‘When the Elephants Fight the Grass Suffers’: Decentralisation and the Mining Industry in Indonesia

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Abstrak


Tulisan ini bertujuan untuk menganalisis hambatan yang dialami oleh daerah di bidang pertambangan pada masa otonomi daerah. Beberapa solusi diajukan bagi pembangunan ekonomi-sosial yang layak dan memenuhi kebutuhan masyarakat lokal.

Introduction

One cannot dissociate Decentralisation and Reformation (Reformasi) in Indonesia. The two processes are occurring at the same time and at a very fast pace, constantly re-interpreted by diverging political and ideological power groups, with growing expectations and competing economical interests. In addition to its pace, the rate of change imposed on the Indonesian diverse and multicultural society is occurring at an unstable moment of the country’s history.

The laws for regional governments have already changed six times since Independence. Previous changes, however, did not involve such drastic transformations nor were they so hurriedly implemented as two regional autonomy laws Nos.22/1999 and 25/1999. Although in the process of implementation since January 2002, the Regional Autonomy Laws are still under review and vigorously debated. This situation leaves a dangerous legal vacuum for illicit practices.

The mining industry provides a large source of revenue for the country. This has a significant impact on the stability of the

1 This article is based on the paper presented at the panel ‘Conflict surrounding Devolution of Economic and Political Power’ at the 2nd International Symposium of Journal ANTROPOLOGI INDONESIA: ‘Globalization and Local Culture: A Dialectic towards the New Indonesia’, Andalas University, Padang, 18–21 July 2001.

2 President Megawati Sukarnoputri herself, ‘...strongly criticised the law 22/1999 as being against the principles of Indonesia as a unitary state as is laid down in the 1945 Constitution’ (The Jakarta Post 2001).
economy at a time when Indonesia is in the midst of confronting socio-political changes. The mining sector’s contribution to the Indonesian economy in 1999 was US$11.47 billion, a sum which, as Noke Kiroyan (PT Kaltim Prima Coal) notes, could solve part of the problem of lagging regional development if it were more evenly distributed (Kiroyan 2001). In the year 2000, Indonesian tax revenues (in which mining has a noticeable input), contributed for 71% of the state total earnings, making it a major and indispensable contributor to national income (Poernomo 2001).

The mining sector says that it welcomes regional autonomy, which ‘...by its very nature, grants more power to regions in Indonesia that have thus far been deprived of the privileges and rights they deserved’...Thus: ‘the mining sector sees devolution of power as a phase filled with positive opportunities’...and... ‘has a notable interest in participating in Indonesia’s true quest for democracy’ (Kiroyan 2001). However, to date, the international mining companies active in Indonesia have suspended exploration projects and new investments, as if preparing to leave the country should business become unprofitable, hazardous or both.3 Interestingly, however, a few newcomers for whom Indonesia is a ‘green-field’, are prudently considering to invest in promising grounds and showing some willingness to find out what involvement it would imply to do so in remote regions of Indonesia.4

Why has the mining sector become so cautious? What are the current concerns?

The major issues for the industry are the wide-ranging implications of a number of legal uncertainties. For example, the former Mining Law 11/1967 (still partly in place) and the new Regional Autonomy Laws are contradictory on matters such as the issuing of mining licenses. The issuing of mining licences was the exclusive privilege of the central government under Law 11/1967, but is devolved to the local governments under the Law No.22/1999. Ambiguities apply also to tax raising. For the regions these changes represent a major opportunity to raise badly needed funds. For the industry, these legal uncertainties are simply discouraging investment.

Prior to 1999, the entire legal framework was set by the national and provincial authorities. The General Mining Industry was governed by individual Contracts of Work (COW) which were signed between a company and the government.5 These COW’s involved no input from and little benefit for the regions. Supporting local development was in accordance with general undertakings in the COW but it was regarded as a goodwill gesture from the company rather than compliance with strict legal requirements. As the eight generation of COW is being redesigned, the miners want legal certainty, the regions want a larger share of revenues and both expect ‘fairness of income

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3 According to Pricewaterhouse Cooper, more than 150 exploration projects in Indonesia have been suspended, withdrawn or are inactive (Kiroyan 2001).

4 One example is Placer Dome, which comes with the experiences from a number of projects in Canada, South America, PNG and the Philippines, some of which were learned at high costs.

5 The General Mining Industry includes gold, nickel, tin, copper, etc, (but not coal nor oil and gas which are under different legislation). COW are contractual agreements between the government and companies. What makes them particularly attractive for the industry is the right of ‘Conjunctive Title’, the option of ‘Lex Specialis’ (to fit individual cases) and the recourse to national or international arbitration for dispute settlement. Each COW contract between Indonesia and a company is individually approved by the DPR.
tax treatment’ from the central government for which this revenue is also indispensable. All stakeholders are still to agree on a mutual understanding of the terms of such ‘fairness’.  

