longer carry 90% of goods and commodities produced
3. Activities along major economic corridors are mostly commodities-based, with clusters of industrial, plantation, and mining complexes, each of which could be well-served by rail

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The Need for Special Railways

1. Only a fraction of railway infrastructure costs can be borne by the Government and State-Owned Enterprises
2. The majority of funds must come from private investment
3. Government need not spend public funds to develop railways that will serve one or a handful of industrial clients
4. The private sector has a strong incentive to build railway infrastructure for industrial clients that can provide a stable, long-term source of revenue


3


The Economic Benefits of Special Railways

1. More goods and commodities will be able to get to market, providing a stable engine for growth and an increased source of revenue for the State
2. The construction of new rail infrastructure will bring indirect economic benefits as well


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The Role of the Regulator

1. Although the business case for Special Railways is clear, the vast capital resources needed for such investments will not be committed without a clear regulatory framework.
2. At minimum, the Government must provide assurances that, subject to compliance with reasonable regulatory constraints (technical, safety, environmental, etc.), the railway will be able to operate as intended for a sufficiently long period of time.


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Main Regulatory Challenges

1. Lack of clarity over who can use/operate a special railway
2. Restrictions on the scope of special railways
3. Uncertainty over interconnection
4. Lack of clarity over nature and ownership of special railway assets
5. Complexity of licensing system

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Proposed Solutions

A new Ministerial Regulation will clarify and implement the Railway Law and existing Government Regulations (PP 56/2009 and PP 72/2009)

Some targeted changes to existing Government Regulations are also desirable but not strictly necessary to implement the proposed Ministerial Regulation

No changes to the Railway Law are needed – all of the proposed regulations are consistent with the Railway Law

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1. Lack of clarity as to who can use/operate a Special Railway

Client Rule: a Special Railway can only be used by a business entity to support its main activities (Article 5(3) of the Railway Law)

Operator Rule: a Special Railway can only be operated by a business entity to support its main activities (Article 33(1) of the Railway Law)

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Who is the 'business entity'?

Client:

- a single legal entity
- two or more affiliated legal entities
- a consortium of unaffiliated legal entities



Operator:

- same legal entity as client
- affiliate of client
- unaffiliated entity with exclusive contract




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Affiliation through actual control

'Control' can be defined broadly to include either ownership of a majority of the voting shares or the ability to appoint a majority of the directors of a company



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Consortium rule: rationale

MoT's main concern appears to be the potential for unequal treatment of smaller clients as a result of allowing multiple entities to form a single special railway

We believe this concern can effectively be managed if the multiple clients are members of a single consortium

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Consortium rule: rationale



The consortium rule means that multiple customers must act as a single business entity with a common purpose, thereby reducing the opportunity for discrimination

Risks relating to unequal treatment can effectively be managed in the consortium agreement

If contractual safeguards are insufficient, parties still have recourse to applicable anti-monopoly laws

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What are the 'main activities'?

Client: Any type of business that can legitimately claim to need a Special Railway for support

Operator: same main activity as client (if the operator is the same legal entity as client or an affiliate of client) **OR** a transportation company (if the operator is unaffiliated to the client but has an exclusive transportation contract with client)



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2. Restrictions to the scope of the railway

Point-to-Point Rule: a Special Railway can only operate within the area of the client's main activities, and from that area to a single point in a support area (Article 350 of PP 56/2009)


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Rationale for modifying Point-to-Point Rule

The point to point rule significantly restricts the usefulness of a special railway, making it more difficult to justify the considerable initial investment

Relaxation of the rule would enable the railway to carry products to and from several customers or suppliers of the client company

The point to point rule is not a requirement of the Railway Law, but exists only in PP 56/2009

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Rationale for Keeping Point-to-Point Rule


There is a difference of opinion within MoT as to whether the Point-to-Point Rule restricts the Railway Law or expands it.

Those who view the Point-to-Point Rule as expansive do not want to relax it any further.


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Proposal to Relax Point to Point Rule


The point to point rule should be amended to eliminate concepts of 'main business area' and 'supporting area' and provide instead for a functional definition of 'Station' that explains in general terms what can be done with a Special Railway.

This would require an amendment to PP 56/2009


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3. Uncertainty over Interconnection

Connection Law: A Special Railway may, with approval from the relevant authority, be connected to a public railway or a special railway network (Article 52 of UU 23/2007) and the transportation services may be merged (Article 149(2) of UU 23/2007)

Cooperation Rule: A Special Railway operator may, with the approval of MoT, enter into a cooperation agreement with another railway operator without changing the nature of the Special Railway (Article 374 of PP 56/2009)

Integration Rule: A Special Railway may, with approval from the relevant authority, be integrated with the network of another railway operator, but the rules applicable to public railways shall apply (Article 161 of PP 72/2009)

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Interconnection rules: rationale

Allowing special railways to interconnect and share infrastructure or rolling stock (by agreement) has potential to increase efficiency, reduce costs, and prevent unfair competition

Each railway continues to serve its own client, but cooperation between operators is allowed

The resulting network would provide specialist services to a limited number of large customers.

We think that this is the model we need to encourage private investment in railways



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Proposal for Interconnection rules

Define cooperation rules under Article 374 of PP 56/2009 to enable several special railway operators (each serving their respective client) to share infrastructure and rolling stock without losing the status of special railway

Define interconnection rules under Article 161 of PP 72/2009 that specify that the network shall be managed by the special railway entities and that rules for public railways in relation to safe operation of trains shall apply.



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What happens if railways interconnect ?

We propose that an interconnection agreement should allow the first operator to:

- access the infrastructure of the other operator for the purpose of providing services in support of the first operator’s client
- arrange for the other operator (if it is a public operator) to provide services in support of the first operator’s client
- grant the other operator access to the first operator’s infrastructure for any purpose consistent with the other operator’s business


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Interconnection – Differing Views

There are differing views within MoT as to whether Article 374 of PP 56/2009 can be used as a basis for implementing interconnection rules.

Some view the rule in Article 161 of PP 72/2009 as requiring that any integration of rail infrastructure between a Special Railway and another railway results in the conversion of the Special Railway into a public railway.

Based on Article 149(2) and (3) of UU 23/2007 we believe the intention is only that the transportation rules for general railways apply also to special railways as far as they are applicable


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4. Lack of clarity over nature and ownership of special railway assets

Special Railways are developed by private parties for a private purpose using only private funds

We believe there is nothing in the Railway Law or PPP regulations that requires special railways to be treated as a form of 'concession'

We propose that end-of-project-life issues be freely negotiated at the appropriate time between operator and regulator as part of the special railway license terms, from the starting point that the assets are to be treated as private property

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5. Complexity of the licensing system

The procedures for obtaining licences are overly complex

We think they can be simplified and streamlined without reducing their effectiveness or limiting regional autonomy

Much of this simplification can be done through a Permen, though minor amendments to PP 56/2009 would also be desirable.

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Conclusions

The objective of increased private sector involvement is not being achieved because of a number of constraints

We believe these constraints can effectively be addressed through regulatory provisions within the current Railway Law

Most can be achieved through a new Ministerial Regulation, though targeted amendments of the existing PP 56/2009 and PP 72/2009 would also be desirable.

Perkeretaapian Khusus Tahap III

Tahapan Menuju Perubahan Undang-undang

Jakarta 21 Juni 2011



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Kebutuhan atas Perkeretaapian Khusus

1. Infrastruktur transportasi Indonesia harus dengan segera dikembangkan untuk mengikuti pertumbuhan ekonomi yang telah diproyeksikan
2. Prasarana jalan raya sendiri tidak bisa menampung 90% barang dan komoditas yang telah diproduksi
3. Kegiatan dalam sektor ekonomi sebagian besar merupakan kegiatan yang didasarkan pada komoditas, dengan berbagai macam industri, perkebunan dan pertambangan yang akan sangat membutuhkan kereta api.


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Kebutuhan atas Perkeretaapian Khusus

4. Hanya sebagian dari biaya perkeretaapian khusus yang dapat didanai oleh Pemerintah dan BUMN.
5. Sebagian besar dana harus berasal dari pihak swasta.
6. Pemerintah tidak perlu mengeluarkan uang rakyat untuk mengembangkan perkeretaapian yang akan melayani satu atau beberapa industri.
7. Pihak swasta memiliki motif yang kuat untuk membangun infrastruktur perkeretaapian bagi sektor industri yang dapat menjadi sumber pendapatan jangka panjang yang stabil.


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Manfaat Ekonomi dari Perkeretaapian Khusus

1. Banyaknya barang dan komoditas yang masuk ke pasar, akan memberikan fondasi yang kuat untuk perkembangan dan merupakan penambahan sumber pendapatan bagi Negara.
2. Pembangunan infrastruktur rel kereta api yang baru akan memberikan manfaat ekonomi secara tidak langsung

4

Peran Serta Pembuat Undang-undang

1. Walaupun tujuan dari Perkeretaapian Khusus telah diketahui dengan jelas, sumber dana yang besar yang dibutuhkan untuk investasi tersebut tidak akan mengalir masuk tanpa adanya kerangka perundang-undangan yang jelas.
2. Setidaknya, Pemerintah untuk memberikan jaminan bahwa dengan tunduk kepada peraturan yang memberikan batasan-batasan (teknis, keselamatan, lingkungan, dll), perkeretaapian dapat beroperasi sesuai dengan tujuannya untuk waktu yang lama.


5

Tantangan Bagi Peraturan Utama

1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus
2. Pembatasan terhadap lingkup perkeretaapian khusus
3. Ketidakpastian mengenai interkoneksi
4. Ketidakjelasan atas sifat dan kepemilikan dari aset perkeretaapian khusus
5. Kerumitan sistem perizinan

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Usulan Penyelesaian


Peraturan Menteri yang baru akan memperjelas Undang-undang Perkeretaapian dan Peraturan Pemerintah yang telah ada (PP 56/2009 dan PP 72/2009)

Beberapa perubahan terhadap Peraturan Pemerintah yang ada saat ini juga sebaiknya dilakukan namun tidak sepenuhnya diperlukan untuk menerapkan Peraturan Pemerintah yang diusulkan

Tidak diperlukan perubahan terhadap Undang-undang Perkeretaapian – segala perubahan terhadap peraturan yang telah diusulkan konsisten dengan Undang-undang Perkeretaapian

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1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus

Aturan Klien: Perkeretaapian Khusus hanya dapat **digunakan** oleh suatu **badan usaha** untuk mendukung **kegiatan pokoknya** (Pasal 5(3) Undang-undang Perkeretaapian)

Aturan Penyelenggara: Perkeretaapian Khusus hanya dapat **diselenggarakan** oleh suatu **badan usaha** untuk mendukung **kegiatan pokoknya** (Pasal 33(1) Undang-undang Perkeretaapian)

8

Siapakah yang dimaksud dengan 'badan usaha'?

Klien:

- badan usaha tunggal
- dua atau lebih badan usaha yang terafiliasi
- sebuah konsorsium dari badan usaha yang tidak terafiliasi

Penyelenggara:

- badan usaha yang sama dengan klien
- afiliasi dari klien
- badan usaha yang tidak terafiliasi yang memiliki kontrak eksklusif



9

Afiliasi melalui kendali nyata

"Kendali" dapat diartikan secara luas untuk meliputi kepemilikan atas mayoritas saham dengan hak suara atau kemampuan untuk menunjuk atau mengganti mayoritas direksi perseroan

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Dasar Alasan dari Aturan Konsorsium

Hal yang menjadi kekhawatiran utama Kementerian Perhubungan adalah potensi perlakuan yang tidak adil terhadap badan usaha kecil sebagai akibat dari diperbolehkannya beberapa badan usaha untuk membentuk suatu perkeretaapian khusus tunggal.

Kami yakin bahwa kekhawatiran ini dapat diatasi secara efektif apabila badan usaha tersebut merupakan anggota dari suatu konsorsium tunggal

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Dasar Alasan Aturan Konsorsium

Aturan konsorsium berarti bahwa beberapa pengguna/klien harus bertindak sebagai satu badan usaha dengan tujuan yang sama, yang dengan demikian mengurangi kemungkinan terjadinya diskriminasi

Resiko terkait dengan perlakuan yang tidak adil dapat diatasi secara efektif dengan perjanjian konsorsium

Jika jaminan dengan perjanjian masih belum cukup, terdapat perlindungan lain bagi para pihak melalui undang-undang anti monopoli

12

Apa yang dimaksud dengan ‘kegiatan pokok’?

Klien: Segala jenis usaha yang secara sah dapat meminta pengadaan Perkeretaapian Khusus sebagai dukungan terhadap usahanya tersebut

Penyelenggara: kegiatan usaha yang sama dengan klien (jika penyelenggara adalah badan usaha yang sama dengan klien atau afiliasi dari klien) **ATAU** suatu perusahaan yang bergerak di bidang transportasi (jika penyelenggara tidak terafiliasi dengan klien tetapi memiliki perjanjian transportasi eksklusif dengan klien)



13

2. Pembatasan terhadap lingkup perkeretaapian

Aturan “titik ke titik”: Perkeretaapian Khusus diselenggarakan terbatas dalam kawasan yang merupakan wilayah kegiatan pokok badan usaha, dan dari kawasan kegiatan pokok ke satu titik di wilayah penunjang (Pasal 350 PP 56/2009)

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Dasar Alasan Mengubah Peraturan “titik ke titik”



Pengaturan ini sangat membatasi penggunaan dari perkeretaapian khusus, sehingga menyulitkan dalam mendapatkan investasi

Dengan memperlunak pengaturan maka akan memungkinkan perkeretaapian khusus untuk membawa produk-produk kepada dan dari beberapa konsumen atau penyedia barang dari klien

Aturan titik ke titik tidak diatur di dalam Undang-undang Perkeretaapian, dan hanya ada di dalam PP 56/2009

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Dasar Alasan Mempertahankan Pengaturan “titik ke titik”

Terdapat perbedaan pendapat di dalam Kementerian Perhubungan mengenai apakah peraturan Titik ke Titik membatasi atau memperluas Undang-undang Perkeretaapian.

Bagi mereka yang berpendapat bahwa peraturan Titik ke Titik sudah memperluas ketentuan Undang-undang Perkeretaapian, tidak ingin lebih lanjut memberikan kelonggaran.

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Usulan untuk Melonggarkan Peraturan “Titik ke Titik”

Peraturan “titik ke titik” seharusnya diubah untuk menghilangkan konsep “wilayah kegiatan pokok” dan “wilayah penunjang” dan sebaiknya untuk memasukkan suatu definisi mengenai penggunaan “Stasiun” yang memberikan penjelasan secara umum mengenai apa yang dapat dilakukan di Stasiun sehubungan dengan Perkeretaapian Khusus.

Hal ini akan membutuhkan perubahan atas PP 56/2009

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3. Ketidakpastian mengenai interkoneksi



Peraturan Penyambungan: Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, disambungkan dengan jaringan perkeretaapian umum atau jaringan perkeretaapian khusus (Pasal 52 UU 23/2007) dan pelayanan angkutan tersebut dapat diintegrasikan (Pasal 149(2) UU 23/2007)

Peraturan Kerjasama: Sebuah penyelenggara Perkeretaapian Khusus dapat, dengan persetujuan dari Kementerian Perhubungan, melakukan kerjasama dengan penyelenggara perkeretaapian lain tanpa mengubah fungsi dari Perkeretaapian Khusus (Pasal 374 PP 56/2009)

Peraturan Integrasi: Sebuah Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, diintegrasikan dengan jaringan angkutan perkeretaapian lainnya, dengan ketentuan bahwa pengaturan mengenai perkeretaapian umum akan berlaku (Pasal 161 PP 72/2009)

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Dasar Alasan Peraturan Interkoneksi

Memberikan kemungkinan bagi Perkeretaapian Khusus untuk melakukan interkoneksi dan berbagi infrastruktur dan gerbong (berdasarkan perjanjian) akan dapat meningkatkan efisiensi, mengurangi biaya dan mencegah persaingan tidak sehat



Masing-masing penyelenggara tetap melayani kliennya tetapi kerjasama antara penyelenggara diperbolehkan

Jaringan yang dibentuk akan memberikan layanan bersifat khusus dan terbatas hanya kepada beberapa pelanggan besar.

Kami berpendapat bahwa inilah konsep yang diperlukan untuk mendorong pihak swasta berinvestasi di sektor perkeretaapian

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Usulan Peraturan Interkoneksi

Memberikan pengertian atas ketentuan kerja sama yang disebut dalam Pasal 374 PP 56/2009 agar beberapa penyelenggara perkeretaapian khusus (masing-masing melayani kliennya sendiri) dapat berbagi infrastruktur dan lokomotif, gerbong tanpa harus kehilangan statusnya sebagai perkeretaapian khusus

Memberikan pengertian atas ketentuan interkoneksi dalam Pasal 161 PP 72/2009 untuk secara jelas menyatakan bahwa jaringan tersebut harus dijalankan oleh badan usaha Perkeretaapian Khusus dan bahwa peraturan keselamatan dan penyelenggaraan untuk perkeretaapian umum harus berlaku.

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Apa yang terjadi apabila perkeretaapian terinterkoneksi ?

Kami mengusulkan agar perjanjian interkoneksi memperbolehkan penyelenggara pertama untuk :

- Mengakses infrastruktur penyelenggara lain untuk tujuan memberikan jasa pelayanan yang mendukung klien penyelenggara pertama tersebut
- Mengatur penyelenggara lain (apabila penyelenggara umum) untuk menyediakan layanan yang menunjang klien penyelenggara pertama
- Memberikan akses terhadap penyelenggara lain untuk menggunakan infrastruktur penyelenggara pertama untuk tujuan apapun yang sesuai dengan usaha penyelenggara lain tersebut

21

Interkoneksi – Perbedaan Pendapat

Terdapat perbedaan pendapat dalam Kementerian Perhubungan mengenai apakah Pasal 374 PP 56/2009 dapat digunakan sebagai dasar untuk menerapkan peraturan interkoneksi.

Terdapat pendapat bahwa aturan dalam Pasal 161 PP 72/2009 mempunyai pengertian bahwa setiap integrasi infrastruktur perkeretaapian antara Perkeretaapian Khusus dengan perkeretaapian lainnya mengakibatkan terjadinya perubahan status dari Perkeretaapian Khusus menjadi perkeretaapian umum.

Berdasarkan Pasal 149(2) dan (3) Undang-Undang Perkeretaapian kami berpendapat bahwa pengertian yang dimaksud adalah bahwa aturan-aturan pengangkutan untuk perkeretaapian umum juga berlaku untuk perkeretaapian khusus sepanjang dapat diberlakukan

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4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset perkeretaapian khusus

Perkeretaapian khusus dibangun oleh pihak swasta untuk tujuan pribadi dengan menggunakan hanya dana pribadi

Kami berpendapat bahwa baik di UU Perkeretaapian atau peraturan infrastruktur (PPP) tidak terdapat pengaturan bahwa perkeretaapian khusus dianggap sebagai suatu bentuk 'konsensi'

Kami mengusulkan bahwa hal-hal yang berhubungan dengan apa yang akan terjadi setelah proyek berakhir untuk secara bebas dinegosiasikan pada waktu yang pantas antara penyelenggara dan pemerintah sebagai bagian dari ketentuan perizinan, dengan pemahaman bahwa aset untuk diperlakukan sebagai milik pribadi

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5. Kerumitan sistem perizinan

Prosedur untuk mendapatkan izin terlalu berbelit-belit

Kami berpendapat bahwa proses tersebut dapat disederhanakan dan dipersingkat tanpa mengurangi efektifitas atau membatasi otonomi daerah

Banyak dari penyederhanaan ini dapat dilakukan melalui Permen, walaupun perubahan kecil terhadap PP 56/2009 juga diinginkan.

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Kesimpulan

Tujuan ditingkatkannya keterlibatan pihak swasta belum tercapai karena terdapatnya berbagai hambatan

Kami berpendapat bahwa hambatan-hambatan ini dapat secara efektif diatasi melalui ketentuan-ketentuan yang ada pada Undang – Undang Perkeretaapian yang berlaku saat ini

Sebagian besar dapat dicapai melalui Peraturan Menteri, walaupun beberapa perubahan terhadap PP 56/2009 dan PP 72/2009 yang berlaku saat ini juga sebaiknya dilakukan.

ANNEXE 7: MINUTES AND OTHER MATERIALS FROM SECOND IAWG MEETING

Working Group II – 24 Juni 2011 – Ruang Majapahit – Kementerian Perhubungan

The meeting was led and opened by Bpk. Prasetyo. In his opening remarks, he addressed his expectation for the materials prepared by IndII consultant team have covered the discussed matters on the special railway.

Bpk. Efi and Bpk. Suyono from IndII addressed matters that have been done by IndII with regard to the drafting of the Ministerial Regulation including the discussions conducted by the team. Bpk. Efi briefly addressed matters that are still being discussed between the team and the Ministry of Transportation, namely: point to point rule, interconnection, the definition of a business entity and a suggestion from the mining office in relation to the licensing in mining.

The team further continued the discussion by delivering a presentation in which the team believes that the draft of the Ministerial Regulation is almost final. The team further explained about the changes made by the team based on the results of further discussions with the Ministry of Transportation, related departments and private investors. The presentation covered each of the four points mentioned earlier by Bpk. Efi.

The team assured attendees that the guiding principle of the draft Ministerial Regulation is to provide needed clarify and comfort to investors, while ensuring that the letter and spirit of prevailing laws and regulations are respected. The team also addressed that the amendments to the Government Regulation will still be suggested. However, the draft of the Ministerial Regulation can also be made without amending existing Government Regulations. The team further explained about the definition of 'control', which is not restricted only to ownership of a majority of shares, but also covers the concept of contractual control (i.e a shareholders agreement) which is a commonly accepted concept as regulated under the Financial Accounting Standards (PSAK 38).

The Team also explained that the consortium rule is very important to enable the participation of smaller companies in the development of the special railway. Otherwise, special railways will only be available to a handful of very large companies.

Bpk Prasetyo addressed that currently three licenses have been issued to TKK, Primanayana and BATR. Other than the issued licenses, there are also applications which have been submitted by Adani, MEC and PT INKA. Bpk. Prasetyo expects that the drafting of the regulation will accommodate the needs of the parties although he is also aware that it is not an easy task to achieve.

Bpk Gofur of the Legal Bureau

He expressed the view that it is possible to construct points between the main business area and supporting area, subject to satisfying the technical requirements.

The team also addressed that it is important to regulate the consequences of an accident with regard to interconnection between special railways or between special and public railways and its relation to which party will be responsible in the event of an accident. In principle, the obligation of conducting the operation and maintenance are borne by the party who obtains a license as an operator and therefore even though there is an interconnection and common use of infrastructure, the operator should still be the party responsible in the event of an accident.

Ibu Meri of the Legal Bureau

Under Government Regulation No. 56 of 2009, a special railway is meant to support its main business. She addressed that there is no prohibition with regard to entering into a cooperation agreement. However, there must be restrictions applied so it will not become a public railway. For example, if the user is a consortium, the service provided by the special railway must be given only to the members of the consortium.

The team agrees that transportation by special railway must be in support of a particular business activity. The main principle applied is that a special railway is a railway dedicated only to one client. Further, the ability to enter into an exclusive contract is implied by Articles 33(1) and 5(3) of the Railway Law.

Bpk. Doni of the Infrastructure division, Ministry of Transportation.

He raised a question on whether it is possible to have different technical standards at proposed interconnection points (e.g., with respect to signaling). He further addressed that with regard to public railway, the infrastructure division has prepared a regulation regarding the technical requirements for a public railway. In relation to this, he then questioned whether a further regulation on the technical requirements of a special railway, especially regarding interconnection, will be needed.

The team responded that requirements with regard to standards that comply with the prevailing regulations are necessary. In relation to the interconnection, a minimum requirement with regard to standards must be applied. Ideally, technical requirements which regulate the standards for a special railway, including with respect to interconnection, must be made. Different standards, though, may be applied as long as there is compatibility.

Bpk Prawoto

With regard to an exclusive contract with non-affiliated parties, he asked the team to explain the content of the contract. The team responded that the contract will govern that the service relationship must be exclusive to ensure that the special railway will only serve one client. Other than that, the contract may govern other matters required

to ensure that the loan will be repaid, among others with regard to the price/fee that must be paid. Provisions with regard to penalties and service obligations will also be covered in the agreement, in the event the operator is not able to provide service or the user cannot settle the payment.

With regard to consortium, he asked whether in a consortium concept, the consortium members will agree to a price/tariff element. He also asked whether the price/tariff utilization will not violate the law since the special railway only serves its main business. Further he added that in the event the user and the operator are two affiliated business entities, the tariff requirement may not be needed.

With regard to the interconnection, he still questioned the point to point concept on whether it will be considered as public railway if the points are connected. If it is not considered as a public railway, it will cause the special railway can serve several places and therefore will conduct similar activities as public railway. According to the team, the point to point rule should not impede the interconnection and should not restrict what can happen in the area located between the main business area and supporting area. The interconnection will enable smaller scale business entities to use the infrastructure. This is because the other possible option will only be to construct its own special railway, which may not be economically feasible. Allowing a mechanism for interconnection will also limit unfair business competition practices.

Mr. Prawoto also asked the team to give further explanation on the proposal of the transfer of assets after the expiry of the license and/or after the utilization. The team addressed that with regard to the status of the assets, the operator and the license issuing authority should have a meeting to discuss possibilities on the status of the assets. The meeting and discussion should be held 3 years before the client intends to stop using the special railway.

Bappenas

The Bappenas official addressed that at the beginning, the regulation regarding the area was implemented to protect public interest. During its development, it has become problematic because of lack of investment. Therefore currently the regulation is aimed to invite the investment.

With regard to concession, he addressed that the special railway may be considered as a concession because it opens the corridor to economic development which will affect the development in the surrounding areas. He also asked whether this will lead to an amendment to the law.

The team conveyed that the team has carefully considered public interest issues in drafting the Ministerial Regulation, which among others includes a requirement to conduct a planning review before the construction of the special railway to determine whether a special railway is the best option to take. The public interest is also taken into account at the end of SR operations, when the operator and the regulator discuss the future use of the assets.

With regard to concession and its relation with the time period, the team addressed that the time period of the special railway operation will follow the time period of the main business served by the special railway as provided in the main business license. However, public interest can also be taken into account (e.g., by requiring the operator to do an updated planning study) as part of the license renewal process.

Bpk Prasetyo further addressed in his closing remarks that the draft of the Ministerial Regulation has been reviewed and commented not only by the Ministry of Transportation but also by the Agricultural Department, Bappenas and other related authorities. Finally he expressed his gratitude to IndII consultant team for their cooperation.

Working Group II – 24 Juni 2011 – Ruang Majapahit – Kementerian Perhubungan

Rapat dipimpin dan dibuka oleh Pak Prasetyo. Beliau menyampaikan harapan beliau agar bahan-bahan yang disiapkan oleh tim konsultan IndII dapat mengakomodir hal-hal yang telah sejauh ini dibahas mengenai perkeretaapian khusus.

Pak Efi dan Pak Suyono dari IndII menyampaikan hal-hal yang telah dilakukan tim konsultan IndII sehubungan pembuatan rancangan Peraturan Menteri termasuk diskusi dan pembahasan yang telah dilakukan oleh tim. Pak Efi menyampaikan secara singkat hal-hal yang masih menjadi bahan pembahasan antara tim dengan Kementerian Perhubungan yaitu mengenai aturan titik ke titik, interkoneksi, pengertian badan usaha dan masukan dari dinas pertambangan sehubungan dengan perizinan di dalam pertambangan.

