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The Hidden Driver of Deforestation: Why Effecting Reform of Indonesia's Legal Framework is Critical to the Long-term Success of REDD+

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Front Cover Image: Wife and husband farmers Hasbulah Lubis, 44, (woman) and Rofiqoh Nasution, 35, harvest arabica coffee fruit from their coffee trees on recently deforested land in Pagar Gunung village near Batang Gadis National Park in Mandailing Natal, North Sumatra.

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THE HIDDEN DRIVER OF DEFORESTATION: WHY EFFECTING REFORM OF INDONESIA'S LEGAL FRAMEWORK IS CRITICAL TO THE LONG-TERM SUCCESS OF REDD+

ABSTRACT

In 2015, the state parties to the United Nations Framework Convention on Climate Change (UNFCCC) agreed a mechanism that could be deployed by developing country governments to create economic, social and environmental incentives to reduce greenhouse gas emissions through avoiding deforestation and forest degradation, called REDD+. Countries around the globe have commenced the process of implementing REDD+, including Indonesia. Indonesia introduced a dedicated REDD+ Agency, regulations on the topic, and made policy progress in key areas of REDD+. The legal and policy framework supporting REDD+ is, however, in a state of flux, after the legal and bureaucratic infrastructure put in place to support it was recalibrated following the election of President Joko Widodo in 2014. Given this uncertainty, this paper assess Indonesia's existing legal framework for REDD+ and outlines some legal strategies that could be implemented to revive the REDD+ policy process in Indonesia.

THE HIDDEN DRIVER OF DEFORESTATION: WHY EFFECTING REFORM OF INDONESIA'S LEGAL FRAMEWORK IS CRITICAL TO THE LONG-TERM SUCCESS OF REDD+

ARJUNA DIBLEY AND JOSI KHATARINA

Indonesia is a critically important country in the context of global climate change. The country's archipelagic character places it at great risk of suffering the damaging effect of rising sea levels, one of the impacts predicted to flow from increased global temperatures (Li, Rowley, Kostelnick, Braaten, Meisel and Hulbutta, 2009). Indonesia is also host to large tracts of tropical forests, which currently absorb globally significant amounts of carbon emissions (Perry, Oren and Hart, 2008). Indonesia thus has much to gain from slowing the effects of climate change, and could be a critically important country in mitigating the 'greenhouse effect'.

According to the Ministry of Forestry, Indonesia has around 130 million hectares of forest in 2011 (Indonesia. Ministry of Forestry, 2012: 5), making the country one of the most forested in the world. These forests, and the peatlands contained within them, are globally significant for a number of reasons, including because they house immense biodiversity and cultural diversity. They also store substantial amounts of carbon dioxide emissions. Indonesia's peatlands, for example, hold at least 57 billion tonnes of carbon, which is equivalent to about 140 times the country's annual carbon emissions (Page, Rieley and Banks, 2010). Indonesia's forests thus play a critical role in mitigating the greenhouse effect (Bazzaz, 1998).

Indonesia's forests also house much of the country's abundant natural resources central to its recent economic growth, including timber, coal, minerals and soil for agricultural uses. This places Indonesia's forests under immense pressure, as industry seeks to exploit the resources contained within them for energy and agricultural purposes. As a consequence, Indonesia has, on some estimates, the fastest rate of deforestation in the world, driven largely by the conversion of forests to monocultures for agricultural or other purposes.¹ As a consequence of this deforestation, land use in Indonesia is the country's largest source of emissions (at approximately 48 per cent), making Indonesia one of the largest emitters of carbon dioxide globally (Indonesia. Ministry of Environment, 2010).

1 Margono et al (2014: 730-31) argue that Indonesian deforestation rate in 2012 reached 840,000 Ha per year. This data was, however, contested by the Ministry of Forestry, which stated that, using their methodology, the rate was around 450,000 Ha/per annum, a reduction of around one million Ha from previous measurements. See Rhismawati, 2013 and Zamzami, 2013.

Indonesia is not unique in seeking to navigate between the competing demands of exploitation of natural resources for economic growth, and preserving forests to mitigate climate change. In fact it was as a consequence of two other developing countries, Papua New Guinea and Costa Rica, arguing in international climate change negotiations that it was unfair to place this burden on developing countries that the notion of REDD+ first emerged (UNFCCC, 2005). 'REDD+' stands for 'reducing emissions from deforestation and forest degradation, plus conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries'. It is a mechanism introduced under the United Nations Framework Convention on Climate Change (UNFCCC) and is intended to assist developing countries create economic incentives to keep forests standing by measuring the amount of carbon stored in forests and peatlands and creating tools by which they can receive payment for storing such carbon. If successful, it is intended that REDD+ will create an alternative market for forests to compete against existing markets that drive forest degradation and destruction.²

Indonesia, with its large tracts of tropical rainforest and fast deforestation rates, has much to potentially gain from an effective REDD+ scheme. For this reason the former government, led by President Susilo Bambang Yudhoyono (SBY), took several steps to promote REDD+ globally through the UNFCCC framework. This included making REDD+ a key part of the Conference of the Parties (COP) of the UNFCCC, which Indonesia hosted in Bali in 2007. The government of Indonesia also introduced a number of REDD+ regulations and institutions domestically. Despite these efforts, no coordinated and effective REDD+ policy framework yet exists in the country.

It is on this issue – understanding the reasons why a REDD+ framework in Indonesia remains an unrealised aspiration – that this paper focuses. It is a question that could be examined through a number of different lenses. There are a host of economic reasons that place REDD+ at odds with powerful economic interests in the country. Similarly, one could analyse the political dynamics that have led to the failure of REDD+, such as the relative lack of interest of current President Joko Widodo (Jokowi) regarding global environmental issues, as compared to SBY (Connelley, 2014). This paper, while acknowledging each of these economic and political factors, focuses on the legal conditions that currently limit REDD+ in Indonesia. In particular we assess the extent to which the current legal framework is consistent with UNFCCC rules on REDD+.

The paper starts by setting out some background to REDD+, including the rules that govern the mechanism under the UNFCCC and how countries are expected to introduce REDD+ into their policy frameworks. The second part of paper will argue that legal frameworks are important in the context of achieving REDD+, both to introduce

2 The benefits of REDD+ are also intended to be broader than carbon, and include protecting biodiversity, preventing land degradation, and protecting sites of social and cultural significance.

the legal norms that will facilitate REDD+ and because they determine the institutional settings which assist to implement those norms. The third part of the paper examines what Indonesia has done to date to introduce a REDD+ legal and policy frameworks. This is followed, in the fourth part, by an analysis of why legal framework reform is required to make REDD+ effective in Indonesia and, in the final part, about the ways in which such reform could be effected. Ultimately, this paper argues that legal frameworks are a cause of deforestation but must be part of the process used to implement REDD+ in the country.

1. UNFCCC REDD+ FRAMEWORK - A 'TOP-DOWN – BOTTOM-UP' MECHANISM FOR RESULTS-BASED PAYMENTS

The UNFCCC is the backbone of the international law regulatory framework on climate change. It sets broad conditions on climate adaptation and mitigation, the details of which are further elaborated in the decisions of annual COP meetings. COP decisions are not legally-binding treaties, and may be overturned and amended by future COP decisions. They do, however, represent unanimous positions of the UNFCCC parties and hence carry significant political authority (Wang and Wiser, 2002). Article 4(c) of the UNFCCC allows parties to develop 'practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases...in all relevant sectors, including the agriculture and forestry sectors'. On the basis of this UNFCCC mandate, numerous COPs since 2007 have considered and promulgated decisions on REDD+.

