

Natural Resource Federalism: Considerations for Myanmar

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CONTEXT

Myanmar is going through a political, economic and social transition, including in the governance of the country's natural resources. Peace negotiations involving the government, military and ethnic armed groups are ongoing. During the discussions, the sharing of revenues between central and local governments, as well as the potential transfer of greater political autonomy to the country's states and regions, have emerged as important points of debate. This includes the agreement—in principle—to move towards a federal Union.

Federalism could have major implications for natural resource governance. Nearly every state and region hosts oil, gas or mining activity. (See figure 1.) Historically, national institutions have primarily been responsible for managing these resources. However, demands for more subnational control are widespread. Many stakeholders from resource-producing areas argue that they have borne the brunt of the sector's social and environmental impacts for decades while realizing few benefits. In many cases, discussions about control over natural resources are related to broader historical grievances between ethnic areas and the central government. This has led regional and state leaders, as well as representatives of several armed groups, to demand not only greater financial benefits from their natural resources but more influence in how the sector is managed. Natural resources also play a more direct role in Myanmar's conflicts. Both the military and several armed groups have financial interests in the sector and, in some cases, competition over resources drives confrontations between warring parties.¹

Steps have already been taken to decentralize certain aspects of natural resource governance. The 2008 Constitution allocates environmental crisis response, gems polishing and collection of quarrying fees to state and regional governments. More recently, the national government has begun delegating additional responsibilities, notably licensing and collection of certain revenue streams from artisanal and small-scale activity. Revenue sharing with state and regional governments has also increased. However, decentralization has been marred by ambiguities and the vast majority of governance responsibilities remain at the Union level.

To date, peace discussions have been notably silent on the issue of natural resources. Nonetheless, demands for greater subnational control are likely to remain a salient issue. Whether within the current framework of piecemeal decentralization or more clearly defined federal structures, careful consideration should be given to how responsibilities

This is a summary of the 2018 NRGi report *Natural Resource Federalism: Considerations for Myanmar*. The full report is based on a comparison of Myanmar with peer countries, primarily in the Asia-Pacific region. It provides analysis of different approaches to the division of responsibilities in seven key policy areas. The report builds on the 2016 NRGi publication *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues*. Both reports are available on NRGi's website.

¹ Global Witness, *Jade: Myanmar's 'Big State Secret'* (October 2015); Adam Burke, Nicola Williams, Patrick Barron, Kim Jolliffe and Thomas Carr. *The Contested Areas of Myanmar: Subnational Conflict, Aid, and Development* (The Asia Foundation, 2017).

could be shared between the Union and states and regions. There are many different models which could be pursued. Ultimately, decision-makers will need to consider both the demands of different stakeholders in the peace process (politics) and the urgent need to strengthen resource governance in the country (technical efficiency).