Tim melanjutkan dengan presentasi dimana tim menyampaikan bahwa tim percaya bahwa rancangan ini sudah hampir mengenai 'final'. Penjelasan hari ini menjelaskan mengenai hal-hal perubahan-perubahan yang tim lakukan sehubungan dengan rancangan Permen berdasarkan hasil diskusi dan pembahasan dengan Kementerian Perhubungan, department-departemen terkait dan juga pihak swasta.

Tim menyampaikan bahwa pendekatan-pendekatan yang dilakukan sehubungan dengan pembuatan rancangan Permen adalah Pemerintah untuk dapat memberikan jaminan mengenai pelaksanaan perkeretaapian khusus dengan memperhatikan ketentuan-ketentuan yang berlaku. Tim berpendapat walaupun perubahan atas beberapa ketentuan PP tetap akan disarankan oleh Tim akan tetapi rancangan Permen yang dibuat oleh tim dapat dilaksanakan tanpa harus melakukan perubahan atas PP. Tim lebih lanjut menerangkan mengenai pengertian kendali dimana pengertian kendali tidak hanya dibatasi oleh kepemilikan saham mayoritas tapi juga berdasarkan perjanjian (seperti perjanjian pemegang saham) yang merupakan suatu konsep yang diterima secara luas sebagaimana diatur di dalam Pernyataan Standar Akutansi Keuangan (PSAK 38). Lebih lanjut Tim juga menyampaikan bahwa aturan konsorsium adalah penting untuk memungkinkan keikutsertaan perusahaan-perusahaan kecil dalam perkeretaapian khusus.

Pak Prasetyo menyampaikan bahwa sampai saat ini sudah ada tiga izin yang dikeluarkan yaitu kepada TTK, Pramanayana dan BATR. Selain itu terdapat juga permohonan-permohonan dari Adani, MEC dan PT INKA. Harapan beliau adalah dapat dibuatkan peraturan yang sejauh memungkinkan dapat mengakomodir kebutuhan-kebutuhan para pihak tapi disadari bahwa untuk mencapai hal tersebut tidaklah mudah.

Pak Gofur Biro Hukum

Beliau menyampaikan bahwa menurut pendapat beliau mengenai dibangun titik-titik diantara Kawasan kegiatan pokok dan wilayah penunjang menurut beliau seharusnya dimungkinkan asal dapat memenuhi aspek-aspek teknis.

Mengenai interkoneksi dalam hal terjadi kecelakaan beliau menanyakan mengenai pihak mana yang akan bertanggung jawab, baik sehubungan interkoneksi antara perkeretaapian khusus maupun perkeretaapian khusus dengan umum. Tim menyampaikan dan setuju bahwa sehubungan dengan kecelakaan adalah harus terdapat pengaturan khusus sehubungan dengan kecelakaan. Pada prinsipnya karena kewajiban pelaksanaan dan perawatan dari suatu infrastruktur adalah terletak pihak yang mendapat izin sebagai penyelenggara sehingga walaupun terjadi interkoneksi dan penggunaan infrastruktur bersama maka dalam hal terjadi kecelakaan seharusnya tetap menjadi tanggung jawab penyelenggara.

Biro Hukum

Pertanyaan selanjutnya dari Biro Hukum mengacu pada PP 56 yang menyatakan bahwa kegiatan perkeretaapian khusus adalah untuk mendukung kegiatan pokoknya. Sehubungan dengan perjanjian kerjasama disampaikan bahwa bahwa seharusnya perjanjian kerjasama diperbolehkan dan tidak ada larangan. Akan tetapi tetap harus ada pembatasan supaya perkeretaapian khusus tidak menjadi perkeretaapian umum sebagai contoh apabila pengguna adalah konsorsium maka pelayanan harus dibatasi hanya melayani anggota konsorsium saja.

Tim pada prinsipnya setuju bahwa kegiatan transportasi dalam perkeretaapian khusus adalah untuk mendukung (support) suatu kegiatan. Prinsip yang utama adalah perkeretaapian khusus adalah perkeretaapian yang didedikasikan untuk satu klien. Kemampuan untuk melakukan suatu kontrak yang eksklusif dimungkinkan oleh UU Perkeretaapian.

Pak Doni dari Bagian Prasarana (Kementerian Perhubungan)

Beliau menanyakan apakah dimungkinkan terdapat perbedaan standar (secara teknis) sebelum memasuki suatu titik interkoneksi. Sebagai contoh adalah mengenai persinyalan. Beliau lebih lanjut menyampaikan bahwa sehubungan dengan perkeretaapian umum divisi prasarana sudah menyiapkan peraturan mengatur mengenai ketentuan teknis untuk perkeretaapian umum. Apakah dalam hal rancangan Permen ini dilaksanakan berarti harus dibuat peraturan khusus yang mengatur mengenai ketentuan teknis dari perkeretaapian khusus (utamanya sehubungan dengan interkoneksi).

Tim berpendapat bahwa sehubungan dengan standar harus terdapat ketentuan mengikuti aturan-aturan yang bersifat nasional. Sehubungan dengan interkoneksi ketentuan minimum mengenai standar harus berlaku. Idealnya terdapat ketentuan teknis yang mengatur mengenai standar untuk perkeretaapian khusus termasuk sehubungan dengan interkoneksi. Kuncinya adalah compability dimana bisa dengan standar yang berbeda tetapi yang penting adalah compatibility.

Pak Prawoto

Mengenai kontrak eksklusif (dengan non-affiliated) beliau meminta supaya tim dapat lebih menjelaskan isi kontrak tersebut mengenai hal apa saja. Tim menyampaikan

bahwa kontrak akan mengatur bahwa hubungan pelayanan adalah eksklusif untuk memastikan bahwa perkeretaapian khusus hanya melayani satu klien. Selain itu dapat juga meliputi hal-hal lain yang diperlukan untuk memastikan bahwa pinjaman akan dapat dibayar kembali, antara lain mengatur mengenai ketentuan harga/biaya yang harus dibayarkan. Ketentuan mengenai denda juga dapat dimasukkan di dalam perjanjian untuk mengatur dalam hal penyelenggara tidak dapat melakukan pengangkutan atau pengguna tidak dapat melakukan pembayaran.

Sehubungan dengan konsorsium beliau menanyakan bahwa di dalam konsep konsorsium para anggota konsorsium akan menyetujui suatu unsur harga/tariff. Beliau menanyakan apakah penggunaan harga/tariff ini tidak menyalahi undang-undang karena perkeretaapian khusus hanya melayani usaha pokoknya. Beliau menambahkan bahwa dalam hal pengguna dan penyelenggara adalah badan usaha yang terafiliasi maka dapat tidak diperlukan ketentuan tarif.

Mengenai interkoneksi beliau masih mempertanyakan sehubungan dengan konsep titik ke titik apabila terhubung maka seharusnya menjadi perkeretaapian umum karena kalau tidak maka perkeretaapian khusus bisa melayani tanpa batasan dan menjadi sama dengan perkeretaapian khusus. Menurut tim peraturan titik ke titik seharusnya tidak menghalangi terjadinya interkoneksi dan tidak membatasi apa yang bisa terjadi di kawasan yang terletak diantara kawasan usaha pokok dan wilayah penunjang. Apabila terjadi interkoneksi memungkinkan badan usaha kecil untuk ikut menggunakan infrastruktur karena pilihan lain yang adalah hanya membangun perkeretaapian khusus sendiri yang tentunya menjadi tidak ekonomis dan menghindari persaingan usaha yang tidak sehat.

Beliau juga meminta penjelasan yang lebih jelas mengenai proposal pengalihan asset setelah berakhirnya izin dan/atau penggunaan. Tim menyampaikan bahwa mengenai status asset bahwa penyelenggara dan otoritas yang menerbitkan izin untuk bertemu dan membahas kemungkinan-kemungkinan yang ada sehubungan dengan status asset. Pertemuan dan pembahasan untuk dilakukan 3 tahun sebelum masa berakhirnya izin.

Bapenas

Beliau menyampaikan bahwa awalnya regulasi mengenai kawasan adalah untuk melindungi kepentingan publik. Bahwa dalam perkembangannya menjadi dilematis karena terjadinya kekurangan investasi sehingga kepentingan publik tidak bisa terakomodir. Oleh karena itu arahnya sekarang untuk membuka investasi.

Mengenai konsensi beliau berpendapat bahwa sebetulnya perkeretaapian khusus dapat dianggap sebagai konsensi karena membuka koridor perkembangan ekonomi yang akan mempengaruhi perkembangan di daerah-daerah sekitarnya. Beliau menanyakan apakah hal ini nantinya akan mengarah pada perubahan undang-undang.

Tim menyampaikan bahwa masukan dari beliau sangat bagus dan tim sudah dengan hati-hati mempertimbangkan hal-hal tersebut dalam pembuatan Permen ini dimana antara lain telah dimasukkan ketentuan bahwa sebelum dilakukan pembangunan

perkeretaapian khusus harus dilakukan kajian apakah pembangunan perkeretaapian khusus di suatu wilayah adalah pilihan yang tepat.

Sehubungan dengan konsensi dan hubungannya dengan jangka waktu tim menyampaikan bahwa jangka waktu perkeretaapian khusus mengikuti jangka waktu dari izin kegiatan pokok yang dilayani. Akan tetapi bahwa memang perlu ditetapkan suatu batasan-batasan dan atau peninjauan kembali (dalam hal misalnya perpanjangan izin) untuk melindungi kepentingan publik.

Pak Prasetyo dalam kata penutup menyampaikan bahwa rancangan Permen ini juga telah mendapatkan tanggapan tidak hanya dari Kementerian Perhubungan tapi juga dari Departemen Pertanian, Bapenas, dan lain-lainya. Beliau mengucapkan terimakasih kepada tim konsultan IndII atas kerjasamanya.

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An Australian Government Initiative



Activity number and title	: #229 - Special Railway Phase 3	Coordinator LFV : Coordinator WG4 :
Title of meeting	: Working Group I - Discussion of the Special Railway Regulation	
Date and place	: 10 June 2011 Gd. Karsa 2nd Floor, Majapahit Room, MOT	

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Special Railways Phase III

The Road to Regulatory Reform

Jakarta 24 June 2011



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The Need for Special Railways

1. Indonesia's transportation infrastructure must be developed quickly in order to keep up with projected economic growth
2. Roads alone can no longer carry 90% of goods and commodities produced
3. Activities along major economic corridors are mostly commodities-based, with clusters of industrial, plantation, and mining complexes, each of which could be well-served by rail


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The Need for Special Railways

1. Only a fraction of railway infrastructure costs can be borne by the Government and State-Owned Enterprises
2. The majority of funds must come from private investment
3. Government need not spend public funds to develop railways that will serve one or a handful of industrial clients
4. The private sector has a strong incentive to build railway infrastructure for industrial clients that can provide a stable, long-term source of revenue



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The Economic Benefits of Special Railways

1. More goods and commodities will be able to get to market, providing a stable engine for growth and an increased source of revenue for the State
2. The construction of new rail infrastructure will bring indirect economic benefits as well



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The Role of the Regulator

1. Although the business case for Special Railways is clear, the vast capital resources needed for such investments will not be committed without a clear regulatory framework.
2. At minimum, the Government must provide assurances that, subject to compliance with reasonable regulatory constraints (technical, safety, environmental, etc.), the railway will be able to operate as intended for a sufficiently long period of time.



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Main Regulatory Challenges

1. Lack of clarity over who can use/operate a special railway
2. Restrictions on the scope of special railways
3. Uncertainty over interconnection
4. Lack of clarity over nature and ownership of special railway assets
5. Complexity of licensing system

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Proposed Solutions



A new Ministerial Regulation will clarify and implement the Railway Law and existing Government Regulations (PP 56/2009 and PP 72/2009)

Some targeted changes to existing Government Regulations are also desirable but not strictly necessary to implement the proposed Ministerial Regulation

No changes to the Railway Law are needed – all of the proposed regulations are consistent with the Railway Law


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1. Lack of clarity as to who can use/operate a Special Railway

Client Rule: a Special Railway can only be used by a business entity to support its main activities (Article 5(3) of the Railway Law)

Operator Rule: a Special Railway can only be operated by a business entity to support its main activities (Article 33(1) of the Railway Law)


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Who is the 'business entity'?

Client:

- a single legal entity
- two or more affiliated legal entities
- a consortium of unaffiliated legal entities

Operator:

- same legal entity as client
- affiliate of client
- unaffiliated entity with exclusive contract

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Affiliation through actual control

'Control' can be defined broadly to include either ownership of a majority of the voting shares **OR** the power to appoint or remove a majority of the directors of a company

The ability to exercise control of a company through contractual rights (e.g., shareholders agreement) is a widely accepted legal and commercial practice, and is also reflected in generally accepted Indonesian accounting principles (e.g., PSAK 38).

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Consortium rule: rationale

MoT's main concern appears to be the potential for unequal treatment of smaller clients as a result of allowing multiple entities to form a single special railway

We believe this concern can effectively be managed if the multiple clients are members of a single consortium


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Consortium rule: rationale

The consortium rule means that multiple customers must act as a single business entity with a common purpose, thereby reducing the opportunity for discrimination

Risks relating to unequal treatment can effectively be managed in the consortium agreement

If contractual safeguards are insufficient, parties still have recourse to applicable anti-monopoly laws


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What are the 'main activities'?

Client: Any type of business that can legitimately claim to need a Special Railway for support

Operator: same main activity as client (if the operator is the same legal entity as client or an affiliate of client) **OR** a transportation company (if the operator is unaffiliated to the client but has an exclusive transportation contract with client)



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2. Restrictions to the scope of the railway

Point-to-Point Rule: a Special Railway can only operate within the area of the client's main activities, and from that area to a single point in a support area (Article 350 of PP 56/2009)

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Rationale for Modifying P2P Rule



The point to point rule significantly restricts the usefulness of a special railway, making it more difficult to justify the considerable initial investment

Relaxation of the rule would enable the railway to carry products to and from several customers or suppliers of the client company

The point to point rule is not a requirement of the Railway Law, but exists only in PP 56/2009


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Rationale for Keeping P2P Rule

There is a difference of opinion within MoT as to whether the Point-to-Point Rule restricts the Railway Law or expands it.

Those who view the Point-to-Point Rule as expansive do not want to relax it any further.


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Compromise: a proposal to interpret P2P Rule

The point to point rule can be interpreted broadly:

- to allow different types of 'supporting areas' (e.g., transportation points, off-takers, raw materials suppliers, etc.)
- to provide flexibility in the use of infrastructure at points between the 'area of main activities' and the 'supporting area'.

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3. Uncertainty over Interconnection



Connection: A Special Railway may, with approval from the relevant authority, be connected to a public railway or a special railway network (Article 52 of UU 23/2007) and the transportation services may be merged (Article 149(2) of UU 23/2007)

Cooperation: A Special Railway operator may, with the approval of MoT, enter into a cooperation agreement with another railway operator without changing the nature of the Special Railway (Article 374 of PP 56/2009)

Integration: A Special Railway may, with approval from the relevant authority, be integrated with the network of another railway operator, but the rules applicable to public railways shall apply (Article 161 of PP 72/2009)

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Interconnection rules: rationale

Allowing special railways to interconnect and share infrastructure or rolling stock (by agreement) has potential to increase efficiency, reduce costs, and prevent unfair competition


Each railway continues to serve its own client, but cooperation between operators is allowed

The resulting network would provide specialist services to a limited number of large customers.

We think that this is the model we need to encourage private investment in railways

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Proposal for Interconnection rules

Implement cooperation rules under Article 374 of PP 56/2009 to enable several special railway operators (each serving their respective client) to share infrastructure and rolling stock without losing the status of special railway

Implement integration rules under Article 161 of PP 72/2009 to make clear that integration of special railway infrastructure with public railway infrastructure can only occur if technical requirements applicable to public railway infrastructure are met.

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What happens if railways interconnect ?

We propose that an interconnection agreement should allow the first operator to:

- access the infrastructure of the other operator for the purpose of providing services in support of the first operator's client
- arrange for the other operator (if it is a public operator) to provide services in support of the first operator's client
- grant the other operator access to the first operator's infrastructure for any purpose consistent with the other operator's business

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Interconnection – Differing Views


There are differing views within MoT as to whether Article 374 of PP 56/2009 can be used as a basis for implementing interconnection rules.


Some view the rule in Article 161 of PP 72/2009 as requiring that any integration of rail infrastructure between a Special Railway and another railway results in the conversion of the Special Railway into a public railway.

We believe that Article 161 of PP 72/2009 can be read to require the application of public railway **technical rules** to certain types of interconnection, without changing the **legal status** of a Special Railway.


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4. Lack of clarity over nature and ownership of special railway assets


Special Railways are developed by private parties for a private purpose using only private funds

We believe there is nothing in the Railway Law or PPP regulations that requires special railways to be treated as a form of 'concession'

We propose that end-of-project-life issues be freely negotiated at the appropriate time between operator and regulator as part of the special railway license terms, from the starting point that the assets are to be treated as private property

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5. Complexity of the licensing system

The procedures for obtaining licences are overly complex

We think they can be simplified and streamlined without reducing their effectiveness or limiting regional autonomy

We believe this simplification can be done through a Permen.

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Conclusions

The objective of increased private sector involvement is not being achieved because of a number of constraints

We believe these constraints can effectively be addressed through regulatory provisions within the current Railway Law

Most can be achieved through a new Ministerial Regulation, though targeted amendments of the existing PP 56/2009 and PP 72/2009 would also be desirable.


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Perkeretaapian Khusus Tahap III



Tahapan Menuju Perubahan Regulasi

Jakarta 24 Juni 2011



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Kebutuhan atas Perkeretaapian Khusus

1. Infrastruktur transportasi Indonesia harus dengan segera dikembangkan untuk mengikuti pertumbuhan ekonomi yang telah diproyeksikan
2. Prasarana jalan raya sendiri tidak bisa menampung 90% barang dan komoditas yang telah diproduksi
3. Kegiatan dalam sektor ekonomi sebagian besar merupakan kegiatan yang didasarkan pada komoditas, dengan berbagai macam industri, perkebunan dan pertambangan yang akan sangat membutuhkan kereta api.

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Kebutuhan atas Perkeretaapian Khusus

4. Hanya sebagian dari biaya perkeretaapian khusus yang dapat didanai oleh Pemerintah dan BUMN.
5. Sebagian besar dana harus berasal dari pihak swasta.
6. Pemerintah tidak perlu mengeluarkan uang rakyat untuk mengembangkan perkeretaapian yang akan melayani satu atau beberapa industri.
7. Pihak swasta memiliki motif yang kuat untuk membangun infrastruktur perkeretaapian bagi sektor industri yang dapat menjadi sumber pendapatan jangka panjang yang stabil.



3

Manfaat Ekonomi dari Perkeretaapian Khusus

1. Banyaknya barang dan komoditas yang masuk ke pasar, akan memberikan fondasi yang kuat untuk perkembangan dan merupakan penambahan sumber pendapatan bagi Negara.
2. Pembangunan infrastruktur rel kereta api yang baru akan memberikan manfaat ekonomi secara tidak langsung

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Peran Regulator

1. Walaupun tujuan dari Perkeretaapian Khusus telah diketahui dengan jelas, sumber dana yang besar yang dibutuhkan untuk investasi tersebut tidak akan mengalir masuk tanpa adanya kerangka perundang-undangan yang jelas.
2. Setidaknya, Pemerintah untuk memberikan jaminan bahwa dengan tunduk kepada peraturan yang memberikan batasan-batasan (teknis, keselamatan, lingkungan, dll), perkeretaapian dapat beroperasi sesuai dengan tujuannya untuk waktu yang lama.

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Tantangan Bagi Peraturan Utama

1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus
2. Pembatasan terhadap lingkup perkeretaapian khusus
3. Ketidakpastian mengenai interkoneksi
4. Ketidakjelasan atas sifat dan kepemilikan dari aset perkeretaapian khusus
5. Kerumitan sistem perizinan

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Usulan Penyelesaian

Peraturan Menteri yang baru akan memperjelas Undang-undang Perkeretaapian dan Peraturan Pemerintah yang telah ada (PP 56/2009 dan PP 72/2009)

Beberapa perubahan terhadap Peraturan Pemerintah yang ada saat ini juga sebaiknya dilakukan namun tidak sepenuhnya diperlukan untuk menerapkan Peraturan Pemerintah yang diusulkan

Tidak diperlukan perubahan terhadap Undang-undang Perkeretaapian – segala perubahan terhadap peraturan yang telah diusulkan konsisten dengan Undang-undang Perkeretaapian

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1. Ketidakjelasan mengenai siapa yang dapat menggunakan atau mengoperasikan perkeretaapian khusus

Aturan Klien: Perkeretaapian Khusus hanya dapat digunakan oleh suatu badan usaha untuk mendukung kegiatan pokoknya (Pasal 5(3) Undang-undang Perkeretaapian)

Aturan Penyelenggara: Perkeretaapian Khusus hanya dapat diselenggarakan oleh suatu badan usaha untuk mendukung kegiatan pokoknya (Pasal 33(1) Undang-undang Perkeretaapian)

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Siapakah yang dimaksud dengan ‘badan usaha’?

Klien:

- badan usaha tunggal
- dua atau lebih badan usaha yang terafiliasi
- sebuah konsorsium dari badan usaha yang tidak terafiliasi



Penyelenggara:

- badan usaha yang sama dengan klien
- afiliasi dari klien
- badan usaha yang tidak terafiliasi yang memiliki kontrak eksklusif



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Afiliasi melalui kendali nyata

“Kendali” dapat diartikan secara luas untuk meliputi kepemilikan atas mayoritas saham dengan hak suara ATAU kemampuan untuk menunjuk atau mengganti mayoritas direksi perseroan

Kemampuan untuk melaksanakan kendali terhadap suatu perusahaan melalui hak-hak yang diatur di dalam perjanjian (contohnya Perjanjian Pemegang Saham) merupakan praktek yang secara hukum dan komersial diterima luas dan juga tercermin di dalam Pernyataan Standar Akuntansi Keuangan (PSAK 38)



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Dasar Alasan dari Aturan Konsorsium

Hal yang menjadi kekhawatiran utama Kementerian Perhubungan adalah potensi perlakuan yang tidak adil terhadap badan usaha kecil sebagai akibat dari diperbolehkannya beberapa badan usaha untuk membentuk suatu perkeretaapian khusus tunggal.

Kami yakin bahwa kekhawatiran ini dapat diatasi secara efektif apabila badan usaha tersebut merupakan anggota dari suatu konsorsium tunggal

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Dasar Alasan Aturan Konsorsium



Aturan konsorsium berarti bahwa beberapa pengguna/klien harus bertindak sebagai satu badan usaha dengan tujuan yang sama, yang dengan demikian mengurangi kemungkinan terjadinya diskriminasi

Resiko terkait dengan perlakuan yang tidak adil dapat diatasi secara efektif dengan perjanjian konsorsium

Jika jaminan dengan perjanjian masih belum cukup, terdapat perlindungan lain bagi para pihak melalui undang-undang anti monopoli

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Apa yang dimaksud dengan ‘kegiatan pokok’?

Klien: Segala jenis usaha yang secara sah dapat meminta pengadaan Perkeretaapian Khusus sebagai dukungan terhadap usahanya tersebut

Penyelenggara: kegiatan usaha yang sama dengan klien (jika penyelenggara adalah badan usaha yang sama dengan klien atau afiliasi dari klien) **ATAU** suatu perusahaan yang bergerak di bidang transportasi (jika penyelenggara tidak terafiliasi dengan klien tetapi memiliki perjanjian transportasi eksklusif dengan klien)



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2. Pembatasan terhadap lingkup perkeretaapian

Aturan “titik ke titik”: Perkeretaapian Khusus diselenggarakan terbatas dalam kawasan yang merupakan wilayah kegiatan pokok badan usaha, dan dari kawasan kegiatan pokok ke satu titik di wilayah penunjang (Pasal 350 PP 56/2009)


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Dasar Alasan Mengubah Peraturan “titik ke titik”

Pengaturan ini sangat membatasi penggunaan dari perkeretaapian khusus, sehingga menyulitkan dalam mendapatkan investasi

Dengan memperlunak pengaturan maka akan memungkinkan perkeretaapian khusus untuk membawa produk-produk kepada dan dari beberapa konsumen atau penyedia barang dari klien

Aturan titik ke titik tidak diatur di dalam Undang-undang Perkeretaapian, dan hanya ada di dalam PP 56/2009

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Dasar Alasan Mempertahankan Pengaturan “titik ke titik”

Terdapat perbedaan pendapat di dalam Kementerian Perhubungan mengenai apakah peraturan Titik ke Titik membatasi atau memperluas Undang-undang Perkeretaapian.

Bagi mereka yang berpendapat bahwa peraturan Titik ke Titik sudah memperluas ketentuan Undang-undang Perkeretaapian, tidak ingin lebih lanjut memberikan kelonggaran.

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Jalan tengah: Usulan sehubungan interpretasi Peraturan “Titik ke Titik”

Peraturan “titik ke titik” dapat secara luas diartikan sebagai berikut:

- Memperbolehkan terdapatnya ‘wilayah-wilayah penunjang’ yang berbeda jenis (contohnya titik pengangkutan, off-takers, supplier barang mentah, dsb)
- Memberikan fleksibilitas penggunaan infrastruktur pada titik titik yang terletak di antara ‘kawasan kegiatan pokok’ dan ‘wilayah penunjang’

17

3. Ketidakpastian mengenai interkoneksi

Penyambungan: Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, disambungkan dengan jaringan perkeretaapian umum atau jaringan perkeretaapian khusus (Pasal 52 UU 23/2007) dan pelayanan angkutan tersebut dapat diintegrasikan (Pasal 149(2) UU 23/2007)

Kerjasama: Suatu penyelenggara Perkeretaapian Khusus dapat, dengan persetujuan dari Kementerian Perhubungan, melakukan perjanjian kerjasama dengan penyelenggara perkeretaapian lain tanpa mengubah status dari Perkeretaapian Khusus (Pasal 374 PP 56/2009)

Peraturan Integrasi: Suatu Perkeretaapian Khusus dapat, dengan persetujuan dari otoritas yang berwenang, diintegrasikan dengan jaringan angkutan perkeretaapian lainnya, dengan ketentuan bahwa pengaturan mengenai perkeretaapian umum akan berlaku (Pasal 161 PP 72/2009)

18

Dasar Alasan Peraturan Interkoneksi

Memberikan kemungkinan bagi Perkeretaapian Khusus untuk melakukan interkoneksi dan berbagi infrastruktur dan gerbong (berdasarkan perjanjian) akan dapat meningkatkan efisiensi, mengurangi biaya dan mencegah persaingan tidak sehat

Masing-masing penyelenggara tetap melayani kliennya tetapi kerjasama antara penyelenggara diperbolehkan

Jaringan yang dibentuk akan memberikan layanan bersifat khusus dan terbatas hanya kepada beberapa pelanggan besar.

Kami berpendapat bahwa inilah konsep yang diperlukan untuk mendorong pihak swasta berinvestasi di sektor perkeretaapian

19

Usulan Peraturan Interkoneksi

melaksanakan ketentuan kerja sama yang disebut dalam Pasal 374 PP 56/2009 yang memperbolehkan beberapa penyelenggara perkeretaapian khusus (masing-masing melayani kliennya sendiri) berbagi infrastruktur dan lokomotif, gerbong tanpa harus kehilangan statusnya sebagai perkeretaapian khusus

Melaksanakan ketentuan integrasi dalam Pasal 161 PP 72/2009 untuk secara jelas menyatakan bahwa integrasi antara infrastruktur perkeretaapian khusus dengan infrastruktur perkeretaapian umum hanya dapat terjadi apabila persyaratan teknis yang berlaku untuk perkeretaapian umum telah dipenuhi.

20



Apa yang terjadi apabila perkeretaapian terinterkoneksi ?