Warsaw Framework on REDD+: A Phased, Top-down – Bottom-up Mechanism

Indonesia is intimately entwined with the development of REDD+ in the UNFCCC. The first substantial COP decision on REDD+ was passed at the COP hosted by the government of Indonesia in Bali in 2007, and over the next six years further detailed texts were negotiated by the UNFCCC parties, until the 2013 COP in Warsaw, where the Warsaw Framework for REDD+ was agreed. With only a few outstanding technical matters to be resolved, a June 2015 meeting of the Subsidiary Body for Scientific and Technological Advice (SBSTA), a technical advisory body under the UNFCCC, formally closed off the agenda item on REDD+, bringing consideration of the REDD+ rules at an international level to a close.

The Warsaw Framework for REDD+ includes some basic principles for the process by which states should implement REDD+. These call on developing country governments to develop strategies for REDD+ implementation that mirror its prescriptions. National level governments are asked to establish REDD+ frameworks in a 'phased' approach, meaning that countries should first establish national strategies and action plans, then take steps to implement them.³ Ultimately, the end goal of the phased implementation

3 While the focus is on national governments, the rules do allow for progressive REDD+ implementation occurring initially at a sub-national level.

of REDD+ is to achieve a policy framework where countries can be paid for reducing carbon emissions through maintaining or increasing in forest stocks. This is referred to as 'results-based payments', and is discussed further below.⁴

The Warsaw Framework for REDD+ also set out some substantive elements which parties should include in their national strategies or action plans. For example, the rules call on countries' action plans to 'address drivers of deforestation'. This requirement is for countries to understand the drivers of deforestation and degradation and develop measures that could be established to prevent these. Drivers of deforestation can be proximate or direct causes, such as human activities that directly have an impact on forest cover and loss of carbon, agricultural expansion, infrastructure extension, and wood extraction (Kissinger, Herold and De Sy, 2012: 10, para 1). They could also be underlying or indirect causes of deforestation and forest degradation, which involve complex interactions of fundamental social, economic, political, legal and technological processes that are commonly distant from their area of impact (Kissinger, Herold and De Sy, 2012: 10, para 2). The REDD+ rules also call on countries to develop measures to 'safeguard' REDD+. This includes ensuring that REDD+ activities are transparent, that local communities have given free, prior and informed consent for such activities to take place, and that they do not affect indigenous peoples' land rights. Developed and decided at the COP in Cancun, these elements have come to be known as the 'Cancun Safeguards'.⁵

These COP decisions on REDD+ are high-level in nature, and they contemplate that states will take the basic principles and further develop detailed and prescriptive rules in a way consistent with their 'national circumstances'. In this way, the Warsaw Framework on REDD+ is a 'top-down' and 'bottom-up' mechanism. It allows states to build upon the non-binding international principles consistent with their national legal and policy frameworks. This contrasts, for example, with international human rights law principles which are more prescriptive in requiring states to take certain actions (Chapman, Wilder, Millar and Dibley, 2015, forthcoming).

4 See Chapman, Wilder, Millar and Dibley, 2015. There are useful summaries of the rules in Wilder, 2014.

5 Cancun Decision 1/CP.16, Annex 1/para 2.

Financing REDD+: From Projects, to Jurisdictional 'Readiness', to Results-based Payments

When the notion of REDD+ was first proposed to the UNFCCC, it was conceived of as a mechanism to be financed largely by market mechanisms. REDD+ activities, under this older conception, would be largely driven by individuals, NGOs, private companies, and some governments. These people and organisations would establish REDD+ projects in specific areas of forests over which they would generate carbon credits that would be bought and sold in global carbon markets. The UNFCCC would facilitate the production of such projects, in an approach not dissimilar to the Clean Development Mechanism. In this way, the early concept of REDD+ was focused on projects. As the UNFCCC REDD+ negotiations progressed, the concept shifted, however. Developing country parties raised concerns with the project-based approach to REDD+, arguing that such an approach would exclude local communities and countries from the benefits of REDD+, with project developers enjoying all of the benefits. REDD+, as conceived under the Warsaw Framework, is thus broader than projects. It instead focuses on states creating frameworks to facilitate REDD+ and to carry out REDD+ activities themselves. In this way, the rules are said to regulate REDD+ at a jurisdictional level (Chapman, Wilder, Millar and Dibley, 2015, forthcoming).

To support the phased implementation of this jurisdictional approach to REDD+, the COP decisions call on developing country parties to seek (and developed country parties are encouraged to provide), financing from a variety of sources, including from public, private, bilateral and multilateral and market-based sources (Chapman, Wilder, Millar and Dibley, 2015, forthcoming). One of the major types of REDD+ financing is for REDD+ 'readiness' or advance financing, provided for countries to set up jurisdictional policy frameworks for REDD+. It is anticipated that, in the long term, financing for REDD+ will not be focussed on 'readiness' but will instead be results-based, that is, payments would be made for proven emission reductions as a consequence of REDD+ policy frameworks (Streck and Costenbader, 2012). Despite public pledges for results-based payments for REDD+, the authors are not aware of any public finance having yet been disbursed on this basis anywhere in the world, and certainly not in Indonesia.⁶ The reason for this is, in part, because countries have not yet established the legal frameworks for REDD+ that would allow for such payments to be made with the certainty that they will achieve forest-based emission reductions.

6 We are, however, aware of private sector payments for results in one project for REDD+-like activities in Central Kalimantan, which generates voluntary emission reductions credits.

2. LEGAL FRAMEWORKS: CRITICAL FOR REDD+ IMPLEMENTATION

The notion of 'legal frameworks' for REDD+ is not included in the text of Warsaw Framework for REDD+. Nonetheless, it is widely acknowledged to be an important part of REDD+ implementation, for some of the reasons which we discuss in relation to Indonesia below.⁷ Commentators and scholars have, however, used the term in different ways to variously refer to a range of institutional structures, policy documents, laws and regulations both directly and indirectly relevant to the areas of public administration which relate to REDD+.

We consider 'legal frameworks' for REDD+ to be comprised of two elements. First, 'normative frameworks', which are the substantive legal norms necessary to convert the concept of REDD+ into an operational mechanism. This may include norms setting out how carbon in forests will be measured, how governments or others will be able to set aside forest areas for REDD+ purposes, and laws relating to the protection of forest dwelling communities in the context of REDD+ activities.

Equally important to the norms which comprise REDD+ is the 'institutional framework' that supports such norms and allows them to be effective, that is, the institutions and the rules that govern them, and which will give effect to the norms. This includes the rules governing the relationships between national and subnational governments, agencies and officials.