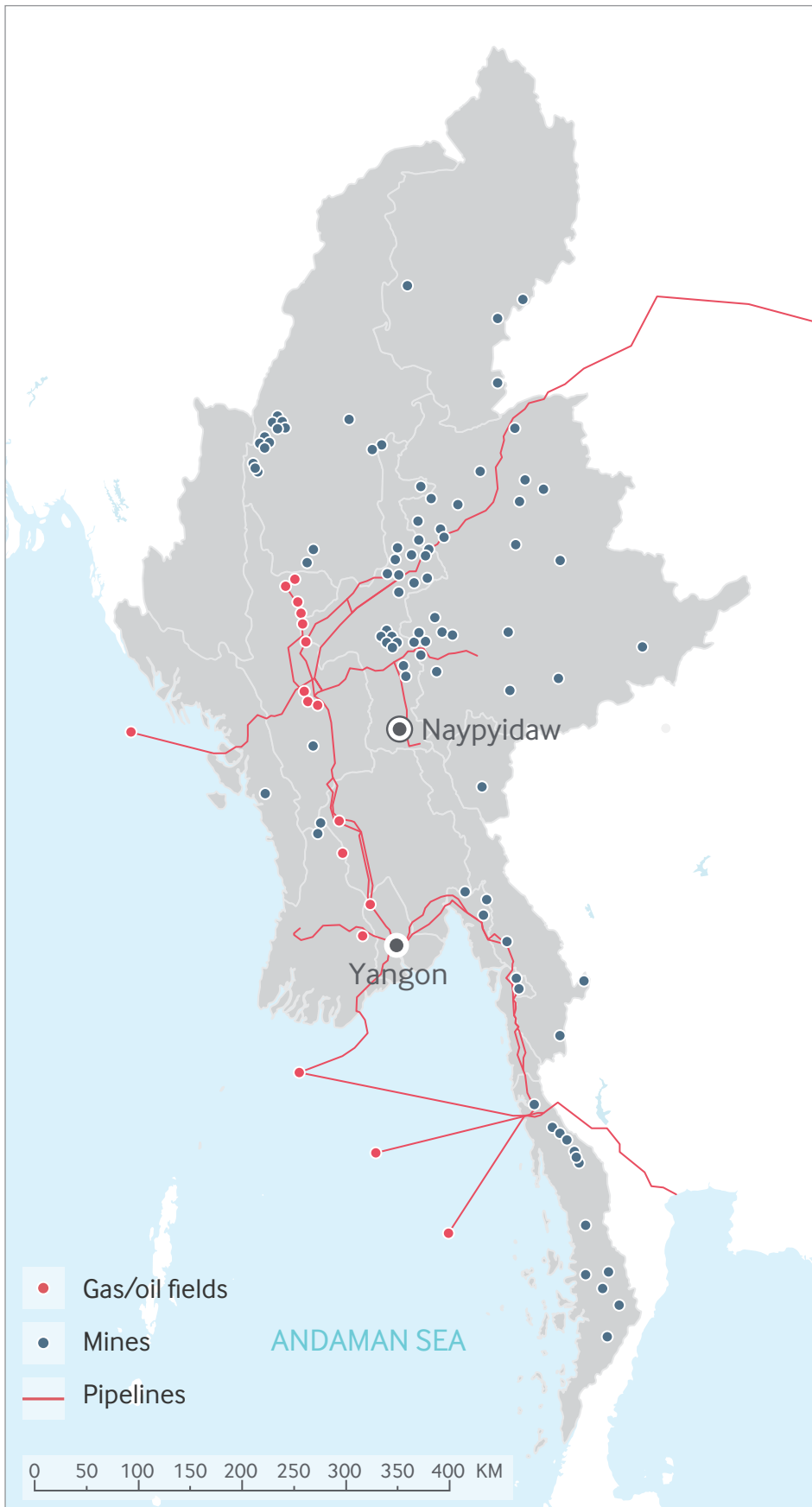


Figure 1. Map of extractive activities in Myanmar

Map: Thet Naing Oo

WHAT IS NATURAL RESOURCE FEDERALISM?

In Myanmar, as in many other resource-rich countries, the constitution states that the Union (that is, the sovereign state) is the ultimate owner of all lands and natural resources.² However, many countries share the power and responsibility to manage and benefit from natural resources between national and subnational governments via the constitution, legislation or delegation by the national government.³

Natural resource federalism is the process of conferring some level of responsibility for natural resource governance to subnational institutions. This means deciding which level of government should write laws and regulations, and which level should be responsible for implementation and monitoring. These decisions need to be made for a wide range of policy areas, including:

- Licensing for exploration and production
- Cadaster and land management
- Fiscal frameworks and revenue collection
- Environmental management
- Occupational safety and health
- Local content
- Artisanal and small-scale extraction

There is no single model for what this should look like. (See box 1.) In some countries, the national government devolves certain responsibilities for legislation, implementation or monitoring to subnational institutions, while in other countries subnational governments have constitutional sovereignty in some or all of these areas. Many countries pursue a mixed model. Legislative powers may for instance remain at the national level, while implementation and monitoring are the responsibility of subnational governments. Often the division of responsibilities will differ by policy area, as well as by the type, scale and location of extractive activity.

2 Republic of the Union of Myanmar, *Constitution of the Republic of the Union of Myanmar* (2008).

3 Nicholas Haysom and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control and Wealth-sharing* (Centre for Humanitarian Dialogue, October 2009); Center for Constitutional Transitions, International IDEA and the United Nations Development Programme, *Oil and Natural Gas: Constitutional Frameworks for the Arab States Region* (2014).

