

# Assessing Mineral Licensing in a Decentralized Context: The Case of Indonesia

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## SUMMARY

Selected aspects of natural resource management have been transferred (or decentralized) to subnational governments in at least 60 countries.<sup>1</sup> Decentralized authority can include power to decide local land uses or to collect and manage fees and taxes from the extraction of oil, gas, and minerals.<sup>2</sup> While in most countries licensing is still vested with national authorities, a small number of countries have transferred mineral licensing powers to subnational governments. These governments can assign, manage, and terminate the right to search for and extract minerals from the ground. Some of the developed countries with a decentralized mineral licensing system are Australia, Canada, and the United States. Developing countries with decentralized mineral licensing include Argentina, China, India, Indonesia, and the Philippines.<sup>3</sup>

The decentralization of mineral licensing is driven by the wish to improve development outcomes by letting the people directly affected by extractive projects make decisions about the exploration and development of mineral deposits. However, the decentralization process can raise unforeseen political, fiscal, and administrative challenges.

This paper reviews primarily the case of Indonesia, where the proliferation of district-licensed mining permits has catalyzed a host of natural resource governance problems:<sup>4</sup> a weak investment climate, pollution, increased rates of corruption and illegal mining, and inadequate revenue collection systems.<sup>5</sup> While many countries with central government licensing face similar problems, a decentralized licensing system can exacerbate them. If not well conceived or designed, a decentralized system can suffer from poor information sharing and coordination among different levels of government. Also, implementation

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- 1 "Subnational government" refers to a provincial, regional, and district government elected by citizens and with some control over public spending.
- 2 Jesse Ribot, *Democratic Decentralization of Natural Resources* (Washington, DC: World Resources Institute, 2002), 3-4.
- 3 *Sector Licensing Studies: Mining Sector* (Washington, DC: World Bank Group, 2009), 23.
- 4 Javier Aguilar *et al*, *Implementing EITI at the Subnational Level. Emerging Experience and Operational Framework*, Extractive Industries for Development Series No. 23, World Bank, 2011.
- 5 Bill Sullivan, "Overlapping Mining Concessions: A Systemic Problem Not Easily Resolved," *Coal Asia Magazine*, July-August 2011 (<http://news.mitraismining.com/Mining%20Regulations%20Documents/11WAS103%2002%20Coal%20Asia%20-%20Article%20on%20Overlapping%20Mining%20Concessions.pdf>); Nina Indriati Lestari, *Illegal Coal Mining in South Kalimantan—A Mining Company Confronts PETI Operations through Engagement Case Study No. 4, Artisanal and Small-Scale Mining in Asia-Pacific Case Study Series*. Artisanal and Small-Scale Mining (ASM) in Asia-Pacific Portal (<http://www.asmasiapacific.org>).

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and enforcement of licensing rules may be severely undermined by weak capacities of subnational governments or a lack of mechanisms that keep governments accountable to citizens.

This paper reviews the attributes of a mineral licensing system, as well as the pros and cons of decentralizing licensing as found in the case of Indonesia. Mineral licensing was decentralized in Indonesia in 2001. NRGi initiated field research in 2012 in two districts (Bangka and Kukar).<sup>6</sup> Field research is ongoing; this paper discusses preliminary findings and proposes some reforms.

## THE FUNCTIONS OF A MINERAL LICENSING SYSTEM

An effective mineral licensing system features a clear legal and regulatory framework, well-defined institutional responsibilities, and clear procedures based on established criteria.

In terms of a regulatory framework, most governments establish state ownership over minerals in the ground by law, often through their constitutions.<sup>7</sup> State ownership also sanctions a government's authority over the design of the procedures by which licensing takes place and for the administration of the mineral licensing system in a timely, efficient, and transparent manner.<sup>8</sup>

The primary institutional body in a mineral licensing system is the cadastre. While the use of the term cadastre is sometimes restricted to the list of mining properties (the registry) or to graphic representations of mineral rights (cadastral maps),<sup>9</sup> in this paper I use it to mean the public institutions responsible for managing applications and granting mineral rights, maintaining the registries, and controlling the timing and validity of licenses.<sup>10</sup> Some of the most important functions of the cadastre include:<sup>11</sup>

- Receiving, processing, maintaining, and updating exploration and exploitation applications and grants of licenses in chronological order for industrial, large-scale and small-scale activities.
- Producing and making publicly available updated cadastral maps on which existing mineral rights, pending applications, and areas restricted for mining activities are correctly plotted.
- Verifying that licenses do not overlap, checking eligibility of applicants, and making decisions to grant or refuse applications.
- Ensuring compliance with payment of fees and other technical requirements to ensure titles are valid.
- Collecting administrative fees, such as application fees or annual rents.
- Initiating procedures for terminating licenses in accordance with laws and regulations.

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6 Ambarsari Dwi Cahyani and Sonny Mumbunan conducted research and collected data in Indonesia.

