

Multiple Authorisation: The Legal Complexity of *Desentralisasi* in Indonesia and the Potential Contribution of IIAs in Reducing Confusion

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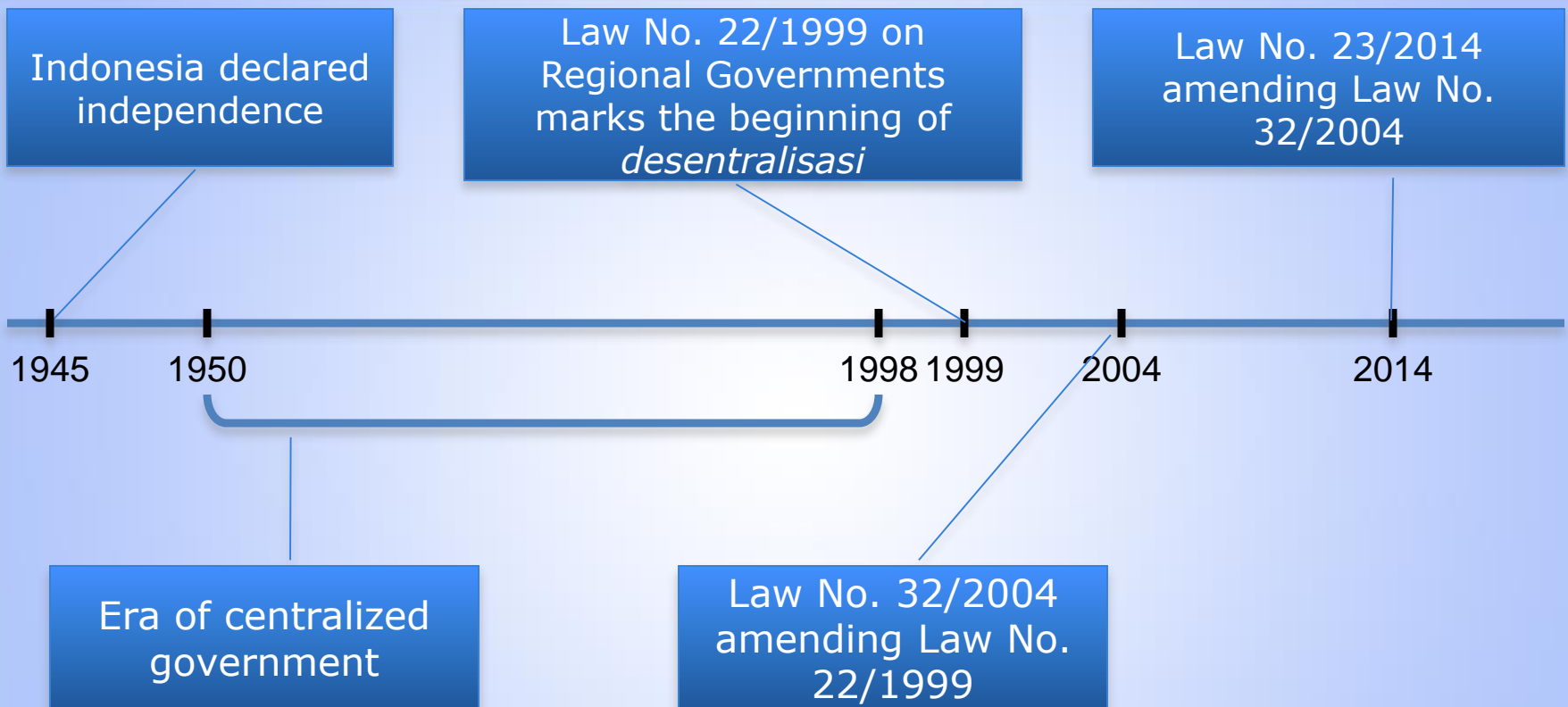
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Indonesia's *desentralisasi* in a nutshell

Development of Legal Framework



Indonesia's desentralisasi in a nutshell

Essence and Progress

- Delegation of authority to 31 areas, e.g. education, youth and sports, health, **environment**, housing, **investment**, SMEs, labour and transmigration, transportation, land ownership, **plantation**, **mining**, **industry**, and **trade**.
- Regional governments: provincial, regency or city.
- Main goals: Increase the efficiency of public services, effectiveness of governance, and the promotion of democracy.
- Critics:
 - Lack of capacity at the regional level;
 - Growing inequalities between rich and poor regions;
 - Worsening corruption.

Main problems of *desentralisasi* on FDI

- Corruption and abuse of power
- Lack of coordination and capabilities

Corruption Perception Index

Centre for International Law



Ranking in ASEAN (2013)	Country	Corruption Perception Index Score	
		2012 ranking (176 countries)	2014 ranking (175 countries)
1	Singapore	5	7
2	Brunei	46	-
3	Malaysia	54	52
4	Philippines	105	85
5	Thailand	88	85
6	Indonesia	118	107
7	Vietnam	123	119
8	Laos	160	145
9	Myanmar	172	156
10	Cambodia	157	156

Source: Transparency International, *Corruption Perception Index*, <http://www.transparency.org/research/cpi/overview>

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Corruption and Abuse of power

- The rise of “little Soehartos” from the region
- Bribery to regional leaders, e.g. Alstom (France) paid US\$ 772 million to the US Department of Justice for bribery in Lampung.
- Money politics for regional elections, e.g. vote buying.
- Business distorting regulations, e.g. charges for import/export licenses, certificates of origin, loading/unloading fees.

Abuse of power - ISDS

- Regional governments' quest to invest:
 - *Cemex v Indonesia*
 - Breach of contract and *de facto* expropriation under the ASEAN Agreement on the Promotion and Protection of Investments)
 - Settled by both parties.
 - *East Kalimantan v PT KPC*
 - One of the few cases brought by a regional government to the International Centre for the Settlement of Investment Disputes (ICSID).
 - Tribunal found no jurisdiction.

Lack of Coordination and Capabilities

- Lack of coordination: confusion of authority between different levels of government.
- Lack of capabilities: limited skills of the personnel due to lack of training, influence of political considerations in civil service appointments.

Lack of Coordination and Capabilities - ISDS

- *Churchill Mining v Indonesia & Planet Mining v Indonesia*
 - Indonesia – United Kingdom and Indonesia – Australia BITs;
 - Overlap of exploration licenses leading to revocation of PT ICD's licenses.

Alleviating *Desentralisasi*

- *Improve the Existing IIAs*
 - Amend the existing IIAs to include a requirement for the investor to obtain the relevant licenses from both the central and regional governments.
- *Innovative dispute prevention mechanism*
 - South Korea's Office of Foreign Investment Ombudsman
 - Peru's State Coordination and Response System for Int'l Investment Disputes

Conclusions

- Indonesia has the potential to continue on to its growth path, but:
 - Soft infrastructure is as critical as hard infrastructure;
 - *Desentralisasi* needs to be further assessed and refined.

- As regards Indonesia's IIAs and *desentralisasi*:
 - Government can use Indonesia's IIAs to discipline regional governments and promote the rule of law;