Box 1. The spectrum of the division of responsibilities

The authors use the term “natural resource federalism” to represent the range of options available to policy-makers to give greater responsibilities to subnational institutions. This terminology has been chosen because of Myanmar’s aspirations to establish a federal union. However, federalism represents the far end of the spectrum of options to shift power from the national to subnational levels.



In broad terms, the options can be categorized as follows:

- **Deconcentration.** The national government appoints and stations officers at the sub-national level who are tasked with implementing national policies. Decision-making and implementation are brought physically closer to subnational stakeholders but accountability ultimately rests with national institutions.
- **Decentralization/devolution.** Decision-making and accountability is transferred to subnational institutions, which select their own leaders and are given authority—by the national government—to make policy decisions in certain areas.
- **Federalism.** Sovereignty is constitutionally divided between national and subnational institutions. This means that the national government may be constitutionally prohibited from interfering in some subnational decisions.

If managed well, natural resource federalism could be a means of addressing historical grievances in many of Myanmar’s resource-producing areas, with the extractive sector potentially acting as a driver of socioeconomic development that underpins stability. Decentralizing powers and responsibilities could bring decision-making closer to stakeholders directly impacted by the sector, allowing the government to be more efficient and effective. This could be helpful in Myanmar, where monitoring and enforcement capacity among national institutions has at times been limited, particularly in areas that are contested between the national government and ethnic armed organizations. A greater sense of local ownership could also improve the investment climate if it helps to bolster support among local communities for the selected number of extractive projects which have succeeded in securing the “social license to operate.”

Natural resource federalism can, however, pose challenges. Particular risks arise when functions are decentralized in contexts where subnational officials lack the capacity to adequately fulfill their responsibilities or where roles and responsibilities are poorly defined. This can undermine sector governance and investor confidence. In situations where transparency and accountability mechanisms are weak, giving greater responsibilities to subnational institutions can also increase the risk of corruption and mismanagement.

International trends

There is no “one-size-fits-all” solution for resolving questions around where natural resource governance responsibilities should lie. Countries apply a wide variety of models and there are major variations in the extent to which these have contributed to improved natural resource governance. Ultimately, deciding which powers to grant to subnational institutions is not just a technical decision but is closely woven into country-specific socio-political considerations and realities.

However, several international trends are evident:

- **First, it is common that one level of government legislates or sets regulations while another level implements, monitors and enforces those laws or regulations.** This allows for the maintenance of national standards while bringing decision-making closer to those stakeholders directly impacted by extractive activity. For instance, environmental legal frameworks are typically determined by the national government but provide for subnational input in implementation, either by giving subnational governments a formal role in granting environmental approvals or by mandating consultation. In Mongolia, for example, national legislation identifies the governors of *soums* (districts) as the authorities responsible for assessing environmental protection plans for mineral exploration projects. Subnational institutions can also apply penalties in the event of environmental non-compliance by companies.⁴

Similarly, national authorities often write occupational safety and health laws, while implementation and monitoring responsibilities are decentralized. In the Philippines, for example, the monitoring authorities are the regional offices of the Department of Environment and Natural Resources, a national government agency. This arrangement brings monitoring closer to site, while ensuring those carrying out inspections are accountable to the national government and apply national standards.

- **Second, many countries share responsibilities in certain areas.** This is especially common when it comes to issues where broad-based support is important. For instance, consent for companies to begin onshore oil, gas or mineral production commonly provides for both national and subnational involvement. In the Philippines, for example, minerals licenses are granted by the national government but subject to approval by local authorities and, in some cases, indigenous communities. This has led to *de facto* moratoriums on mining activity in several localities.⁵ In some instances, the threat of withholding consent has successfully been used to negotiate changes to project plans with companies.⁶ While less common, shared responsibilities can also apply to offshore projects. In Australia, rights to explore and produce offshore oil and gas are granted by the Joint Authority, which is made up of the national-level minister and their state or territorial counterparts.⁷

Another area where national and subnational authorities sometimes share responsibility is negotiations of local content provisions. Even some unitary countries such as Mongolia and the Philippines have granted the right to subnational entities to participate in the negotiation of contractual provisions on local content.⁸ In the Philippines, this right is in part conferred through indigenous people's legislation. In addition to participating in contract negotiation, indigenous people have the right to play a role in implementing local content plans and policies when extractive activities take place in their "ancestral domains."⁹

4 Government of Mongolia, *Law of Mongolia on Environmental Impact Assessments* (2014); Government of Mongolia, *The Minerals Law of Mongolia* (2006).