7 The main exception to this rule is the United States, where whoever owns the surface has ownership rights to minerals.

8 Enrique Ortega Girones et al, *Mineral Rights Cadastre: Promoting Transparent Access to Mineral Resources Extractive Industries for Development Series No. 4* (Washington DC: World Bank, 2009).

9 Under this more restrictive definition, a cadastre refers to a comprehensive register of real properties or land parcels within a country or administrative subdivision, which usually includes details of ownership, tenure, location, and dimensions.

10 Girones et al, 4-5.

11 Ibid., 10-13.

- Acting as a technical referee in disputes between titleholders regarding demarcation of areas granted, and resolving disputes over defining and demarcating boundary lines of areas subject to mineral licenses.

The World Bank recommends unifying management of all mining activity under the responsibility of a single organization. Countries have adapted this principle to suit their needs, thus creating different institutional configurations. In Mongolia, the cadastre agency is an independent department in the Ministry of Mines. In Madagascar, it is outside the Ministry of Energy and Mineral Resources but reports directly to the minister. In Chile, the process to grant mineral rights is developed and overseen by both the Ministry of Mines (technical offices) and the Ministry of Justice (administrative offices). In Mozambique, the cadastre agency is within the Directorate of Mines, mingling cadastral and inspection functions. In Argentina, where mineral licensing is partly decentralized, each province has its own cadastre, but there is a common national information system for sharing and transferring data.<sup>12</sup> Indonesia had an efficient computerized cadastre until cadastre management was decentralized and mineral licensing responsibilities were transferred to subnational governments in 2001.

Licensing procedures should allocate resources and balance competing interests in a way that honors the rights and interests of investors, and also protects the rights of communities and individuals. The procedures should cover the entire duration of a mining project. They should include clear rules on how licenses are issued, monitored, and terminated, and they should prevent undercapitalized, incompetent, or otherwise unqualified firms from undertaking mining projects.

Investors must be confident that their license guarantees them tenure and exclusive rights over the area their license covers, and the government must be certain that license holders will report the information necessary to manage the fiscal aspects of the mineral sector. In addition, the government and its citizens should be confident that these procedures will prevent and/or mitigate negative impacts of mining activities.

Finally, procedures for revocation of a license triggered by failure to adhere to the rules should be clear before the government and investors finalize any legal agreement.<sup>13</sup> If these procedures are not set out clearly in the legal framework, ambiguities may allow undue discretion and potential opportunities for corruption, as well as create regulatory uncertainty.

One of the most important rights that a mining license should provide is an exclusive, non-overlapping mineral right. This is necessary to avoid conflict that occurs when different parties try to explore or develop the same mineral deposit. Exclusivity also makes clear which party is responsible and accountable for payment of royalties, taxes, or fees; operational commitments; environmental obligations; health and safety obligations; and social commitments within a license area.

Security of tenure refers to the security of title and clear rules governing the titleholder's rights associated with the license area. These rules include duration of the title, procedures for relinquishment and renewal, rights to transfer the title to eligible third parties, and changing an exploration license into an exploitation license. Security of title guarantees that licenses and mineral rights will not be suspended or revoked except on specific grounds, which are objective (not discretionary) and clearly specified and detailed in the legal framework. A licensing system that guarantees security of tenure dramatically reduces

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<sup>12</sup> Ibid., 25-29.

<sup>13</sup> *Sector Licensing Studies: Mining Sector*, x-xi.

investment risks because it protects investors against arbitrary revocation of claims.<sup>14</sup>

In a decentralized setting, it is important to understand which level of government ensures the investors' security of tenure. If a subnational government issues a license to an investor, the investor must be certain that the national government will respect this claim and that no other investor will be issued another license over the same area. Likewise, if indigenous communities have occupancy, usage or access to land or have the right to withhold consent for any given license, the investor must be certain that the title has been approved and will be respected by those communities as well as subnational or national authorities.

### Issuing and terminating licenses

Licenses can be issued on a "first come, first served" basis or through some form of auction; each method has pros and cons, largely depending on context.<sup>15</sup> A "first come, first served" system involves direct application by a company seeking to obtain a license. This system tends to work better in countries that do not have accurate geological data about their mineral deposits and may therefore be unable to attract the interest of multiple companies in an auction. Unless managed openly and subject to sound qualification criteria and independent, expert compliance scrutiny, a "first come, first served" system may attract investors who lack the necessary technical or economic capacity to successfully develop the deposit, or who intend to speculate by reselling the license for a profit or by inflating share prices.<sup>16</sup> Countries like Australia and Chile have used this type of licensing system successfully because they established rules that attract the interest of technically and financially competent investors.<sup>17</sup> Indonesia follows this approach to issue licenses though it is in the process of changing to an auction system.