Kami mengusulkan agar perjanjian interkoneksi memperbolehkan penyelenggara pertama untuk :

- Mengakses infrastruktur penyelenggara lain untuk tujuan memberikan jasa pelayanan yang mendukung klien penyelenggara pertama tersebut
- Mengatur penyelenggara lain (apabila penyelenggara umum) untuk menyediakan layanan yang menunjang klien penyelenggara pertama
- Memberikan akses terhadap penyelenggara lain untuk menggunakan infrastruktur penyelenggara pertama untuk tujuan apapun yang sesuai dengan usaha penyelenggara lain tersebut

21



Interkoneksi – Perbedaan Pendapat

Terdapat perbedaan pendapat dalam Kementerian Perhubungan mengenai apakah Pasal 374 PP 56/2009 dapat digunakan sebagai dasar untuk menerapkan peraturan interkoneksi.

Terdapat pendapat bahwa aturan dalam Pasal 161 PP 72/2009 mempunyai pengertian bahwa setiap integrasi infrastruktur perkeretaapian antara Perkeretaapian Khusus dengan perkeretaapian lainnya mengakibatkan terjadinya perubahan status dari Perkeretaapian Khusus menjadi perkeretaapian umum.

Kami berpendapat bahwa Pasal 161 PP 72/2009 dapat diartikan sebagai mewajibkan penerapan ketentuan-ketentuan teknis dari perkeretaapian umum dalam beberapa jenis interkoneksi tanpa mengubah status hukum dari perkeretaapian khusus.

22

4. Kurangnya kejelasan mengenai sifat dan kepemilikan dari aset perkeretaapian khusus

Perkeretaapian khusus dibangun oleh pihak swasta untuk tujuan pribadi dengan menggunakan hanya dana pribadi

Kami berpendapat bahwa baik di UU Perkeretaapian atau peraturan infrastruktur (PPP) tidak terdapat pengaturan bahwa perkeretaapian khusus dianggap sebagai suatu bentuk 'konsensi'

Kami mengusulkan bahwa hal-hal yang berhubungan dengan apa yang akan terjadi setelah proyek berakhir untuk secara bebas dinegosiasikan pada waktu yang pantas antara penyelenggara dan pemerintah sebagai bagian dari ketentuan perizinan, dengan pemahaman bahwa aset untuk diperlakukan sebagai milik pribadi

23

5. Kerumitan sistem perizinan

Prosedur untuk mendapatkan izin terlalu berbelit-belit

Kami berpendapat bahwa proses tersebut dapat disederhanakan dan dipersingkat tanpa mengurangi efektifitas atau membatasi otonomi daerah

Kami berpendapat penyederhanaan ini dapat dilakukan melalui suatu Permen,

24

Kesimpulan

Tujuan ditingkatkannya keterlibatan pihak swasta belum tercapai karena terdapatnya berbagai hambatan

Kami berpendapat bahwa hambatan-hambatan ini dapat secara efektif diatasi melalui ketentuan-ketentuan yang ada pada Undang – Undang Perkeretaapian yang berlaku saat ini

Sebagian besar dapat dicapai melalui Peraturan Menteri, walaupun beberapa perubahan terhadap PP 56/2009 dan PP 72/2009 yang berlaku saat ini juga sebaiknya dilakukan.

**ANNEXE 8: SUPPLEMENTARY NOTE BY PROF. SUYONO
DIKUN AND DR. DAVID LUPTON**



Australia Indonesia Partnership
Kemitraan Australia Indonesia



**SPECIAL RAILWAY III
MACRO PERSPECTIVES OF PRIVATE RAILWAYS
IN INDONESIA
A SUPPLEMENTARY NOTE**



INDONESIA INFRASTRUCTURE INITIATIVE

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Suyono Dikun PhD

David Lupton PhD

Jakarta, 24 June 2011

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I. MACRO ECONOMIC FRAMEWORK

1.1. INTRODUCTION

Rail history in Indonesia dated back into 1864, when the colonial government first constructed the track between Semarang and Solo and finished by 1873. However, despite the long history of railway, freight rail transport in Indonesia is still underdeveloped. Not only that road transport had long been given a dominating role in freight movements due to its massive development, but also because for so many years rail transport had been oriented towards transporting massive, long distance passenger movements with subsidy which has resulted in the marginalization of cargo movements by rail. As a result, Indonesia railway simply has no interaction with the economy and its contribution to national GDP is negligible¹ (See Table 1). The share of passenger rail is currently only about 7 percent and the share of freight rail is also negligible, only 0.7 percent, of the national passenger and freight movements as opposed to the share of road which is more than 80 and 90 percent respectively² (Table 2).

Table 1- Contribution of Transport Sector to National GDP (%)

Year	Rail	Sea Transport	Air Transport	Road	Total
2003	0.04	0.64	0.46	1.63	2.77
2004	0.04	0.63	0.57	1.63	2.87
2005	0.03	0.64	0.59	1.62	2.88
2006	0.03	0.64	0.62	1.61	2.90
2007	0.03	0.64	0.66	1.60	2.93

Source: Indonesia Statistics, BPS, 2007

Table 2- Market Share of Transport in National Economic Movements (2007, %)

Year	Passengers	Freight
Road	84.2	91.2
Rail	7.3	0.7
Other Transport	8.5	8.1
Total	100.0	100.0

Source: PT KAI, 2007

The National Railway Master Plan has indicated a strong will of government to increase the role of railways in the economy by projecting a 13 percent and 17 percent shares of passenger and freight movements by rail respectively in 2030 (Table 3). Rail tracks would be expanded up to 12,100 km in 2030 with the number of rolling stocks increases significantly. The Plan indicated that

¹ Previous studies have indicated the negligible contribution of railway sector to the economy which is less than 0.1 percent of the national GDP

² Data collected from DGR and PT Kereta Api Indonesia, 2007

as many as 10,320 locomotives (1,960 units for passenger trains and 8,360 units for freight) would be needed in 2030 with 1

9,410 passenger trains and 166,940 railcars. The Plan has also indicated the total investment needed for railway development to amount to USD 67.3 billion, consisted of USD 33.2 billion for rolling stocks and USD 34.5 billion for infrastructure. From the total investment needed, only 30 percent would originate from government budget and the rest of the investment (70 percent) must come from private investment³.

Rail infrastructure would need a huge investment to build and for public railways, is still considered public obligation. Thus government investment (in the magnitude of USD 20.2 billion or USD 1.1 billion annually) would be needed for public railway development. For public railways, there is a very few, if any, private investors who would be willing to invest in infrastructure, at least probably not in the 10-15 years to come. Some conditionalities must be fulfilled first before private investors would be willing to invest, including strong market demand to ensure return on investment, clear government supports, good project structure, and legal and regulatory certainties⁴. Inviting for USD 47 billion (a USD 2.4 billion annually) from private investment is a big task of the government. Although government has been working hard in the last ten years to promote public-private partnership, still Indonesia has no precedence of PPP in railways and the fact that railway industry and market are still managed and operated in vertical integration manner by the incumbent operator would keep the investors away from public railway business.

Table 3 – Railway Investment Plan 2030

Year	Length of Tracks (km)	Locomotives for Passenger Trains	Locomotives for Freight	Trains	Railcars
Jawa	6,800	1,790	7,600	17,890	151,970
Sumatera	2,900	90	530	810	10,590
Kalimantan	1,400	20	80	190	1,530
Sulawesi	500	50	120	470	2,380
Papua	500	50	30	50	470
Total	12,100	1,960	8,360	19,410	166,940

Source: NRMP, 2011

³ The National Railway Master Plan. DG of Railways, Ministry of Transport, 2011

⁴ See for example: Dikun, S. The Future of Indonesia Railways. An Interface Report Towards the National Railway Master Plan, IndII, August 2010

The only way for private investment under the current circumstances to enter the railway market is by means of special railways, a private financing initiative to build railway services for their own main business undertakings. Opportunity is widely open for private corporations, domestic and international, with government licensing in the mining, plantations, industry, and agriculture products to build their own special railways from their production complexes to the terminal points or outlets. This will give a tremendous enhancement of rail-port direct interfacing, a multimodal transport that is now lacking from Indonesia's transport system. This will also enhance the role of railways in the national economy.

The latest offensive of government policy towards economic corridors gives rise to the development of special railways. According to the Law No. 23/2007, a special railway (SR) is defined as a type of railway privately developed and operated exclusively to serve the principal business activities of the Special Railway Proponent (SRP)⁵. A SRP is a business entity proposing to develop a special railway to serve its principal business activities. As such, SR is entirely private initiative in nature and in term of project proposal it becomes unsolicited, financed solely by the SRP, and does not require government funding or government support. Given this nature, a SR does not have to be tendered as stipulated in Presidential Regulation No. 13/2010 for Public Private Partnership projects. Although Perpres 13 regulates an unsolicited PPP project, it is, however, insufficient to regulate a private financing initiative leading to special railway development by private investors. Thus, no operating regulation in Indonesia has so far entertained this kind of private undertaking. More operational regulation on Special Railways have also been stipulated in Government Regulations No. 56/2009 and No. 72/2009. But neither regulation provides a very clear picture on the policy and legal certainties of the conducts of special railways related to the preparation, licensing, and operation sides. A Ministerial Regulation would therefore be critical to provide clear answers to all the uncertainties.

1.2. ECONOMIC RATIONALES

1.1.1. Long Term Planning

Law Number 17/2007 on the Long-term Development Planning (RPJP) 2005-2025 projected that Indonesia would be a developed economy with wealthy, independent, and just society. Its national GDP per capita would equivalent to middle income countries with open unemployment rate of 5 percent and poverty rate of 5 percent. In transport sector, RPJP envisaged a national seamless transport network system which is having a close linkage with the economy. RPJP has also explicitly stated that the role of government would be focussed on policy determination while the private sector would be having a greater role to invest in infrastructure projects, including transport. The development stage of transport sector during the course of four 5-year planning (RPJM) of RPJP is shown in Table 4 below. In 2025, it is projected that railway transport

⁵ Law Number 23/2007 on Railways

has functioned well as the backbone of economic movements in the country. Recent projections made by government and other international institutions have also indicated the potential for Indonesia to proceed into USD 16,000 per capita GDP by 2025, placing Indonesia into the 12 biggest economy in the world⁶.

Table 4 : Transport Development in Long-Term Development Planning

RPJM I 2005-2009	RPJM II 2010-2014
Acceleration of infrastructure development with the increasing role of private investment, putting in place all fundamental policy frameworks, reforms, regulations, and institutional changes in transport sector.	Acceleration of infrastructure development with the increasing role of public-private partnership, and to develop more transport infrastructure networks.
RPJM III 2015-2019	RPJM IV 2020-2025
Developed transport infrastructure networks, including transport access to rural areas to support local economic activities, such as agriculture products, plantations, mining, and industry.	Transport infrastructure networks fully developed providing services to the economy in an efficient and effective way.

Source: Law No. 17/2010 on Long-Term Development Planning

1.1.2. The Economic Corridors

With the issuance of Presidential Regulation (Perpres) Number 32/2011 on May 20, 2011, government launched the Master Plan for the Acceleration and Expansion of Indonesia Economic Development 2011-2025 (MP3EI). The Plan has the spirit of not doing business as usual, meaning that the Plan must be implemented in such a rapid fashion manner with no or little bureaucratic hurdles and without too much depending upon the government budget. The Private investment is therefore imperative and would probably constitute more than half of the total investment in the corridors. The main objective of MP3EI is to enable Indonesia to convert itself to a developed economy with national GDP of around USD 4-4.5 trillion by 2025 and becoming the ninth largest economy in the world. It is projected that around 82 percent of national GDP would be contributed by the economic activities and productions in the economic corridors. This in turn would create spillover effects into other regions outside the corridors. The development of economic corridors in Indonesia is based on the potentials and advantages inherent in each region throughout Indonesia. As a country consisting of thousands of islands and located between two continents and two oceans, the Indonesian archipelago has a unique combination of economic potential with specific major islands or regions having their own strategic future-role in achieving Indonesia's 2025 vision.

⁶ Coordinating Ministry for Economic Affairs, 2010

By taking into consideration this potential and the strategic roles of each major island, six economic corridors have been identified as depicted in Figure 1 below. According to Perpres 32/2011, the implementation of the Master Plan is coordinated by a Committee for the Acceleration and Expansion of Indonesia economic Development or KP3EI⁷. In the Master Plan, it is also indicated that one of many tasks of the KP3EI is to revise regulations regarding infrastructure. These include the issuance of Perpres to replace Joint Ministerial Decree on PSO-IMO-TAC in railway sector and revision of

Figure 1: The Six Economic Corridors



Source: The MP3EI, 2011

Perpres Number 13/2010 on Public Private Partnership. It is expected that revision of Perpres 13 would also include the chapter and articles on special railways, particularly on the agreements between government and private promoters on how to accelerate the implementation of special railways in Indonesia.

Table 5 shows the development themes for the six corridors according to the specific economic characteristics of each island. These themes will in turn characterize the economic mainstreaming of the corridors in which clusters of economic activities-industry, mining, plantations, and agriculture - will be linked up together along the corridor and will create the acceleration of regional and local economic growth in the region.

Table 5 : Themes for the Six Economic Corridors

Corridor	Nature	Economic activity mainstreaming
Sumatera	Center for	Production and Processing of Natural Resources and as Nation's Energy Reserves
Jawa	Driver for	National Industry and Service Provision
Kalimantan	Center for	Production and Processing of National Mining and Energy Reserves

⁷ The Master Plan for Acceleration and Expansion of Indonesia Economic Development (MP3EI). Coordinating Ministry for Economic Affairs, May 2011. MP3EI stands for Master Plan untuk Percepatan dan Perluasan Pembangunan Ekonomi Indonesia. KP3EI stands for the Komite Percepatan dan Perluasan Pembangunan Ekonomi Indonesia.

Corridor	Nature	Economic activity mainstreaming
Sulawesi	Center for	Production and Processing of National Agricultural, Plantation, Fishery, Oil & Gas
Bali-NTT	Gateway for	Tourism and National Food Support
Papua-Maluku	Center for	Development of Food, Fisheries, Energy, and National Mining

Source: The MP3EI, 2011

Table 6 shows the projected economic growth of the regions under three circumstances: (i) business as usual or do-nothing; (2) implemented RPJM programs; and (3) implemented MP3EI programs. Overall, Indonesia is projected to grow by 10.3

Table 6 : Projections of 2025 GRDP in the Corridors Under Three Different Scenarios

Corridors	Do Nothing	RPJM Programs	MP3EI
Sumatera	10.2	12.5	13.2
Jawa	10.6	12.8	12.8
Kalimantan	9.1	11.2	11.9
Sulawesi	9.6	13.1	13.8
Bali-NTT	10.3	11.1	11.8
Papua-Maluku	8.8	12.2	12.9
Non EC	10.5	11.8	12.1
Indonesia	10.3	12.4	12.7

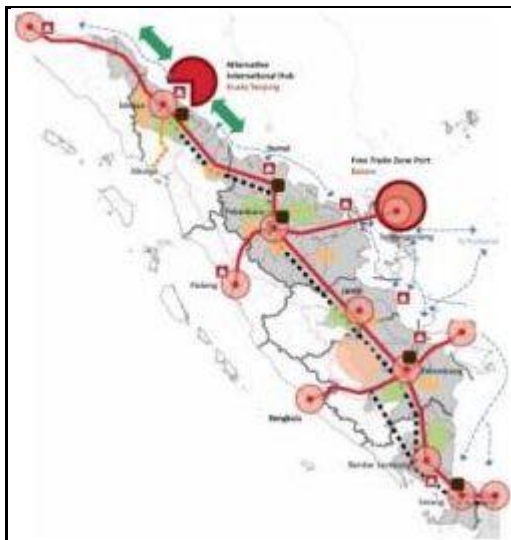
Source: The MP3EI, 2011

percent under do-nothing scenario and 12.4 percent under implemented RPJM programs in 2025. But implementation of MP3EI would enhance the economic growth into 12.7 percent. The six regions with the economic corridors would also be experiencing a growth of 11.8 to 13.8 percent in 2025 with the non-economic corridor regions would be having around 12.1 percent growth. While at one side the projections represent the optimism of the government heading towards a developed

economy circumstances of the country, on the other side, however, this has brought a big concern on how infrastructure along and within the corridors would be developed, financed, and managed accordingly to better serve the economic movements in the corridors. The economic growth would simply not exist without efficient and reliable transport system networks in the corridors.

II. ECONOMIC CORRIDORS AND SPECIAL RAILWAYS

Figure 2: Sumatera Economic Corridors



Source: The MP3EI, 2011

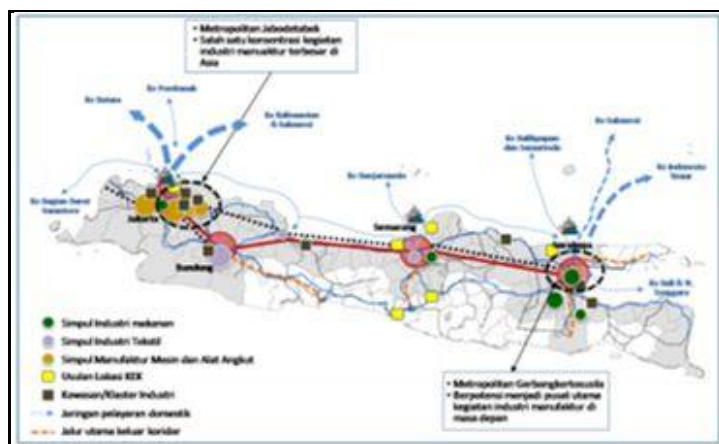
The implementation of the MP3EI economic corridor programs and the flowing of economic activities within each cluster of economic centers and between one cluster to another and the smooth final flows to the ports and airports would only happen if the transport infrastructure and network along the corridors is ready to serve the economic movements in an efficient and effective manners. According to the Plan, Sumatera Economic Corridor (Figure 2) is directed at four main economic commodities: Palm Oil, Rubber, Coal, and Steel. To support the development, it is essential to build connectivity such as roads and railway construction across the eastern part of Sumatra, from Aceh to Lampung and down to Banten. Strengthening

connectivity in the corridor would also taking into account intra corridor connectivity, inter corridor connectivity (connectivity from and to corridors), and international connectivity. The development of Sumatera Economic Corridor is based on spatial structure planning, which is shaped by movement patterns of plantation (rubber and palm oil) and coal mining to processing or industrial zones and also to ports. Therefore, for each province, giving priority for maintaining and constructing new infrastructures such as road, bridge, railway, seaport and airport is aimed to improve connectivity to deliver increased goods and services. Because Sumatra serves as a gateway to

Indonesia on the west side, the main port for international shipping functioning as the international hub port should be established.

The future economic movements in Sumatera corridors, especially freight, would be much higher than current volumes and cannot be solely burdened to

Figure 3: Jawa Economic Corridors

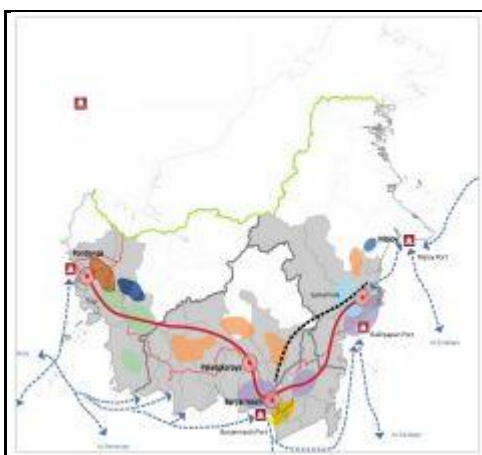


Source: The MP3EI, 2011

road network only. Sumatera Rail, however, is scattered to only three small networks in the North, West, and South Sumatera without any linkage whatsoever. Railway tracks and rolling stocks are in poor condition as they are aged. Many of the rails, bridges, signals and telecommunication systems have exceeded their technical age limits. Compared to other transportation modes, the market share of railways in the transportation sector is very small. Given these circumstances, building an efficient and reliable railway along and within the corridor would make a lot of sense. But the high investment costs of building such system would be tremendously high and government would not be financially able to make the investment. Therefore, special railways with private investment would seem to be the only way to do that in a rapid fashion manner.

In general, Jawa Corridor (Figure 3) has better economic and social conditions in relevance to other corridors with the potential to progress in its value chain from manufacturing based economy to service-based economy. This corridor has the potential to serve as the benchmark for economic changes, evolving from primary-industry focus towards being more focused on tertiary-industry. There are, however, several issues identified in Java Economic Corridor that requiring attention, including high population and population density along the corridor, massive urbanization, and prosperity gap between provinces and districts within the corridor. Apart from that Jawa economy constitutes about 60 percent of national GDP and economic movements would also be extremely high after the implementation of the economic corridor. This would justify the development of freight railway in Jawa corridor along with its associated rail access to ports and airports. In the longer term, it is envisaged that Jawa economic corridor would be characterized by the operation of high speed rail for passengers and freight rail with higher axle load standard for cargo movements.

Figure 4: Kalimantan Economic Corridors



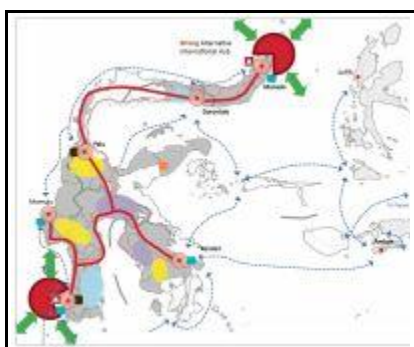
Source: The MP3EI, 2011

The economic corridor in Kalimantan (Figure 4) would be characterized by mining and energy products which contributed to 50 percent of its GRDP. Sulawesi Economic Corridor (Figure 5), on the other hand, would mainly be based on agriculture, plantation, fishing, and nickel mining products. Tourism, food products, fisheries, and animal husbandry would be the main business in the Bali-Nusa Tenggara Economic Corridor (Figure 6) while Papua-Maluku Economic Corridor (Figure 7) is directed towards the development of food center, fisheries, energy, and mining. Again, all these corridors would urgently require a

transportation network to perform and achieve their economic goals.

Efficient and reliable transportation infrastructure and system network is one of the most important components in economic corridor development. Even if there was no economic corridors, Indonesia is in urgent need for a rather massive infrastructure development to support and sustain the projected 7-8 percent per annum economic growth as stated in the RPJM 2010-2014 and other official planning documents. The development of transport linkages will play key roles in corridor development to reduce logistic costs, to improve competitiveness, and to open and provide market access. However, current levels of basic infrastructure in the corridor still need improvement to achieve world class standards. Roads in Sumatera corridor are narrow with many parts in poor condition and only about 40 percent of road networks are in good condition. Road network also suffers from excessive overloading which is the main cause of consistent road damage. This has resulted in high unit freight rates, although economically unit freight rates should reduce with longer trip distances. Railway transport in Sumatera is scattered in three provinces without any integration

Figure 5: Sulawesi Economic Corridors



Source: The MP3EI, 2011

whatsoever in handling cargo movements.

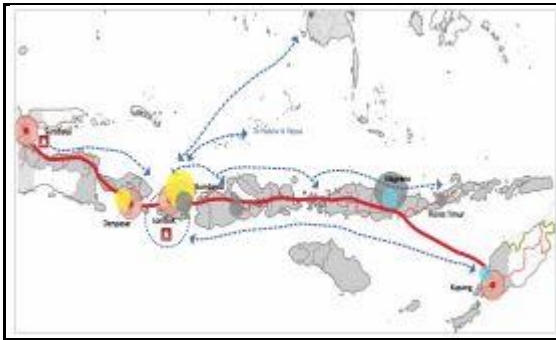
Major arterial road network in Jawa is overburdened and carry more than 90 percent of heavy traffic and had long become oversaturated and overcongested. Freight rail in Jawa is also insignificant in playing its role in the economic movements⁸. Trans Kalimantan Highway has never been completed as intended in the original plan to connect all provinces in the island. The existing road network is also not in stable condition due to coal transport by trucks. Kalimantan railway never exists and the proposed special railways to transport coal by MEC is still in the early stage of development.

Sulawesi, Bali-Nusa Tenggara, and Papua are probably too premature for special railways in a very near future and instead would be preferably enhancing their road network to support their economic corridors. The proposed railway circle line in Bali is exclusively intended for passenger transport.

⁸ The complex problems of road overloading had long been addressed by related institutions in the country but so far without any significant results on how to mitigate the problems. Current study by Indii has indicated several countermeasures on this. See:

III. RATIONALES FOR PRIVATE INVESTMENT

Figure 6: Bali-Nusa Tenggara Economic Corridors



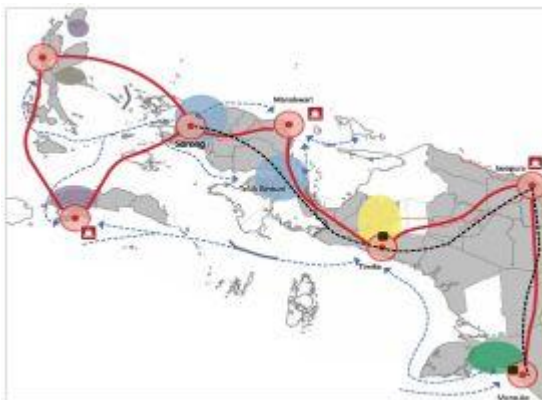
Source: The MP3EI, 2011

As mentioned before, special railways could accelerate the private involvement and investment in Indonesia's railway sector. Other significant achievement of special railways would include building up the economic linkages where rail sector would directly be given a greater role in the economic activities of the country. Indonesia economy, primarily the real economy, had been suffering from the lack of efficient transport system to transport their products to the outlets. The facts that the majority of the economic activities along the economic corridors are commodity-based, with clusters of industrial, plantation, and mining complexes as the generators, strongly identify the urgent need for railway transport. Railways are expected to be the backbone of the economic movement. The facts that only about 10 percent of the corridor development costs are expected to be financed by government investment and about 55 percent of the finance coming from private investment would also lead to private sector investment in the railway development. Special Railways, a private financing initiative to build mostly freight rail, are seen as a key factor to achieving the government's objective.

Encouraging private sector investment is expected to bring both expertise and financial resources that would otherwise not be available. Proposed projects suitable for private sector investment include railways to carry coal and minerals between the mines and export ports. Palm oil, cement, forest products, and other mining products are commodities in the corridors that would be nicely transported using railway. Railways

are seen as being essential to the success of the entire mining and plantation operations. Private railways can thus both be profitable and contribute to the growth of the Indonesian economy. Without private investment, government budgetary constraints are likely to limit growth. The reason for involving the private sector goes further than simply attracting investment. Rather than ask "why involve the private sector in

Figure 7: Papua Economic Corridors



Source: The MP3EI, 2011

constructing railways”, the question should be inverted to ask “what is the justification for government intervention in the operation of railways if market signals the viability of such activity?” Indonesia is a typical mixed economy, where most goods and services are provided by the private sector, but with government intervention in various sectors in the form of regulatory controls (including price control or monitoring) or government ownership. The mixed economy model is based on the premise that a free market generally provides the right signals for firms and individuals to interact and trade to mutual benefit, but that the state will need to set an appropriate legal framework (setting the ground rules) and that direct intervention by the state is appropriate where there is evidence of market failure. When there is market failure, the private pursuit of benefits by individuals or firms results in an outcome where everyone is worse off than if decisions were made collectively.

IV. INTERNATIONAL EXPERIENCE⁹

Over the last two decades there has been a strong trend toward development of sector-specific industrial railway lines and decentralisation and privatisation of formerly monolithic national railway networks. In many cases, rates and services are wholly unregulated and hence there is little published information. Depending on railway size and particular conditions, sector railways may be regulated by transport ministries for safety or, in some cases, may be subject only to safety regulation applicable to industry generally. The international trend is away from highly centralised national networks. Transport is essential for fostering economic growth and most countries are encouraging the industries that benefit most to take primary responsibility for their transport needs. Existing national railway networks typically benefit more from traffic generated by minimally-regulated, sector-specific railway lines than they are injured by competition from them. Indonesia can learn from experiences of other countries and select the best option for Indonesia railway ahead.