5 Erin Smith and Peter Rosenblum, *Enforcing the Rules: Government and Citizen Oversight of Mining* (Revenue Watch Institute, 2011).

6 Varsha Venugopal, *Thinking Locally: Community Consultation in the Philippines* (Natural Resource Governance Institute, 2016).

7 Andrew Smith, John King and Clayton Utz, "Oil and Gas Regulation in Australia: Overview," *Thomson Reuters Practical Law*, 1 May 2013.

8 Government of Mongolia, *Minerals Law*; Government of Mongolia, *The Law of Mongolia on Petroleum* (2014); Government of the Philippines, *Indigenous Peoples Rights Act* (1997).

9 Government of the Philippines, *1995 Mining Act* (1995).

- **Third, some responsibilities are more commonly allocated to subnational governments.** This is particularly the case when it comes to the management of issues where impacts may be felt to a larger degree at the local level and where local officials may have better access to information. Particularly in the mining sector, the monitoring of environmental and occupational safety and health (OSH) issues is often a subnational responsibility.

Another policy area that is commonly subnational jurisdiction in both unitary and federal countries is the governance of artisanal and small-scale extractive activity. Bringing decision-making physically closer to the site of production can be effective in reducing barriers to formalization (e.g., by making it easier to apply for licenses, pay taxes) and can help to better regulate the sector. For example, in the Philippines, artisanal and small-scale mining licenses are awarded by city or provincial-level boards. These boards are composed of representatives from the central and subnational government, small- and large-scale mining industry and environmental civil society organizations.¹⁰

- **Fourth, some responsibilities are more commonly allocated to national governments.** Setting tax and royalty rates, collecting major revenue streams, and negotiating large-scale contracts—particularly for offshore oil and gas—are often national jurisdiction. This may be due to the complexity of the tasks and the higher degree of administrative capacity needed to implement them.

In unitary countries, all major revenue streams tend to be collected by the national government, while subnational governments often only have rights to collect smaller taxes and fees. In Mongolia, for example, the national government collects royalties and corporate income tax while local governments collect property, land, vehicle and water use taxes, as well as royalties on gravel and sand production.¹¹ In federal countries, there is typically more direct subnational revenue collection. However even then, certain revenue streams will typically still be collected by the national government, particularly in the oil and gas sector. This is, for example, the case in Malaysia. Royalties collected from projects located within three nautical miles from the shore are collected by the federal government and then shared with states. For projects located further offshore, the federal government is not constitutionally required to share royalties (though in practice this has happened in the past).¹²

When it comes to setting fiscal terms, the influence of subnational governments is often even more limited. Particularly in the oil and gas sector, it is rare for subnational governments to determine the rates of sector-specific revenue streams. In India, for example, subnational governments collect onshore royalties but at rates set by the national government. The national government also determines and collects offshore royalties. In Malaysia, on the other hand, there is a certain degree of subnational input as royalty rates are determined by the production sharing contracts agreed between the state oil company Petronas, the federal government and relevant producing state governments.¹³

10 Government of the Philippines, *Small Scale Mining Act* (1991).

11 Natural Resource Governance Institute (NRGI) and the United Nations Development Programme (UNDP), *Natural Resource Revenue Sharing* (2016).