In an auction or competitive bidding system, investors submit bids for a license without knowing what competitors may be offering. An open, fair auction system may help avoid the perception that mining rights are granted in an arbitrary, unfair, or corrupt manner. Auctions may allow countries to select the best (i.e., financially and technically competent) partner from a range of competitors, and give government negotiators more bargaining power since competitors pitted against each other tend to offer better deals to secure the contract.

However, auctions also carry risks. The procedures and skills needed to organize competitive bidding processes are different and more sophisticated from those needed for "first come, first served" arrangements, because competitive bidding involves defining and selecting the areas to be tendered, establishing technical and financial qualification criteria for bidders, determining the bid evaluation criteria, establishing bid evaluation procedures, and appointing a bid evaluation committee. Thus, it may not be suitable if a country is seeking to award licenses to large, unexplored areas or if government officials lack the requisite technical expertise to administer and evaluate bids properly.<sup>18</sup> Auctions are now standard practice for oil licensing in Norway and the United Kingdom, and for United States federal lands.

The Extractive Industries Sourcebook states, "First come, first served will continue to be appropriate for areas that are largely unexplored. Good practice is for a government to offer licenses on a competitive bidding basis in situations where geological data is available and

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14 Girones et al, 2; *Sector Licensing Studies: Mining Sector*, 10.

15 Also known as "first come, first qualified"

16 Girones et al, 33.

17 Ibid.

18 *Sector Licensing Studies: Mining Sector*, 25-26.

where there are strong indications of multiple and competing interests.”<sup>19</sup> Whatever method is chosen to issue exploration and mineral rights, the process should be clear.

Just as criteria for issuing licenses should be clear, so too should the grounds and processes for terminating a license. When a license is issued, the license holder should understand the grounds for termination as well as when the license expires. Grounds for termination may include failure to comply with reporting requirements or failure to carry out remedial environmental actions. The regulatory system should clarify how a notice of termination is given, how it can be appealed, and who has ultimate powers of adjudication in case of dispute.

### Monitoring license-holders and their obligations

Mining companies are subject to a range of obligations that can be grouped broadly into five categories: (1) fiscal terms, (2) operational commitments, (3) environmental obligations, (4) health and safety obligations, and (5) social commitments.<sup>20</sup> These obligations may be defined in law (an extreme example would be a pure permit regime) or contract (an extreme example would be a pure contract regime). In a pure permit regime, all major obligations applicable to mining operations are established in law; licenses and permits contain identical obligations and are subject to applicable legislation. In a pure contractual regime, basic principles are defined in law, and the primary document governing the relationship between the license holder and the government is typically a lengthy contract (sometimes referred to as a mineral development agreement), which may have been individually negotiated.

In reality, most countries use some combination of both regimes, and monitors should refer to both, because focusing only on the laws or licenses/contracts could lead monitors to miss important obligations.<sup>21</sup> When licensing is decentralized, identifying all relevant obligations may become more challenging because the obligations could be in documents approved by or held at different levels of government.

The licensing system should make clear how the performance and behavior of license holders is monitored and how compliance is enforced. All stakeholders—the license-holder, the community, and the government—should understand their own and each other’s roles and responsibilities in monitoring.<sup>22</sup> Specific government bodies should be responsible for providing monitoring and oversight (i.e., to receive reports from license-holders or carry out compliance inspections). Community members may conduct monitoring activities as well, and specific channels and/or points of contact should be identified to receive reports/concerns from citizens. Company self-reporting has become a common mechanism of government monitoring, which reduces the government’s burden to compile and calculate information, and places more emphasis on compliance enforcement through reviewing and auditing submitted information.

To ensure that monitoring is carried out properly, governments should require reports to be based on internationally accepted standards; regular and timely, clear; and open to auditing and requests for additional details.<sup>23</sup>

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19 <http://www.eisourcebook.org>.

20 Erin Smith and Peter Rosenblum, *Government and Citizen Oversight of Monitoring: Enforcing the Rules: Government and Citizen Oversight of Mining* (New York: Revenue Watch Institute, 2011), 7.

21 *Ibid.*, 7-9.

22 *Ibid.*, 34-37.

23 *Ibid.*, 38-39.

Both before issuance and throughout the term of the license, the system should ensure that appropriate safeguards for health, safety, environmental, and social impacts are in place. These might include environmental and social impact assessments and management and mitigation plans; regular reporting to and/or oversight and monitoring by government and public bodies; and adequate consideration for post-mining activities. For example, many countries require mining companies to deposit a bond sufficient to pay for future clean-up and reclamation as a condition for obtaining a license.<sup>24</sup>

## DECENTRALIZATION OF MINERAL LICENSING

Government decentralization of natural resource management has been gaining momentum in the past two decades.<sup>25</sup> At least 60 countries decentralized some aspects. (Box 1 presents an overview of decentralization of mineral licensing in Argentina and Canada.)<sup>26</sup> Potential benefits that proponents of decentralization emphasize are more efficient use of resources, reduced transaction costs, better matching of services to needs, improved coordination between local demand and supply of services, provision of benefits to local communities, and increased accountability to the public.<sup>27</sup> Proponents argue that local governments with decision-making power and resources can be catalysts for economic and social development, and political participation and oversight by citizens will increase if they believe that local governments can make decisions about their economic and social welfare.<sup>28</sup>