International experience shows that many countries are encouraging private participation in the rail sector. They are doing so by making it easy to get licenses, limiting regulation to safety, environment, and human resource issues, and providing an environment that permits a wide range of private finance mechanisms. Private participation in the rail sector generally results in (i) much greater investment in rail infrastructure, (ii) privately financed rolling stock, and (iii) the development of innovative means to finance rail sector investments – including development of leasing and contracting markets in everything from locomotives to track maintenance machinery. The overall lesson from international experience is that liberalisation of transport regulations to encourage private sector participation in rail transport markets, including infrastructure, leads to greater investment, more competition, declining rail transport prices, and much better customer services. Private participation in the rail sector can transform the sector and contribute significantly to national economic development.

With regard to specific differences with Indonesia, no other country of which we are aware requires railways outside of the national network to serve only a single enterprise and be owned by it. On the contrary, private investment in railways without any enterprise connection is encouraged, and service other than to a particular industry is welcomed as creating transport capacity that would otherwise not exist. Whereas the current Special Railway rules appear designed to avoid competition between new lines and the national network, most railway sectors encourage competition as being in the public interest. International experience supports a range of organisational options and procedures to increase railway capacity: sector-specific investments, regional initiatives, PPPs and SOEs. Current international trends strongly suggest the need for Indonesia to liberalise the permissible scope of investment in the

⁹ This section is a condensed version of the topic discussed in the Final Report of Special Railways Phase 2

rail sector by either modifying the Special Railway provisions or designing workable solutions consistent with the Special Railway provisions, or both.

The United States

United States Railways have always been dominated by the private sector and today there are seven large “Class 1” railways, 30+ regional “Class 2” railways, and more than 500 smaller “short-line” railways. The short-line railways are particularly pertinent to the Special Railway issue – they serve a variety of local purposes ranging from commuter services to strictly internal company operations. A number of the lines are minerals carriers. About 25 per cent of all US rail freight travels on short-line railways for some part of its journey.

Up until late last century, railroads were heavily regulated worldwide. They were seen as natural monopoly industries and regulation was seen to be required in order to eliminate excess profits and assure efficient provision of services. However, rather than earn monopoly rents, the railway industry in North America, Europe and Australia struggled to remain financially viable in the face of competition from other modes, especially trucks. For example, US rail share of freight transportation declined 33% between 1950 and 1975. During the 1970s, the rail industry’s return on equity was in the 3% range and return on sales was only 4%. Several major US railroads declared bankruptcy in the 1970s including the Penn Central, the Rock Island, and the Erie Lackawanna. The freight rail experience in Europe and Australia was similar although government subsidies and road freight regulation kept the railroads in business.

The solution to the problem of freight railroad viability was total economic deregulation. The rationale for the change was that regulation was inhibiting the rail industry from responding to competitive pressures from the trucking industry. With the Staggers Act of 1980, US railroads were free to enter and exit markets, introduce new service offerings, enter into private contracts with shippers, set rates and abandon track. Over the next two decades, the railroads reduced costs, rationalized capacity and increased productivity. As a result, revenue ton-miles increased more than four-fold from 1980 to 2005. The productivity gains and corresponding cost reductions enabled the railroads to invest in track and rolling stock upgrades. The industry also cut its tariffs, enabling it to compete more effectively with other modes. US coal rates declined steadily in real terms from 3 cents per ton-mile in 1985 to 1.5 cents in 2005. The end result was a rebound in rail share. US freight rail share stood at 40% in 2007.

Railway developers In the United States are responsible for acquiring the property needed for railway construction and operation, with or without governmental support (mostly from local jurisdictions). The federal government has no more right to railroad land than it has to any other private property. That is, any claims would be based on the terms under which federal land was made available for railroad use. The federal government certainly could not require that any State or local property agreements for railroad use be reserved for integration into national rail networks after the private railroad ceased to operate.

Railways in England and the United States (along with banks, insurance companies and other transporters) were among the first businesses to require a corporate charter; i.e., to be incorporated. (Prior to the 19th century, almost all businesses were informal, with no rules of corporate governance.) In the US, incorporation was, and is, done mainly at the State level and without any limitation as to who can incorporate as a railway company.

The equivalent in Indonesia would be for the provinces to be able to license any railway activity they saw fit, subject only to any national safety standards. Following the US model, there would be no restrictions on who could operate a rail line in, say, East Kutai – a coal mine operator, a group of affiliated mining interests, ports, other private parties, or a public-private joint venture.

The United States' Federal Railroad Authority (FRA) requires adherence to a code on industry safety practices and for years has been recommending the standardisation of operating rules and practices for cost-effectiveness in terms of both safety and efficiency. However, the FRA has elected to allow railroad operating rules to be established primarily by railway carriers and their association rather than imposing government rules on the industry.

Nearly all US short-lines are independently operated, privately owned enterprises that would be classified as public railways in Indonesia – they carry freight (and sometimes passengers) for hire. In addition to a number of pure “industrial facility” railways that are unreported, about 70 of the small US railways are “shipper-owned”, defined as 50 per cent or more of the railway’s traffic being the owner’s own cargo. However, there is no prohibition on any other cargo being carried. US short-line railways are essentially free from economic regulation of rates and services, only being regulated in terms of safety and technical standards

Any citizen, including a public or private corporate entity, can develop a railway line – either a public or specialised railway – to serve its perceived needs. The railway line developer must comply with local rules and regulations regarding land use, the environment, endangered species, and other local terms and conditions. Local government agencies are free but not required to use their power of eminent domain to help assemble the right-of-way. Once the railway is built, it must have safety and technical standards that comply with regulations issued by the Federal Railway Administration (part of the Department of Transportation). Generally, there are no access requirements for such railways – access to a privately built railway is subject to commercial contract negotiations. A railway built for a special purpose – e.g., to serve a mine or industrial complex – can serve other customers at its discretion and under commercial terms acceptable to it and the other customers.

In some cases, the Surface Transportation Board (the US economic regulator for transport) can compel third-party access over the combined railway if it is in the public interest. It can also direct competing railways to reach a commercial arrangement to share facilities where it deems this to be in the public interest. Such cases generally only arise in major railway mergers and acquisitions, as a mechanism to protect an existing competitive environment. They rarely apply to smaller industry-focused lines.

In all cases, local governments have easement rights to cross private infrastructure with roads and utilities. Those rights are subject to local laws, and the terms are generally commercially negotiated in the public interest.

Canada

The Canadian rail sector is similar to that in the United States. More than 40 enterprises operate short-line and regional railways over 13,000 kilometres of track, representing about 30 per cent of the entire Canadian railway network. As in the US, there is little economic regulation of small railways except for rate oversight on certain grain traffic. Small railways are incorporated in regional (provincial) jurisdictions; there are no requirements to limit traffic to the owner's own traffic; and the national government has no claim on the use of any property that it did not previously own and conditionally release for private railway use.

At one time Canada maintained a nationalised railway company, Canadian National (CN) in competition with the private company Canadian Pacific (CP) as a deliberate policy to prevent CP exploiting any natural monopoly. CN has since been privatised and ranks as one of the most efficient railway in the world. Sector specific regulations have all but disappeared, with reliance now being given to general regulation concerning environment, land use, trade practices etc.

Any public or private enterprise can develop and build a railway, whether for exclusive use, limited use, or as a common carrier. While Canada, like the US, does not require public or competitor access to private railways, Canadian regulations do require that a railway provide infrastructure access to another private railway if the customer served is within 15 kilometres of the proposed point of interchange. Access is commercially negotiated but the commercial terms cannot be unreasonable and are subject to judicial oversight.

Any new railway must meet the safety and technical standards promulgated by Transport Canada, which are similar to those issued by the Federal Railway Administration in the United States. Local governments have the right to cross private (or publicly financed) infrastructure with roads, drainage structures, and utilities. Those rights are subject to local laws regarding terms and conditions and are generally commercially negotiated in the public interest.

Mexico

Mexico, after supporting a money-losing state-owned railway throughout most of the 20th century, concessioned its main railway to three private operators in 1996-97, followed by concessioning residual lines as six short-lines (ranging from 72 to 1,550 kilometres in length) in 1997-2000. Mexico's short-line railways serve a number of communities and businesses, and a few are special purpose mineral railway operations. As is true throughout North America, Mexico has no restrictions on the corporate affiliations of railway owners nor does it restrict the goods any railway can carry. Mexico gives primary regulatory responsibility to the Secretaria de Comunicaciones y Transportes (SCT) to ensure compliance with safety rules and oversee certain policies

on tariffs and access. The railway unit within the SCT publishes and enforces safety and technical standards for railways and any new railway must meet those standards. Safety and technical regulations are similar to those in Canada and the US.

Mexico, however, also has a strong competition law. It designed its privatised rail system to create competition at major commercial centres and assigns certain responsibilities concerning rates and competitive issues to a general competition agency (Comision Federal de Competencia or CFC). The CFC has prevented rail mergers on grounds that they might reduce competition. Under current Mexican law, railways similar to the proposed Bukit Asam ventures in Sumatra would be supported as pro-competitive, and multiple service points and transport connections would be encouraged rather than restricted as under Indonesia's Special Railway provisions and proposed Ministerial Regulations amplifying them.

As in the US and Canada, any public or private enterprise can develop and build a railway for limited or public use in Mexico. Each private railway development must meet local land-use and environmental regulations. As in the US and Canada, local governments can help the development of such railways either directly or indirectly, through land acquisition or other means, as long as their actions are legal and proper under general laws of public governance.

Russia

Although Russia is commonly thought of in terms of its large state-owned railway network, the image of a centralised system is false. Even in the USSR there were 17 major railroads and about 70 railway divisions which, while controlled by the Ministry of Railways, had a substantial degree of autonomy in many respects. Beyond that, there are many industrial railroads in Russia (such as mining or lumbering railroads) with a total length about half that of the common-carrier system (which now also hosts many above-rail operators). About two-thirds of industrial railway freight in Russia flows to and from the common-carrier railroads while the other third is internal transport only on an industrial railroad. (For example, a lumber company uses its private industrial railroad to transport logs from a forest to its sawmill.) About 4 per cent of the industrial railroad traffic travels on tracks jointly operated by two companies. In addition to the thousands of kilometres of industrial and privately owned and operated railways, reforms in the Russian rail sector have resulted in the growth of hundreds of rail equipment operators. These reforms are transforming Russia's railways. Since 2003, private investors have acquired more than 400,000 freight cars (worth nearly USD20 billion), and more than 2,000 private operators have evolved, some of which are rail service companies only while others are affiliates of shipper/industrial lines. While Russian Railways (RZD) still dominates the rail-freight market, the private operators are gaining ground rapidly – jumping from a 26 per cent market share in 2003 to 38 per cent by 2007. A new equipment leasing market has developed and private investment in the sector (including new suppliers for passenger equipment, freight cars, locomotives, and railway infrastructure components such as signalling, sleepers, and electronic systems) has attracted billions of dollars in new investment. At the same time, the railway, transformed from a cabinet level ministry to

an SOE, has thrived, become profitable and is now able to float Eurobonds and otherwise raise the capital needed to renew and transform itself.

Most railways in Russia that are not a part of the national railway network (RZD) are owned and operated by private enterprises (coal, timber and steel companies). Generally, the industrial railways are operated as separate subsidiaries and may be jointly owned by several enterprises and local government units. These railways are free to provide service to shippers that are not part of the enterprise group owning the rail unit. In the past, prices were related to the national tariff, but they are now largely unregulated. Pricing oversight is provided by a national competition commission, largely on the basis of complaints rather than strict oversight.

People's Republic of China (PRC)

While state-owned China Railways (CR) continues to run a large majority of rail lines in the People's Republic of China, regional networks and joint ventures have multiplied in recent years. Of China's 78,000-km railway network in 2007, 65,320 km (about 84 per cent) was owned and operated by the Ministry of Railways, 8,940 km was owned by joint-venture railways and 4,740 km was controlled by local authorities or industries. Continued growth in demand and the increasing need for reliable transportation have resulted in dedicated railway lines for each of the ten major coal-production areas, which form a key component of China's railway expansion plans. The railway financing system in the PRC is based on the principle of "government taking the leading role, but diversified investment and market oriented projects."

Joint ventures are the major mode for new railway projects in the PRC. At the end of 2008, RMB300 billion (about USD45 billion) was committed from outside MOR. The decentralised portion of China's rail sector is expected to grow significantly in absolute size and system percentage. Strategic investors such as power plants, coal mines, ports, insurance groups, either public or private, are expected to play a major role. The Shenhua Group (a large coal mining and energy company) operates Shenhua Railway, now totalling 1,369 km, with various expansion projects planned. The private special purpose Shenhua Railway carries more than 150 million tons of coal annually. In the PRC, special rates are applied to non-national railway lines according to their investment costs and other factors. For Shenhua's railway lines, the rates are set by kilometre, with no base cost. Yankuang Group Corporation Limited also operates regional coal railways; Yanzhou coal, for example, operates a 184-km track connecting Yanzhou's mines with its largest client.

Asia Energy Logistics Group has recently become China's first private majority foreign-owned operator of cargo railways. Asia Energy has a 62.5 per cent stake in a CNY1.6 billion, 250-km, 10 million-tons-a-year coal railway project in Hebei province. Private companies, especially resources miners, have been eager to develop their own railways instead of waiting for the government to expand the railway network, providing room for private enterprises to engage in smaller projects.

Another privately funded rail project is planned to link the towns of Jiafeng and Nanchenpu over a stretch of 64.29 kilometres. The USD340 million rail line will have six

stops and pass through six counties in Sanxi province. It has been funded by two private companies – Broad Union Investment Management Group Co., Ltd. and Ufeng Railway Construction Investment Co., Ltd. – in addition to the local state-run Railway Bureau of Zhengzhou. McKinsey & Company recently projected that private and foreign investment in China's railways will rise from 7 to 30 per cent in the coming years. Private railway development is subject to the approval of the Ministry of Railways and must meet CR technical and safety standards.

Japan

Japan has 57 significant private railways (excluding numerous metros, trams and monorails and other urban systems) in addition to the seven major private railway systems (six passenger, one freight) created from the breakup of Japanese National Railways. While most conventional railway lines are regional systems that principally carry passengers, they include 14 freight lines, some of which are specialised in particular commodities (notably coal, limestone, cement, chemicals, oil, and containers). Despite specialisation and close affiliations with industries served, there are no ownership restrictions for operating a regional freight line.

While the pace of new railway development in Japan has slowed in recent decades, any national entity (public or private) is free to assemble the land and resources to develop a railway to meet its needs. New railways must meet local government standards and conform to safety and technical standards set at a national level. Access arrangements are subject to commercial negotiation, with the national government having a right to require access to private (or local government-financed) railway infrastructure.

India

Since independence, Indian Railways (IR) has enjoyed a strong monopoly in India, although a few private railways do exist on private estates or are operated by companies for their own purposes (including plantations, sugar mills, collieries, mines, dams, harbours and ports). The Bombay Port Trust runs a railway of its own, as does the Madras Port Trust. The Calcutta Port Commission Railway and the Vishakhapatnam Port Trust are special railways serving specific ports. The Bhilai Steel Plant has a freight railway network. Tata (a private concern) operates funicular railways at Bhira and at Bhivpuri Road (as well as the Kamshet-Shirawta Dam railway line, which is not a public line). The Pipavav Rail Corporation holds a 33-year concession for building and operating a freight railway line from Pipavav to Surendranagar. The Kutch Railway Company, a joint venture of the Gujarat state government and private parties, is involved (along with the Kandla Port Trust and the Gujarat Adani Port) in the Gandhidham-Palanpur freight railway line. In the past, IR generally set the freight tariffs on these lines except for own-use traffic, but after reforms in 2005 there has been a trend to allow the operating companies freedom to set freight tariffs and generally run the lines without reference to IR.

Recently, the railway ministry in India launched a major initiative to develop alternative sources of funding for developing infrastructure projects. It calls for involving the private sector in constructing tracks, developing private freight terminals, automobile

and ancillary hubs, and the private operation of special freight trains on the network. The initiative accommodates a variety of approaches, including PPP arrangements under which private participants will share the cost of developing a new line and then be entitled to a discount of 10-12 per cent on incremental traffic carried on the network. Alternatively, new lines can be constructed under a “full contribution apportioned earning mode,” where the private entity would finance the building of a new line and, in return, receive apportioned earnings for a period of 25 years (i.e., essentially a concession).

In addition, India is promoting a vertical separation “special freight train operation” scheme, allowing private operators to invest in private freight cars and use the railway network for a period of 20 years. These companies will pay IR an access charge and will set their own prices for services offered.

The development of railways requiring national government financing is still restricted in India, remaining largely under the control of the powerful Ministry of Railways. Many developments have been slowed by the requirement for Indian Railway Ministry control.

Australia

Australian railways were originally developed by the states and their fierce independence could be seen in the diversity of rail gauges adopted so that at one time a cross country journey from Perth to Brisbane required one to change trains six times. Rail freight declined rapidly with introduction of modern roads and truck technology. The main exceptions to the trend were the private mineral railways in Western Australia and the coal operations in Queensland and the Hunter Valley (NSW). Attempts to redress the loss in traffic initially focused on amalgamation of the State railways with the aim being a single national railway, but this was not a success.

In the late 1980s, policy analysts looked to railroad privatization and corporatization as the way to improve the competitive and financial position of the Australian railroads. This was based on the success of similar policies in Europe and South America, but was also consistent with reforms in other sectors. The 1991 Inquiry Report on Rail Transport found that the governments controlling the railroads lacked commercial focus and clearly defined objectives, leading to inappropriate government intervention. The report also warned of the developing problem of monopolistic pricing in coal freight. It suggested corporatization of government-owned rail and vertical unbundling of rail operators coupled with required open access of rail track and infrastructure for an appropriate fee.

The Australian railway system has greatly decentralised over the last two decades, with nine enterprises now operating railway infrastructure and train services, three separate infrastructure managers, nine train operators of freight services, five operators of commuter services, five others providing regional services, five special purpose iron ore railways, and a variety of small local train operations. Australian law provides for multi-carrier access to infrastructure in most cases and there is little constraint on railway pricing. While the interstate rail traffic is generally provided by

vertically unbundled providers, intrastate operations are performed by a mix of bundled and unbundled providers.

As in North America, any Australian entity can develop a private railway in Australia. It must comply with local and national land-use and environmental regulations and can use the support of local government units to help assemble the land needed for the railway development. For the most part, railway lines are considered strategic infrastructure and national open-access rules apply when access is in the public interest. This sometimes requires a legal proceeding to determine the extent of the public interest. Generally, access requirements also require the accessing railway to bear the cost of any capacity additions needed to keep the accessed railway whole. The opportunity to have a railway designated as open access was extended to the private mineral lines in Western Australia. This has led to legal proceedings with the line owners (the mining companies) fighting to avoid having to offer this option.

Brazil

Compelled largely by the need to reduce a railway subsidy burden amounting to approximately USD300 million annually, in 1992 Brazil began to develop a railway concessioning process modelled largely on Argentina's experience, but with a more complex structure. The concessioning design was completed in 1995 and concessions were let over the next two years. As in Argentina, the terms of freight railway concessions were set at 30 years, but with extensions possible for another 30 years.

Between 1996 and 1998, six freight concessions were developed from the federal railway (Rede Ferroviária Federal) and one from the Sao Paulo State railway. In addition, the huge state mining and industrial enterprise, Companhia Vale de Rio Doce (CVRD, now Vale) was privatised in June 1997, along with its two private rail lines serving its own traffic: Estrada de Ferro Vitória a Minas (EFVM) and Estrada de Ferro Carajás (EFC). Both private railways carry general freight traffic and determine their own prices for such transport. General freight traffic on the EFVM amounts to more than 30 per cent of all traffic on the network. In the passenger sector, Brazilian experience, as in Argentina, focused on urban transit, specifically in Rio de Janeiro and Sao Paulo. Budget deficits and the need to reduce state subsidies to the city subway and commuter rail (Flumitrens) led to the concessioning decision. The Rio de Janeiro metro system was concessioned in December 1997 to a consortium (Consórcio Oportrans), including Cometrans, the owner of the Mitre and Sarmiento passenger rail concessions in Buenos Aires. Operational control was transferred in April 1998. The Flumitrens concession was signed in July 1998 and went into effect in November 1998. In addition, there are a number of small Brazilian industrial lines. For example, Portofer-Transporte Ferroviário Ltda., a private company, provides railroad operations for Santos harbour. Other ports, cement plants and steel companies have small internal railway operations.

Today the Brazilian railway network consists of 15 privately owned and operated cargo lines, six privately owned and operated metropolitan networks and seven additional urban transport companies, about ten short-lines of up to 50 km that are used mainly for tourism, and a number of private internal company rail operations as indicated

above. In the 10 years after the Brazilian state railway was divided up, the industry had a substantial revival. General cargo traffic increased by 112 per cent and steel and minerals cargo by 91 per cent, while containerised traffic increased more than 10 times compared with 1999 volumes. With concessioning rail pricing and rate levels remaining stable, labour and total factor productivity increased substantially. Overall, there has been a substantial increase in the sustainability of Brazil's railway sector.

In contrast to the Indonesian Special Railway regulation requirement for common ownership, the principal criticism of private railway operations in Brazil is that the affiliation between railway shareholders and major industries is too great. Although it is recognised that these affiliations were essential for attracting private investment to the railways, diversification of ownership is now being encouraged when new investment is solicited.

V. INDONESIA SPECIAL RAILWAYS

5.1. Private Investment Model

Based on the macro economic framework and the experience with railways internationally described above, we can identify the type of railway that would best serve the objective of providing an efficient transport system supporting the development of Indonesia's industries and resources. This section describes the desirable features of such a railway. The following section describes the existing regulatory framework, while the final section in this chapter identifies the perceived constraints imposed by the current regulations that limit the achievement of the desired outcome.

Internationally, successful railways serving major industries generally have the following features:

- private investment oriented decision making i.e., no public policy criteria attributes,
- the exclusion of any state financial support or formal state participation,
- service based on contracts rather than published tariffs,
- the right to disallow access to the railway infrastructure i.e., limited access only,
- the right to negotiate interoperation agreements with other railways,
- the right to carry a range of products at the complete discretion of the entity, and
- the right to service other business opportunities on a wholly discretionary basis.

Ownership may be common between the railway and its major client or may be completely separate, both models are used internationally; normally this is a commercial decision.

Thus, in summary, the overriding and distinguishing feature of the private sector commercial railway is that is a business to business model rather than a public service model. There is normally no public entitlement to the investor's railway facilities, rolling stock or equipment and the investor is not obliged to make locomotive or rolling stock available to third parties except perhaps in national emergency situations. Access to the infrastructure and to the services operated is limited at the discretion of the original private business initiator. This provides the investor exclusive use of the railway operating equipment in which it has invested, to be deployed free of tariff oversight. A framework for access by third party operators is sometimes required by the government to overcome monopoly concerns. Such third parties railway seeking infrastructure access would not be constrained by the scope of service of the incumbent railway operator/investor.

Private commercial railways are normally based on a proposal wholly initiated by the business investor which proposes the railway service. Unlike a PPP Railway, the roles of

the regency, provincial or central government roles are normally limited to public safety, environmental protection etc.. The main recommendation of the Phase II report on Special Railways¹⁰ was the creation of a new class of railway: the limited public railway. The limited public railway would have the features described above. Unfortunately it appears that a new class of railway could not be created without significant change to the railway Law. An alternative approach based in particular on utilising the opportunities presented by the provisions of the current railway Law with respect to interconnections to enable the creation of a B2B railway network is described in following sections.

5.2. Current Regulatory Frameworks

Recent changes in Indonesian law have liberalized previous restrictions on private investment in the railway sector in some important respects. Under the prior railway law (Law 13/1992), PT Kereta Api (Persero) or PT KAI, the national railway, was established as a State Owned Enterprise, with an effective monopoly on railway service except for a restricted ability of industries to develop “Special Railways” for their internal business. Private investment was largely restricted to the railway supply sector (where a State Owned Enterprise was also prominent).

Perpres 67/2005 (later Perpres 13/2010) permitted private enterprises to cooperate with Government through a PPP process to construct and operate railway infrastructure and Law 23/2007 opened up the possibility for private train operators to provide train services over existing railway infrastructure. The three brief references to Special Railways in Law 13/1992 were expanded to some eight provisions in Law 23/2007, partly to accommodate the new possibilities that such railways could be approved by sub-national governments, partly to define the SR as serving the primary activity of the enterprise served, and partly to provide implementing Government Regulations. GR56/2009 included those implementing regulations for Special Railways, providing (among other provisions) that a SR could serve a supporting area outside of a main enterprise district, could link to public or other special railways, could link a storage area to a port and it could be converted to public railway operational status after interconnection with another railway.

While opportunities for private investment in Indonesian railways (and in SRs in particular) have been broadened under current Indonesian law and regulation, they are still quite restrictive relative to international practices:

- While Law 23 provides for independent above-rail operators on existing infrastructure, there are no regulatory procedures governing how such a proposed operator would go about acquiring a license and no “network statement” on the European model, that sets forth the terms and conditions for sharing infrastructure

¹⁰ Special Railway Guidelines and Regulatory Framework Recommendations. IndII – HWTSC, Inc. Final Report, February 2011

use with the primary train operator, PTKA. Consequently, this potential area for private investment remains as yet undeveloped.

- If an investor wishes to develop railway infrastructure that would serve an unspecified public, the only current alternative is to submit the proposal to a government entity at the national or sub-national level. That entity would then assume sponsorship for the proposal and submit the proposal to a tendering process. The proposal originator, under Perpres 13/2010 rules, would be given a choice of certain advantages in the tender, but would not be guaranteed to be awarded the construction and operating concession/BOT. To date, this approach has yet to result in a successful railway development.
- If an investor wishes to develop railway infrastructure without first winning a public tender, it is currently limited to developing and operating such infrastructure for a single enterprise. Private railway development to serve a multi-enterprise sector is not permitted.

The Special Railway is thus the only certain vehicle for private investment in commercial railways in Indonesia. It was thus the focus of the IndII project. The law with respect to special railways nevertheless has many limitations.

The existing Special Railway law as currently interpreted limits SR business to one customer and requires SR ownership or control by that customer. This does not create competition, it constrains it. Other articles in the Indonesian Special Railway regulation are similarly out of touch with International best practices. One regulation specifies that a Special Railway can only serve a district owned or controlled by an enterprise and one point in a support area for that enterprise. This is a severe restriction on business scope. The same regulation is interpreted to limit a Special Railway to using a private port it owns. Surely a public port could benefit if it could receive traffic from a Special Railway? Thus, many existing Special Railway regulations escalate matters that would ordinarily be subject to negotiation to an inflexible bureaucratic rule, handicapping both public and private stakeholders in reaching a commercial accommodation.

One argument raised in defense of the regulations is that they are protecting shippers against monopoly practices. However the main effect is to limit present or prospective competition to the existing public railway. At the same time, however, this deprives the public railway of traffic that might be fed to it by a less restricted private railway operation. This is a lose-lose proposition for the Special Railway and customers it could serve, as well as for the Public Railway and its customers. To illustrate, development of BATR or other Special Railways in South Sumatera and Lampung will not deprive any coal shipper of transport options they have today, but would both compete with PTKA and potentially offer business to it.