At the 2001 Indonesia Mining Conference, Charlie Lenegan, President Director of PT Kelian Equatorial Mining (a major mining company located in East Kalimantan), highlighted some of the challenges in the relationships between project developers, regional governments and communities. Lenegan attributes the current difficulties in implementing regional autonomy to three main factors. One, a lack of clarity in definition of roles and authorities between the regional and national/provincial governments; two, insufficient capacity building to prepare regional governments for the responsibilities transferred to them under Regional Autonomy; and finally a lack of funding to enable regional governments to meet their responsibilities (Lenegan 2001).

East Kalimantan, for example, contributes Rp70 trillion to the national economy, but receives less than 10% in return from the central government. Furthermore its General Allocation Grant (Dana Alokasi Umum) has considerably diminished between 2001 (Rp257 bn) and 2002 (Rp39 bn), an allocation which, when fully disbursed to the region, will barely cover salaries and wages but none of its pressing development needs such as roads, hospitals, schools, government offices or capacity building programs.

In the absence of national funding, the regional governments are turning to other sources of revenue in the form of taxes, levies and fees that they seek to impose on the resource companies operating in their region. Some regional governments have also addressed their budgetary difficulties by running media campaigns to exert pressure on most companies to fund regional development projects or contribute more revenue. Companies who rely on their initial COW, are concerned that ‘rent-seeking’ or unlawful behaviour will increase if local leaders are allowed to introduce new ‘taxes’ arbitrarily. Companies have expressed the view that they recognise the need to increase the share of project benefits that flow to regional governments but find themselves in no position to satisfy the demands for contribution, taxes and levies that regional governments try to impose to cover the shortfalls in funding from the central government. What regional governments are failing to understand is that in the economics of modern mining, companies’ additional costs for such taxes and royalties cannot be passed on to the world market. Furthermore, in Indonesia not all expenditures on community development are deductible as business expenses. Based on middle or long term investments—some assurances are required regarding mining projects that most of their short and long term costs can be identified, planned and budgeted as precisely as possible. ‘Initially the mining industry makes the vast majority of its investment up front. Often it is fifteen to twenty years from the first rock picked up in a stream.

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6 The Ministry of Energy and Mineral Resources is drafting a decree to authorise the central government to gradually transfer mining rights to the regions however, several governors and regents have voiced their opposition to the idea.

7 Sendrawar, a member of the local legislature of the Kutai Barat Regency (Commission A-Law and Government) is urging mining companies to abide by regional regulations rather than to their Contract of Work... Companies, said FX Yapan. ‘should not refer to Contract of Work which was signed with central government and should not ignore (their) obligations to regional government’ (Kaltim Post 2002).

8 PP/2000 has already increased mineral royalties which reduces Indonesia’s competitiveness of on the global market.
bed to the first penny of return on investment made’ (Ness 2001).

Furthermore, the industry understanding is that a more equitable redistribution to the region should originate from better fiscal arrangements rather than from further contributions by the industry. Beni Wahju, chairman of the Indonesian Mining Association (IMA), contests the new revenue sharing arrangements: ‘Under the new law, though 80% of the mining royalties is supposed to go to the provinces and districts, regulations specify that this money will first go to the central Finance Ministry, which will then disburse the money. In the past provinces have accused Jakarta of short-changing them. Wahju says the money should be paid directly to the regional governments so that they see evidence of how mining companies contribute to the local economy’ (Dhume 2001). Under such new fiscal arrangements, a project would pay an agreed level of tax directly to the regional government with appropriate offset to taxes paid to the central government.

In order to solve discrepancies between Regional Autonomy Law (UU 22/1999) and the Mining Law (UU 11/1967), an additional Mining Law is currently drafted. The change will address a number of sector-specific implementing decrees and regulations and that were initially rejected by all parties. The new Mining Law will include clauses that provide for a better protection of the environment and recognise community rights, such as lands rights and human rights. A number of large companies, are stating strongly their commitment to abide by these clauses. Their industry codes of conduct and declarations of intent published internationally, state that any project has to include both the respect of environmental issues and a significant involvement of local communities in the project. ‘Hit me with tough environmental regulation says Rick Ness (PT Newmont), ‘that’s OK, but please don’t load me up with corporate taxes, transactional taxes and higher royalties. This is a recipe for disaster for the mining Industry in Indonesia because we cannot pass on these cost to the world market’ (Ness 2001).