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Detractors argue that potential risks of decentralization such as state capture, clientelism, capacity constraints, competition for power among different levels of government, and weak information sharing between subnational jurisdictions can mitigate or outweigh envisioned benefits.<sup>29</sup> There is evidence that smaller local jurisdictions are more susceptible than national counterparts to state capture if local economies are more homogenous and less competitive. Also, smaller local jurisdictions are more susceptible than national counterparts to clientelism if politicians can identify and monitor political supporters more effectively, or there are ready-made client networks based on familial, tribal, or other ties.<sup>30</sup>

In Indonesia, as in the rest of Asia, decentralization in natural resource management was triggered by citizens' demands. Until the late 1980s and early 1990s, decisions on extraction were made almost solely by industry and national governments, with no consultation with or involvement of subnational governments, local communities or indigenous peoples.

24 *Sector Licensing Studies: Mining Sector*, 2.

25 For more discussion on historical and current trends and motivations of decentralization, see G. Shabbir Cheema and Dennis Rondinelli, "From Government Decentralization to Decentralizing Governance," in G. Shabbir Cheema and Dennis Rondinelli (eds), *Decentralizing Governance: Emerging Concepts and Practices* (Washington, DC: Brookings Institution Press, 2007), 1-20; and Jesse Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization* (Washington, DC: World Resources Institute, 2004), 7-8.

26 Ribot, *Democratic Decentralization of Natural Resources*, 3-4.

27 Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, 12.

28 Cheema and Rondinelli, 1-20.

29 Jose Edgardo Campos and Joel Hellman, "Governance Gone Local: Does Decentralization Improve Accountability," in *East Asia Decentralizes: Making Local Government Work* (Washington, DC: World Bank, 2005), 237-52.

30 *Ibid.*, 240-41. The authors argue that the "presence of aristocratic lineages in the sugar-producing provinces in Central Luzon and Western Visayas in the Philippines; the network of tribal leaders in Papua New Guinea; and the system of ulama in East Java, Indonesia, are all ready-made local clientelist networks that build on predemocratic legacies. These legacies have proven quite adaptable to new modes of political competition. Such exclusive patron-client networks are far more difficult to build and maintain in a more diverse and competitive national playing field." See also Serdar Yilmaz and Varsha Venugopal, "Local Government Discretion and Accountability in Philippines," *Journal of International Development* (May 2010). The authors argue that decentralization reshaped administrative structures in Philippines without reforming existing power relations among local residents, national and local governments, and service providers.



A 2002 study of the Asian mining sector found that in virtually all countries in the region, citizens reported that resource depletion and development had taken place without a commensurate improvement in the quality of life, particularly at provincial and local levels of government.<sup>31</sup> Today, local communities and indigenous people have voiced their concerns about sustainable development, intergenerational equity, and indigenous rights. This has given new impetus to new governance approaches to mining-related development in the region.<sup>32</sup> One example of this is the 2001 decentralization of mineral licensing to lower levels of government in Indonesia.

## Decentralized mining licensing: Argentina and Canada

### Canada

Canada's mining policy and law transferred most mining responsibility to provincial governments. Canadian provinces set their own licensing policies, and they can vary substantially from one to the next. The role of federal government concerns only uranium, through the nuclear fuel cycle from exploration to disposal of waste; minerals exploration and mining on federal lands and offshore areas; and mineral development in the Northwest Territories, Nunavut, and Yukon. The division of roles between national and subnational government is clearly delineated and unequivocal.<sup>33</sup> In Quebec, all licensing procedures are online, a strict "first come, first served" mechanism is observed, and security of tenure is backed by a geographic information system-based cadastre.

### Argentina

Argentina has 23 provinces, each with its own constitution, ownership of mineral resources, mining rights regulation, mining rights granting procedures, and taxation system. Historically, there had been little mining investment in Argentina because of uncertainties about key factors such as security of tenure, conversion of exploration rights to mining rights, and stability of tax regimes. On May 6, 1993, the provinces signed a legal pact that established uniform cadastral rules that guaranteed security of tenure, established compatible databases that compiled licensing data into a national database, and introduced fiscal stability guarantees. The agreement recognized that each province would have full authority to call for bids to explore and develop on a large-scale mineral reserves located in its own territory.<sup>34</sup>

Thus, the power of each province to grant and regulate licenses within its territory was clearly recognized, and a centralized information system guaranteed that provinces shared information. Following the reforms, the number of foreign mining companies operating in Argentina grew from 4 in 1989 to more than 80 in 2009. A number of mining operations developed, including Cerro Vanguardia, Rio Colorado, and Veladero, and billions of dollars were invested in mining, which substantially increased employment, income, and exports.<sup>35</sup>

*In a decentralized setting, local decision-makers who are familiar with environmental, social, and economic impacts to the area, are able to make decisions that could bring greater protection to and greater benefit for the local population.*

The advantage of decentralized mineral licensing is that it brings the decision-making (including processing license applications, issuing exploration or mining licenses and enforcing compliance with licensing rules) closer to where exploration or mining takes place. The basic argument in favor of such an approach is that local decision-makers are more familiar with potential and actual environmental, social, and economic impacts to the area, and are thus able to make decisions that will bring greater protection to and greater benefit for the local population.

