

**OVERLAPPING MINING CONCESSIONS – A SYSTEMIC PROBLEM NOT  
EASILY RESOLVED<sup>12</sup>**

**INTRODUCTION**

In late May, the Coordinating Minister for the Economy announced a temporary moratorium on the issuance of new mining licenses and the extension of existing mining licenses in order to deal with the systemic problem of overlapping mining concessions. The Coordinating Minister also indicated that existing mining licenses which had not been properly issued in accordance with the applicable procedures would be cancelled.

The Central Government is to establish a team led by the Ministry of Energy & Mineral Resources and the Internal Affairs Ministry to audit existing mining licenses in an endeavor to settle the problems created by overlapping mining licenses as well as other issues.

The Indonesian Coal Mining Association has expressed its full support for the initiatives to resolve the problem of overlapping mining concessions.

The problem of overlapping mining concessions is said to be discouraging new and, more particularly, foreign investment in the mining sector, which new investment is expected to reach US\$3.2 billion in 2011.

The problem of overlapping mining licenses is, however, a systemic one which is not likely to be easily or quickly resolved. Accordingly, the moratorium on issuing new mining licenses may have to last for a considerable period of time if it is to fully achieve its intended purpose. There would also seem to be some potentially significant legal issues regarding the right of the Central Government to impose the moratorium in the first place and to subsequently cancel mining licenses that it determines have not been properly issued.

**BACKGROUND**

There are, undoubtedly, many reasons for the problem of overlapping mining concessions in Indonesia. Some only of these reasons are detailed below.

First, the technical resources and training available to local mining office staff in using the existing mapping system are inadequate. It seems to be unquestionably the case that Indonesia's failure to adequately resource and support a modern digital

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mapping system makes it more difficult for local mining office staff to properly determine the location of existing mining concessions before granting mining licenses for new mining concessions, something which enhances the risk of overlapping mining concessions arising (“**Category 1**”).

Second, in the run up to the Minerals & Coal Mining Law coming into force on 12 January 2009, there were a huge number of new mining licenses issued by Regents in order to avoid the requirement for a public tender imposed by the Minerals & Coal Mining Law for metal minerals and coal. It is inevitable that, in the rush to issue new mining licenses prior to 12 January 2009, many Regencies were careless in following the standard mapping system and in otherwise complying with the procedures in place for avoiding the problem of overlapping mining concessions (“**Category 2**”).

Third, it is a matter of common knowledge that, since 12 January 2009 and notwithstanding the requirement for a public tender, certain Regents have continued to issue new mining licenses on the basis of application rather than tender by the simple expedient of backdating the new mining licenses to a date just prior to 12 January 2009 (“**Category 3**”). The number of mining licenses dated the first week of January 2009 is quite astounding. Given the covert manner in which these backdated mining licenses have been issued it is, again, not surprising that the normal prudential procedures for avoiding overlapping mining concessions were ignored.

Fourth, it is not implausible that some mining licenses have been deliberately issued by Regents with full knowledge of the existence of another mining license in respect of the same area and at the behest of interested third parties wanting to put pressure on the existing mining license holder to offer them some participation in the underlying mining project (“**Category 4**”). The more prospective the area, the more likely is this to be the real reason for the overlapping mining concession problem. The writer is aware of Category 4 situations mysteriously arising after legal due diligence enquiries have not disclosed the existence of any such overlapping mining concession and where the boundaries of the newly identified overlapping mining concession, by some extraordinary coincidence, surround the location of each and every borehole drilled as part of the technical due diligence process carried out in respect of the long established and well documented existing mining concession.

Fifth, the actual boundaries of certain Provinces and Regencies in Indonesia are a matter of genuine dispute (“**Category 5**”). Readers may be surprised to learn, for instance, that the boundary between Central Kalimantan and Southern Kalimantan has, to this day, not been finally determined according to the Ministry of Internal Affairs. As a result, the Regency of East Barito in Central Kalimantan and the Regency of Tabalong in South Kalimantan both claim that significant land areas fall within their Regency with the consequence that each of these Regencies has issued mining licenses in respect of the same areas. Likewise, it seems that the boundary between West Sulawesi and South Sulawesi has never been finally determined with the result that it is not clear which of West Sulawesi’s Mamasa Regency and South Sulawesi’s Tana Toraja Regency has the authority to issue mining licenses in respect of areas close to their common but not finally determined border. No doubt, other examples of unclear Provincial and Regency boundaries are readily to be found.