Developing an adequate legal framework for REDD+ in a country does not necessarily mean creating an entirely new set of REDD+ specific norms or institutions. On the contrary, the process should seek to build on a country's existing domestic policies, laws, institutional mandates and regulations, adding new norms and institutions to the extent they are not already contemplated under existing legal frameworks. In fact, because REDD+ is a concept that cuts across the way that land use is governed generally, it will cover forestry, as well as a number of areas of regulation, including laws on agrarian rights, environmental management, accountability measures related to the Cancun Safeguards, state revenue sharing between central and sub-national governments, and a plethora of natural resource – specific sectoral laws on mining, plantation estates and others.⁸ For this reason, when considering REDD+ legal framework reform, it is necessary to consider the existing legal framework in the context of which such reform will be made.

7 See Constenbader, 2009; Covington & Burling LLP and Baker & McKenzie, 2009; and Angelsen, 2009.

8 The term 'sectoral law' is used by several Indonesian legal experts. See, for example, Santosa, Khatarina and Assegaf, 2012: 178-205, 186.

3. REDD+ LEGAL FRAMEWORKS IN INDONESIA

The Indonesian government has made a substantial pledge to reduce its carbon emissions: a 29 per cent reduction from its 'business as usual' emission levels by 2030, a substantial part of which will come from reducing land use related emissions (Indonesia. Government, 2015). Given Indonesia's substantial emissions from forestry, the government has taken a number of steps to create a framework for REDD+.

Indonesia's REDD+ Legal Context

There is no direct reference to REDD+, climate change, forestry management or forestry in Indonesia's foundational legal document, its Constitution of 1945 (*Undang Undang Dasar 1945*). The Constitution does, however, contain a number of articles relevant to the way in which natural resources generally, and hence REDD+, are governed. Article 33(3) of the Constitution imposes the most significant aspect of land use regulation in Indonesia. It states that:

The earth and water and the natural resources (*kekayaan alam*)⁹ contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

While there has not been any determinative judicial decision specifically on the meaning of 'natural resources' in art 33(3), the Indonesian Constitutional Court has made comments in its deliberations (that is, not in the binding part of the decision, the *amar putusan*) that the 'forestry sector', including the use of 'forest products', does come within the meaning of 'natural resources'.¹⁰ Accordingly, art 33(3) does have a significant impact on the regulation of REDD+, as forests and 'forest products' (particularly carbon) are central.

On the basis of art 33 of the Constitution, various line ministries have taken responsibility for further regulating natural resources and land use. Relevantly, Law No 41 of 1999 on Forestry (Forestry Law), is the key statute regulating forests in Indonesia and is managed by the Ministry of Environment and Forestry (MOEF).¹¹ There are other Laws

9 The term *kekayaan alam* is used in the Constitution, rather than the term *sumberdaya alam*, both of which translate to English as 'natural resources'. There are subtle differences in meaning between the terms, and this was considered in the drafting of the Environmental Law. *Sumberdaya alam* is broader in scope and includes all natural resources, even where those natural resources do not have a direct benefit (or have been used for a benefit). For instance, fresh air could fall within *sumberdaya alam*. *Kekayaan alam*, by contrast, signifies natural resources that have an inherent value, which would include carbon and forests.

10 *Constitutional Court Decision No 35/PUU-X/2012, reviewing Law No 41 of 1999 on Forestry*, 3, 142.

11 Technically, it was the Ministry of Forestry that had control over forests. In 2015, the former

that regulate land use, including Law No 18 of 2004 on Plantation Estates, for example, which is supervised by the Ministry of Agriculture (MoA).

Existing REDD+ Project Regulations

Following the Bali COP, the MOEF took control of the regulation of REDD+, using its mandate to regulate forest areas and forest products. In particular, the MOEF passed the following regulations:

- Ministry of Forestry Regulation No 30 of 2009 on Reduction of Emissions from Deforestation and Forest Degradation Procedure;
- Ministry of Forestry Regulation No 36 of 2009 on Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests, as amended by Ministry of Forestry Regulation No 11 of 2013;¹²
- Ministry of Forestry Regulation No 68 of 2008 on the Establishment of Demonstration Activities for Reducing Carbon Emissions from Deforestation and Forest Degradation; and
- Ministry of Forestry Regulation No 20 of 2012 on the Management of Forest Carbon.¹³

These four Regulations will be together referred to as 'Existing Project Regulations'.

The Existing Project Regulations were largely created at a time when REDD+ was conceptualised by the UNFCCC and the international climate change community as a project-based activity, rather than under the current jurisdictional approach to REDD+. Accordingly, the regulations contemplate a licencing regime whereby individuals, companies, cooperatives, and other entities can carry out REDD+ like activities in forest areas. As a matter of law, these Existing Project Regulations remain in place but in

Ministry of Environment was merged with Ministry of Forestry, creating a single ministry governed by a single Minister. The institutional merger preoccupied the ministry for much of 2015 but the new structure has recently become more settled.

12 Amended by Ministry of Forestry Regulation No P.11/MENHUT-II/2013 and No 8/MENLHK-II/2015.

13 The Indonesian term *penyelenggaraan* has several English translations. The Ministry of Forestry use the translation 'Implementation of Forest Carbon' for the name of this regulation but, in fact, the regulation's scope is broader than implementation, and includes the scope of forest carbon activities, rules and procedures for applying for forest carbon licences and rules about financing. Accordingly, we think the better translation is 'Management of Forest Carbon', and so this is used throughout the paper.

practice they are rarely used,¹⁴ in part because there are few REDD+ projects operating in Indonesia but also for the reasons we discuss further below.

Forest Moratorium

The Indonesian government signed a Letter of Intent with the Kingdom of Norway on 26 May 2010 (LOI). This pledged USD1 billion¹⁵ to the Government of Indonesia for 'readiness' of REDD+ policy infrastructure in Indonesia and results-based payments for emissions reductions from forests.¹⁶ One of the conditions of the LOI was that the Indonesian government should issue a suspension of all new concessions with respect to the use of and conversion of peat land and forest areas until a REDD+ policy framework could be established and implemented.¹⁷ To this end, Presidential Instruction (*Instruksi Presiden*) No 10 of 2011 created a forest moratorium by suspending the grant of concession licences for logging and conversion of forests and peat lands for two years, up to 20 May 2011. As the relevant REDD+ infrastructure contemplated by the LOI had not been completed by 2011, the moratorium was extended until 2013, and has since been renewed twice, extending it until 2017.¹⁸

REDD+ Institutions

In addition to the moratorium, and the Existing Project Regulations, the Indonesian government under President SBY also introduced key institutions to coordinate REDD+. During his period of government, SBY used Presidential Regulations (*Peraturan Presiden*) to establish a number of national institutions to coordinate other line ministries. As mentioned, as REDD+ is cross-cutting, policy coordination is required to ensure consistent policy making. The diagram below maps out some of the key institutions under Indonesia's bureaucracy which are required to implement REDD+. President SBY established the Presidential Working Unit for Development Monitoring and Control

14 We are aware of only one project that has applied for a licence under Ministry of Forestry Regulation No 36 of 2009.

15 At a fixed exchange rate of 6 Norwegian Kroner to 1 US Dollar.

16 The vast majority of the financing was allocated for results-based payments, with some being set aside for readiness financing. After the Indonesian government dissolved the REDD+ Agency (see below), there was some speculation that the Norwegian financing would be withdrawn, as the dissolution of the REDD+ Agency constituted a breach of the LOI, but the funding pledge was still in place at the time of writing. See Parlina, 2015.

17 LOI, art VII (c) (i). Note that in practice a number of exceptions were made to this ban, including for the issuance of licences for REDD+ related activities.