31 Allen L. Clark, "Political, Economic and Administrative Decentralization: Addressing the Distributional Effects of Mineral Sector Development in Asia," East-West Center, Honolulu, Hawaii. This paper was presented at the United Nations Conference on Trade and Development workshop on growth and diversification in mineral economies in Africa in Cape Town, South Africa, from November 7 through 9, 2002.

32 Allen Clark and Jennifer Cook Clark, "The New Reality of Mineral Development: Social and Cultural Issues in Asia and Pacific Nations," *Resources Policy* 25 No. 3 (1999): 189-96.

33 *Sector Licensing Studies: Mining Sector*, 52-62.

34 Baker & McKenzie, *Latin American Mining Handbook 2010*.

35 Girones et al, 51-53.

Subnational governments may or may not have the ability to undertake rigorous cost-benefit analysis of projects or to monitor them and enforce compliance effectively. But by deciding which projects get licenses, they can ensure that the potential benefits a project brings to the area are worth the costs borne by citizens; that the locations of extractive projects are aligned with local land-use plans; and that extractive revenues benefit the local population.<sup>36</sup> For example, the Philippines' local government code—established in 1991 and the statutory basis for the country's decentralization policy—requires national agencies like the Department of Environment and Natural Resources to obtain consent from local governments before a mining project starts. Researchers had found that in the case of potentially adverse environment impacts of mining, local governments and civil society groups in the Philippines often collaborated to withhold consent to mining projects or to place a moratorium on mining.<sup>37</sup>

One intrinsic disadvantage of a decentralized mineral licensing system that does not use nationally uniform cadastral rules is that it can result in reduced interest from major domestic or international mining investors. A decentralized system with uniform cadastral rules to guarantee security of tenure and a national database to hold all licensing data effectively provides companies a “one-stop shop.” Similarly, current data in the national geological survey (which usually is a separate office) offers companies a one-stop shop for that information. In Argentina, the power of each province to grant and regulate licenses within its territory is clearly recognized, but a central information system guarantees that information is shared among the provinces and provides security of tenure.<sup>38</sup>

In a decentralized mineral licensing system that does not have a centralized cadastre, or where subnational offices do not use unified coordinates and codification systems, as in Indonesia, it is more difficult and costly for companies to identify promising areas for license applications. Also, lack of uniform licensing implementation means that companies must examine the licensing regime and comply with confusing and potentially contradictory rules in each jurisdiction where they may consider investing, which can be a significant disincentive for large mining companies. As a result, subnational licensing can lead to the prevalence of smaller local mining operations rather than larger ones. Subnational governments in Indonesia have issued more than 10,000 mining licenses, and the vast majority has gone to small and medium-sized domestic companies.

Decentralized mineral licensing in Indonesia has caused complex management challenges: a boom in small-scale mining permits with ensuing environmental impacts and social conflicts; different investors with overlapping claims to the same titles, which has eroded investor confidence in the performance of the system in place; media reports of corrupt authorities issuing mining rights; a widespread lack of transparency in regional administrative offices that hinders citizen monitoring initiatives; and inadequate enforcement, contributing to the emergence of illegal mining operations and inadequate revenue collection.<sup>39</sup>

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36 This analysis does not account for the conceptual tension inherent in the decentralization debate on whether the country or the subnational area is the right unit for a cost-benefit analysis. While at the local level costs may outweigh benefits, the benefits to the country as a whole may potentially outweigh costs to the area immediately affected. A strong intergovernmental coordination system is essential to ensure that decision-making is coherent and accounts for needs and concerns at national and subnational levels.

37 William N. Holden and R. Jackson, “Mining and decentralization: Local governments and mining in the Philippines.” *Natural Resources Forum* 30 (2006): 188-98.

38 Girones et al, 51-53.

39 Jason M. Patlis, “New Legal Initiatives for Natural Resource Management in a Changing Indonesia: The Promise, the Fear and the Unknown,” in Budy Resosudarmo (ed.), *The Politics and Economics of Indonesia's Natural Resources* (Singapore: Institute of Southeast Asian Studies, 2005), 231.



The following issues with Indonesia's subnational licensing regime directly contribute to the above challenges:

- 1 Conflicting attributions of authority between different levels of government
- 2 Poor coordination and management of information between different levels of government
- 3 Limited subnational government ability to implement and enforce rules
- 4 Lack of incentives for government to perform coupled with weak oversight and accountability to citizens

These issues are discussed below.