Sixth, the 2009 Minerals & Coal Mining Law actually allows mining licenses for different and unrelated minerals to be issued in respect of the same mining concession

on the basis that each distinct mineral should be the subject of a separate mining license. Although the 2009 Minerals & Coal Mining Law contemplates that the holder of a mining license for one mineral has a first priority right to obtain a mining license for any other mineral the holder discovers on its mining concession, this has not prevented different and unrelated companies ending up with mining licenses for different minerals in respect of the same mining concession (“**Category 6**”). Category 6 becomes particularly complicated when the relevant government agencies and geologists disagree over whether particular minerals are or are not related and, therefore, may or may be the subject of separate mining licenses in respect of the same mining concession.

## COMMENTARY

### 1. Different Solutions for Different Categories

It should be readily apparent from the Background that the Central Government needs to take a carefully nuanced approach to dealing with the different Categories of overlapping mining concessions which can arise. This is not a case of “one size fits all”, with the result that different solutions tailored to the particularities of each Category are required.

1.1 **Category 1 – Inadequately Supported Mapping System:** Overlapping mining licenses which are the result of inadequate resources and training available to local mining office officials in order to support the use of the existing mapping system, do not necessarily involve any wrongdoing on the part of the holder of the later overlapping mining license who may well have had no knowledge of the earlier existing mining license. Although the relevant authorities could apply a strict “first in time, first in priority” approach and simply cancel the later overlapping mining license once the overlap becomes apparent, this is not necessarily an equitable and fair approach in all situations. As a minimum, it would seem appropriate that, where there is no evidence of wrongdoing, the holder of the later overlapping license be allowed to receive, without having to participate in any tender, a new mining license for a reduced or differently configured mining concession area which does not include any part of the earlier mining concession that was the subject to the overlap.

Of course, in order to avoid a continuing problem with Category 1 cases, Indonesia needs to ensure that every local mining office receives the training and has access to the technical resources necessary to properly use a fully digital mapping system. This is only likely to be possible in the medium term at best.

1.2 **Category 2 – Pre 12 January 2009 Rush:** Mining licenses which were genuinely issued, albeit in haste, prior to 12 January 2009 should, arguably, not be cancelled or revoked just because the relevant Mining Office failed to follow the procedures for avoiding overlapping mining concessions. These mining licenses are not necessarily tainted by wrongdoing per se, on the part of the holders but, rather, in many instances by mere carelessness on the part of the overworked and under resourced local Mining Office. In these cases and unless actual wrongdoing is established, it seems inappropriate to penalize the

mining license holder by cancelling the mining license. If any party is to be penalized or punished, it should surely be the local Mining Office staff on grounds of carelessness or negligence.

If the problem of Category 2 mining concession overlaps can only be resolved by cancelling the hastily issued mining license then the holder of that mining license is probably entitled to receive some form of compensation from the holder of the continuing mining license as the price of resolving the overlap.

- 1.3 **Category 3 – Covert Backdating:** Unlike Categories 1 and 2, Category 3 is clearly a case of overt wrongdoing and the holder of the backdated mining license must be assumed to have been a willing party to, if not the prime instigator of, the backdating of the mining license. In the case of Category 3 overlaps, therefore, cancellation of the backdated license and without compensation would seem to be entirely appropriate and justified.

The real difficulty, however, in dealing with Category 3 will surely be in establishing that the subject mining license was, in fact, issued after 12 January 2009 but backdated to prior to 12 January 2009. While a purported issuance date of the first week of January 2009 is often an indicator of backdating, many mining licenses were, undoubtedly, actually and properly issued in the first week of January 2009, with the result that they are really Category 2 examples rather than Category 3 examples.

- 1.4 **Category 4 – Actual Knowledge of Overlap:** Category 4 is also a clear case of overt wrongdoing which should be dealt with by cancelling the later, overlapping license without compensation to the mining license holder.