18 Presidential Instruction No 8 of 2015 on the Suspension of the Provision of New Licences in Primary Forests and Peatlands, art 5.

(UKP4) by Presidential Regulation in 2009.¹⁹ It focused on the priority policy areas of interest of the President, and reported directly to him. For a time, UKP4 included within it a specialist REDD+ Taskforce to coordinate the various line ministries relevant for REDD+ (MOEF, MOA and others) and subnational governments.

19 Presidential Regulation No 54 of 2009 and subsequent amendments.

National

Sub-national

In 2013, SBY passed a new Presidential Regulation (No 62 of that year), establishing a REDD+ Agency (*Badan Pengelola REDD+*). The mandate of the REDD+ Agency was to coordinate the various ministries and national and sub-national government agencies involved in the administration of REDD+. To achieve this, the Regulation provides for the REDD+ Agency's Head to employ up to 60 professional staff, which he or she may organise into special teams.²⁰

Legally, the status of the REDD+ Agency was an issue of some contention, as it was not constituted in the same way as Indonesia's line ministries or coordinating ministries. This meant that line ministries were not comfortable with the Agency issuing licences for REDD+ or making policy. Instead, the Agency, and its Head, Heru Prasetyo, were given power to 'coordinate' national ministries and subnational Governments. It is not clear that Presidential Regulations can create 'coordinating' powers but the Agency relied on the direct reporting line between it and the President to progress its mandate using the political (as opposed to legal) influence it had as a result of being connected to the President's office.

Using its political power, the REDD+ Taskforce (and then the REDD+ Agency) were able to develop many of the policy frameworks required for REDD+ in Indonesia, including developing a National Strategy on REDD+, an approach for monitoring carbon emissions in forests, developing a safeguard policy and developing 'One Map', a crucial initiative to improve forest and peatland governance. One Map's purpose is to create a single map of land use concessions issued by various levels of government in Indonesia. This is an important tool for the issuance of land use rights, and one that is currently missing.

Presidential Elections of 2014

In late 2014, Indonesia held a presidential election, after which SBY completed his last term and was replaced with President Joko 'Jokowi' Widodo. Jokowi's campaign was characterised by, among other things, its focus on domestic policy issues and included a call to streamline the Indonesian bureaucracy (Lubke, 2014). As part of this commitment, Jokowi repealed some of the institutions set up by SBY under Presidential Regulations, including the REDD+ Agency. He also consolidated the then Ministry of Forestry and Ministry of Environment, into the single MOEF, and ordered the functions of the REDD+ Agency to be housed within that new consolidated ministry. A new Director General for Climate Change, Nur Masripatin,²¹ has been appointed in the MOEF, with responsibility for REDD+ (Sapariah, 2014). It remains unclear what of the existing work of the REDD+ Agency will be brought across to the MOEF, and how this will be done.

20 On 12 December 2013, President SBY issued a statement noting that Heru Prasetyo was to be the chairman of the REDD+ Agency. Prasetyo was previously Deputy I in the UKP4.

21 Nur Masripatin was formerly a Deputy Director of the REDD+ Agency.

The consolidation of institutions following Jokowi's election caused a hiatus in the development of REDD+ policy in Indonesia. The consolidation not only got rid of coordination activities being carried out by the REDD+ Agency but also removed the legal basis upon which the policy steps taken to date on REDD+ had been based.

4. THE NEED FOR A REDD+ LEGAL FRAMEWORK IN INDONESIA

As a result of all these changes, Indonesia is left today without a clear overarching legal framework for REDD+. There is, however, a great need to consider the law in developing a REDD+ policy framework for the country, for two key reasons. First, the existing approach to REDD+ regulation in Indonesia is normatively at odds with the agreed Warsaw Framework for REDD+. Secondly, the institutional framework currently in place in Indonesia will make it difficult for the goals of REDD+ to be realised in the country.

Normative Disconnect between Indonesian REDD+ Regulations and Warsaw Framework for REDD+

The REDD+ Agency's previous work on establishing a REDD+ National Strategy contained plans for a number of reforms in Indonesia's legal and policy frameworks, consistent with the Warsaw Framework for REDD+. As noted above, it is unclear what, if any, aspects of this National Strategy will continue to be developed in Indonesia. It is, therefore, not possible at present to analyse how Indonesia's policy on, and legal framework for, REDD+ compares to the Warsaw Framework for REDD+. It is possible, however, to assess how Indonesia's existing law compares to that framework.

As noted above, Indonesia retains some REDD+ norms through the Existing Project Regulations. There are substantial gaps in the norms contemplated by, and central to, the Warsaw Framework for REDD+ that are not covered by the Existing Project Regulations. Conceptually the Existing Project Regulations reflect the older notion of REDD+, that is, a project-based activity to be carried out - largely - by private individuals, NGOs and companies. The Existing Project Regulations establish a scheme for such entities to access a licence to carry out REDD+ activities in forest areas. As discussed above, this is no longer reflective of the new jurisdictional concept of REDD+ as determined by the Warsaw Framework for REDD+.

Additionally, the Existing Project Regulations assume that REDD+ will be financed by market mechanisms only. For instance, Ministry of Forestry Regulations Nos 30 of 2009 and 36 of 2009 were drafted on the assumption that a global or domestic 'compliance market' for carbon reductions will commence after 2012. What this means is that there will be an international or Indonesian (or regional) requirement for companies to offset their emissions through carbon credits. However, no such compliance market has yet been established in Indonesia or internationally, and it looks increasingly unlikely that it will, as REDD+ is being favoured as an activity implemented among states at the national level, rather than at project level.

Therefore, the Indonesian government will need to decide what approach it takes to its REDD+ regulatory framework. It will need to consider whether to maintain the project based approach to REDD+ set out in the Existing Project Regulations, take a jurisdictional approach, or somehow combine the two approaches.

Additionally, the Existing Project Regulations, drafted before the Warsaw Framework for REDD+ was completed, do not contain all important elements of REDD+.²² They do not, for example, require the strong protections of forest-dwelling communities contemplated in the Cancun Safeguards.

Institutional Reasons for REDD+ Reform

There are a number of reasons why legal reform for REDD+ is important from an institutional perspective. First, some of the institutional rules regarding the interaction between ministries, and between the national and subnational government, remain unsettled under Indonesian law. This lack of certainty has implications for, and, we argue, are a driver of, deforestation in Indonesia. Secondly, with the dissolution of the REDD+ Agency and the transfer of authority for REDD+ to the MOEF, Indonesia no longer has an overarching institution for coordinating across the sectors. Unfortunately, this is critical for a successful REDD+ regime.

Institutional factors driving deforestation

A great deal has been written about Indonesia's forestry institutions and the impact of poor governance regimes on deforestation.²³ In this section we do not intend to systematically set out the governance problems facing Indonesia's forestry regime but instead highlight, by using a historical example regarding decentralisation, how these institutional factors can be a cause of deforestation.