### Conflicting attributions of authority between different levels of government

A clear division of authority and clear rules to follow are necessary in any institutional arrangement, but they are even more important in decentralized settings. Unclear, overlapping mandates can lead to multiple entities having authority to issue licenses in a particular area. This immediately increases the likelihood of overlapping and conflicting claims, which decreases security of tenure and increases investment risk. This confusion also makes it difficult to identify which government agency is responsible for monitoring particular aspects of mining activities, and can lead to inadequate oversight of the sector.

In Indonesia, local regulations often contradict national ones that set parameters for acquiring and using rights granted by licenses. To potential investors, these conditions create a high risk for security of tenure, and that contributed to Indonesia's ranking as the third-worst performing country for "regulatory duplication and inconsistencies" in the Fraser Institute's 2011-2012 mining survey.<sup>40</sup>

Before decentralization, the power to issue mining permits belonged solely to the central government. Under Mining Law No. 4/2009, permits are now issued by the central government if the mining area covers more than one province.<sup>41</sup> The power goes to the governor of a province when the area covers more than one regency but is within one province, and to the regent/mayor when the area is within one city or regency. The law states that the central government has the right to determine what land is (and is not) available for mining, though it must consult with local governments. However, in November 2012 the Constitutional Court ruled that the law's consultation requirement was unconstitutional and decided that the authority to determine mining areas rested with local governments.

In February 2012 Indonesia passed a law that required the central government to issue business permits for companies with foreign shareholders.<sup>42</sup> This was inconsistent with a

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40 *Annual Survey of Mining Companies 2011/2012* (Vancouver, Canada: Fraser Institute, 2012), 9-13, 121-23. Since 1997 the Fraser Institute has conducted an annual survey of metal mining and exploration companies to assess how mineral endowments and public policy factors like taxation and regulation affect exploration investment. Survey results represent the opinions of executives and exploration managers in mining and mining consulting companies operating around the world. The 2012 survey includes data on 93 jurisdictions around the world, including subnational jurisdictions in Argentina, Australia, Canada, and the United States.

41 Indonesia is divided into provinces, which are divided into regencies and cities. A district is an area within the regency or city.

42 *Mining in Indonesia: Investment and Taxation Guide* (Indonesia: PriceWaterhouseCoopers, 2012, 4th ed.); Rick Beckman, *Mining in Indonesia—Regencies Get Back Authority to Determine Mining Areas* (Jakarta: Norton Rose Fulbright, 2012) (<http://www.nortonrose.com/knowledge/publications/72949/mining-in-indonesia-regencies-get-back-authority-to-determine-mining-areas>); "Indonesian Nationalism," *Mining Journal Online* (Dec. 21, 2012), ([http://www.mining-journal.com/reports/indonesian-nationalism?SQ\\_DESIGN\\_NAME=print\\_friendly](http://www.mining-journal.com/reports/indonesian-nationalism?SQ_DESIGN_NAME=print_friendly)).

2009 mining law (which stated that the issuer of a mining permit was determined by the location of the site, not type of shareholder). As a result of regulatory changes and ongoing confusion, fewer than half of the 10,000 licenses issued by all levels of government in the last ten years hold “clean and clear” status from the Ministry of Energy and Mineral Resources; “clean and clear” certifies that mining permits do not overlap or conflict with each other and the license complies with mining laws.<sup>43</sup>

#### Poor coordination and management of information between different levels of government

Readily available, reliable, and up-to-date information is crucial to administering mineral licensing effectively in a decentralized setting. In addition to the need for a clear picture of the role, functions, and responsibilities of both central and subnational offices, the licensing system also should explain the cadastral procedures to be applied at central and subnational levels and should include an effective system for storing and sharing data.<sup>44</sup>

While problems with information management are not unique to decentralized systems, such systems may present greater risk. More decentralization of functions may lead to greater information being generated that requires maintenance and coordination, with more people or agencies at different administrative levels generating this information; this increases the risk of inconsistent decisions and actions. If the subnational licensing system does not rely on a centralized cadastral system, or the centralized system has inaccurate licensing or geological data collected from subnational jurisdictions, it becomes difficult and costly for companies to easily identify promising areas for exploration and mining. Therefore, there are fewer investments. Lack of accurate data can lead to inadequate monitoring, which then could lead to negative social and environmental impacts and less revenue. Licensing based on inaccurate data also could result in overlaps, which in turn creates an environment ripe for conflicts and corruption.