- 1.5 **Category 5 – Uncertain Regency and Provincial Boundaries:** Category 5 cases will, almost certainly, be the most difficult to resolve. There is no wrongdoing or even negligence per se in the issuance of the relevant mining licenses. Each of the Regencies/Provinces, sharing the undetermined border, may well have good but not conclusive grounds for believing that its understanding of where the relevant Regency/Provincial boarder lies is correct and, therefore, it is entirely justified in issuing mining licenses covering land in the area also claimed by the neighboring Regency/Province.

Existing Category 5 cases should, most probably, be resolved by either (i) the holder of one overlapping mining license buying out or otherwise compensating the holder of the other overlapping mining licensee or (ii) the holders of both overlapping mining licenses being given some joint interest in the underlying mining concession and/or any resulting mining project. The problem with both these approaches, however, is that, unless and until the relevant Regency/Provincial boarder is finally determined, it will not be clear which Regency/Province is authorized to issue a valid mining license in respect of the subject mining concession.

The only way to prevent Category 5 cases from recurring indefinitely is, of course, to finally determine the borders between the relevant Regencies/Provinces, something which is going to require both the cooperation of the relevant Regencies/Provinces and the involvement of the

Ministry of Internal Affairs which will determine the exact boundaries based on Minutes of Area Determination to be prepared, agreed and signed by the relevant Governors. In every case, this is likely to be a very protracted process which may take years rather than months to resolve.

- 1.6 **Category 6 – Mining License for Unrelated Minerals:** Category 6 cases do not necessarily involve any wrongdoing or negligence as the same are allowed by the 2009 Minerals & Coal Mining Law.

While, theoretically, it should be possible for unrelated holders of mining licenses, in respect of the same mining concession but for unrelated minerals, to jointly exploit the same mining concession, the practical difficulties of so doing seem to be very considerable. This is particularly the case in terms of the timing of the different exploration/production operation activities and the need for each mining license holder to be able to carry out its particular exploration/production operation activities without interfering with the viability of the other mining license holder's exploration/production operation activities.

The most obvious solution, in the absence of any proven wrongdoing or negligence, would seem to be to simply give priority to the holder of the first issued mining license if a settlement cannot be otherwise arrived at between the holders of the overlapping mining licenses themselves.

## 2. **Unresolved Legal Issues**

- 2.1 **Authority to Declare Moratorium:** It is not entirely clear to the writer that the Central Government (whether the Coordinating Minister for the Economy or the Minister of Energy & Mineral Resources) necessarily has the legal authority to declare a moratorium on the issuance of new mining licenses pending the resolution of the problem of overlapping mining concessions.

Article 157 of the 2009 Minerals & Coal Mining Law does contemplate the temporary suspension of Regional Government authority in connection with mining licenses but only in the very limited circumstance where the Regional Government has failed to abide by annual production quotas for different minerals as set by the Central Government. On its face, then, Article 157 does not have any relevance in the case of overlapping mining concessions.

The 2009 Minerals & Coal Mining Law gives (i) the Regents the power to issue mining licenses in the case of mining concessions falling wholly within a particular Regency and (ii) the Governors the power to issue mining licenses in the case of mining concessions falling within two or more Regencies in the same Province. The authority of the Minister of Energy & Mineral Resources (that, is the Central Government) to issue mining licenses is confined to mining concessions falling within two or more Provinces. This being the case, where is the legal basis for the Central Government, whether in the form of the Coordinating Minister for the Economy or the Minister of Energy & Mineral Resources to declare a moratorium on the issuance of new mining licenses by the Regents and the Governors in the case of mining concessions otherwise

falling within their particular geographical areas? There would seem to be a good argument that, at most, the Coordinating Minister for the Economy or the Minister of Energy & Mineral Resources has the authority to declare a moratorium on the issuance of new mining licenses in the case of that very small number of mining concessions falling within two or more Provinces.

If it is questionable, as it must be, whether the Central Government really has the authority to declare a moratorium on the issuance of new mining licenses by the Regents and the Governors in the case of mining concessions otherwise falling within their particular geographical areas, then the moratorium would seem to require the voluntary cooperation of all the relevant Regents and Governors in agreeing to not issue any more mining licenses until the problem of overlapping mining concessions is resolved. It must be questionable, though, whether this voluntary cooperation will be forthcoming from all the relevant Regents and Governors given how protective the Regencies and Provinces are of their regional autonomy prerogatives and rights.