As part of the broader *Reformasi* movement, which followed the end the rule of President Soeharto in 1999, Indonesia went through a major process of decentralisation, giving governments greater autonomy and self-government powers. The consequence was that subnational governments were granted authority to regulate various aspects of land use related to planning and granting of concessions, as well as in relation to

22 It should be noted that the REDD+ Agency did substantially advance a policy framework for ensuring the Cancun Safeguards were protected under the national REDD+ program. The policy framework is called PRISAI (*Prinsip, Kriteria, Indikator Safeguards Indonesia*), and it was intended to be folded into the financing mechanism for REDD+ (called FREDDI), ensuring that no money would be disbursed for REDD+ activities, unless such activities met the safeguard principles. As noted above in text, given the REDD+ Agency has now been disbanded, it is not clear what status these policies continue to have. See, Indonesia. Government, 2015.

23 See Indrarto, Murharjanti, Khatarina, Pulungan, Ivalerina, Rahman, Prana, Resosudarmo and Muharrom, 2012; Springate-Baginski and Wollenberg, 2010; and Angelsen, 2008.

monitoring and enforcement.²⁴ This division of power between national and subnational governments added to the already complex landscape for natural resources governance in Indonesia, where different line ministries govern different aspects of land use. The problems with decentralisation and land use are, in part, driven by lack of clarity in the Indonesian law governing legal instruments (Resosudarmo, 2007).

During the broader *reformasi* process, Indonesia also passed several laws clarifying aspects of the legal system. It was during this period that the Indonesian Consultative Assembly (MPR) passed a Decree on Lawmaking, MPR Decree No III of 2000. The MPR, the highest legislative institution in Indonesia, was set up to promulgate the Constitution, appoint or dismiss the President and Vice President, and to form guidelines for the development of state policy. While the MPR still retains some of these roles under the Indonesian Constitution, it no longer holds law-making powers (Butt and Lindsey, 2012). Nonetheless its pre-existing decrees hold a higher authority than statutes and other regulations. The MPR Lawmaking Decree has since been supplemented by Law No 12 of 2011 on the Formation of Laws and Regulations (the Lawmaking Law).

24 It should be noted that recently the Law No 32 of 2004 on Local Government was replaced by Law No 23 of 2014 on Local Government. The current law recentralises management of forest, mining and fisheries.

INDONESIA'S LEGAL HIERARCHY (Law No 12/2011)

The Lawmaking Law sets out the legal instruments which can be used in the Indonesian legal system (see diagram above). They include the Constitution, the main legislative instrument, laws or statutes (*Undang Undang*), and a range of regulations, all the way down to regulations of municipal governments (these laws, and other subnational government laws, are referred to collectively as *Peraturan Daerah*, or Perda).

Article 7 of the Lawmaking Law states that lower level laws may not contradict a higher level law. Article 8 of the Act also states that apart from the legal instruments listed in the Lawmaking Law, there are other types of instruments that are legitimate if ordered or mandated by a higher level law based on the authority of an institution. On the basis of art 8, ministries issue Ministerial Regulations (*Peraturan Menteri*) in Indonesia; and the Existing Project Regulations fall within this category of legal instrument. It should be noted that prior to Indonesia enacting the Law on Lawmaking, the Indonesian bureaucracy always relied on lower level regulations, such as Presidential Decrees and Regulations, Ministerial Regulations, or Director General Regulations, to regulate many aspects of public policy. Ministerial Regulations are not, however, explicitly mentioned in the Lawmaking Law, and were not named in the MPR Lawmaking Decree, and hence,

as we discuss below, hold a relatively weak, even contentious, position in Indonesian law.

In 1999, the Ministry of Forestry issued a Ministerial Regulation as technical guidance in respect of Government Regulation (*Peraturan Pemerintah*) No 6 of 1999, which allowed the Municipal Government to issue small-scale forest concessions. The purpose of this power was to ensure that local authorities could make decisions about local and small scale forest uses. Local governments misused this power and issued forest concessions for firms in a manner that breached the law (Resosudarmo, 2007). In 2003, the Papuan Government, for example, had granted concessions to 44 private firms for a total of 11.8 million hectares (Resosudarmo, 2007). The Ministerial Regulation was eventually revoked in 2000, however subnational governments publicly rejected the Ministry of Forestry's direction to stop the issuance of licences (Resosudarmo, 2007). The subnational governments argued that the Ministerial Regulation used to revoke the technical guidance and order them to stop issuing concessions was not a recognised source of law (in part because it was not listed in the MPR Lawmaking Decree). Accordingly, such a regulation, they argued, could not be used to determine the way that municipal regulations or *Perda* are issued. They said that the Government Regulation that granted them the power to issue concessions had to be amended if the right was to be revoked. Ultimately, the Government Regulation was amended but some heads of local governments remain reluctant to give up their power (Resosudarmo, 2007).

Lack of clarity as to the status of legal instruments has contributed markedly to deforestation in Indonesia. Between 1999 and 2002, Indonesia experienced its highest rate of deforestation, reaching more than 3 million hectares of deforestation per annum. In practice the Ministry of Justice has taken the view that national level regulations, such as Ministerial Regulations, do have higher regulatory status over local government regulations because they have nation-wide effect.²⁵ Nonetheless, this is still an issue which arises frequently in respect of land use governance in Indonesia. For example, Municipal Governments have power to issue plantation licences including in forest areas. Due to conflicting norms between regulations in the forestry sector and the plantation sector, it is not clear which licence should be acquired first; a licence from MOEF to gain access to the forest area where the plantation is proposed to occur; or a licence from the Ministry of Plantations to conduct agricultural activities in that forest area (with the latter being a licence from the local government). As a result, a recent report issued by the MOEF has found that numerous plantation concessions have been issued in state forests by subnational governments without first securing the appropriate permit from the MOEF. The report showed that subnational governments have issued permits covering 5 million and 7 million hectares forest for plantation and

25 See for example, Hariningsih, 2009. Even though this discussion was based on the previous Law, it had similar issues to the current one, so it is still relevant.

mining, respectively, without following proper procedures.

This lack of clarity regarding institutional frameworks has an impact on driving deforestation in Indonesia, as this example of decentralisation has shown. The example has also shown how, in considering deforestation, it is important to consider the ways that different line ministries and subnational governments work together as part of ongoing national REDD+ efforts in Indonesia.

Need for institutional coordination

Given the cross-cutting nature of REDD+, it will be necessary for the full jurisdictional program of REDD+ to bind a variety of different ministries. The advantage of the former REDD+ Agency was that it sat above the different ministries and was able to work with each of them towards a single approach to REDD+ (see diagram above of bureaucracy relevant to REDD+). Under the current regime, the MOEF will be required to work closely with other ministries to create a coordinated regime. There are a number of political reasons why it may be challenging for a MOEF minister to encourage the ministers leading different ministries to support a unified policy on REDD+, but there are also some difficulties in achieving this from a legal perspective too. In particular, under the Lawmaking Law, ministries can only pass Ministerial Regulations.

Ministerial Regulations may be made in respect of a subject area and must be consistent with Laws which are managed by the ministry. Therefore, it is possible for the MOEF to pass Ministerial Regulations regarding forestry and the environment (provided they have a mandate to do so under a relevant Law). It is not possible, however, for the MOEF to pass Ministerial Regulations on public finance, a matter that is governed and managed by the Ministry of Finance (Presidential Regulation No 28 of 2015, art 4). This could create problems for the effectiveness of REDD+, where, to create a coordinated REDD+ regime, it will be necessary to have regulations on public finance, among other issues. For example, if Indonesia wanted to allow foreign governments or development banks to pay for the results of its REDD+ program (an approach that major public financiers, such as the Green Climate Fund, are contemplating),²⁶ then it would need to develop a regulatory framework to facilitate this process. The MOEF would not have the authority to promulgate such regulations, as they would need to regulate the flow of public finance into Indonesia. Thus the MOEF would need to request the Ministry of Finance to produce regulations on this topic. This would require a substantial level of coordination between the two ministries.