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After the Indonesia governments decentralized cadastral management in 2002 and transferred mineral licensing responsibilities to subnational governments, a number of challenges surfaced: lack of coordination in the design and implementation of legal framework; cadastral procedures that varied among offices in different subnational areas; lack of coordination in the development of different codification systems for data (which made simultaneous, consistent processing of all cadastral data impossible); and use of different map sources making integration with other licenses in GIS impossible.<sup>45</sup>

The practical implication of lack of inter-government coordination is well illustrated by Rio Tinto’s efforts to develop the Lasamphala nickel deposit in Sulawesi. Rio Tinto started negotiations with the central government and the Central Sulawesi provincial government to exploit a nickel deposit in 2005. While Rio Tinto was seeking a permit from the central government, the Morowali regency government granted rights to a local contractor in an area that borders two provinces in southeast Sulawesi. Rio Tinto claimed

43 “Clean and clear” is a national license database program run by the Ministry of Energy and Mineral Resources. In 2013 the program identified 10,790 mining licenses that were issued in Indonesia in ten years; 5,502 of these were clean and clear, and 5,288 were not.

44 Girones et al, 51.

45 In response the Indonesian government initiated the One Map Program in 2013. It provides a single, uniform base map that all government institutions must use. The map is produced by BIG (Badan Informasi Geospasial or Geospatial Information Body).

the area was being illegally mined because the site was included in its preliminary contract of work that the central government issued in 2007, and sued the Morowali government in 2008.<sup>46</sup> The dispute was finally resolved in favor of the company, and the national government granted a permit in 2010.<sup>47</sup>

### Limited subnational government ability to implement and enforce rules

A fundamental challenge in Indonesia seems to be that the speed at which control over the mineral sector has been decentralized in response to social and political factors has outpaced the development of the capacities of local governments to assume these new duties and responsibilities. Capacity is linked to skills, knowledge, and legitimacy, and it can refer to the technical, financial, and administrative skills public officials need to fulfill various mandates; the resources they require to support their efforts (both human and physical); and the systems that enable such work.<sup>48</sup>

A general lack of capacity can be compounded by specific challenges associated with mining, a sector that is complex and highly technical and thus presents management challenges for subnational governments, such as absorbing and stabilizing the often large, irregular flows of revenue involved, and tackling the social and environmental impacts of mining projects.

Mineral licensing requires strong operational capacity, which includes competent, efficient, and timely license processing as well as a strong on-site presence for monitoring and inspection of compliance with license conditions. This requires adequate budgets to pay for the on-site presence and a minimum number of experienced, skilled employees.

According to research from NRGi partners, most mining districts lack capacity and funding. In Kukar district, the Energy and Mining Office's budget and staff are quite small considering the scope of their responsibility to oversee mining activities. In 2011, the occupational safety and health inspection budget enabled the office to conduct inspections at less than 25 percent of the district's 285 coal mining operations.

Lack of capacity at the subnational level is often cited as an argument against decentralization, backed by technical arguments concerning management requirements and anecdotes of failed local government efforts.<sup>49</sup> As a partial explanation, subnational governments may be at a disadvantage when compared with their national counterparts because more human and physical resources historically flow to the capital than to subnational jurisdictions. If decentralization is a relatively new phenomenon, the local staffs may not be as skilled or experienced.<sup>50</sup> Additionally, the increased responsibility does not often come with a corresponding increase in financial and physical resources, further hindering the local government's ability to implement and enforce the rules.

*Mineral licensing requires strong operational capacity, which includes competent, efficient, and timely license processing as well as a strong on-site presence for monitoring and inspection of compliance with license conditions.*

46 Budy P. Resosudarmo et al, "Socioeconomic Conflicts in Indonesia's Mining Industry," in R. Cronin and A. Pandya (eds.), *Exploiting Natural Resources: Growth, Instability and Conflict in the Middle East and Asia* (Washington, DC: Henry L. Stimson Center, 2009), 33-46.

47 Jakarta Globe. March 2 2010. <http://thejakartaglobe.beritasatu.com/archive/rio-tinto-finally-secures-permit-for-nickel-project-in-sulawesi/>

48 Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resources Decentralization*, 59-62.

49 Campos and Hellman, "Governance Gone Local: Does Decentralization Improve Accountability?"

50 Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, 62.

In many countries, lack of capacity at the local level is often accompanied by a lack of capacity or willingness to cede power at the national level. The abilities of all levels of government to fulfill their requisite responsibilities should be examined when analyzing challenges and ways to address them.<sup>51</sup>

#### Lack of incentives for government to perform coupled with weak oversight and accountability to citizens

One of the most touted potential benefits of decentralized decision-making is the increased accountability that decision-makers have to local citizens. However, just as the speed of decentralization can outpace development of government capacity, so too can it outpace development of the local populations' ability to hold these new decision-makers accountable for their actions. If the people issuing the licenses are incentivized to be accountable only to counterparts in the national government, or to help entities seeking licenses instead of protecting constituents, the result may simply be a shift of bad behavior from the national level to the subnational level.