12 Wee Chong Hui, *Oil and Gas Management and Revenues in Malaysia* (Universiti Teknologi Mara Sarawak).

13 NRGI and UNDP, *Revenue Sharing*.

CONSIDERATIONS FOR MYANMAR

Regardless of which model Myanmar chooses to pursue, a set of cross-cutting actions may be considered to ensure that any moves to empower subnational institutions further strengthen natural resource governance:

- **Clearly define roles and responsibilities.** Clarity on who has ultimate responsibility for legislation, implementation and monitoring is essential. In Myanmar, institutional overlap and ambiguity is already a common challenge among some national institutions. When it comes to environmental management, for example, the legal framework gives monitoring responsibilities to multiple Union-level institutions. This creates the risk of none having a full sense of ownership or of none being empowered and equipped (with sufficient resources and capacity) to perform these responsibilities. In both cases, functions cannot be adequately fulfilled. Regardless of whether roles remain at the national level or are shifted to subnational institutions, it is important that they are clearly defined within the legal framework to ensure accountability and effective implementation.

In Myanmar, licensing and environmental approvals are two areas where there could be particular value in clarifying the role of subnational institutions. International experience shows that these are policy areas in which there is particular value in involving different levels of government, as well as local communities, even if ultimate decision-making rests with national institutions. However, if this happens, it is important that the legal framework clearly sets out which subnational institutions play a formal role, what the precise nature of their involvement is, and what degree of influence they have. For example, if chief ministers of states and regions are to be involved in minerals licensing decisions—as currently happens *de facto*—this role needs to be clearly defined in the legal framework.

- **Remain conscious of capacity constraints.** Effective natural resource governance can require large amounts of human, financial and technical capacity. While demands for subnational control are often politically salient, any move to confer responsibilities should be accompanied by a process to ensure subnational institutions are properly equipped to fulfill their duties.

If, for example, Myanmar's states and regions were to directly collect more revenue in the future (or were to receive greater transfers from the Union government), their capacity to manage these funds should be strengthened. Particularly when it comes to production monitoring—for the purposes of determining how much royalty a company pays on the resource it extracts—a relatively high degree of technical sophistication is required. Union institutions tasked with revenue collection already suffer from capacity challenges in this area. In addition, the capacity of regional parliaments to scrutinize spending decisions and hold subnational decision-makers to account should be further improved.

Likewise, the capacity of subnational governments to participate in licensing processes could be strengthened. This includes helping officials to better understand the terms of licenses, organize meaningful consultations and implement systems for tracking what rights have been allocated. Giving powers to institutions that lack the requisite skills and resources to negotiate and enforce license terms could increase the chances of corruption and make

it harder to secure a good deal from extractive companies. In Indonesia, for example, the decentralization of licensing processes was associated with a major increase in resource governance challenges.¹⁴

- **Maintain minimum standards.** It is important that natural resource federalism does not trigger a “race to the bottom” on social, environmental and governance standards. This is particularly relevant when it comes to environmental management, where poor performance can have impacts beyond subnational boundaries. Minimum standards can also be important in the management of artisanal and small-scale mining, where miners are often highly mobile and willing to cross subnational boundaries in search of economic opportunities. They may be drawn to states or regions that provide the right incentives for formalization—or alternatively those states and regions where informal activities can proceed with impunity.

Many countries manage this risk by setting clear minimum standards at the national level but conferring implementation and monitoring responsibilities to subnational institutions. Another option is to set broad national legal standards but to allow subnational governments to supplement these with additional regulations that are tailored to the local context. For example, in Australia each state and territory has its own OSH legislation. However, in recent years the federal government has acted to improve the harmonization of laws and regulations through the development of model legislation.¹⁵ In Indonesia, the national government legislates on local content, but individual regencies have passed additional regulations tailored to the local context.¹⁶



A farmer looks at the open pit of the Tigyit coal mine.

Suthep Kritsanavarin for NRGi

14 Rebecca Iwerks and Varsha Venugopal, *It Takes a Village: Routes to Local-level Extractive Transparency* (Natural Resource Governance Institute, February 2016); Smith and Rosenblum, *Enforcing the Rules*.

15 David Cliff, *The Management of Occupational Health and Safety in the Mining industry in Australia* (International Mining for Development Centre, 2012).

16 Government of Indonesia, *Regulation of Regents No.48/2011* (2011).

- **Coordinate the roles of different levels of government.** While only one institution should have ultimate responsibility over a given issue, it is critical that national and subnational institutions do not operate in silos. This is particularly important when closely related functions are divided between different levels of government. An example of this is Myanmar’s planned delegation of licensing responsibilities for artisanal and small-scale production to states and regions while maintaining control over larger operations at the Union level. This could potentially increase the risk of overlapping permits being granted, blur lines of accountability and increase the risk of non-compliance. If responsibility is shifted to institutions that are genuinely accountable to subnational governments rather than Union ministries, new coordination mechanisms will be required. Similarly, horizontal coordination between individual subnational governments is important.