5. APPROACH TO EFFECTING REDD+ LEGAL REFORM IN INDONESIA

As set out above, there are substantial normative and institutional matters that ought to be the subject of legal reform in Indonesia, if it is to have an effective REDD+ regime

26 See, for example, Green Climate Fund, 2014.

consistent with the Warsaw Framework for REDD+. While some of the challenges we have outlined are significant, we think it is possible, as a matter of law, to address them. Of course, like any democracy in the world, the extent to which legal reform is possible is contingent on political support and favourable political dynamics to give effect to such reform. In this section, we set out a range of approaches for advancing REDD+ legal reform in Indonesia, ranging from most legally secure and most politically difficult, to the least legally secure but most politically feasible.

A Law on Climate Change or Natural Resources Management

From a legal perspective, the best way to introduce a REDD+ legal framework in Indonesia that is legally sound and consistent with the principles under the Warsaw Framework for REDD+ is by statute. This could be a Law on Climate Change or Natural Resources Management, incorporating REDD+ within its scope, and making provision for REDD+ to be further regulated through a Government Regulation.

Such a Law could deal with all of the issues noted above, introducing all the normative elements of REDD+ into the Indonesian legal system. This Law could, for example, explicitly repeal the Existing Project Regulations (that is, Ministry of Forestry Regulations Nos 36 of 2009, 30 of 2009, 20 of 2012, and 68 of 2008), and introduce a broadly worded chapter on REDD+ including, inter alia, regulation of the Cancun Safeguards and methods to measure carbon stocks. This could compel different line ministries and subnational governments to work together to give effect to a national REDD+ regime. The new Law could also empower a single body to regulate all aspects of REDD+, leading the effort to reform forest and peatland governance. In this way, the Law could create a new REDD+ Agency but, unlike the previous agency, which was constituted by Presidential Regulation, it should give the proper legal authority to the new agency to coordinate all the line ministries. Of course, as discussed earlier, the cross-cutting nature of the REDD+ would require that it have strong political support from the President.

A significant disadvantage of seeking to regulate REDD+ by a national Law is that the legislative process in Indonesia is cumbersome. For instance, in the first 11 months of its five-year term, the 2009-14 People's Representative Council (DPR) passed only six Laws. In 2010, it produced only 14 of the 70 Laws it had planned; in 2011 only 24 out of 93, even though 93 of them had been categorised as priorities; and in 2012, 32 bills were passed out of a total of 64 priority bills (Australia. Department of Foreign Affairs and Trade, 2014). The main reason for this slow legislative output is that the DPR is slowed by complicated lawmaking processes and procedures. There are also a number of political factors that are likely to slow the process of enacting a Law, including the fragmented nature of the current DPR and the numerous non-lawmaking tasks it has, which take up much of its time (Hukum Online, 2015). For example, Law No 8 of 2013 on the Prevention and Eradication of Forest Damage was initially submitted in 2002, meaning it took over a decade before it was enacted.

Government Regulation on REDD+ under Environmental Protection and Management Law

According to the Lawmaking Law, the purpose of Government Regulations is to implement national Laws. Government Regulations are issued in response to a specific delegation of power under Laws. Many national Laws specify that some form of lower-level regulatory instrument, such as a Government Regulation or Presidential Regulation, should provide that further regulation. Therefore to create a REDD+ Government Regulation would require a grant of power under national Law.

One possible source of power for a Government Regulation on REDD+ is through Law No 32 of 2009 on Environmental Protection and Management (Environmental Law). There are two potential grants of power under that Law. Firstly, art 63(1)(j) says that 'in protecting and managing the environment the government shall be authorised to stipulate and implement policies over control of climate change and protection of the ozone layer'. Secondly, art 57 says that 'preservation of the environment' shall be carried out, including 'conservation of the atmosphere', and provides authority to the government to pass a Government Regulation for such a process.²⁷ These grants of power would be broad enough to pass a further regulation on REDD+.

A substantial limitation with grants of power under both art 63(1) (j) and art 57 of the Environmental Law would be that they do not explicitly allow any such Government Regulation to apply cross-sectorally. This means that the Government Regulation could possibly be ignored if it sought to regulate matters beyond the realm of the MOEF. For example if there is a need to harmonise forestry and plantation regulations (meaning amendments of each of the relevant regulations), a Government Regulation on REDD+ would not be enough to 'force' the Ministry of Agriculture to make such changes. Another limitation is that Government Regulations cannot introduce criminal sanctions, and hence it would not be possible to include any offences in the regulation.²⁸ This is relevant for REDD+, because to protect the long term permanence of REDD+ forests, policymakers may want to 'criminalise' actions that are damaging to forests or REDD+.

27 Law No 32 of 2009 on Environmental Protection and Management, art 57(5).

28 The Law No 12 of 2011 on Law Making (art 15) prevents Government Regulations introducing criminal sanctions. Note, however, that, in practice, additional criminal sanctions for REDD+ may not be required, given the expansive scope of Law No 8 of 2013 on the Prevention and Eradication of Forest Damage.

Ministerial Regulation and Joint Regulations on REDD+

As discussed above, the main legal instrument available to the MOEF to give effect to REDD+ is a Ministerial Regulation. These regulations provide significant flexibility for Ministries and, provided its subject falls within the scope of the Ministry, can include norms that apply nationally.

A key disadvantage of Ministerial Regulations in relation to the regulation of REDD+ is that such legal instruments are confined to the ambit of the ministry under which they are promulgated. Ministries can promulgate Joint Regulations (*Peraturan Bersama*) (formerly known as Joint Decisions, or *Surat Keputusan Bersama* - SKB). These Joint Regulations sit at the same level as Ministerial Regulations, and are formed by each of the relevant Ministries enacting (and signing) the same Ministerial Regulation.²⁹ There are two approaches for this. The first is a top-down approach, that is, when a 'higher' power, such as the President, directs Ministers to coordinate in respect of a particular matter by using a Joint Regulation. The second approach is to create a Joint Regulation from the bottom-up, that is, Ministers themselves elect to promulgate a Joint Regulation with other Ministries.³⁰ In order to create a Joint Regulation, Ministers would need to rely upon higher-level legal authority (found under, for example, a Law or a Government Regulation) to further regulate an area of law. Such higher legal authority would only need to give power to the Ministry to create further regulations and would not need to specifically require the Ministry to create a 'Joint Regulation'. There are some Joint Regulations that employ this approach.³¹ While it would be possible to create a REDD+ legal framework through Joint Regulations, it may be a politically-taxing exercise, requiring substantial commitment from the minister in charge of the MOEF to help advance the REDD+ agenda.

29 For instance, the Joint Regulation of the Minister of Forestry and Minister of Finance on the Management of the Reforestation Fund within the Forest Development Account (Joint Regulation on the Reforestation Fund) is enacted by way of Ministry of Finance Regulation No 04/PMK.02/2012 and Ministry of Forestry Regulation No PB.1/MENHUT-II/2011.