Apart from the adverse impact that narrow restrictions on private railway investment have on the transport sector itself, the wider negative impact on the economy is even greater. Private investment in the railway sector in Indonesia is linked to an industry – the mining industry – that also requires long term planning and a tremendous amount

of capital. The establishment of new railway infrastructure efficiently supporting the coal mining industry could create massive financial benefits to the economy and direct tax and other state revenues. This benefit, however, stems from the entire project development and that requires stability and consistency of the prevailing and proposed laws and regulations in all relevant project components, including transport. When the ability to license supporting railway services in a timely manner is a weak link in the process, urgent action is needed. This requires Ministerial Regulation to improve the attractiveness of the current Special Railway provisions.

5.3. Identified Constraints

One Client rule

The Railway Law limits the special railway to one client. This severely limits the applicability of the Special Railway option to large extractive industries such as coal mining. Within the mining industry, it strongly favours larger foreign owned mines as only these can afford to build the transport infrastructure they need to get their products to market.

Ownership Restrictions

There are differing interpretations of the Law with respect to the relationship between the operator of the railway and the client. The most common interpretation is that the operator and the client must be the same business entity. While a literal reading indicates that neither Law no. 23/2007 nor GR 56/2009 explicitly requires ownership, such an interpretation is widely accepted. All the current proponents of Special Railways propose a different operator to the client. This is clearly a major issue.

Point-to-Point Rule

As noted above, the excessive restrictiveness of the “point-to-point” rule was created by GR 56/2009 and was not required by Law no. 23/2007. The rule significantly reduces the scope for a Special Railway, limiting the role to either a localised servicing network (eg a sugar cane railway) or a single export line.

Prohibition of a tariff

One interpretation of the elucidation to Article 5(1) of the railway Law is that a Special Railway cannot charge a fee. This is because the elucidation says

General railway in this provision refers to railway used to serve transportation of people and/or goods with payment collection.

Special railway in this provision refers to the railway solely to support main activities of a legal entity, and not used for serving the general society.

This has been taken to mean that if there is payment collection, the railway must come under the first provision – ie be a general (ie public) railway. Such an interpretation appears to conflict with the definition in the article itself where the test is availability to the public. An alternative interpretation is that the elucidation is in fact silent on the (unlikely) situation where a service carries the general public or goods without a fee. It could be argued that in this situation the public are not the client-the client is the entity that is paying for the operation – ie it is Special Railway. This interpretation is supported by Government Regulation 56/2009 which gives a tourist railway as an example of a Special Railway.

Uncertainty over Interconnection

The Law provides for interconnection between special railways and between the special railway and a public railway. There is uncertainty as to the status of the resulting network, with one interpretation being that the network must be a public railway.

Residual Value

There is a question over the status of the railway when the license expires and/or the client has no further requirement for the railway. One view is that the railway reverts to the state – ie it is treated like a concession. This is not considered to be a good option.

Complexity of Licensing Articles

The actual licensing provisions are over complicated. The regulations provide a number of instances where approvals are required but do not indicate the criteria to be applied. This raises doubt in the final result.

Conflict with Mining Regulations

There is a fundamental philosophical difference between the mining Law and regulations and the Railway Law and regulations. The mining law starts from the premise that government revenue is a percentage of the mining company profit. It therefore includes measures to ensure that the profit cannot be transferred elsewhere, and in particular provides provisions to prevent companies transferring profits to subsidiaries. The preferred process for selection of a mining services company is through tender, and the life of a licence is short. This suits (and encourages) a competitive mining services sector. The Railway Law starts from the premise that the railway is a very large long term investment that will only happen if there is a close relationship between the operator and the main client.

The difference can be resolved through ministerial discretion under the mining law.

VI. PROPOSED AMENDMENTS

The terms of reference for Phase III required the consultant to consider both amendment to the Government Regulations and a Ministerial decree or Permen. While we believe most of the issues raised in the previous section can be achieved with a Permen some of the issues might be better supported by a change in Government Regulation. However during the presentations to the MoT and DGR, it was requested that the legislative proposals be limited to issuance of a Permen. We have developed our proposals accordingly.

6.1. One Client Rule

It is not possible to change the one client rule without changing the Law. Instead we have proposals that will lessen the restrictive impact of the rule, yet retain the economic rationale for the law which is to prevent the railway from extracting monopoly profit from its client(s). The proposals are:

- Permitting the railway to serve more than one subsidiary of a company by interpreting the client to include associated companies
- Permitting the one client to be a consortium
- Permitting interconnection between special railways thus producing a network of special railways which together may serve multiple clients.

Principle supporting the consortium rule

(The multiple subsidiary and interconnection rules are dealt with under other sections below)

It has been suggested that an Indonesian business entity owned by a number of mines (or other business interests) could form the core of a consortium designed to build a special railway, possibly a cooperative, to distinguish it from a legal association. If this were permitted, the Special Railway might be a unit or a subsidiary or an affiliate of, or have a contractual relationship with, the cooperative. Most flexibility would be provided through allowing a contractual relationship. To protect the cooperative and the Special Railway licensee, the contract with the Special Railway would prohibit it from providing transport services to other entities which are not members of the cooperative.

By combining as a consortium, a number of business interests can achieve the benefits of having a railway while at the same time denying the railway operator the opportunity to play one company off against another to extract monopoly profits. The concept of a consortium owning the railway is consistent with the B2B model we propose in Section 3.1 above.

International Practice

We are not aware of a situation elsewhere in the world that would require railway customers to form a consortium. However the situation where one railway serves a small group of like industries occurs with a number of “short lines” in America.

Special Railway Applications

We propose as part of the clarification of the relationship between the operator and the client, that a consortium of unaffiliated businesses be permitted as the client.

This would enable mines to get together to build and operate a railway. The consortium requirement means that the railway would still only deal with one customer. Differences between the mines would have to be resolved within the consortium. Safeguards are provided in the standard commercial practice legislation.

6.2. Ownership

Issue

The similar wording of Article 5(3) and 33(1) of the railway law have been interpreted to require that the client and the operator are one and the same or at least that they are part of the same business group. While even a restrictive reading of the Law does not require the infrastructure to be owned by the operator or the client, this is generally referred to as the ‘ownership restriction’.

Multi-million dollar investments, such as railway infrastructure investments, typically require complex organizational structures to accommodate international and national participants, to recruit specialized technical and management talent and to take proper advantage of financial opportunities. Furthermore, the expertise required to run a major railway operation is not the same as that required for operating a mine or industrial plant. It may be more efficient to contract this expertise from another party (such as an existing railway) than to establish an in-house operation.

International Experience:

International experience of railways of a similar nature to the Indonesian Special Railway (ie lines dedicated to one or a small number of large customers) includes examples of specially established railway operating subsidiaries and of contractual arrangements between independent companies. We are not aware of any other country where the relationship is specified by law. Where two companies enter a contract on their own free will, the contract will normally include provisions for the goods carried being more or less than specified, non-performance of the operator etc. Remedies are through normal law of contract provisions.

Special Railway Applications:

Ideally the relationship between the operator and the client should be a purely commercial matter. Failing this, the provisions addressing primary enterprise control of an SR should not be interpreted so narrowly as to require an SR to be only an operating division or subsidiary of an Indonesian Perseroan Terbatas (PT) or ordinary limited liability company. The focus should be on evidence of effective control and should include control by contract.

In the licence decisions made to-date, the Law has been interpreted to allow the operator to be a subsidiary or a sister entity within the same business group. The objective is to ensure that the railway remains under the control of the client. There is a desire to define what constitutes control.

It could be argued that the Law does allow operation by a different business entity (eg a transport company) as long as the operator already has a business licence that the railway will support and the operation only caters for the one client.

The MoT has indicated that a “control-by-contract” relationship might be sufficient to receive a special railway license. In this case, the contract would be for substantially all the capacity of the railway. The license would permit the Special Railway to serve only the mine (or entity) specified and would retain the other limitations of GR 56/2009 (e.g., the point-to-point regulation).

Non-Producer Parent Arrangements

Law 23/2007 and GR 56/2009 do not require that the “primary enterprise” be a non-transport producer of goods. A tourist industry is explicitly cited in the elucidation of GR 72/2009 as a potential operator of a Special Railway.¹¹ This being the case, a special railway operator could be a service industry, a consuming industry or a legal association of enterprises. The new mining law, which provides for a trading entity to receive a mining service IUJP, supports such an interpretation.

The law and regulation would clearly permit a raw materials consuming industry, say, a steel or aluminum company, to establish a SR for the purposes of shipping raw materials to the facility, even if it shipped none of its output over the SR. For example, MEC’s long term plan to develop an aluminum plant in Eat Kutai regency would certainly qualify that enterprise to build and operate a SR for a private port terminal to the plant.

¹¹ GR 72/2009, Article 161: “*Pelayanan angkutan perkeretaapian khusus hanya digunakan untuk menunjang kegiatan pokok badan usaha tertentu. Penjelasan: Badan usaha tertentu antara lain usaha penambangan batu bara, usaha perkebunan, dan pariwisata.*”

“Special railway transportation services shall be used only for supporting the main activities of a particular legal entity. Elucidation: A particular legal entity shall include, among other things, coal mining business, plantation business, and tourism.”

Since Law 23/2007 and GR 56/2009 allow for a Special Railway to serve a service industry, there is no reason why a maritime trading company might not own an SR to transport product through a private port terminal. At the same time, an SR operator whose main business is a coal broker should be qualified as an operator. In each of these cases, sanctioning such types of arrangements could be made explicit in the proposed Ministerial regulation.

6.3. Interconnections

Issues

Currently, a special railway cannot provide service to another customer. A mine developing in near or alongside an existing Special Railway cannot be served by the Special Railway.

Considerations

This restriction could result in a number of special railways serving the same area, or could prevent development of additional mines. If smaller mines cannot afford or are not permitted to operate their own railway, it effectively gives the existing mine a monopoly as it is the only company that can afford to transport the output.

The added cost of developing both a mine and special railway will tend to reduce development potential. It would be in the public interest to allow an existing special railway to serve another mine. Allowing multiple users will reduce the cost of developing mines, and will normally reduce transport costs for both the original sponsoring mine and the new mine development.

International Practice

We are not aware of any other country that restricts access to a railway as a matter of public policy. Railways have economies of scale, so normally increasing the scope of the railway will result in lower costs to the benefit of everyone. The issue with the private railways in Western Australia is rather to try to persuade the mining companies that own the railways to allow other users. They argue that because their lines are near capacity, catering for other companies would reduce the flexibility of the mine to vary its production and would reduce the service it could offer to its customers.

In North America, the main way the scope of the railway is extended to enable the railway to meet the needs of its customers is through interconnection rules. At a minimum, interconnection provides for an interchange of wagons between systems with one operator hauling the wagons on behalf of the other. At a maximum, one system gives running rights to the other for the through operation of trains. Rules have been established for the sharing of costs and revenues and management of wagons, while for through running contracts provide for adherence to standards, the availability

of paths, penalties for late running or non availability of infrastructure, accidents and locomotive failures, etc.

Special Railway Provisions

We propose two provisions that are within the Law, but would reduce the damaging effect of the current limitation to one client. The first is to allow a consortium of mines to operate a special railway. This is discussed under 'ownership' above. The other measure proposed is through developing the interconnection rules. Interconnection of special railways or connection of a special railway to a public railway is allowed for in the Railway Law. This allow another mine (for example) to build a special railway to interconnect with an existing line and for the operators of the lines to cooperate in operating the joint network.

By using the provisions of article 374 of GR 56/2009 we can retain the status of the railway as an SR. This has the advantage that it would not trigger the rules for Public Railways concerning government tariff oversight, etc. It would result in a network of special railways serving a number of companies on a B2B basis. This is the form of operation envisaged in Chapter 3.1 above. It is also consistent with the Railway Law, which talks about a special railway network.

The inclusion of additional customers would require the consent of the existing operator(s).

6.4. Relaxation of Point-to-Point Rules

Issue

Regulation 350 of GR 65/2009 severely limits rail transport services that can be provided by special railways. The regulation only permits transport services between points within a service area and a single destination in a single supporting area or district. Since the regulation applies to all industries, the concept of a service district is somewhat vague, but in many cases would be defined by a license to a specific geographic area. In the mining sector that is the focus of most SR interest, the license is an IUP for mine development in a rather small geographic area. Defining service as between a single IUP and a single supporting point (e.g., a port terminal) is unrealistically limiting.

International Practice

While there are many examples of mineral railways that do precisely what this rule allows – transport minerals from a mine to a port some distance away without any intermediate points, we are not aware of any case where this is imposed by regulation. For each example of a railway of this kind there will be other railways where the line serves multiple destinations or shares part of the line haul infrastructure with other

operations. Limiting a Special railway to a point to point operation limits the type of operation to one particular model only.

Special Railway Application

The preferred solution would be to change or delete Article 350 of 56/2009. The article is not required by the railway Law and imposes a considerable additional restriction. It could be argued that it is not legally valid as it is inconsistent with the Railway Law. However because of the perceived difficulties in amending government regulations, it is proposed that the implementing regulation in the Permen relaxes the provisions of Article 350 as much as possible.

It is recommended that the SR is permitted to serve intermediate locations. For example in the event that a power plant is built along a Special Railway alignment it is recommended that the Special Railway may be permitted to serve the power plant with coal from the principal owner's mine. Such services should be permitted, whether or not the power plant is a subsidiary of the railway. There is no sense in limiting the ability of the special railway to serve users of the primary product of the sponsoring mine. This will require revisions by way of clarification in the proposed Ministerial regulation. Similarly, if a Cooperative or Association may be allowed to be the sponsoring business entity for a special railway and a broader service area defined, the special railway should be able to load at the several locations of the cooperative members.

At a minimum, Ministerial Regulations should avoid, as has been suggested, more tightly defining the point-to-point restrictions. Instead, the Government Regulations should permit a more expansive definition of a service district, permitting service to several locations within the district. MOT should consider an explicit statement in a revised Article 350 that receiving points owned by third parties along the SR route should not be interpreted as in violation of the single point and supporting district rule, nor should interconnections with public railways or other SRs.

If the origin and destination can be defined as a mining area and terminal area respectively, it is possible that the mining operation could load from several locations within a mining area and discharge at several stockpiles in a terminal area. This kind of flexibility would be very useful. Additional flexibility would also be useful – the BATR operation in Lampung would discharge at a storage area some distance from the terminal – because terminal property is so valuable, storage areas are often at a distance from the ship or barge loading jetty. It would increase flexibility to allow a Special Railway to unload at a remote storage facility and at the terminal.

6.5. End of project Life Provisions

Issue

Current special railway regulations require all the assets of the special railway to be transferred to the relevant government unit at the end of the special railway license period. It is understood that some government units expect that the transfer will be made at no cost to the government, on the grounds that the assets would have zero value to the Special Railway company. From the phase II report, it appears there is a perception among certain Government stakeholders that the right to build and operate an SR should be treated as a concession granted by the Government for a limited period of time. This view implies that ownership of the SR should automatically revert to the Government at the end of the 'concession'.

Considerations

We would expect that investors in computing their financial returns will already assume zero value at the end of the concession. To this extent the proponents of a 'free transfer' are correct. However while the terminal valuation regulations will make no difference to investors, they can help assure that the assets transferred at the end of the license period are in good condition and able to continue operating or that the railway is removed and land restored, if that is needed.

If there is an on-going role for the railway as a public railway, the relevant authority (central, regional or local government) will want to ensure that the line is handed over in good condition. Experience in railway concessions in other countries is that if the value of the railway's assets is set to zero, the railway company will avoid maintenance expenses and re-investment in anticipation of the upcoming end of its concession period. There is no reason to believe it would be any different in Indonesia. The concessionaire would run the assets down to zero value at the end of the concession – for example, they would not replace worn rail, might sell all the rolling stock to a shell company and lease it back, and would take many other steps to ensure that they had extracted as much of the value in the assets as possible by the end of the license period. The railway would be transferred to the government with huge maintenance arrears and no rolling stock.

If there is no future role for the railway once the mining operation ceases (eg it serves a remote area where there is no commercial traffic) the local government would probably prefer the special railway company to pick up the railway line and return the right-of-way to a near natural state so the land might be used for agriculture or other purposes. A functioning railway could be an embarrassment if there was local pressure to keep it open despite the prospect of large losses. If there is no terminal valuation negotiation process, there is no incentive for the parties to agree on the termination process. We think it better to let the parties negotiate a terminal valuation procedure.

Special railway Provisions

Compulsory transfer of the rail assets is not good public policy nor is it likely to benefit the governmental units that will be responsible for the probably depleted railway assets after the transfer.

The consultant team does not believe that there is any legal requirement under UU 23/2007 for treating the development of an SR as a Government concession rather than regulated private activity. So long as the SR is developed entirely by private parties to serve the developer's core business, with no Government assistance of any kind (financial or otherwise), the railway and its land are private property just like a factory. Hence, the consultant team believes that the implementing regulations for SRs should provide flexibility in allowing SR proponents and regulators to negotiate what is to happen to the infrastructure at the end of the license term. This could include transfer to the Government or its designee at a pre-determined or determinable price, sale to another licensed operator, conversion of SR into a PR, etc.

6.6. Complexity of The Regulatory Process

Issue

The government regulations are overly complex.

Special railway considerations

The following amendments to Special Railway licensing should be considered:

- Add an article that explicitly defines the minimum qualifications for an SR licensee
- Reduce the number of licenses and licensing steps required
- Limit the requirement to demonstrate SR ownership/control to the operating license
- Provide for transferability of licenses for conditions other than transfer of ownership of the primary enterprise, as currently provided

ANNEXE 9: MINUTES AND OTHER MATERIALS FROM LAST FGD

Focus Group Discussion (FGD) – Hotel Akmani, Venezia 2 Room, Mezzanine Floor, Jl. KH. Wahid Hasyim 91, Jakarta 13050 – 16 August 2011

Pak Asril, Pak Prasetyo, Pak Saptandri, Pak Baitul, Pak Efi Novara, Shirley M. Oroh, Guy Des Rosiers, Benny Bernarto and additional MOT staff (of more than 20 participants in total)

The meeting was opened by Pak Efi who delivered remarks regarding the last INDII program on the Special Railway and Pak Asril then delivered brief remarks. The consultants team provided an explanation of the illustration comparing the draft Ministerial Regulation prepared by the legal division team of the Directorate General of Railway and the draft prepared by the consultants team.

Pak Asril further explained the ‘history’ of Special Railways and applications for a permit to construct a Special Railway submitted by private parties so far, including among others MEC and Adani. Pak Asril confirmed that the most important objective was to draw up a regulation that was ‘safe’ from the legal perspective. There should be no concessions, but in emergency situations, a Special Railway should serve the public interest.

With regard to the correlation between policy on railways and policy on ports, Pak Asril said that abroad, specifically in Brisbane, policy on railways and policy on ports is set out in one policy statement.

Pak Saptandri stated that as the implementer, the legal team would refer to the content of the regulation. The most important issue, according to Pak Saptandri, was sole responsibility, ie that only one party would be responsible. A consortium would be allowed, but the most important issue was which party would apply for the Special Railway license. The government will not get involved in business matters as long as the technical requirements are satisfied. He asked whether once the Special Railway track was already available, other companies could also use the track or would have to construct their own Special Railway tracks. He said that as long as the current Special Railway operator remained responsible for all of the tracks, including the recently constructed tracks connecting the existing Special Railway to those of other companies, then they should be able to use the railway. He admitted that it would be more complicated from the legal perspective, but if the government issued a policy, it would be doable.

The consultants team repeated their explanation of the illustration at Pak Asril’s request in order to provide a philosophical understanding of the consultants team’s suggestions for the benefit of the other FGD participants who had only just arrived at the meeting.

Regarding the third example in the illustration, Pak Saptandri's opinion was that the logic of the consultants team's explanation should be acceptable because the IUP holder was not required to connect the Special Railway to a public port and the Public Railway in the port. The IUP holder would only need to connect the Special Railway to the Public Railway. Regarding the fourth example in the illustration, he said that it would not need to be affiliated and connections between a number of Special Railway operators should not be an issue.

Regarding slide no. 6, Pak Asril said that it (the siding) was similar to the one suggested by an applicant from Russia. He said that the response to these slides from the consultants team should be up to the Ministry of Transportation

Response from the Legal Division of the DGR to the examples in the illustration

With regard to the first example (The Special Railway connecting the IUP holder to the Power Plant) basically, according Pak Baitul the illustration was possible and was the same as the consultants team's. However, Pak Prawoto also pointed out that this Ministerial Regulation must not conflict with any Government Regulations or laws and should consider not only the business aspect. Pak Prawoto's opinion was that the definition of a support area could be expanded to cover an electric power plant as long as it did not cover a public port. Article 350 of PP 56 which provides restrictions should be taken into account. The support area should be related to the main area.

With regard to the second example – Pak Baitul said that he would reconfirm the existence of a 'terminal for own interest located' in a public port. A terminal for own interest located in a public port would mean that use of the terminal would be restricted to the company. Pak Prawoto also said that the Special Railway could be connected to the the company's own terminal, but not the public port. Pak Prawoto repeated that the Special Railway operator should not have the ability to control the user as the Special Railway was supposed to serve the user's main business.

With regard to the third example – the legal division believed that before the Special Railway was integrated into the Public Railway, the Special Railway should be connected to the support area. Pak Prawoto said that in this example, the IUP holder could cooperate with the Public Railway directly using the business-to-business concept without having to construct a Special Railway. Pak Asril agreed with the legal division that there should be a support area (warehouse, etc), not only an interconnection point. In response, a question was raised by other MOT staff to the legal division of the MOT that the Law allowa the Special Railway to be connected to the Public Railway but without requiring a support area for the interconnection. In principle, there should be an agreement between the Special Railway operator and the Public Railway operator.

Pak Baitul said that the basic concept of the Ministerial Regulation from the legal division was not to further develop the use of Special Railways, but to restrict them while incorporating the suggestions already provided.

With regard to the fourth example – As long as IUP holders 1, 2 and 3 were affiliated, it would be acceptable, but if they were not affiliated, it would be restricted. It would have to be a public railway rather than a special railway.

With regard to the fifth example – further internal discussion was needed. In principle this would require an affiliate relationship.

With regard to the sixth example – Conceptually, only maintenance terminals were allowed. However, this would need to be discussed further. If there was an affiliate relationship between the IUP holder and the electric power plant, it could be considered. If the electric power plant was deemed to be a support area, the Special Railway would be allowed to load and unload and continue to the port.

With regard to the seventh and eighth examples – in principle they were acceptable as long as there was an affiliate relationship.

Lastly, the team raised the issue of ‘tariff’ for the Special Railway service and the general view from the MOT attended the FGD was that there would be no issue as long as it was agreed among the parties.

Pak Asril closed the FGD by conveying his gratitude to all the parties that had assisted with the drafting of the Ministerial Regulation, including IndII and said that the legal division would remain the party responsible for completing the Ministerial Regulation.

* * *

Focus Group Discussion (FGD) – Hotel Akmani, Venezia 2 Room, Mezzanine Floor, Jl. KH. Wahid Hasyim 91, Jakarta 13050 – 16 August 2011

Pak Asril, Pak Prasetyo, Pak Saptandri, Pak Baitul, Pak Efi Novara, Shirley M. Oroh, Guy Des Rosiers, Benny Bernarto and additional MOT staff (keseluruhan dihadiri lebih dari 20 peserta)

Pertemuan dibuka oleh Pak Efi menyampaikan keterangan mengenai program terakhir INDII sehubungan dengan Perkeretaapian Khusus (PK) yang kemudian dilanjutkan dengan sambutan singkat dari Pak Asril. Tim konsultan memberikan penjelasan mengenai ilustrasi yang menjelaskan perbedaan-perbedaan yang terdapat di dalam draft Permen yang disiapkan oleh tim divisi hukum Direktorat Jenderal Perkeretaapian (DJK) dengan draft dari tim konsultan.

Pak Asril lebih lanjut menerangkan kembali mengenai sejarah dari PK dan juga permohonan-permohonan pembangunan PK yang telah diajukan oleh pihak swasta sampai saat ini antara lain yang diajukan oleh MEC dan juga Adani. Pak Asril menegaskan bahwa yang penting adalah aturan yang dibuat harus 'aman' dari segi hukum. Sehubungan dengan status 'konsensi' beliau berpendapat bahwa dalam PK tidak ada konsensi tapi didalam kondisi-kondisi darurat PK harus dapat dipergunakan untuk keperluan umum.

Mengenai hubungan antara kebijakan perkeretaapian dan pelabuhan Pak Asril menyampaikan bahwa di luar negeri kebijakan perkeretaapian dan pelabuhan menjadi satu kesatuan.

Pak Saptandri menyampaikan bahwa sebagai pelaksana maka tim hukum akan berpegangan pada 'bunyi' dari peraturan. Hal-hal penting menurut Pak Saptandri adalah mengenai tanggung jawab haruslah 'tunggal' dalam arti hanya ada satu pihak yang bertanggung jawab. Menurut beliau konsep Konsorsium dapat diperbolehkan karena yang penting adalah siapa yang mengajukan izin PK. Urusan bisnis bukan urusan pemerintah sepanjang memenuhi ketentuan-ketentuan teknis. Pertanyaan dari beliau apakah dalam hal sudah ada jalur PK apakah perusahaan-perusahaan lain dapat kemudian bergabung ataukah harus membangun jalur PK sendiri? Sehubungan dengan pertanyaan ini beliau lebih lanjut menyampaikan bahwa menurut beliau selama operator PK yang sudah ada tetap menjadi penanggungjawab dari semua jalur termasuk jalur-jalur yang baru dibangun untuk menghubungkan existing PK dengan perusahaan lain yang baru akan bergabung kemudian maka seharusnya bisa dilakukan. Beliau mengakui bahwa walaupun mungkin dari sisi legal konsep ini agak susah tapi apabila ada policy dari atas maka dapat seharusnya dapat dilakukan.

Tim Konsultan mengulang kembali penjelasan mengenai ilustrasi sebagaimana diminta oleh Pak Asril sehingga dapat didengar juga oleh peserta FGD yang baru hadir untuk memberikan pengertian mengenai filosofi dari apa yang diusulkan oleh tim konsultan.

Sehubungan dengan contoh 3 dari ilustrasi Pak Saptandri berpendapat bahwa penjelasan tim konsultan seharusnya dapat diterima secara logika karena tidak perlu pemegang IUP membangun PK untuk terhubung dengan pelabuhan umum dimana

sudah terdapat PU (Perkeretaapian Umum) yang terhubung dengan pelabuhan umum. Pemegang IUP hanya perlu membangun PK untuk terhubung dengan PU. Sehubungan dengan contoh 4 dari ilustrasi Lebih lanjut beliau menyampaikan bahwa tidak perlu harus merupakan perusahaan yang terafiliasi sedangkan mengenai interkoneksi antara para penyelenggara PK seharusnya tidak perlu menjadi masalah.

Sehubungan dengan contoh no. 6 dari ilustrasi Pak Asril menyampaikan bahwa usulan yang terdapat dalam slide ini (siding) adalah seperti yang diusulkan oleh pemohon dari Rusia. Beliau menyampaikan bahwa slides ini adalah opsi-opsi yang diajukan oleh tim konsultan dan kembali kepada MOT bagaimana menyikapi usulan-usulan tersebut.

Tanggapan dari Divisi Hukum DJK atas contoh-contoh yang ditayangkan di dalam ilustrasi

Mengenai contoh 1 (PK menghubungkan IUP dengan Power Plant) dari ilustrasi disampaikan oleh Pak Baitul bahwa skema ini sebenarnya dimungkinkan dan bahwa pandangan tim DJK Secara umum sama dengan tim konsultan. Akan tetapi Pak Prawoto menyampaikan bahwa bagaimanapun Permen tidak boleh bertentangan dengan PP dan UU dan jangan hanya melihat dari sisi bisnisnya saja. Pak Prawoto berpendapat bahwa definisi wilayah penunjang di dalam draft DJK dapat ditambahkan untuk meliputi pembangkit tenaga listrik selama bukan pelabuhan umum. Beliau menambahkan bahwa harus tetap berpegangan pada Pasal 350 dari PP yang memberikan batasan-batasan. Wilayah penunjang harus ada keterkaitan dengan wilayah pokoknya.