One means of addressing this kind of challenge is to develop platforms for coordination and information exchange. In Argentina, for example, provinces feed information on subnational licensing decisions into a national cadaster. Decision-making therefore remains at the subnational level while facilitating national coordination. If Myanmar were to grant licensing or land registration responsibilities to states and regions, subnational institutions could nonetheless be required to input information into a national cadaster as opposed to keeping records only at the subnational level. Additionally, consideration should be given to how to improve coordination between the extractive industries and other sectors, such as forestry and agriculture, as well as protected areas—in other words with overall land policy and management. This would be particularly important if the degree of subnational involvement differs from sector to sector.

- **Consider the potential role of non-state stakeholders.** While natural resource federalism discussions typically focus on formal government structures, there may be scope to consult or involve locally based non-state stakeholders (e.g., communities, unions and NGOs) in processes such as licensing, environmental management, health and safety inspections, or local content implementation. This may be particularly valuable in Myanmar where formal political structures may not always represent the interests of all minorities. While this should not be a substitute for the role of well-functioning and publicly accountable institutions, it can serve as a useful tool for strengthening accountability.

In Mongolia, for example, community representatives are charged with monitoring license holder’s compliance with local content requirements.¹⁷ International experience also provides examples of labor unions or civil society organizations participating in the monitoring of OSH or environmental performance. This can be particularly effective when governments face funding or staff shortages that reduce their on-the-ground presence.

There is also value in remaining cognizant of the concerns of the private sector and considering what kind of arrangements will help to attract high-quality responsible investors. Argentina’s decision to establish a unified national cadaster in the early 1990s, for example, helped to address widespread issues

17 Government of Mongolia, *Minerals Law*.

associated with insecurity of tenure and strengthened investor confidence.¹⁸ By contrast, the challenges associated with the decentralization of licensing decisions in Indonesia contributed to reduced investor interest in the country's mining sector.



Miners at an unlicensed jade mine in Hpakant, Kachin State

Khin Saw Htay for NRGi

- **Promote transparency.** Transparency is an important means of building trust between national and subnational institutions. Making extractive sector data readily available is important to address information and power asymmetries and to allow subnational institutions to adequately fulfill the functions that have been assigned to them. This helps to give subnational institutions the means to enforce decisions and to have a stronger sense of influence over the full range of decisions being made, including those remaining under the ultimate control of the national government. For instance, even if certain licensing responsibilities remain with the national government, subnational stakeholders should nonetheless have information about those decisions, including the terms being agreed.

Transparent decision making could also be valuable when allocating fiscal responsibilities. Currently fiscal decentralization is occurring in an *ad hoc* manner. This can make budgeting difficult and restrict the ability of state and regional governments to make spending decisions that are fully informed and based on predictable estimates. There should be transparency over fiscal transfers, as well as efforts to build consensus around which revenue streams should be directly set or collected by subnational institutions and how to ensure equity between states and regions. (See NRGi's 2016 report *Sharing the Wealth: A Roadmap for Distributing Myanmar's Natural Resource Revenues* for more details on revenue sharing.)

Finally, policymakers should be mindful of matching greater subnational responsibilities with strengthened subnational accountability mechanisms in order to mitigate the risk of corruption or mismanagement. The Common Ground initiative in the Australian state of New South Wales is a publicly-accessible online tool to track subnational licensing decisions.¹⁹ It provides a useful example of the way in which subnational transparency mechanisms can help to build trust between different stakeholders.

¹⁸ Andrew Bauer, Rebecca Iwerks, Matteo Pellegrini and Varsha Venugopal, *Subnational Governance of Extractives: Fostering National Prosperity by Addressing Local Challenges* (Natural Resource Governance Institute, August 2016).

¹⁹ See NSW Government, Department of Planning and Environment, "Common Ground," accessed 16 November 2017, www.commonground.nsw.gov.au.

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