30 Arguably a Minister's power to enact Joint Regulations in such cases arises under Law No 39 of 2008 on State Ministries. Under art 4(2), Ministers are in charge of 'certain affairs' (including environmental matters) including 'coordinating and synchronising the program of the government'. Under art 6, the coordination responsibility of Ministers is not exclusively restricted to his/her own ministry itself. Coupled with the power for Ministries to create Ministerial Regulations, this empowers the passage of Joint Regulations.

31 For instance, Joint Regulation of the Minister of Defence and the Minister of Finance on State Budget Implementation Mechanisms in the Ministry of Defence and the Indonesian Armed Forces, with Ministry of Defence Regulation No 15 of 2013 and Ministry of Finance No 67/PMK.05/2013, states that its source of power is art 7 (2) of Law No 1 of 2004 on the State Budget which gives the Ministry of Finance power to create laws on the State budget but does not specifically state that a Joint Regulation with the Ministry of Defence is required.

Also, from a legal perspective (and as discussed above), as Ministerial Regulations do not explicitly appear on the hierarchy of laws, their ability to trump Perda, or other types of laws not listed on the hierarchy (such as Presidential Instructions), is sometimes questioned in practice. Additionally (and specifically in relation to Joint Regulations), because such legal instruments do not appear on the hierarchy, it is possible for Ministries to simply dishonour them, or decide to remove themselves from Joint Regulations. In sum, a REDD+ legal framework constituted by a series of Ministerial Regulations and Joint Regulations would be the quickest to achieve and, although politically difficult, it may be easier than passing a new Law. Reform under this approach would, however, be legally weak.

6. CONCLUSIONS

Indonesia has been a major contributor to REDD+ internationally, reflecting the potentially significant role that the country could play in mitigating global carbon emissions through avoided deforestation. Through the efforts of Indonesia and other UNFCCC parties, the Warsaw Framework for REDD+ is now housed in a number of COP decisions, setting out high-level principles which are to be turned into domestic policy frameworks on REDD+. Ultimately, the goal of the Warsaw Framework on REDD+ is to create a regime by which developing countries can receive results-based payments for their REDD+ activities. As we have shown in this paper, in order to do so, Indonesia, among other countries, will need to put considerable effort into reforming its existing legal frameworks to accommodate REDD+.

In thinking about legal frameworks in this paper, we have separated ‘normative’ elements and ‘institutional’ elements. The former refers to the legal norms required to give effect to the principles in the Warsaw Framework for REDD+. The latter are the rules and institutions facilitating the REDD+ norms. While Indonesia acted early to pass regulations - the Existing Project Regulations - on REDD+ from 2008, these regulations are now at odds with some of the key principles under the Warsaw Framework for REDD+, including areas critical to that international regime, such as the Cancun Safeguards.

From an institutional perspective, Indonesia took some impressive early steps creating a REDD+ Taskforce and then the REDD+ Agency in 2013, reporting directly to the then-President, SBY. The shift of presidential leadership to President Jokowi has, however, brought with it a partial unwinding of the progress the REDD+ Agency had made, pushing the management of REDD+ back into the MOEF. While this approach may prove to be effective (it is still too early to tell), we see a number of challenges to the ability of the ministry to effectively regulate such a complex and cross-sectoral issues such as REDD+. This is particularly because it will be confined to Ministerial Regulations or Joint Regulations in effecting a national REDD+ policy.

In addition to better aligning the normative and institutional elements of Indonesia’s legal regime to the Warsaw Framework for REDD+, we have argued that legal reform

is required for REDD+ in Indonesia because existing laws facilitate deforestation. Firms who have an economic interest in activities requiring deforestation have taken advantage of the segmented nature of the national institutions governing land use in Indonesia, the country's decentralisation policy, and a lack of clarity regarding the hierarchy of laws. Sadly, they have gained access to concessions to use forest areas in an unstructured and unplanned way. Indonesia's forest governance regime has thus been the cause of deforestation itself, rather than a means by which deforestation can be brought under control.

The issues we have highlighted in this paper are substantial, and will require a long term commitment by the government of Indonesia. From a legal perspective, the government could address many of the issues we have highlighted in this paper with a new Law on climate change or natural resources management that includes a section on REDD+. Appreciating the political complexities of creating such a new Law in the current political climate, we have also proposed two other approaches. First, a Government Regulation on REDD+, using the existing powers of the Environmental Law; or, second, a series of Ministerial Regulations and Joint Regulations issued by various ministries. These latter approaches, while more expedient, each have their own drawbacks but they may provide a regulatory solution to developing a legal framework to support an effective REDD+ regime in Indonesia. Given Indonesia's important role in climate change mitigation globally, we think that more attention ought to be paid to this issue, as a matter of urgency.

REFERENCES

- Angelsen, Arild (2008) *Moving Ahead with REDD*. Bogor: Center for International Forestry Research (CIFOR).
- Angelsen, Arild (ed) (2009) *Realising REDD+: National Strategy and Policy Options*. Bogor: Center for International Forestry Research (CIFOR).
- Australia. Department of Foreign Affairs and Trade (2014) 'Stocktaking Research Initiatives of Development Organizations to Work with Parliamentarians in Indonesia', 14 February <<https://dfat.gov.au>>.
- Bazzaz, Fakhri (1998) 'Tropical Forests in a Future Climate: Changes in Biological Diversity and Impact on the Global Carbon Cycle', in Adam Markham (ed), *Potential Impacts of Climate Change on Tropical Forest Ecosystems*. Berlin, Heidelberg, New York: Springer, 177-96.
- Butt, Simon and Lindsey, Tim (2012) *The Constitution of Indonesia: A Contextual Analysis*. Oxford and Portland, Oregon: Bloomsbury Publishing, 29 August.
- Chapman, Sophie; Wilder, Martijn; Millar, Ilona; and Dibley, Arjuna (2015) *Implementing REDD+ Under the UNFCCC: Basic Requirements and Guidance for Developing National Policy and Legal Frameworks*. Sydney: Baker and McKenzie.
- Chapman, Sophie; Wilder, Martijn; Millar, Ilona; and Dibley, Arjuna (2015, forthcoming) 'Implementing REDD+ under the UNFCCC: Basic Requirements and Guidance for Developing National Policy and Legal Frameworks', 9(2) *Climate and Carbon Law Review* 101.
- Connelley, Aaron L (2014) 'Indonesian Foreign Policy under President Jokowi', Policy Analysis, Lowy Institute for International Affairs, 16 October.
- Constenbader, John (ed) (2009) *Legal Frameworks for REDD: Design and Implementation at the National Level* (Bonn: International Union for Conservation of Nature, 2009).
- Covington & Burling LLP and Baker & McKenzie (2009) *Background Analysis of REDD Regulatory Frameworks* (Report prepared for The Terrestrial Carbon Group and UN-REDD Programme: May).
- Green Climate Fund (2014) 'Initial Logic Model and Performance Measurement Framework for REDD+ Results-based Payments', 17 October, UN Doc No. GCF/B.08/08/Rev.01 17 October.
- Hukum Online (2015) 'PSHK Kritik Kinerja Legislasi DPR', 18 May <www.hukumonline.com>.
- Ina Parlina (2015) 'RI-Norway Agree to Continue REDD+', *The Jakarta Post*, 15 April, <www.thejakartapost.com>.