As discussed above, smaller local jurisdictions with homogenous or less competitive economies may be more susceptible than national governments to state capture. This may result in dominant economic actors taking control; or clientelism if politicians can identify and monitor political supporters effectively, or there are ready-made client networks based on familial, tribal, or other ties.<sup>52</sup> One scholar argues that political space at the local level that has been opened up by decentralization in Indonesia has simply helped local rent-seekers to secure privileged positions without the constraining effect of national-level party politics. Additionally the failure of local parliamentarians to live up to the standards of good governance is better explained by innate interests rather than poor education or lack of capacity.<sup>53</sup>

*Decentralization of mineral licensing in Indonesia has mainly been administrative and fiscal. Corresponding political decentralization is yet to take place.*

Decentralization of mineral licensing in the country has mainly been administrative (transferring central authority to grant licenses to subnational levels) and fiscal (allowing subnational governments to collect associated fees). But corresponding political decentralization—allowing for more transparent, consultative, and accountable decision-making—has yet to happen.<sup>54</sup> This has resulted in decisions on licensing that haven't taken into account benefits and costs for the local population.

For example, according to independent local civil society organizations interviewed by NRG's partners, organized groups in Bangka district with close ties to the local political establishment pay for and control significant parts of illegal tin-mining activities that have been granted licenses by the district government in violation of national regulations. Some contend that these illegal operations have resulted in loss of revenue for the district, in addition to creating negative environmental impacts and conflict with other mining operations that have overlapping concessions.

51 Research from Uganda indicates that local government performance is in fact greatly dependent on and constrained by the inability of central government agencies, and suggests that local government performance may be more a function of central government and donor accountability than local capacity. Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, 62-64.

52 Campos and Hellman, 240-41; and Yilmaz and Venugopal, "Local Government Discretion and Accountability in Philippines."

53 Vedi Hadiz, *Localising Power in Post-Authoritarian Indonesia: A Southeast Asia Perspective* (Stanford, CA: Stanford University Press, 2010), 59-62, 98.

54 Recent elimination of direct elections for provincial governors, district chiefs and mayors, further erodes the political decentralization process.

## NEXT STEPS FOR INDONESIA

The issues identified in this review merit an urgent assessment of mineral sector performance and the identification of strategic priorities to overcome reported challenges. Some recommended actions for the Indonesian national government are discussed below.

### **Clarify attributions of authority.**

- Undertake a review of legal instruments at the national and subnational levels to identify gaps, conflicts, duplications, and other inconsistencies, particularly regarding the processes of applying and approving licenses. If there is sufficient interest to warrant an auction, replace the current licensing system with consistent, clear bidding processes.
- Properly assess the costs of administering and monitoring licenses and other permits such as environmental or safety permits at all levels, and ensure that fair, adequate revenues accrue to relevant government units so they can fulfill their responsibilities.

### **Improve information management.**

- Develop uniform cadastral rules and maps, and centralized license and geological databases for licensing information, with performance standards and specifications for transmitting and codifying data, and disclose this information to the public. Maps should include data on forest boundaries, mining deposits, and license holders. Synchronizing the data will help avoid duplication and reduce corruption. For existing overlaps, the central government should further review licenses that do not have clean and clear status, and determine next steps in accordance with Mining Law No. 4/2009.
- Institute clear reporting procedures for subnational governments, with incentives to comply and penalties for noncompliance, to support coordination and communication.
- Require exploration license holders to report their geological findings on a regular basis to the subnational licensing authority, which should then provide them to the national geological database. If there are confidentiality concerns, the government can consider making information publicly available after an exploration license is terminated.

*Develop uniform cadastral rules and maps, and centralized license and geological databases for licensing information, with performance standards and specifications for transmitting and codifying data, and disclose this information to the public.*

### **Develop requisite subnational government capacity.**

- Map out required tasks and responsibilities of administering the licensing system and related health, safety, environmental and social requirements and obligations, and identify the financial, physical, and human resources needed to carry out requisite tasks and responsibilities for the different authorities with responsibility for compliance enforcement.
- Assess available resources, and prioritize needs so that the most pressing, important ones can be met. Possible measures might include using mining-related fees to address specific administrative needs; providing training programs, particularly for field staff; and investing in human resources to attract and retain highly skilled and experienced employees with administrative and technical expertise.

### **Promote downward accountability to citizens.**

- Conduct a thorough assessment to identify (dis)incentives to perform duties honestly and effectively.



- If not already in place, develop sanctions for failing to perform public duties. Carefully define the role of a court system versus that of the central government. For example, make clear which entity has the ability to recall someone from office, conduct criminal proceedings, and impose fines.
- Implement mechanisms to increase direct accountability to local citizens, such as requiring clarity throughout the licensing process, especially in terms of applications, awards, and monitoring licenses; creating easy, direct methods for the public to communicate with relevant government employees; and supporting efforts by civil society to monitor licensing regulations and procedures at the subnational level.
- Implement systems that minimize unnecessary discretion and opportunities to tamper with licensing records.
- Institute regular audits of the licensing system by an independent authority, with findings made publicly available.

*Implement mechanisms to increase direct accountability to local citizens*



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