Mengenai contoh 2 – Pak Baitul menyampaikan bahwa tim DJK akan mengecek mengenai keberadaan suatu terminal untuk kepentingan sendiri yang terletak di dalam pelabuhan umum. Terminal untuk kepentingan sendiri terletak di dalam pelabuhan umum dimana terminal ini terbatas hanya boleh digunakan untuk kepentingan sendiri. Pak Prawoto menyampaikan bahwa seharusnya PK dapat terhubung dengan terminal untuk kepentingan sendiri tapi PK tidak dapat terhubung dengan pelabuhan umum. Pak Prawoto menyampaikan kembali bahwa jangan sampai operator PK mengendalikan pengguna dari PK karena sifat PK hanya menunjang usaha pokok.

Mengenai contoh 3 – Divisi hukum berpendapat bahwa dalam PK harus tetap ada wilayah penunjang. Sehingga sebelum PK berintegrasi dengan PU maka PK harus terlebih dahulu terhubung dengan wilayah penunjang Pak Prawoto berpendapat dalam contoh ini pemegang IUP dapat langsung bekerja sama dengan Perkeretaapian Umum (PU) dengan konsep *business to business* tanpa harus membangun PK. Pak Asril sependapat dengan Divisi Hukum bahwa harus terdapat suatu wilayah penunjang (gudang, etc) dan bukan hanya merupakan suatu titik interkoneksi. Atas pendapat ini terdapat pertanyaan dari tim hukum Kementerian Perhubungan bahwa dalam UU dimungkinkan PK terinterkoneksi dengan PU tetapi tidak terdapat persyaratan harus terdapat wilayah penunjang sehubungan dengan interkoneksi. Pada prinsipnya harus terdapat perjanjian antara operator PK dengan operator PU.

Pak Baitul lebih lanjut menyampaikan bahwa konsep dasar Permen dari divisi hukum adalah tidak untuk mengembangkan lebih lanjut penggunaan PK tapi justru untuk

membatasi perkembangan PK dengan tetap berusaha mengakomodir usulan-usulan yang ada.

Mengenai Contoh 4- Tim hukum DJK berpendapat bahwa selama IUP 1, 2 dan 3 merupakan afiliasi maka dapat diterima tapi apabila bukan afiliasi maka tidak diperbolehkan. Tetapi akan diarahkan untuk menjadi PU daripada menjadi PK

Mengenai Contoh 5 – Sehubungan dengan contoh 5 DJK berpendapat bahwa perlu dilakukan diskusi dan pembahasan internal terlebih dahulu. Prinsip yang dipegang adalah harus terdapatnya hubungan afiliasi.

Mengenai contoh 6 – Menurut DJK secara konsep hanya diperbolehkan terdapat stasiun-stasiun perbaikan hal ini masih perlu didiskusikan lebih lanjut. Apabila terdapat hubungan afiliasi antara IUP dengan pembangkit tenaga listrik maka masih dapat dipertimbangkan. Apabila Pembangkit tenaga listrik dianggap sebagai wilayah penunjang maka PK diperbolehkan untuk melakukan loading and unloading dan melanjutkan ke pelabuhan.

Mengenai contoh 7 dan 8 – DJK berpendapat bahwa pada prinsipnya dapat diterima selama terdapat hubungan afiliasi.

Tim konsultan sempat mengangkat mengenai permasalahan ‘tarif’ dalam pelayanan PK dan dari pendapat umum di dalam FGD bahwa selama disetujui oleh para pihak maka tidak ada masalah.

Pak Asril menutup FGD dengan menyampaikan ucapan terimakasih kepada semua pihak yang telah membantu dalam proses pembuatan Permen IndII dan bahwa divisi hukum tetap menjadi penanggung jawab dalam proses penyelesaian Permen.

* * *



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Special Railways (Phase III)

Draft Special Railways Regulation and Illustration

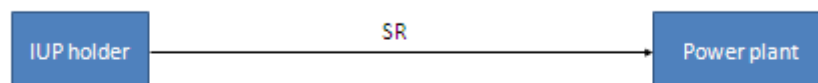
FGD – Hotel Akmani
Jakarta, 16th August 2011



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Example 1



Under DGR proposal, this structure is not possible because:

- Power plant cannot be a 'support area' (if IUP holder is considered as the SR developer) – See DGR proposal Article 9(2)
- Power plant cannot be considered as the SR developer – See DGR proposal Article 3(2)
- Even if power plant could be considered as the SR developer, IUP holder cannot be considered as a 'support area' – See DGR proposal Article 9(2)
- IUP holder and power plant operator cannot form a consortium and be treated as a single 'business entity'

2

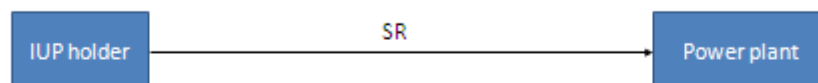


Gladstone Power Station is Queensland Australia's largest power station. (1,680 MW)
Black coal is brought by rail from the Curragh mine, 200 km west of Rockhampton.

Queensland has two other rail-served coal powered stations, at Stanwell and Swanbank.

3

Example 1



Under IndII proposal, this structure is possible because:

- Power plant can be a 'support area' (if IUP holder is considered as the SR developer) – See IndII proposal Article 2(2)
- Power plant can be the SR developer
- IUP holder can be a 'support area' (if power plant operator is considered as the SR developer) – See IndII proposal Article 2(2)
- IUP holder and power plant operator can form a consortium and be treated as a single 'business entity' – See IndII proposal Article 1(7)

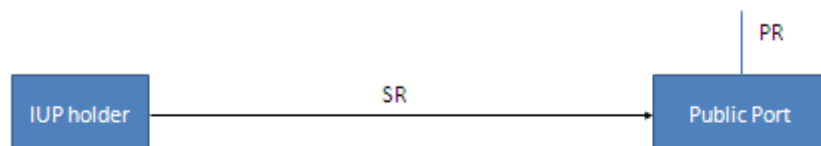
4

Development Based on FGD dated 16 August 2011

- In relation to example 1 the DGR (Legal division) believed that their general understanding is the same as the consultants team's. However, the support area does not necessarily take the form of a power plant. If a power plant has a warehouse, stacking/stockpiling yard then such area/facilities can be deemed as the support area.
- Nevertheless, DGR's opinion is that the definition of a support area in DGR's draft Ministerial Regulation (which currently limited only to special terminals, terminal for own use, special airports, warehousing, stacking, processing plant) could be expanded when necessary as long as it did not cover a public port. Article 350 of PP 56 which provides restrictions should be taken into account. The support area should be related to the main area.

5

Example 2



Under DGR proposal, this structure is not possible because:

- Public port cannot be a 'support area' (if IUP holder is considered as the SR developer) – See DGR proposal Article 9(2)
- Public port cannot be the SR developer – See DGR proposal Article 3(2)
- Even if public port could be treated as SR developer, IUP holder cannot be a 'support area' – See DGR proposal Article 9(2)
- IUP holder and port operator cannot form a consortium and be treated as a single 'business entity'

6



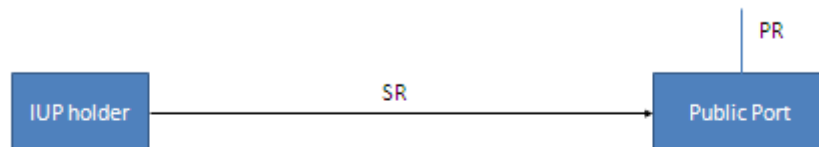
Queensland Railways is one of the world's biggest carriers of export coal through the ports of Newcastle, Hay Point, Gladstone, Abbot point, Point Kembla and Brisbane.

The **Port of Gladstone** is Queensland's largest multi-commodity port and the fifth largest multi-commodity port in Australia. It is the world's fourth largest coal exporting terminal

North Queensland Bulk Ports Corporation Limited is the Port Authority for the Ports of Hay Point and Abbot Point

7

Example 2



Under IndII proposal, this structure is possible because:

- Public port can be either a 'support area' and or an SR developer – See IndII proposal Article 2(2)
- IUP holder can be either a 'support area' or an SR developer – See IndII proposal Article 2(2)
- IUP holder and public port operator can form a consortium and be treated as a single 'business entity' – See IndII proposal Article 1(7)

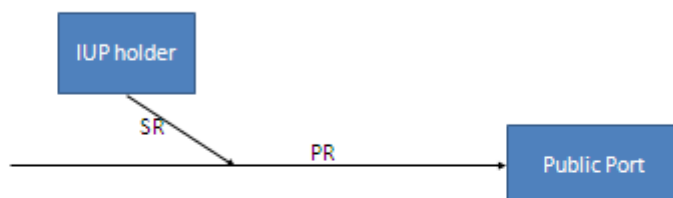
8

Development Based on FGD dated 16 August 2011

- In relation to Example 2 The DGR (legal division) will first confirm the existence of a 'terminal for own interest' located in a public port.
- DGR's principle is that Special Railway can only connect to a 'terminal for own interest' owned by the IUP holder (following Example 2) located in a public port as the use of the terminal would be restricted only to the IUP holder.

9

Example 3



Under DGR proposal, this structure is not possible because:

- Although interconnection is permitted, neither the connection point nor the ultimate end point (i.e., a public port) meets DGR's strict definition of a 'support area' – See DGR proposal Article 9(2)

This is the 'short line' configuration, common in USA.

10

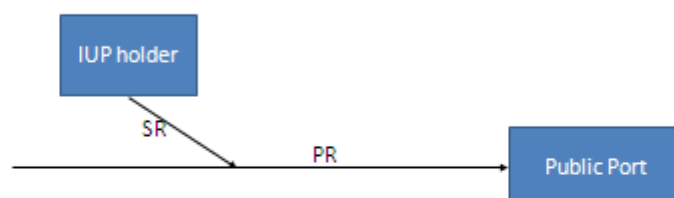
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The Buckingham Branch is a typical US short line. It interchanges with CSX at Strathmore yard and serves small industries and quarries along the line

11

INDONESIA
INFRASTRUCTURE
INITIATIVE

Example 3



Under Indii proposal, this structure is possible because:

- An interconnection point as well as a public port can be considered a 'support area'
– See IndII proposal Article 2(2)

This is the 'short line' configuration, common in USA.

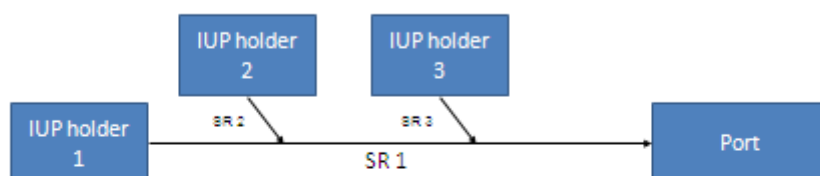
12

Development Based on FGD dated 16 August 2011

- In relation Example 3 the legal division of DGR believed that there need to be a support area so that before the Special Railway was integrated into the Public Railway, the Special Railway should be connected to the support area.
- According to DGR under Example 3 the IUP holder could cooperate with the Public Railway directly using the business-to-business concept without having to construct a Special Railway.

13

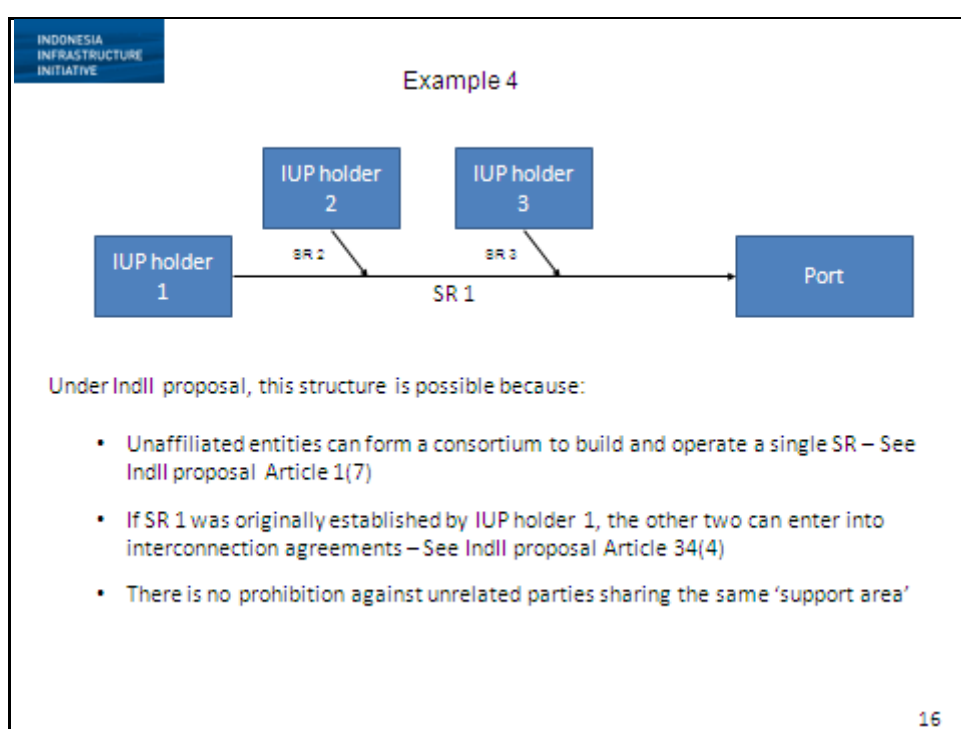
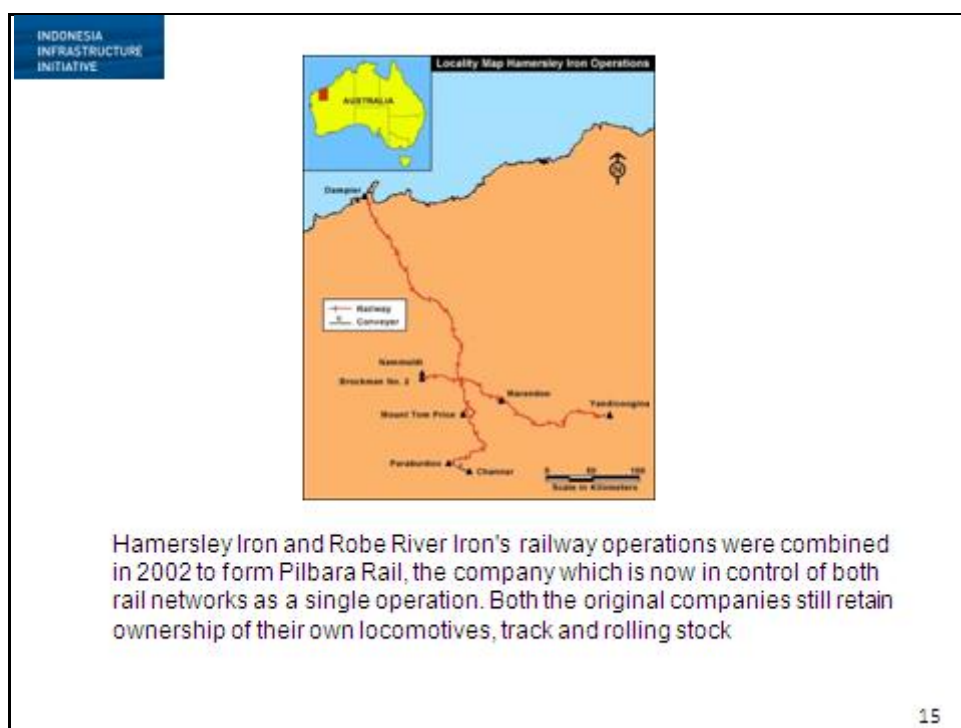
Example 4



Under DGR proposal, this structure is possible only if the three IUP holders are affiliated, because:

- Unaffiliated entities cannot form a consortium
- If SR was originally established by IUP holder 1, the other two cannot share the infrastructure under any circumstances – See DGR proposal, Article 122
- Even if interconnection were possible, the port can only be used by IUP holder 1 – See DGR proposal Articles 10 and 11

14

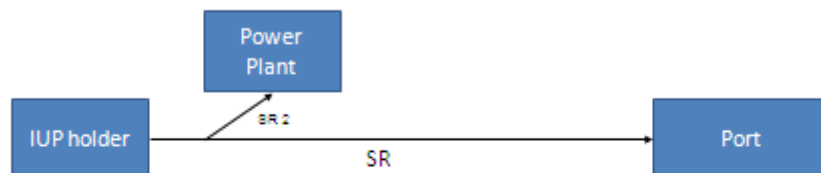


Development Based on FGD dated 16 August 2011

- In relation to Example 4, the DGR believed that as long as IUP holders 1, 2 and 3 were affiliated, it would be acceptable, but if they were not affiliated, it would be restricted. It would have to be a public railway rather than a special railway.

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Example 5



Under DGR proposal, this structure is not possible because:

- Unaffiliated entities cannot form a consortium to build and operate a single SR
- Neither power plant nor port operator can be an SR developer – See DGR proposal Article 3(2)
- No interconnection is possible between two SRs – See DGR proposal Article 122

18

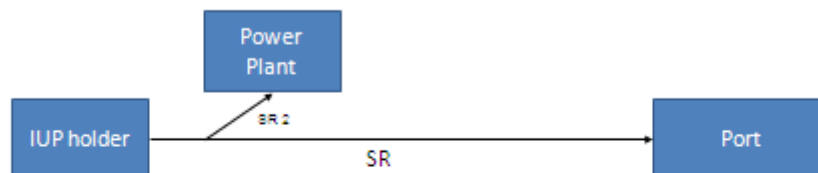


Curragh mine in northern Queensland currently produces 6.5 million tonnes of export coal and 2.5 million tonnes of domestic coal per year.

Curragh steaming coal is railed directly to Stanwell Power Station near Rockhampton. Export high quality metallurgical coal is railed to the R G Tanna Coal Terminal and Barney Point Coal Terminal at the Port of Gladstone.

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Example 5



Under IndII proposal, this structure is possible because:

- Unaffiliated entities can form a consortium to build and operate a single SR – See IndII proposal Article 1(7)
- Power plant can be an SR developer
- Interconnection is possible between two SRs – See IndII proposal Article 34(4)

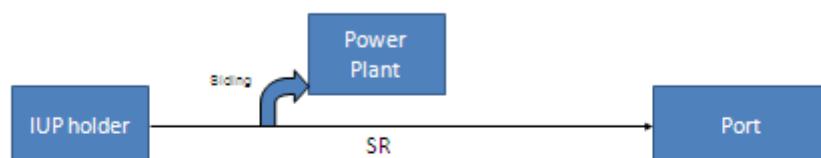
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Development Based on FGD dated 16 August 2011

- In relation to Example 5 the DGR stated that further internal discussion was needed. However in principle this would require an affiliate relationship.

21

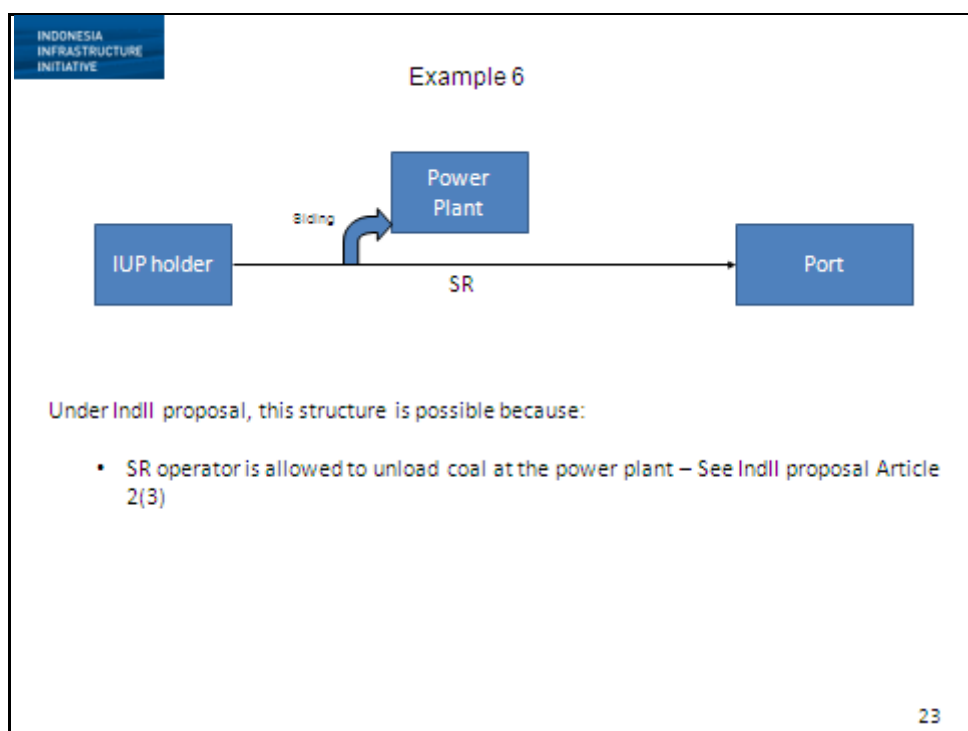
Example 6



Under DGR proposal, this structure is not possible because:

- SR operator is not allowed to unload coal at the power plant – See DGR proposal Article 14

22



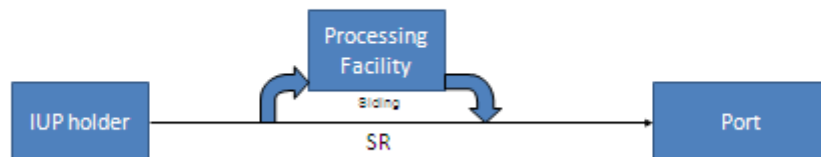
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INFRASTRUCTURE
INITIATIVE

Development based on FGD dated 16 August 2011

- With regard to the Example 6 – the DGR believed that conceptually, only maintenance terminals were allowed. However, this would need to be discussed further. If there was an affiliate relationship between the IUP holder and the electric power plant, it could be considered. If the electric power plant was deemed to be a support area, the Special Railway would be allowed to load and unload and continue to the port.

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Example 7



Under DGR proposal, this structure is not possible because:

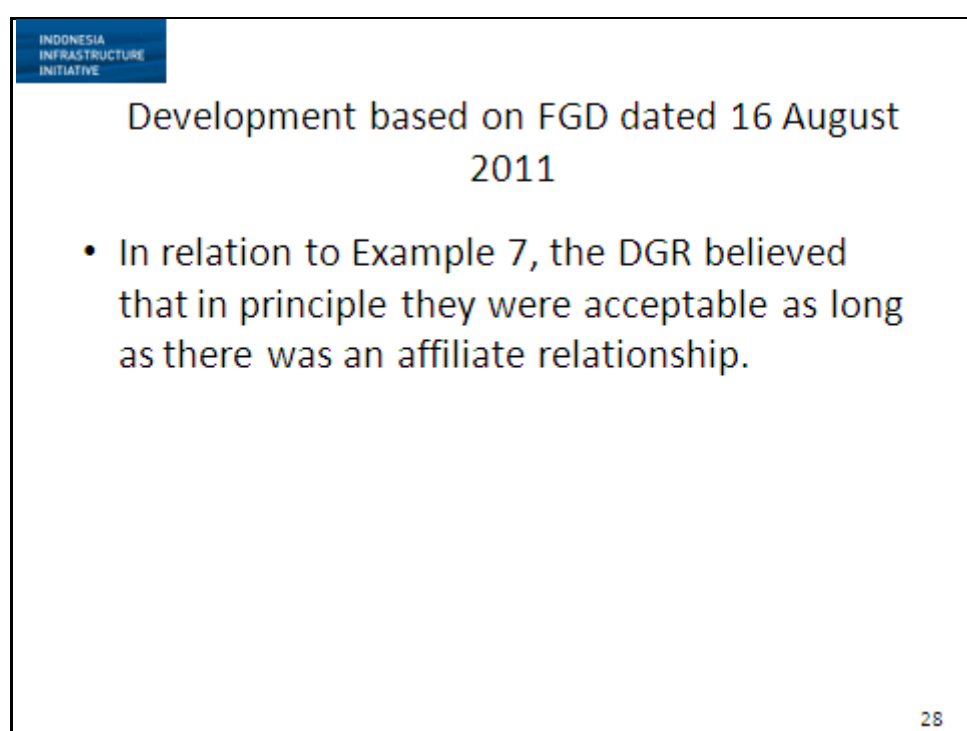
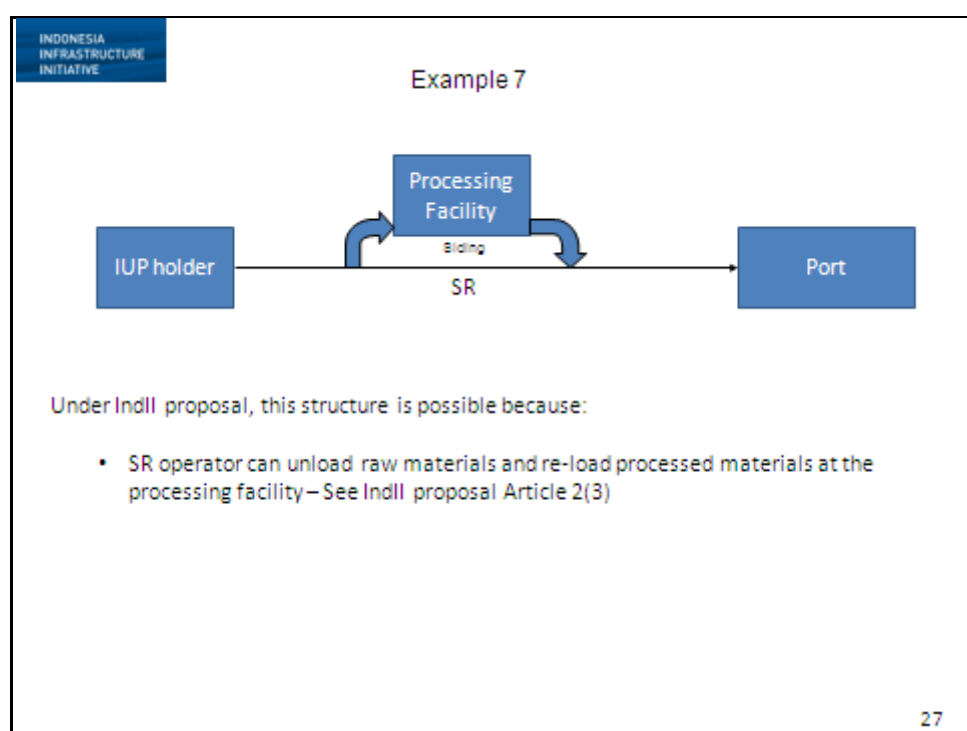
- SR operator would not be allowed to unload raw materials and re-load processed materials at the processing facility – See DGR proposal Article 14

25

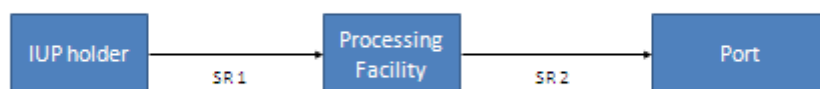


This Almatix bauxite facility in Arkansas US is one of the largest of Almatix' operations, producing Tabular Alumina and various grades of Calcined Alumina. The facility receives feedstock via rail, and ships finished and semi-finished product by rail and truck

26



Example 8

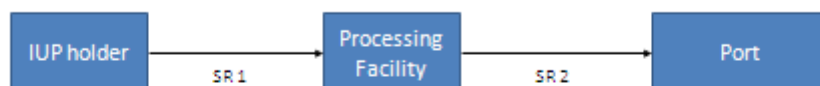


Under DGR proposal, this structure is not possible because:

- Processing facility cannot be developer of SR 1 or SR 2 – See DGR proposal Article 3(2)
- Processing facility cannot be ‘support area’ of SR 1 (if IUP holder acts as developer of SR 1) – See DGR proposal Article 9(2)
- IUP holder, processing facility and/or port operator cannot form a consortium and be treated as a single ‘business entity’

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Example 8



Under IndII proposal, this structure is possible because:

- Processing facility can be developer of SR 1 and/or SR 2
- Processing facility can be ‘support area’ of SR 1 (if IUP holder acts as developer of SR 1) – See IndII proposal Article 2(2)
- Unrelated parties can form a consortium and be treated as a single ‘business entity’ – See IndII proposal Article 1(7)

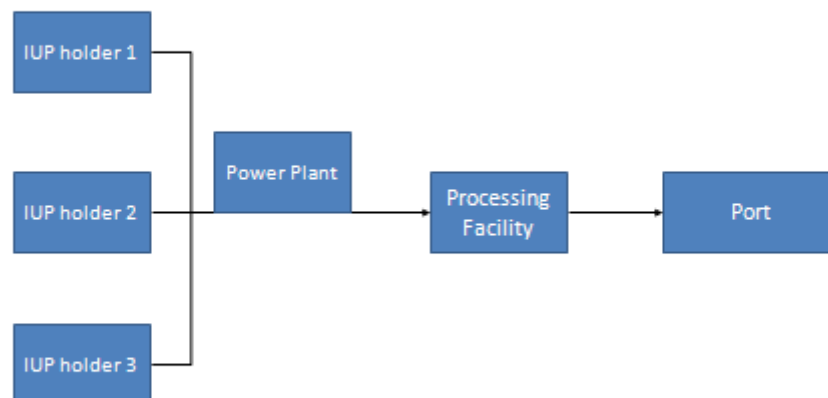
30

Development based on FGD dated 16 August 2011

- In relation to Example 8 the DGR believed that in principle they were acceptable as long as there was an affiliate relationship.