Meanwhile, local NGOs and activists are asking for more ‘fairness’ for grassroots communities in the context of regional autonomy. Some NGOs are critical of Law No.22 and Law No.25/1999 (that provide the financial structure of the new regional autonomy, within which the new Mining Law and COW will be implemented). These, they say are ‘framed as a means of empowerment for local party members rather than for local people.’

National and regional NGOs are also more often, and more forcefully, voicing their opposition to mining projects. The new Forestry Law (44/1999) unequivocally bans open-pit mining operations in protected forest areas. However, in December 2000 the central government declared that the ban was only applicable to investors whose COW had been issued after the new Forestry Law. The issue is still being debated between the two ministries (Forestry and Energy & Mineral Resources). All the while, a number of activist NGOs—under the umbrella of the Indonesian Environmental Forum, Wahana Lingkungan Hidup (WALHI)—have taken a radical stance on the issue and are campaigning for the ban of all foreign investment in Indonesia’s natural resources (Bali Post 2000). However, smaller national and Asian companies are equally involved in projects lo-
located in protected areas and they might not be able or willing to afford the related costs of added social and environmental responsibilities.

Although on different grounds, the Indonesian Mining Association (IMA) is also contesting some aspects of the new Forestry (UU 41/1999) and Autonomy (UU 22/1999) Laws. For IMA the overlap between mining and other land use and the complexity of environmental regulations such as PP18/1999 will constitute the main operational challenges.

Any steps forward?

Misunderstanding, mutual suspicion and frustration on all sides can hardly foster a balanced socio-economic development. A better form of dialogue needs to be re-established between the companies and the various levels of governments, communities, NGOs and other stakeholders in the project area. As a consequence of decentralisation, communities and regional government expect to be consulted and to participate in the development of projects in their region. Some have requested the developers’ support for training and capacity building as illustrated by the following cases.

PT KEM—whose closure motto is ‘Working Together for Sustainable Solutions’—will terminate operations in 2004. The company’s closure strategy provides a recent example of community consultation in Indonesia. Lenegan (2001) describes how the company has been seeking to address responsibly the various closure issues and go beyond what the industry identifies as short term and unsustainable approaches from local governments, community pressure groups or individuals to increase their revenues.

Two years ago, facing pending and ever increasing claims, PT KEM engaged with regional government representatives and NGOs to negotiate a process of resolution. After months of negotiations and the support of facilitators such as WALHI, the company and a local NGO Lembaga Kesejahteraan Masyarakat Tambang dan Lingkungan (LKMTL), are now working together to complete the validation of claims and subsequent payments. The company is also fostering a number of capacity building and agricultural training programs in the surrounding communities where food security has been identified as the primary long-term post closure issue. The company’s employees, of which 70% are local, have been offered a range of training options and support programs to assist them in finding other jobs, returning to farming or developing a business once the closure of the mine has made their current job redundant.

A Mine Closure Steering Committee (MCSC), jointly chaired by the regent and KEM’s President Director, is composed of representatives from the national, provincial and regional governments, the local communities, NGO and shareholders. The MCSC, which operates under a Charter, meets quarterly and its decisions are reached by consensus. Four working groups, consisting of specialists and stakeholders’ representatives from various levels of government and community, are in charge of reviewing the mine closure issues. Working groups focus on matters such as environmental management, dams, use of site facilities as well as community and regional planning. They develop solutions and present the results of their research to the MCSC. These consulting and negotiating bodies are involving a number of key stakeholders in the development of integrated, long-term solutions with the common objective to plan and implement the mine closure in an orderly manner and mitigate its impact on the region.
Similar representative settings, seeking to involve all stakeholders in investigating issues, negotiating solutions and making decisions, can be used to resolve a number of existing difficulties, negotiate new investments or develop future directions, involving the mining industry and the community. Improved communication and active participation will contribute to reduce the risks of conflicts between stakeholders.

Besides dialogue and participation, it is indispensable to create nationwide, a safe and sustainable environment for all. In some areas security has become a main issue. National and international mining industries express concerns about the increasing break down of law and order around mine sites. ‘If those excesses force foreign investors to disappear, says Soetaryo Sigit, (Adaro’s commissioner), Indonesia’s prospects for recovery may vanish as well’ (McBeth 1999). Around certain sites, an uncontrolled influx of newcomers has destabilised or divided the local communities and the increased competition for a share of the local resources has created tensions and conflicts and developed a climate of insecurity. The issue of security is equally crucial for the industry, as is any threat to interrupt a production on which its profit depends.