2.2 **Authority to Audit Mining Licenses:** The Central Government seems to be on stronger legal ground in carrying out the proposed audit of mining licenses than it is in declaring a moratorium on issuing new mining licenses. This is because Articles 142(2) and 152 of the 2009 Minerals & Coal Mining Law may be interpreted as implying a right on behalf of the Minister of Energy & Mineral Resources to investigate the activities of Regents and Governors who the Central Government believes may have not followed the required procedures in issuing mining licenses although this is far from clear. Articles 142(2) and 152 would, however, only seem to properly justify an audit of overlapping mining licenses in the case of Categories 3 and 4 where the overlapping mining licenses are the result of wrongdoing or negligence on the part of local Mining Offices in issuing mining licenses other than in accordance with the 2009 Minerals & Coal Mining Law. Query whether or not Articles 142(2) and 152 also extend to Categories 1, 2, 5 and 6 where the overlapping mining licenses are not the result of wrongdoing or negligence on the part of local Mining Offices in issuing mining licenses other than in accordance with the 2009 Minerals & Coal Mining Law.

2.3 **Authority to Cancel or Revoke Mining Licenses – 2009 Minerals & Coal Mining Law:** To the extent that the Central Government decides to cancel overlapping mining licenses, the Minister of Energy & Mineral Resources is, most probably, empowered to do this by Article 152 of the 2009 Minerals & Coal Mining Law in those cases where (i) the holders of the overlapping mining licenses have violated certain specific provisions of the 2009 Minerals & Coal Mining Law as set out in Article 151 and (ii) the relevant Regent or Governor has failed to impose appropriate administrative sanctions in respect of those violations. Articles 151 and 152 are very specific, however, and do not seem to include failure to comply with the proper procedures in connection with the issuance of mining licenses or overlapping mining concessions per se as opposed to violations of the ongoing obligations of the mining license holders. It is debatable, therefore, whether Articles 151 to 152 would empower the Minister of Energy & Mineral Resources to cancel overlapping mining licenses falling within any of the Categories identified by the writer and, more

particularly, Categories 1, 2, 5 and 6 where the overlapping mining licenses are not the result of violations of the 2009 Minerals & Coal Mining Law.

What is also concerning is the present lack of the specific procedures to be followed by the Minister of Energy & Mineral Resources in cancelling overlapping mining licenses which are the result of violations of the 2009 Minerals & Coal Mining Law. It is to be noted that Articles 83 and 111 of Minister of Energy & Mineral Resources Regulation No. 23 of 2010 re Mining Business Activity refer to the procedures for imposing administrative sanctions, including cancellation of mining licenses, being set out in a subsequent ministerial regulation. To date, though, there is no such ministerial regulation setting out the procedures for imposing administrative sanctions, including cancellation of mining licenses.

- 2.4 **Law No. 32 of 2004 re Regional Administration:** Articles 136(4) and 146(2) of the Regional Administration Law provide that the decisions and regulations of Regents and Governors must not be contrary to the public interest, regional regulations and higher legislation. While Articles 136(4) and 146(2) may be interpreted as prohibiting the issuance, by Regents and Governors, of overlapping mining licenses where this is contrary to the public interest or the 2009 Minerals & Coal Mining Law (as “higher legislation”), Articles 136(4) and 146(2) do not make clear what is the consequence of the decisions and regulations of Regents and Governors being contrary the public interest, regional regulations and higher legislation. Further, Articles 136(4) and 146(2) do not specifically vest any authority in the Central Government to cancel or revoke decisions and regulations of Regents and Governors which are contrary to the public interest, regional regulations and higher legislation. Perhaps this is why the Central Government has never, despite often threatening to do so, moved to cancel Regency regulations which the Central Government claims are contrary to the public interest, regional regulations and higher legislation. Is this a matter for the Central Government or, rather, for the Courts?