31

Example of Coal SR Network



32



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Perkeretaapian Khusus (Tahap III)

Konsep Permen dan Ilustrasi Perkeretaapian Khusus

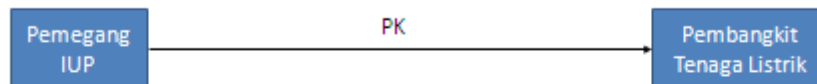
FGD – Hotel Akmani
Jakarta, 16 Agustus 2011



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Contoh 1



Menurut rancangan Permen Divisi Hukum, struktur ini tidak dimungkinkan karena:

- Pembangkit tenaga listrik tidak dapat menjadi 'wilayah penunjang' (apabila pemegang IUP dianggap sebagai pembangun PK) – Lihat rancangan Permen Divisi Hukum Pasal 9(2)
- Pembangkit tenaga listrik tidak bisa dianggap sebagai pembangun PK – Lihat rancangan Permen Divisi Hukum Pasal 3(2)
- Bahkan, jika pembangkit tenaga listrik dapat dianggap sebagai pembangun PK, pemegang IUP tidak dapat dianggap sebagai 'wilayah penunjang' – Lihat rancangan Permen Divisi Hukum Pasal 9(2)
- Pemegang IUP dan operator pembangkit tenaga listrik tidak dapat membentuk sebuah konsorsium dan dianggap sebagai satu 'badan usaha' tunggal

2

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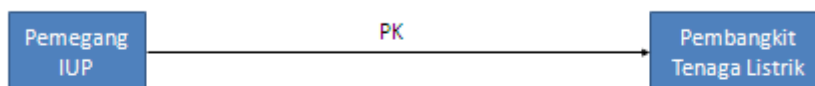
Gladstone Power Station adalah pembangkit tenaga listrik terbesar di Queensland, Australia. (1,680 MW) Batubara diangkut dengan menggunakan rel kereta api dari tambang Curragh, 200 km sebelah Barat dari Rockhampton.

Queensland memiliki dua pembangkit tenaga listrik lainnya yang dilayani oleh kereta api, yaitu yang terletak di Stanwell dan Swanbank.

3

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Contoh 1



Menurut rancangan Permen dari IndII, struktur ini dimungkinkan karena:

- Pembangkit tenaga listrik dapat menjadi 'wilayah penunjang' (jika pemegang IUP dianggap sebagai pembangun PK) – Lihat rancangan Permen dari IndII Pasal 2(2)
- Pembangkit tenaga listrik dapat menjadi pembangun PK
- Pemegang IUP dapat menjadi 'wilayah penunjang' (jika operator pembangkit tenaga listrik dianggap sebagai pembangun PK) – Lihat rancangan Permen IndII Pasal 2(2)
- Pemegang IUP dan operator pembangkit tenaga listrik dapat membentuk sebuah konsorsium dan dianggap sebagai sebuah 'badan usaha' tunggal – Lihat rancangan Permen IndII Pasal 1(7)

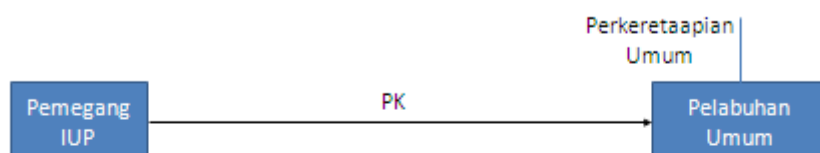
4

Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai contoh 1 disampaikan oleh tim bagian hukum DJP bahwa skema ini mempunyai pemahaman yang sama dengan tim konsultan. Wilayah penunjang tidak perlu spesifik pembangkit tenaga listrik. Jika pembangkit mempunyai pergudangan, lapangan penumpukan maka area/fasilitas tersebut dapat dianggap sebagai wilayah penunjang.
- Namun demikian, tim hukum DJP berpendapat bahwa definisi wilayah penunjang di dalam draft DJK (yang saat ini hanya terbatas pada terminal khusus, terminal untuk kepentingan sendiri, bandar udara khusus, pergudangan, lapangan penumpuk, pabrik pengolahan) dapat ditambahkan apabila diperlukan selama bukan pelabuhan umum. Pasal 350 dari PP 56 yang membatasi PK harus diperhatikan. Wilayah penunjang harus ada keterkaitan dengan wilayah pokoknya.

5

Contoh 2



Menurut rancangan Permen dari Divisi Hukum, struktur ini tidak dimungkinkan karena:

- Pelabuhan umum tidak dapat menjadi 'wilayah penunjang' (jika pemegang IUP dianggap sebagai pembangun PK) – Lihat rancangan Permen Divisi Hukum Pasal 9(2)
- Pelabuhan umum tidak dapat menjadi pembangun PK – Lihat rancangan Permen Divisi Hukum Pasal 3(2)
- Bahkan, jika pelabuhan umum dapat dianggap sebagai pembangun PK, pemegang IUP tidak dapat menjadi 'wilayah penunjang' – Lihat rancangan Permen Divisi Hukum Pasal 9(2)
- Pemegang IUP dan penyelenggara pelabuhan tidak dapat membentuk sebuah konsorsium dan dianggap sebagai sebuah 'badan usaha' tunggal

6



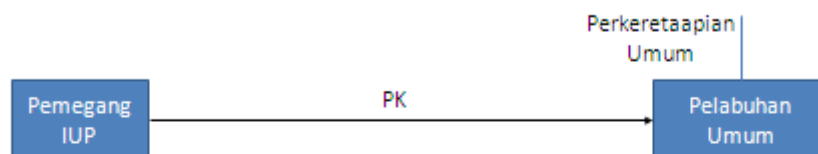
Perkeretaapian Queensland adalah salah satu dari pengangkut batubara untuk ekspor terbesar di dunia melalui pelabuhan Newcastle, Hay Point, Gladstone, Abbot point, Point Kembla dan Brisbane.

Pelabuhan Gladstone adalah pelabuhan multi komoditas yang terbesar di Queensland dan pelabuhan multi komoditas kelima terbesar di Australia. Pelabuhan ini adalah pelabuhan ekspor batubara keempat terbesar di dunia.

North Queensland Bulk Ports Corporation Limited adalah otoritas pelabuhan yang berwenang di Pelabuhan Hay Point dan Abbot Point

7

Contoh 2



Menurut rancangan Permen dari IndII, struktur ini memungkinkan karena :

- Pelabuhan umum dapat menjadi 'wilayah penunjang' dan/atau pembangun PK – Lihat rancangan Permen IndII Pasal 2(2)
- Pemegang IUP dapat berupa 'wilayah penunjang' atau pembangun PK – Lihat rancangan Permen IndII Pasal 2(2)
- Pemegang IUP dan operator pelabuhan umum dapat membentuk sebuah konsorsium dan dapat dianggap sebagai sebuah 'badan usaha' tunggal – Lihat rancangan Permen IndII Pasal 1(7)

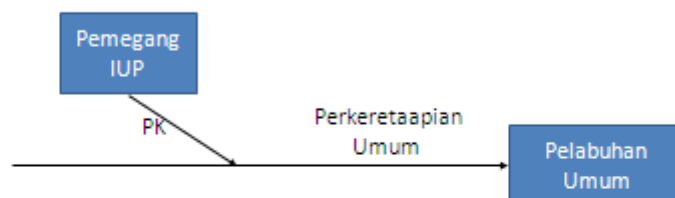
8

Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai contoh 2 – Tim hukum DJP menyampaikan bahwa akan mengecek lebih lanjut mengenai fungsi dan keberadaan terminal untuk kepentingan sendiri yang terletak di dalam pelabuhan umum. Terminal untuk kepentingan sendiri terletak di dalam pelabuhan umum dimana terminal ini terbatas hanya boleh digunakan untuk kepentingan sendiri.
- Tim DJP menyampaikan bahwa seharusnya PK dapat terhubung dengan terminal untuk kepentingan sendiri tapi PK tidak dapat terhubung dengan pelabuhan umum.

9

Contoh 3



Menurut rancangan Permen dari Divisi Hukum, struktur ini tidak dimungkinkan karena:

- Walaupun interkoneksi diperbolehkan, tidak ada titik penghubung atau titik akhir (i.e., pelabuhan umum) yang memenuhi pengertian tegas dari 'wilayah penunjang' yang dimaksud oleh Divisi Hukum – Lihat rancangan Permen Divisi Hukum Pasal 9(2)

Ini merupakan susunan '*short line*' atau jalur singkat, yang umum di Amerika Serikat.

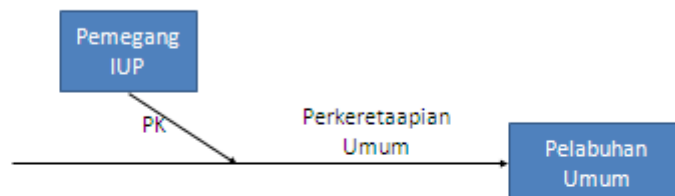
10



Buckingham Branch merupakan salah satu dari jalur singkat di Amerika Serikat. Cabang ini melakukan pertukaran dengan CSX di lapangan Strathmore dan melayani industri-industri kecil dan pertambangan di sepanjang jalur

11

Contoh 3



Menurut rancangan Permen dari IndII, struktur ini memungkinkan karena:

- Titik interkoneksi sebagaimana pelabuhan umum dapat dianggap sebagai 'wilayah penunjang' – Lihat rancangan Permen IndII Pasal 2(2)

Ini adalah susunan '*short line*' atau jalur singkat, yang umum di Amerika Serikat.

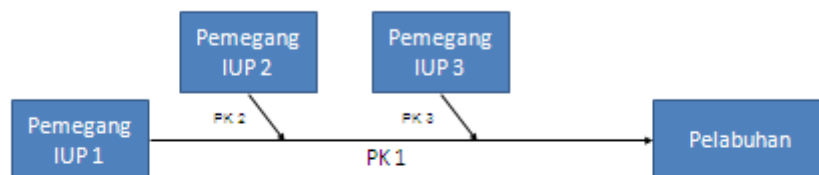
12

Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai contoh 3 – DJP berpendapat bahwa dalam PK harus tetap ada wilayah penunjang. Sehingga sebelum PK berintegrasi dengan PU maka PK harus terlebih dahulu terhubung dengan wilayah penunjang.
- DJP lebih lanjut berpendapat dalam contoh ini pemegang IUP dapat langsung bekerja sama dengan Perkeretaapian Umum (PU) dengan konsep *business to business* tanpa harus membangun PK.

13

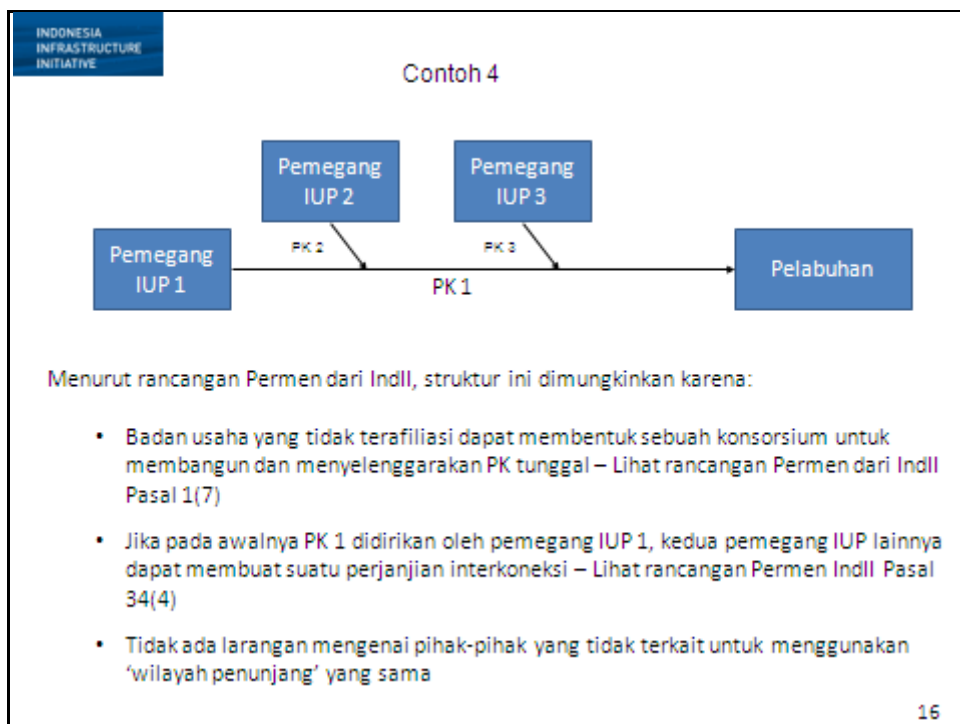
Contoh 4



Menurut rancangan permen dari Divisi Hukum, struktur ini memungkinkan hanya apabila tiga pemegang IUP adalah terafiliasi, karena:

- Badan usaha tidak terafiliasi tidak dapat membentuk sebuah konsorsium
- Jika pada awalnya PK didirikan oleh pemegang IUP 1, kedua pemegang IUP lainnya tidak dapat menggunakan infrastruktur tersebut dalam keadaan apapun – Lihat rancangan permen dari Divisi Hukum DGR, Pasal 122
- Bahkan, jika interkoneksi dimungkinkan, pelabuhan hanya dapat digunakan oleh pemegang IUP 1 – Lihat rancangan Permen Divisi Hukum Pasal 10 dan 11

14



Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai Contoh 4- Tim hukum DJK berpendapat bahwa selama IUP 1, 2 dan 3 merupakan afiliasi maka dapat diterima tapi apabila bukan afiliasi maka tidak diperbolehkan. Tim hukum DJP berpendapat contoh ini lebih baik akan diarahkan untuk menjadi PU daripada menjadi PK

17

Contoh 5



Menurut rancangan Permen dari Divisi Hukum, struktur ini tidak memungkinkan karena:

- Badan usaha tidak terafiliasi tidak dapat membentuk suatu konsorsium untuk membangun dan menyelenggarakan PK tunggal
- Tidak ada pembangkit tenaga listrik ataupun penyelenggara pelabuhan yang dapat menjadi pembangun PK – Lihat rancangan Permen dari Divisi Hukum Pasal 3(2)
- Tidak dimungkinkan dilakukan interkoneksi antara dua PK – Lihat rancangan Permen dari Divisi Hukum Pasal 122

18

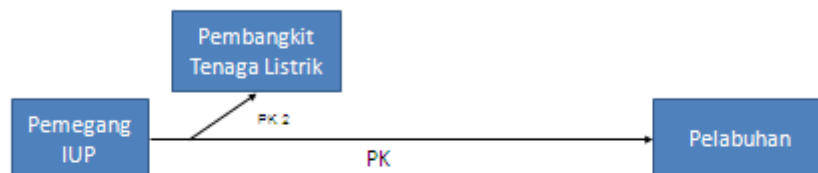


Tambang Curragh mine di sebelah Selatan Queensland saat ini memproduksi 6.5 juta ton batubara untuk diekspor dan 2.5 juta ton untuk kebutuhan dalam negeri setiap tahunnya.

Batubara untuk uap dari Curragh diangkut langsung dengan kereta langsung kepada pembangkit tenaga listrik Stanwell dekat Rockhampton. Batubara metalurgi kualitas tinggi untuk ekspor diangkut dengan kereta kepada Terminal R G Tanna Coal dan Terminal Barney Point Coal di Pelabuhan Gladstone.

19

Contoh 5



Menurut rancangan Permen dari IndII, struktur ini memungkinkan karena:

- Badan usaha tidak terafiliasi dapat membentuk sebuah konsorsium untuk membangun dan menyelenggarakan PK tunggal – Lihat rancangan Permen IndII Pasal 1(7)
- Pembangkit tenaga listrik dapat menjadi pembangun PK
- Interkoneksi dimungkinkan antara dua PK – Lihat rancangan Permen IndII Pasal 34(4)

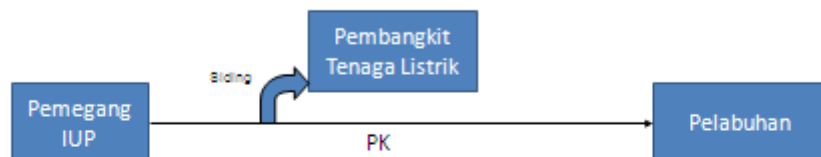
20

Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai Contoh 5 – Sehubungan dengan contoh 5 tim hukum DJP berpendapat bahwa perlu dilakukan diskusi dan pembahasan internal terlebih dahulu.
- Akan tetapi prinsip yang dipegang adalah harus terdapatnya hubungan afiliasi.

21

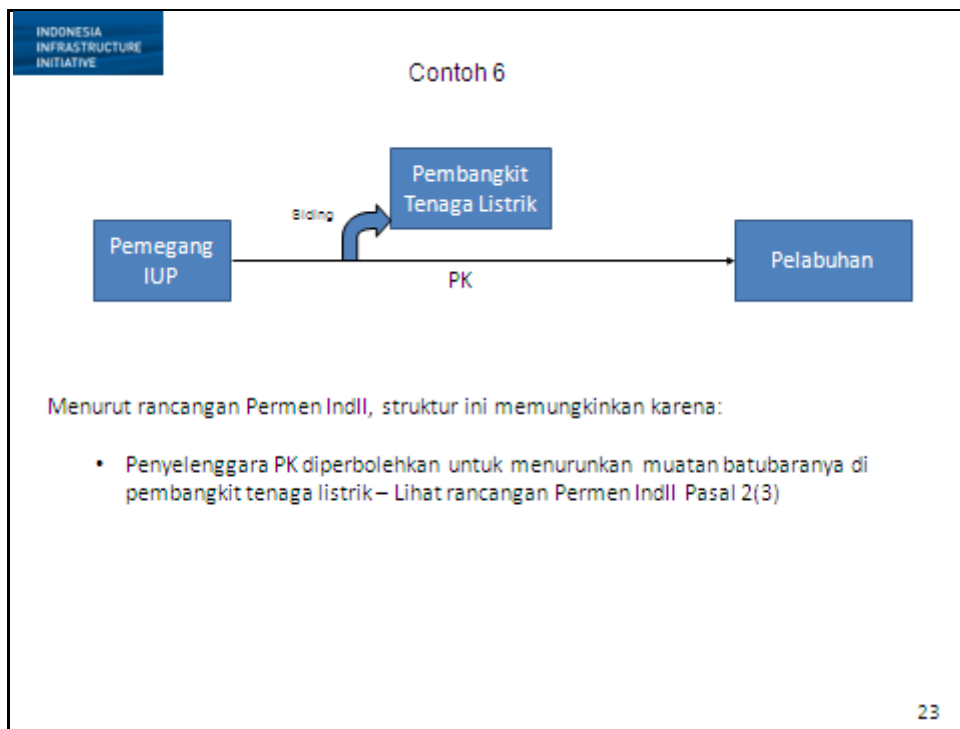
Contoh 6



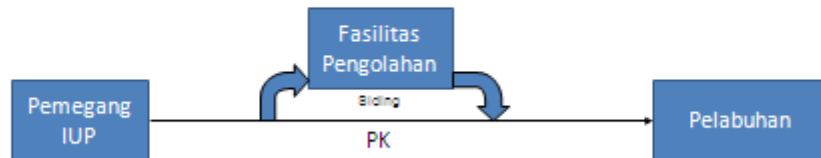
Menurut rancangan Permen Divisi Hukum, struktur ini tidak memungkinkan karena:

- Penyelenggara PK tidak diperbolehkan untuk menurunkan muatan batubara di pembangkit tenaga listrik – Lihat rancangan Permen Divisi Hukum Pasal 14

22



Contoh 7



Menurut rancangan Permen dari Divisi Hukum, struktur ini tidak memungkinkan karena:

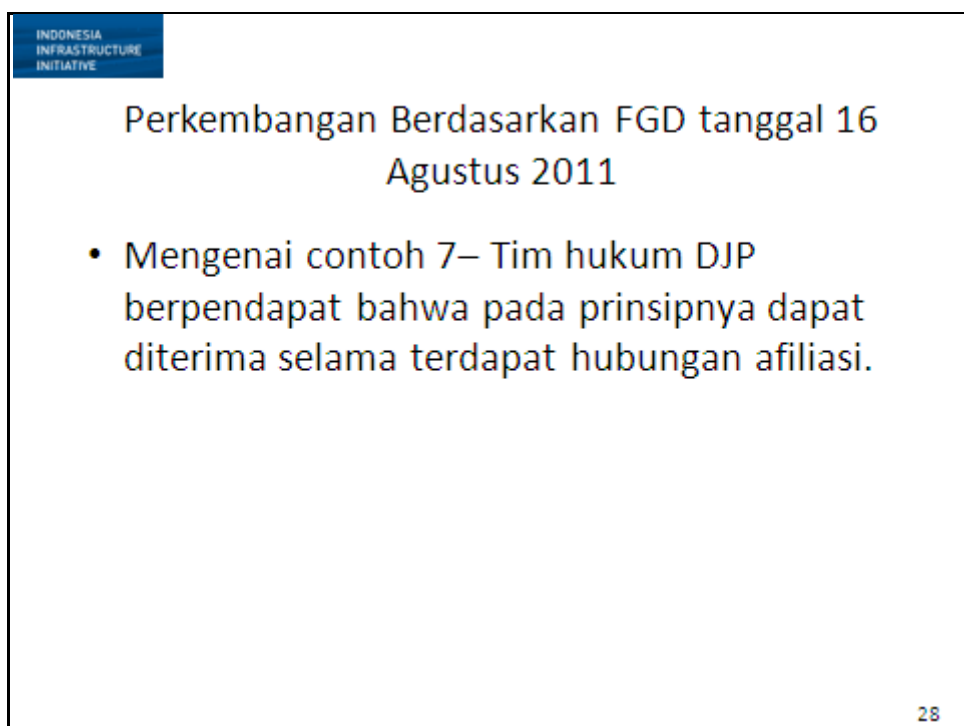
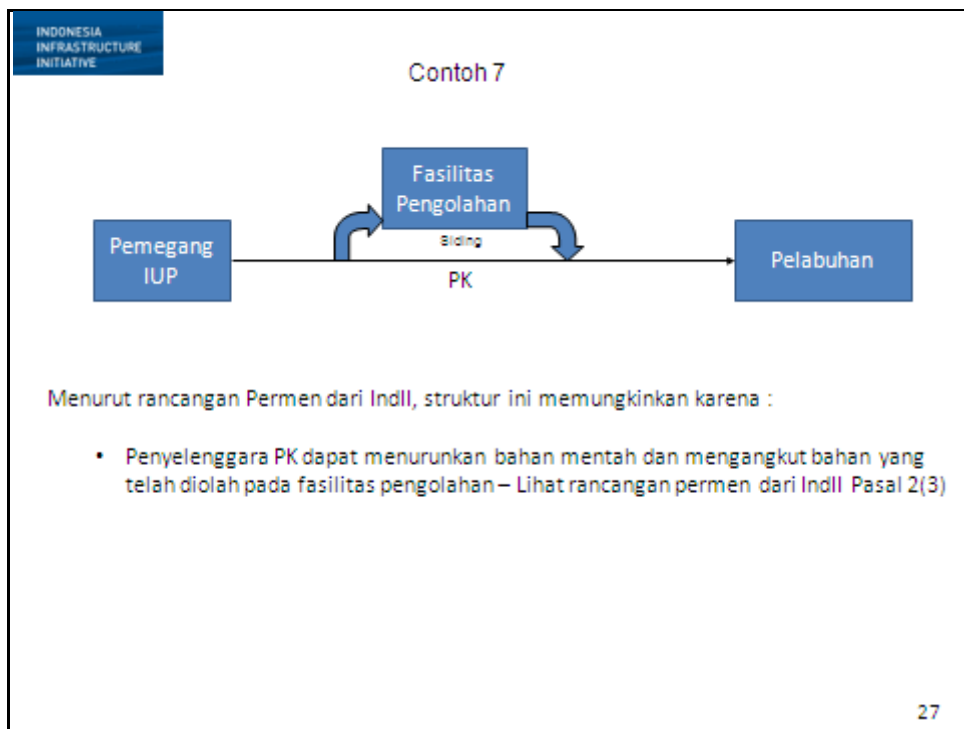
- Penyelenggara PK tidak akan diperbolehkan untuk menurunkan bahan mentah dan mengangkut bahan yang sudah diolah pada fasilitas pengolahan – Lihat rancangan Permen Divisi Hukum Pasal 14

25

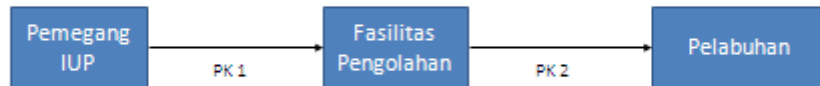


Industri bauksit Almatris di Arkansas, Amerika Serikat adalah salah satu dari penyelenggaraan Almatris yang terbesar, yang memproduksi Tabular Alumina dan berbagai tingkat Calcined Alumina. Industri ini menerima pasokan dengan menggunakan kereta api, dan mengirimkan barang jadi dan separo jadi dengan menggunakan rel dan truk

25
26



Contoh 8

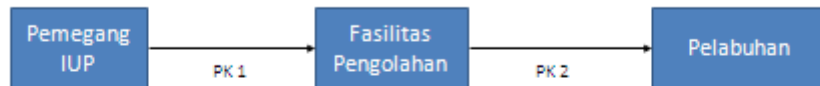


Menurut rancangan Permen Divisi Hukum, struktur ini tidak memungkinkan karena:

- Fasilitas pengolahan tidak dapat menjadi pembangun PK 1 atau PK 2 – Lihat rancangan Permen Divisi Hukum Pasal 3(2)
- Fasilitas pengolahan tidak dapat menjadi ‘wilayah penunjang’ dari PK 1 (jika pemegang IUP bertindak sebagai pembangun PK 1) – Lihat rancangan Permen Divisi Hukum Pasal 9(2)
- Pemegang IUP, fasilitas pengolahan dan/atau penyelenggara pelabuhan tidak dapat membentuk sebuah konsorsium dan tidak dapat diperlakukan sebagai sebuah ‘badan usaha’ tunggal

29

Contoh 8



Menurut rancangan Permen dari IndII, struktur ini memungkinkan karena:

- Fasilitas pengolahan dapat membangun PK 1 dan/atau PK 2
- Fasilitas pengolahan dapat menjadi ‘wilayah penunjang’ dari PK 1 (jika pemegang IUP bertindak sebagai pembangun dari PK 1) – Lihat rancangan Permen IndII Pasal 2(2)
- Pihak yang tidak terkait dapat membentuk sebuah konsorsium dan dianggap sebagai sebuah ‘badan usaha’ tunggal – Lihat rancangan Permen IndII Pasal 1(7)

30

Perkembangan Berdasarkan FGD tanggal 16 Agustus 2011

- Mengenai contoh 8– Tim hukum DJP berpendapat bahwa pada prinsipnya dapat diterima selama terdapat hubungan afiliasi.