However, Indonesian military and police, the expected safe-keepers of security, are ambiguously positioned. The national security budget covers only about 30% of the real military and police expenditures. While some complementary funds are raised through legitimate military-backed commercial enterprises, in the mining industry for instance, it is widespread knowledge that an unknown proportion of funding comes from extortion and illegal activities such as illegal logging or illegal mining.10 According to Harold Crouch, ‘...while the military is in no position to return to political power, governments at all levels are powerless to curb the military’s quest for funds to make up the huge shortfall in its official budget’ (Crouch 2002).

According to Muhammad Nafik, a recent study on the views of researchers and observers, jointly conducted by the Institute for Economics and Social Research, Education and Information (LP3ES) and the Center for the Study of Development and Democracy (Cesda), concludes that although ‘the 1988 downfall of Soeharto had sparked nationwide demands for the Indonesian military (TNI) to soon end its political role’, ‘as a significant political force, the TNI is still an inseparable part of the whole complicated set of interplay and political processes during the current transitional period’ (and) ‘still very much involved with its dual function—politics and security—despite its promise to only focus on security by 2009.’ (The militaries’) ‘strategic aim is to maintain their “corporate interests” by following the political logic that develops in the transitional period, while trying to divert it if at all possible’ (The Jakarta Post 2002). Only a reform of its national security institutions will allow the government to enact other legal and institutional reforms required to establish a lasting democratic rule in Indonesia. Thus, does Indonesia needs more mines?

A reasonable incentive for Indonesians to want more mines would be that such projects would not only maintain an important source of national income, but also contribute to the regions in acceptable terms for the local populations. It would also have to remain attractive to the investors. In the absence of clear legis-

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10 According to the ILO estimate, there was about 77,000 small scale mines in Indonesia in 1999, an unknown number of which were operating illegally. This industry is believed to employ between 300,000 and 500,000 artisanal and small-scale miners (ASM) (Social and Labour Issues in Small Scale Mines—ILLO—Sectoral Activity Programme TMSSM/1999).
lation these terms have to be dealt with on a case-by-case approach and in the current socio-political context the outcome is too uncertain for most international companies to consider new investments. The challenge is to design national mining laws that will be both acceptable for regions and workers and viable for the national economy and the investors.

Meanwhile, a number of mining companies and local authorities are attempting to negotiate mutually beneficial and acceptable terms. Agreements have to satisfy the communities that a decent consensus has been reached and guarantee the miners affordable taxes and uninterrupted production (by road blocks, illegal mining, hostage taking or other unlawful actions). If successful, these agreements will demonstrate the maturity of the regions and the ability and commitment of companies to work in the country in the future.

The national mining industry and a number of representatives from the international industry are currently involved in the redrafting of the Mining Law. The message of the later is that unless the law can be brought to fit into the current global framework, foreign investors may pass Indonesia.11 ‘An immediate assumption that some will make is that the Mining Industry is going to look for lax environmental laws, which in turn will make one country more attractive than another. That is clearly not what the mining Industry wants’ (Ness 2001).

The major players in the industry are saying loud and clear that they are not asking for ‘short-cuts’ in these matters. For example Rio Tinto, (RT) has committed itself to the following policy: ‘Long term commitment to local communities is sought, so that social and economic well being is safeguarded and, where possible enhanced through the mine life and beyond. Every operation should understand and interact constructively with its local communities and assist their development in ways, which apply to the following principles: mutual respect, active partnership, and long term commitment.’12 These companies know that showing laxity toward its personnel, the environment or the community is potentially highly damaging not only to the safe operation of a local project but also to their global reputation. Furthermore, stricter regulations will in fact favour the larger corporations that can afford to implement them.

Large international companies are stating their commitment to implement new stringent environmental and social clauses, providing the new Mining Laws and COW secure the stable and long-term agreement required for profitable mining operations. Is the industry credible? Can it be held to its commitments? What are the alternatives? Are they sustainable? Would a desertion by Western investors benefit the country or suit an isolationist agenda drafted by some for Indonesia?

Meanwhile Indonesia’s public debt is roughly equal to its GNP and some 40% of its workforce remains largely unemployed. The forces at play are multiple. They may care to remember the Indonesian proverb, which says that ‘When the elephants fight the grass suffers’.

11 ‘Indonesia needs to recognise that the available pool of dollars for mining investment is finite and will go to the countries that make the environment for investment the most friendly to the potential investors’ (Ness 2001).

12 Rio Tinto (RT) ‘The Way We Work’ 1998—quoted in Rio Tinto Social and Environmental review (2000:17). RT has invested over US$2 billions in Indonesia though a number of mining companies such as Kaltim Prima Coal or Kelian Equatorial Mining (gold) and has a participation of US$1 billion in copper and gold PT Freeport Indonesia (Satunet Internet news service 2001).
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