### 3. Practical Considerations

While the problem of overlapping mining licenses clearly needs to be resolved, the Central Government should be very careful about how and in what circumstances it cancels or refuses to validate overlapping mining licenses.

With the Churchill Mining debacle still fresh in everyone’s mind, many investors in the Indonesian mining sector are already starting to be concerned about and to question the security offered by mining licenses in Indonesia. Any lack of transparency or apparent administrative unfairness in the Central Government’s decision to cancel or not validate particular overlapping mining licenses will only heighten these concerns.

The Central Government needs to establish very clear and objective criteria for the cancellation and validation of overlapping mining licenses, which criteria can be readily understood by all mining license holders such that there is no ambiguity as to why some overlapping mining licenses are being cancelled while other overlapping mining licenses are validated and remain in place. Unfortunately, however, this has

not happened. In early July, MoEMR published a list of so-called “clean and clear IUPs” which it regards as being valid without, though, providing any indication or explanation of the criteria it relied upon, either in individual cases or overall, in determining the validity of the IUPs on the list. Even worse, MoEMR has said nothing at all about the IUPs which are not on the recently published list – are these IUPs invalid and to be revoked or is their current status merely uncertain and subject to further investigation? Again, there is no definite indication of precisely what were the identified problems with the IUPs not on the list and which raise concerns about their validity or their “clean and clear” status. While it seems that the existing list of “clean and clear IUPs” is to be updated from time to time, there must now be a “question mark” over any IUP which is not currently on the list.

It is also imperative that the holders of overlapping mining licenses be given ample opportunity to present reasons why their overlapping mining license should not be cancelled. Administrative fairness in handling the cancellation or validation of individual overlapping mining licenses will help ensure that there are no lingering suspicions among actual and potential investors in the local mining industry as to the real reason for the cancellation or validation of particular overlapping mining licenses. This recommended approach, however, has apparently not been followed in preparing the recently published list of “clean and clear IUPs”. Leaving the holders of cancelled, non-validated or non-clean and clear mining licenses to take, after the event, legal action in the Courts against the Central Government, as their only avenue of relief in defending the validity of their mining licenses, is definitely not sufficient.

Handled badly and without sufficient sensitivity to the legitimate and entirely understandable concerns of mining industry investors, the cancellation, invalidation or refusal to declare the “clean and clear” status of overlapping mining licenses, by the Central Government, could actually exacerbate the bad image many investors, particularly, foreign investors, have of the Indonesian mining sector. Given how the preparation and publication of the early July list of “clean and clear IUPs” has been handled, this seems a very real possibility.

## **SUMMARY AND CONCLUSIONS**

The large number of overlapping mining concessions in Indonesia is the result of systemic problems which go far beyond one-off administrative failures to properly apply the existing procedures for issuing mining licenses.

At a minimum, there would seem to be at least six different categories of overlapping mining concessions. Particularly intractable is Category 5 or overlapping mining concessions which are the result of uncertain Regency and Provincial borders where there is genuine disagreement as to which Regency or Province has authority to issue mining licenses in respect of certain land areas. Category 1 or overlaps due to an inadequate mapping system will also be very difficult to prevent without a major financial investment in the proper training and resourcing of local mining offices which is needed to support and properly implement a fully digital mapping system.

The Central Government needs to carefully craft a different solution for each category of overlapping mining licenses, which solution clearly addresses the peculiarities of

that particular category. This is definitely not a situation where a “one size fits all” solution is appropriate.

In declaring a moratorium on the issuance of new mining licenses, while it resolves the problem of overlapping mining concessions, the Central Government seems to be on uncertain legal ground unless it has the full cooperation of all the Provinces and Regencies. Likewise, the Central Government’s authority to cancel overlapping mining licenses, which are not clearly the result of violations by mining license holders, of the 2009 Minerals & Coal Mining Law, also seems to be in doubt.

To the extent that the Central Government decides to cancel certain overlapping mining licenses (assuming it has the legal authority to do so), it must ensure (i) objective criteria and transparency for determining which overlapping mining licenses are valid and which overlapping licenses are to be cancelled and (ii) administrative fairness in carrying out the validation/cancellation process. Unfortunately this has not happened to date and anything less will only serve to further undermine the confidence investors have in the security of local mining licenses.

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