- Indonesia. Government (2014) 'Submission by Indonesia on Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks (REDD+) in Developing Countries (Issues Relating to Safeguards)', 24 September <<http://www4.unfccc.int/>>.
- Indonesia. Government (2015) 'Intended Nationally Determined Contribution of the Republic of Indonesia', 24 September <<http://www4.unfccc.int/>>.
- Indonesia. Ministry of Environment (2010) 'Indonesia Second National Communication under the United Nations Framework Convention on Climate Change', November, Jakarta <http://unfccc.int/files/national_reports/>.
- Indonesia. Ministry of Forestry (2012) 'Forestry Statistics of Indonesia – 2011' <www.dephut.go.id/uploads/files/Statistik_kehutan_2011.pdf>.
- Indrarto, Giorgio; Murharjanti, Prayekti; Khatarina, Josi; Pulungan, Irvan; Ivalerina, Feby; Rahman, Justitia; Prana, Muhar; Resosudarmo, Ida; and Muharrom, Efrian (2012) 'The context of REDD+ in Indonesia', Working Paper No 92. Bogor: Center for International Forestry Research.
- Kissinger, Gabrielle; Herold, Martin; and De Sy, Veronique (2012) *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers*, August. Vancouver, Canada: Lexeme Consulting.
- Li, Xingong; Rowley, Rex; Kostelnick, John; Braaten, David; Meisel, Joshua; and Hulbutta, Kalonie (2009) 'GIS Analysis of Global Impacts from Sea Level Rise', 75(7) *Photogrammetric Engineering and Remote Sensing* 807.
- Lubke, Christian Von (2014) 'Maverick Mayor to Presidential Hopeful', 115 *Inside Indonesia*, January-March <www.insideindonesia.org>.
- Margono, Belinda Arunarwati; Potapov, Peter V; Turubanova, Svetlana; Stolle, Fred; and Hansen, Matthew C (2014) 'Primary Forest Cover Loss in Indonesia over 2002 – 2012' (2014) 4 *Nature Climate Change*, August.
- Page, Susan; Rieley, John; and Banks, Christopher (2010) 'Global and Regional Importance of the Tropical Peatland Carbon Pool', 17(2) *Global Change Biology* 798.
- Perry, David; Oren, Ram; and Hart, Stephen (2008) *Forest Ecosystems*, 2nd edition. Baltimore, Maryland: John Hopkins University Press.
- Resosudarmo, Budy (2007) 'Has Indonesia's Decentralization Led to Improved Forestry Governance?', PhD Thesis, The Australian National University.
- Rhismawati, Ni Luh (2013) 'Deforestasi Berhasil Ditekan, Kata Menteri Kehutanan' *Antara New.com*, 26 June <www.antaranews.com>.

- Santosa, MA; Khatarina, J; and Assegaf, RiS (2012) 'Indonesia', in R Lord QC et al (eds), *Climate Change Liability: Transnational Law and Practice*. Cambridge: Cambridge University Press.
- Sapariah, Satri (2014) 'Merging of Indonesia's Forestry and Environment Ministries Continues with Inauguration Event', *Ecosystem Marketplace* <www.ecosystemmarketplace.com>.
- Springate-Baginski, Oliver and Wollenberg, Eva (2010) 'REDD, Forest Governance and Rural Livelihoods: The Emerging Agenda'. Bogor: Center for International Forestry Research.
- Sri Hariningsih (Speaker III) (2009) 'Kedudukan Peraturan Menteri, Keputusan Menteri, Surat Edaran, dan Instruksi Presiden Dalam Sistem Hukum Negara Kesatuan Republik Indonesia', presentation by Officials from MoJ in a seminar in Ternate, North Maluku, 28 April–1 May <<http://luk.staff.ugm.ac.id/atur/NotulaMalut.pdf>>.
- Streck, Charlotte and Costenbader, John (2012) 'Standards for Results-Based REDD+ Finance: Overview and Design Parameters', November. Climate Focus <www.climatefocus.com>.
- UNFCCC (United Nations Framework Convention on Climate Change) (2005) 'Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action', submissions to UNFCCC from the Governments of Papua New Guinea and Costa Rica, UN Doc FCCC/CP/2005/MISC.1.
- Wang, Xueman and Wiser, Glenn (2002) 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol', 11(2) *Review of European Community and International Environmental Law* 181.
- Wilder, Martijn (2014) *The Consolidated Guide to the REDD+ Rules under the UNFCCC*, November. Baker and McKenzie <www.bakermckenzie.com/reddrulebook>.
- Zamzami (2014) 'Inilah Bukti Kerusakan Hutan di Riau', *Mongabay*, 20 July <www.mongabay.co.id>.

LEGISLATION

- Joint Regulation of the Minister of Defence and the Minister of Finance on State Budget Implementation Mechanisms in the Ministry of Defence and the Indonesian Armed Forces, with Ministry of Defence Regulation No 15 of 2013 and Ministry of Finance No 67/PMK.05/2013

Joint Regulation of the Minister of Forestry and Minister of Finance on the Management of the Reforestation Fund within the Forest Development Account (Joint Regulation on the Reforestation Fund), enacted through Ministry of Finance Regulation No 04/PMK.02/2012 and Ministry of Forestry Regulation No PB.1/MENHUT-II/2011

Law No 41 of 1999 on Forestry

Law No 1 of 2004 on the State Budget

Law No 18 of 2004 on Plantation Estates

Law No 32 of 2004 on Local Government

Law No 39 of 2008 on State Ministries

Law No 32 of 2009 on Environmental Protection and Management (Environmental Law)

Law No 12 of 2011 on the Formation of Laws and Regulations

Law No 8 of 2013 on the Prevention and Eradication of Forest Damage

Law No 23 of 2013 on State Budget of the Fiscal Year 2014

Law No 23 of 2014 on Local Government

Letter of Intent with the Kingdom of Norway (LOI)

Ministry of Forestry Regulation No 30 of 2009 on Reduction of Emissions from Deforestation and Forest Degradation Procedure

Ministry of Forestry Regulation No 36 of 2009 on Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests

Ministry of Forestry Regulation No 68 of 2008 on the Establishment of Demonstration Activities for Reducing Carbon Emissions from Deforestation and Forest Degradation

Ministry of Forestry Regulation No 20 of 2012 on the Management of Forest Carbon

Ministry of Forestry Regulation No 11 of 2013 on the Changes to the Minister of Forestry Regulation No P36/Menhut-II/2009 on Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests

Ministry of Forestry Regulation No 8/MENLHK-II/2015 on the Second Amendment of the Minister of Forestry Regulation No 36 of 2009 on Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests

Presidential Instruction No 8 of 2015 on the Suspension of the Provision of New Licences in Primary Forests and Peatlands

Presidential Regulation No 54 of 2009

Presidential Regulation No 28 of 2015

CASES AND COURT DECISIONS

Constitutional Court Decision No 35/PUU-X/2012, reviewing Law No 41 of 1999 on Forestry

United Nations. Framework Convention on Climate Change. Decision I/CP. 16 (Cancun Decision), 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', 15 March 2011.

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