31

Contoh Jaringan PK Batubara



32

Special Railway	Public railway
A. Legal Distinctions	
Must be used by a business entity to support its main activity (UU 23/2007 Article 1 paragraph 6) Cannot serve the general public (UU 23/2007 elucidation to Article 5 paragraph 1 letter b)	Can be used by anyone (<i>i.e.</i> , cannot be restricted to serve just a single business entity or limited entities)
Operator can be any business entity (UU 23/2007 Article 33 paragraph 1)	Operator must be a BUMN, BUMD, or an Indonesian legal entity specifically established for the purpose of operating a public railway (UU 23/2007 Articles 1 paragraph 10 and 31 paragraph 1)
Can only operate within the user's main business area or from such area to a single point in a support area (PP 56/2009 Article 350)	No geographic restrictions as such, but subject to master planning requirements (UU 23/2007 Articles 6 and 7)
Charges for transportation services and track access (for interconnection) can be set contractually on a business to business basis	Transportation tariff guidelines and track access charges are set by Government (UU 23/2007, Articles 151 and 154)
No public service obligation	Operator may be subject to public service obligations (UU 23/2007, Article 153)
Land for underlying infrastructure must be acquired from owners on a negotiated basis	Land for underlying infrastructure may be taken by the Government in accordance with prevailing laws (UU 23/2007 Article 85 paragraph 1)
Should not be subject to public tender requirements under PPP regulations as there is no Government support or guarantee	Subject to public tender requirements under PPP regulations as it may be eligible for Government support or guarantee
B. Economic and Technical Distinctions	
Regulatory risk remains within operator's control, as Government oversight is limited to technical, environmental and safety issues	Regulatory risk is beyond operator's control, as Government sets tariffs and public service obligations Government support and/or guarantees are needed to manage regulatory risks
Demand risk is minimised by contracts with the sole client. Future demand is known in advance allowing efficient operation and provision of infrastructure and equipment	Significant demand risk. Demand may fluctuate leading to uncertainty about future resource requirements and costs.

Special Railway	Public railway
<p>Revenue risk is minimised through contracts with the sole client.</p> <p>Revenue risk can be managed through 'take or pay' arrangements (the value of which, from a financing perspective, depends entirely on the wherewithal of the counterparty).</p>	<p>Revenue risk is beyond operator's control, and can lead to uncertainty about the ability to recover costs of maintenance and operation</p> <p>Sponsor support and/or Government support are needed to manage revenue risk</p>
Technical parameters and scheduling of services can be tailored to specific needs of sole client (greater efficiency)	Technical parameters and scheduling of services must accommodate multiple clients and service requirements (loss of efficiency)
Dedicated loading and unloading facilities (greater efficiency)	Public loading and unloading facilities (loss of efficiency)
Maintenance and other work can be scheduled in consultation with the sole client (greater efficiency)	Multiple clients and common carrier obligations makes it more difficult to schedule down periods (loss of efficiency)
Certainty about future demand and revenues reduces cost of financing	Uncertainty about future demand and revenues make financing almost impossible without Government support or guarantees

Perkeretaapian Khusus	Perkeretaapian Umum
A. Perbedaan dari segi Hukum	
<p>Harus digunakan oleh suatu badan usaha untuk menunjang kegiatan utamanya (Pasal 1 Ayat 6 UU 23/2007)</p> <p>Tidak boleh melayani masyarakat umum (Penjelasan Pasal 5 Ayat 1 Huruf b UU 23/2007)</p>	<p>Dapat digunakan oleh siapa saja (tidak dapat dibatasi hanya untuk melayani suatu badan usaha atau beberapa badan usaha tertentu)</p>
<p>Penyelenggara dapat berupa badan usaha apapun (Pasal 33 Ayat 1 UU 23/2007)</p>	<p>Penyelenggara harus berupa BUMN, BUMD, atau badan hukum Indonesia yang secara khusus didirikan untuk menyelenggarakan perkeretaapian umum (Pasal 1 Ayat 10 dan Pasal 31 ayat 1 UU 23/2007)</p>
<p>Hanya dapat beroperasi di dalam wilayah kegiatan pokok pengguna atau dari wilayah kegiatan pokok tersebut ke satu titik di wilayah penunjang (Pasal 350 PP 56/2009)</p>	<p>Tidak ada pembatasan geografis namun tunduk kepada ketentuan rencana induk (Pasal 6 dan 7 UU 23/2007)</p>
<p>Biaya untuk layanan transportasi dan akses jalur (untuk interkoneksi) dapat ditentukan berdasarkan kontrak atas dasar kesepakatan bisnis (business to business basis)</p>	<p>Pedoman tarif transportasi dan biaya akses jalur ditetapkan oleh Pemerintah (Pasal 151 dan 154 UU 23/2007)</p>
<p>Tidak ada kewajiban untuk menyediakan pelayanan publik</p>	<p>Penyelenggara harus tunduk kepada ketentuan kewajiban pelayanan publik (Pasal 153 UU 23/2007)</p>
<p>Tanah yang digunakan untuk pembangunan infrastruktur harus dibeli dari pemilik atas dasar negosiasi</p>	<p>Perolehan tanah yang digunakan untuk pembangunan infrastruktur dapat dilakukan oleh Pemerintah berdasarkan hukum yang berlaku (Pasal 85 Ayat 1 UU 23/2007)</p>
<p>Tidak terkena kewajiban tender umum berdasarkan peraturan kerjasama antar swasta dan pemerintah karena tidak adanya dukungan atau jaminan Pemerintah</p>	<p>Tunduk kepada ketentuan tender umum berdasarkan peraturan kerjasama antar swasta dan pemerintah karena dimungkinkan untuk mendapatkan dukungan atau jaminan Pemerintah</p>
B. Perbedaan dari segi Ekonomis dan Teknis	
<p>Risiko sehubungan dengan peraturan berada dalam kendali penyelenggara, karena pengawasan Pemerintah terbatas terhadap masalah teknis, lingkungan dan keamanan.</p>	<p>Risiko sehubungan dengan peraturan berada di luar kendali penyelenggara, karena Pemerintah menetapkan tarif dan kewajiban pelayanan publik</p> <p>Dukungan dan/atau jaminan Pemerintah diperlukan untuk mengelola risiko sehubungan dengan peraturan</p>

Perkeretaapian Khusus	Perkeretaapian Umum
Risiko permintaan dikurangi dengan mengadakan kontrak dengan klien tunggal. Permintaan di masa depan dapat diketahui sebelumnya sehingga memungkinkan terjadinya penyelenggaraan dan persediaan infrastruktur dan peralatan yang efisien	Risiko permintaan yang signifikan. Permintaan dapat mengalami fluktuasi sehingga mengakibatkan ketidakpastian sehubungan dengan biaya dan ketentuan sumber daya di masa depan.
Risiko pendapatan dikurangi dengan mengadakan kontrak dengan klien tunggal. Risiko pendapatan dapat dikelola melalui pengaturan 'take or pay' (dari perspektif pembiayaan, nilainya bergantung seluruhnya terhadap persediaan yang diperlukan oleh salah satu pihak)	Risiko pendapatan di luar kendali penyelenggara, dan dapat mengarah pada suatu ketidakpastian sehubungan dengan pendapatan di masa depan dan kemampuan untuk mendapatkan kembali biaya operasional dan pemeliharaan Dukungan sponsor dan/atau dukungan Pemerintah diperlukan untuk mengelola risiko pendapatan
Parameter teknis dan penjadwalan pelayanan dapat disesuaikan dengan kebutuhan khusus dari klien tunggal (efisiensi yang lebih besar)	Batasan teknis dan penjadwalan layanan harus mengakomodir kebutuhan berbagai macam klien dan ketentuan pelayanan (kehilangan efisiensi)
Fasilitas bongkar muat khusus (efisiensi yang lebih besar)	Fasilitas bongkar muat umum (kehilangan efisiensi)
Jadwal pemeliharaan dan pekerjaan lainnya dapat diatur sesuai dengan hasil konsultasi dengan klien tunggal (efisiensi yang lebih besar)	Berbagai macam klien dan kewajiban pengangkutan umum menambah kesulitan untuk menjadwalkan waktu pemeliharaan (kehilangan efisiensi)
Kepastian mengenai permintaan dan pendapatan di masa depan mengurangi beban pembiayaan.	Ketidakpastian mengenai permintaan dan pendapatan di masa depan membuat pembiayaan hampir mustahil tanpa adanya dukungan atau jaminan Pemerintah

INDONESIA INFRASTRUCTURE INITIATIVE

An Australian Government Initiative



Activity number and title	: #229 - Special Railway Phase 3	Coordinator LFV : Coordinator WG4 :
Title of meeting	: FGD III - Discussion of the Special Railway Regulation	
Date and place	: 16 August 2011 Akmani Hotel - Venezia Room, Mezzanine floor Jl.KH. Wahid Hasyim 91, Jakarta Pusat 13050	

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3	Benny Bernarto	Consultant	Makarim & Taira S	benny.bernarto@makarim.com	0815 19056658
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20	Toto Lukito	Head Sub Division of Railway	Dit. LLAKE, MOT		
21	Iman Hidayat	Staff	Biro Hukum Kemenhub		
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23	Revie Hamzah	OM	IndII	revie.hamzah@indii.co.id	0817 4864803
24	Elly Anggraeni	OM	IndII	elly.anggraeni@indi.co.id	0813 8313 8104
25	Annete Ngabito	Consultant	IndII		
26	Setyo Gunawan	Staff	Dit. LLAKE, MOT		

ANNEXE 10: ACTIVITY FINAL COMPLETION REPORT

IndII activity reference #: 229	Date of report: 19 August 2011
Activity name: Development of Special Railway and Limited Public Railway Regulations (Phase III)	
Total budget: AUD 308,861	

PART 1: Executive summary

The goal and objective of this activity was to develop and implement a new Ministerial Regulation on Special Railways, as well as amendments to existing Government Regulation Nos. 56 of 2009 and 72 of 2009, for the purpose of attracting private investment to the Indonesian Railway Sector.

PART 2: Background and context to activity

(A brief outline of the activity history and linkages to IndII objectives/outcomes in the IndII M&E Plan)

The key purpose of this activity is to foster private investment in the Indonesian railway sector, within the limits of the existing legislative framework of Indonesia's Railway Law (Law No. 23 of 2007), by proposing an implementing regulations for the development of Special Railways.

The Railway Law provides for the development of 'exclusive' or 'special' railways to complement the 'public' railway network. A special railway is defined under the law as a railway used to support the main activities of a business enterprise. Although there is a strong interest by Indonesian enterprises (most notably coal mine operators) in developing special railways, existing proposals have stalled at the initial licensing stage due to the generality of existing legal provisions and the lack of an implementing Ministerial Regulation dealing specifically with special railways.

Since 2010, IndII has supported a program to address specifically the issue of special railways. Phase 1 of IndII support to DGR, which was completed in the first half of 2010, identified the need for changes in rail sector regulations to foster private sector investment. Phase 2, which took place in the second half of 2010 and involved extensive stakeholder consultation, identified specific problems with the current regulatory framework, and proposed various regulatory and policy changes to achieve meaningful reform and encourage greater private investment in the railway sector.

In Phase 3, the proposed implementing regulations will need to address several issues, among them:

- 1) Clarifying the legal parameters within which SR operators and clients will be expected to operate;
- 2) Clarifying the scope of SRs;
- 3) Clarifying the nature of SRs and SR assets, both during operation and after they are no longer needed by the SR client;
- 4) Defining basic rules for interconnection between SRs or between SRs and PRs;
- 5) Simplifying the licensing systems, where possible; and

Assuring proper harmonization between the SR licensing scheme and other relevant regulatory licensing schemes (most notably with respect to mining).

PART 3: Key results of activity			
Objectives	Output/ Performance Indicator	Achievements to date	Remarks
M&E Output 1: Policy setting and implementation	<p><i>TOR Output 1.1 of M&E Framework: Draft Ministerial Regulations on Special Railways and Interconnected Special Railways</i></p> <p><u>Indicator:</u></p> <p>Gol's buy-in on the proposed regulation secured</p>	<p>A draft ministerial regulation was produced, after extensive discussions with DGR (traffic and legal division) and MOT (legal bureau). The regulation, as well as the key principles and ideas underlying it, were presented on two occasions to an Inter-agency Working Group, as well as at two Focus Group Discussions (which included private parties as well as relevant Gol stakeholders). Comments from stakeholder meetings were taken into account in the final draft regulation.</p> <p>Between mid-July and mid-August 2011, further meetings were held with key MOT stakeholders in an effort to resolve remains points of disagreement and finalizing the draft regulation. For this purpose, an article-by-article table comparing the most recent DGR legal division draft with the Indll proposal was created to assist DGR in the process of merging the two drafts.</p>	<p>Differences of opinion (particularly between DGR traffic and MOT legal bureau, on the one hand, and DGR legal division on the other) remain on a handful of key issues, namely: interconnection, the interpretation of the point-to-point rule, certain aspects of the definition of <i>badan usaha</i> (specifically, whether it can include a consortium of unaffiliated legal entities), and whether an SR client and SR operator can be two unaffiliated entities linked only by an exclusive, long-term transportation services agreement. While the consultant team remains confident that differences of opinion can be bridged, it is not known whether the consultant team's proposals on the above issues will ultimately be adopted by MOT.</p> <p>Also, as a matter of process, the consultant team had difficulty in scheduling an initial meeting with DGR legal division, and a draft of DGR legal division's Ministerial Regulation was not made available until 18 June, just 10 days before the scheduled end of this</p>

			activity. As a result, there was insufficient time to resolve outstanding differences of opinion. Fortunately, a brief extension of the project from mid-July to mid-August provided the consultant team with a further opportunity to meet with DGR legal division and DGR legal bureau to resolve outstanding issues.
	<p><i>TOR Output 1.2 of M&E Framework: Draft Government Regulations on Special Railways and Public Railways</i></p> <p><u>Indicator:</u></p> <p>Gol buy-in on the proposed regulations secured.</p>	<p>No Government Regulation implementing the concept of Limited Public Railway was produced, as DGR/MOT did not feel this concept was viable under the current Railway Law.</p> <p>While a handful of small changes to the existing Government Regulations were initially proposed by the consultant team (mostly to eliminate the point-to-point rule) and presented at Inter-agency Working Group meetings as well as Focus Group Discussions, DGR/MOT in the end preferred not to modify the point-to-point rule, and requested that the consultant team focus instead on producing a Ministerial Regulation that could stand on its own (i.e., without any amendments to the existent Government Regulations).</p>	<p>The critical assumption of political will to support amendments to existing Government Regulations seems to have been misplaced.</p> <p>From the outset, the consultant team was advised that the concept of Limited Public Railway would not be viable under the current Railway Law, and that any proposed changes to existing Government Regulations should be kept to a strict minimum.</p> <p>In the end, even the consultant team's targeted proposal to eliminate the point-to-point rule was set aside in favour of a different approach (which involved implementing the point-to-point rule in a liberal manner through a Ministerial Regulation).</p>
M&E Output 2: Cross-cutting Issues	<i>TOR Output 1.3 of M&E Framework: Government Regulation(s) and Ministerial Regulation(s) on Special</i>	References to 'prevailing laws' have been incorporated into the draft Ministerial Regulation	Any environmental, gender and social considerations to be taken into account in

	<p><i>Railways and Public Railways integrated social, gender and environmental issues.</i></p> <p><u>Indicator:</u></p> <p>Regulations identified potential positive and negative social, gender and environmental impacts as a result of proposed SR and PR operation.</p> <p>Regulations contain mitigation procedures to be followed under Indonesian law to address those potential impacts.</p>	<p>(particularly with reference to environmental and social issues, which by virtue of Government Regulation No. 56 of 2009 must be considered as part of the licensing process for Special Railways), and care has been taken to ensure that license conditions include (among others) compliance with such legislation, as well as compliance with applicable legislation relating to non-discrimination in employment practices.</p>	<p>connection with the application of a sector-specific Ministerial Regulation must be consistent and in accordance with prevailing Indonesian laws and regulations, under authority of which such regulations will be issued. It would not be appropriate (or even possible) to vary existing laws in the context of implementing sector-specific regulations.</p>
<p><i>Discuss and analyse key activity achievements objectives/outcomes – using the Activity Design and/or IndII M&E Plan's key result areas as a guide; i.e.: What has the activity contributed to program key result areas? Also identify inhibiting & contributing factors to achievements. ** For Section 3.1-3.5 – Please only complete the section relevant to your activity. If your activity is primarily policy with capacity building, please only complete those sections (Refer to your activity design and results frameworks for more details) **. Provide evidence where possible.</i></p>			

3.1 Capacity building initiatives *Individual and work unit*

Following on the heels of the Phase 2 Final Report, the consultant team believes it continued to build capacity at DGR/MOT through frequent and in-depth discussions regarding the legal and policy choices available in implementing Special Railway regulations, including through contributions on matters of Indonesian macroeconomic policy and international best practices.

3.2 Partnership building and performance *Linking with other departments, institutions and donors*

No other foreign assistance agencies or development banks were involved in this project. A number of national and provincial/regency offices were consulted in this project (through the Inter-agency Working Group, Focus Group Discussions, as well as individual stakeholder meetings), including (at the national level) the Investment Coordinating Board (BKPM), the Coordinating Ministry for Economic Affairs (CMEA), the National Development Planning Agency (Bappenas), the Ministry of Energy and Mineral Resources (MEMR), and the Ministry of Agriculture. In addition, a number of meetings were held with relevant private sector stakeholders to seek their views on various policy and procedural questions.

3.3 Policy setting and implementation

If GoI stakeholders had had a clear policy for special railways implementation at the outset of this activity, it would have been straightforward to draft and socialize appropriate implementing regulations within a three-month period in accordance with the TOR. However, despite the recommendations made in Phase 2, it appears there were still unresolved differences of opinion within MOT on how to implement special railway policy, which required the consultant team to engage in additional stakeholder consultations at the outset for the purpose of ascertaining a clear policy goal prior to drafting the proposed implementing regulations. Unfortunately, no such clarity could be achieved, as the most important differences of opinion did not become evident until late May/early June, after the proposed regulations had already been drafted.

As a result, it was necessary for the consultant team, during the final month of the activity, to engage simultaneously in drafting/revising the proposed regulations, while still discussing the underlying policy directions to be incorporated into such regulations. Although these last-minute discussions proved extremely valuable in pinpointing remaining areas of disagreement, while providing reason to believe that differences could be bridged, there was simply not enough time to reach agreement on all outstanding points.

3.4 Access

Not applicable

3.5 Cross-cutting design issues

The main output of this activity is a draft Ministerial Regulation to be issued by MOT, as well as (possibly) amendments to Government Regulation Nos. 56 of 2009 and 72 of 2009 to be issued by GoI. Any environmental, gender and social considerations to be taken into account in connection with the application of a Government Regulation or Ministerial Regulation must be consistent and in accordance with prevailing Indonesian laws and regulations, under authority of which such regulations will necessarily be issued.

While appropriate references to 'prevailing laws' have been incorporated into the draft Ministerial Regulation (particularly with reference to environmental and social issues, which by virtue of Government Regulation No. 56 of 2009 must be considered as part of the licensing process for Special Railways), and care has been taken to ensure that license conditions include (among others) compliance with such legislation, as well as compliance with applicable legislation relating to non-discrimination in employment practices, the adequacy of such prevailing laws was not separately evaluated by the consultant team, as it would not be appropriate (or even possible) to vary such laws in the context of implementing regulations emanating from MOT (which is not tasked with elaborating environmental, social, and gender discrimination policy).

As a practical matter, under prevailing Indonesian law dealing specifically with environmental and social issues (e.g., Indonesia's Environmental Impact Assessment process, known as AMDAL), it is expected that detailed assessments of environmental and social issues will be quite different for a railway in a low population but in a highly environmentally sensitive area, such as East Kalimantan's forests and wetlands, compared with a railway in a highly populated area in Sumatra with competing transport right-of-way, population and business displacement issues and greater air and noise pollution concerns.

Governance issues are relevant to the development of Special Railways for at least three important reasons:

- As in any other context where large projects are subject to regulatory approval, the potential for corruption exists.

- Such potential is heightened if licenses are awarded through direct negotiations rather than through a public tender process.
- Railways can, under the wrong circumstances, engage in monopolistic or other anti-competitive behaviour.

While none of the above problems can be eliminated entirely, we believe that a licensing process that provides clear rules regarding applicable filing requirements and decision-making processes, and imposes strict deadlines for agency action, can make it more difficult for corruption to take place. Therefore, we have endeavoured to follow these principles, wherever possible, in our draft Ministerial Regulation.

With respect to our proposal specifically to exempt Special Railways from public tender requirements (which apply generally to concessions and PPP projects), we believe there is a strong policy argument for exempting from public tender requirements projects involving no public funds and no government support or guarantees of any kind (as these do not really constitute a 'concession', but simply a regulated form of private activity). Here again, however, we believe that the best way to minimize the risk of corruption in the licensing process is to make filing requirements and decision-making processes as transparent as possible, and to impose strict deadlines for agency action.

With regard to potential concerns arising under the Anti-Monopoly Law (Law No. 5 of 1999), we note that fair competition was an important consideration of DGR, and was also echoed by various other Gol stakeholders during the Inter-agency Working Group meetings. Although a railway (like a telecommunication network or pipeline) can behave as a kind of natural monopoly, we believe that the very nature of the Special Railways (which, by law, must be dedicated to serving a single client) would make it difficult for the operator to exert undue power over its client. Where the operator is the same legal entity as the client, or an affiliated entity controlled by, or under common control with, such client, the potential for abuse is effectively eliminated. Even in the case where the client and operator are unaffiliated, the requirement of a long-term exclusive transportation agreement makes it possible for the parties effectively to manage the risk of opportunistic behaviour. Unlike the case of a captive shipper (who has no choice but to use a particular railway to move its goods), captivity in the case of a Special Railway goes both ways.

Additional concerns under the Anti-Monopoly Law may arise as a result of our proposal to allow a consortium of unaffiliated companies to get together and create a common Special Railway. Here again, however, we believe that a simple rule requiring all consortium members to sign a single, exclusive transportation agreement with the common operator (including transparent pricing formulas and basic contractual protection against discrimination) can serve effectively to manage the risk of opportunistic behaviour.

Finally, concerns relating to the Anti-Monopoly Law may also arise in the context of interconnection agreements. In order to minimize this risk, we have included in the draft Ministerial Regulations basic provisions requiring interconnection agreements to be approved not only by the operator but also by the client (when different from the operator). In terms of ensuring fairness to third party operators/client, we also included a provision requiring that costs for infrastructure access be fairly apportioned. We also note that, in the event of abuse, aggrieved parties retain the right to challenge unfair agreements (or refusals to deal) to the *Komisi Pengawas Persaingan Usaha* (KPPU), which is in charge of enforcing the Anti-Monopoly Law.

PART 4: Activity implementation**4.1 Progress** *Outline progress for the period and discuss achievements listed in the table above in Section 3; Is the activity on schedule? If not what are the implications?*

Phase 3 was completed on time, though adjustments to the original schedule provided in the Inception Report were required due to delays in forming the Inter-agency working group and the scheduling of a large number of stakeholder meetings during the final month of the activity.

4.2 Sustainability *Factors contributing to sustainability overall*

It is probably too soon to consider the sustainability of this activity in the broader policy context. While MOT clearly intends to develop a Ministerial Regulation implementing the Special Railways framework, and the consultant team has good reason to believe that many ideas contained in the proposed draft Ministerial Regulation will be reflected in the final draft of such regulations, a sustainability assessment must await the issuance of the final draft. Nevertheless, the consultant team had a good opportunity to discuss in detail alternative legal views and interpretations of the Railway Law with relevant Gol stakeholders, and believes that such discussions were useful in framing key legal and policy issues. In the consultant team's view, DGR/MOT are well-aware of the policy choices and implications associated with the implementation of Special Railway regulations.

4.3 Activity expenditure *Outline expenditure for the period; note any significant underspend/overspend; specify the \$A amount and % variance*

Phase 3 was completed on budget.

PART 5: Program management**5.1 Management arrangements** *Discuss management arrangements between partner ministry, stakeholders and IndII. Were management approaches effective and efficient? Include administrative issues, staffing, etc. If relevant, highlight innovative approaches to managing the activity.*

Continuity of IndII personnel involved in Phase 2, combined with assignment of IndII staff to support the consultant team, has greatly improved consultant interaction with DGR/MOT staff and other relevant stakeholders.

5.2 Lessons learned *What lessons have been learned to date and what impact have these lessons had upon the activity; i.e. What has changed?*

Given the stated objective of Gol buy-in, the intent to create an inter-agency working group, and knowledge of unresolved differences of opinion within DGR/MOT about the appropriate interpretation and implementation of existing Special Railway provisions, the three-month timeframe for completion of this activity was almost certainly too short. A brief, one-month extension from mid-July until mid-August 2011 was very helpful in trying to resolve the outstanding policy and drafting issues.

Administrative delays in creating the inter-agency working group, as well as initial difficulties in scheduling meetings with DGR's legal division, resulted in a large number of stakeholder meetings in June, which made it very difficult to complete all deliverables on time.

On the positive side, the availability and responsiveness of DGR/MOT on the whole was excellent. By the end of June, the consultant team had developed a good working relationship with key individuals and staff, and felt that real progress was being made toward a final draft Ministerial Regulation.

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Government Regulation No. 6 of 2006 on Management of State/Regional Assets

Government Regulation No. 27 of 1999 regarding the Environmental Impact Assessment

Government Regulation No. 38 of 2008 amending Government Regulation No. 6 of 2006 on Management of State/Regional Assets

Government Regulation No. 56 of 2009 on Railway Operations

Government Regulation No. 72 of 2009 on Railway Traffic and Transportation

Presidential Regulation No. 67 of 2005 on Cooperation between Government and Enterprises in Infrastructure Development

Presidential Regulation No. 36 of 2005 on the Procurement of Land for the Development for Public Interest as amended by Presidential Regulation No. 65 of 2006.

Presidential Regulation No. 13 of 2010 amending Presidential Regulation No. 67 of 2005 on Cooperation between Government and Enterprises in Infrastructure Development

Presidential Regulation No. 36 of 2010 on Business Fields Closed or Conditionally Open to Foreign Investment

Ministerial Regulation (MEMR) No. 28 of 2009 on the Operation of Mineral and Coal Mining Service Businesses

Other Documents

Draft Ministerial Regulation (MOT) on Licensing of Special Railways (revision dated 29 November 2010)

Draft Ministerial Regulation (MOT) on Licensing of Special Railways (revised draft dated June 2011)