

## THE PROGRESS ON GOVERNING REDD+ IN INDONESIA



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*Indonesia is one of the ten most forest-rich countries in the world. Almost 70 per cent of Indonesia's mainland is covered with forest. However, Indonesia faces one of the highest rates of forest loss in the world. Deforestation and forest degradation accounts for more than 60 per cent of carbon emissions in Indonesia. Being aware of that fact and the danger of climate change, in October 2009, Indonesia voluntarily committed to reduce emissions by 26 per cent from business as usual by 2020 through national efforts, and by 41 per cent with international support. Indonesia's commitment has gained international support; chiefly from Norway, which signed a Letter of Intent on 26 May 2010.*

*To formalise the commitment, Presidential Decree No 19/2010 on Task Force for the preparation of REDD+ Agency and Presidential Instruction No 10/2011 on moratorium on new licenses and improvement of natural primary forest and peat land governance have been issued. The Presidential Decree ended on 30 June 2011 and was continued by Presidential Decree No 25/2011, which was later amended by Presidential Decree No 05/2013. The third Presidential Decree will conclude in the middle of 2013. The expected outputs are: establishment of a New REDD+ agency; measurement, reporting and verification instrument; funding instrument; improvement on forest governance, including legislative reform, law enforcement and administrative procedures; and gazetting forest areas and consolidating licenses through legal audit and legal compliance or legal due diligence in the pilot province. The new REDD+ Agency is expected to be established in 2013. The Agency will be an independent central agency, directly responsible to the President of the Republic of Indonesia, and will be responsible for leading and coordinating the national effort to reduce the country's carbon emission.*

### Background

Indonesia has a significant role to play in reducing carbon emissions from forests and peatlands, not only because of the size of these areas in the country, but also because the rate of degradation of the two important ecosystem is worrying.

Indonesia's forest areas cover more than 130 million ha,<sup>1</sup> or around 70 per cent of the land area, making Indonesia one of the countries with the most rainforest cover in the world. From 2003 to 2006, the rate of deforestation was around 1.17 million ha/year. From 2009 to 2011, the Indonesian Ministry of Forestry declared that the rate of deforestation reduced to 0.45 million ha/year.<sup>2</sup> The rate of deforestation in Indonesia, therefore, shows signs of decreasing, but it is still alarmingly high.

<sup>1</sup> Ministry of Forestry, *Forestry Statistics of Indonesia*, 2011.

<sup>2</sup> Minister of Forestry, *Ministry of Forestry Regulation No P.37/Menhut-II/2012 on Ministry Forestry Working Plan 2013*.



In the 1990s, both Indonesia and Brazil had the highest net loss of forest in the world.<sup>3</sup> A significant cause of forest loss in Indonesia was influenced by the El Niño Southern Oscillation in 1997-1998, when severe fires burnt over 9.7 million ha of the country's forests. This forest grew on peatlands and, in terms of carbon emissions, made the impact on greenhouse gas (GHG) emissions worse.<sup>4</sup> Peatlands contain more carbon than forests do.<sup>5</sup> Indonesia has around 21 million ha of peatlands (around 83% of Southeast Asia's peatlands), with 42 per cent containing peat greater than two meters deep.<sup>6</sup> Activities under the land use, land-use change and forestry (LULUCF) inventory sector include peat fires as the largest contributor to GHG emissions in Indonesia. Such fires contribute around 60 per cent of total national GHG emissions.<sup>7</sup> Interest in introducing REDD+ (Reducing Emissions from Deforestation and Forest Degradation Plus) projects in Indonesia is high. Implementing REDD+ has become one of the most popular plans to help meet Indonesia's commitment to voluntarily reduce emissions by 2020 from business as usual levels by 26 per cent using domestic efforts and up to 41 per cent with international assistance.

Emissions from deforestation as well as from forests and peatland degradation are basically triggered by governance issues such as ineffective spatial planning, poor tenure rules, ineffective forest management regimes and poor law enforcement.<sup>8</sup>

The national strategy of REDD+ in Indonesia has two main foci: enhancement of forest and peatland governance and development of the infrastructure of REDD+. Infrastructure development includes the establishment of the REDD+ Agency; a funding instrument; and a measurement, reporting and verification (MRV) institution. This paper will discuss both foci with emphasis on the first aspect of providing forest and peatland governance. The first section of this paper provides the background to the REDD+ issue in Indonesia. The second section discusses the Indonesian laws and policies framework that support REDD+, and is followed by an explanation of the development of REDD+ infrastructures. The paper concludes with an outline of the program to enhance forest and peatland governance and its progress.

## Laws and policies framework to support REDD+

### Gol commitment, Lol and REDD+ Task Force

Preparation for the institutionalisation of REDD+ in Indonesia was expedited when the Indonesian President committed the Indonesian Government (Government of the Republic of Indonesia (Gol)) to emissions reduction measures at the G-20 Summit in Pittsburgh in 2009.

We are devising an energy mix policy including LULUCF (Land Use, Land Use Change, and Forestry) that will reduce our emissions by 26 per cent by 2020 from BAU (Business As Usual). With international support, we are confident that we can reduce emissions by as much as 41 per cent. This target is entirely achievable because most of our emissions come from forest related issues, such as forest fires and deforestation.<sup>9</sup>

This commitment invited support from various parties. The Government of the Kingdom of Norway (Norway) provided a Letter of Intent (Lol) in 2010 through which Indonesia receives support from Norway to prepare institutions and rules for the implementation of REDD+ schemes.

<sup>3</sup> Food and Agriculture Organization of the United States, *Global Forest Resources Assessment*, 2010.

<sup>4</sup> G Applegate et al, 'Forest Fires in Indonesia: Impacts and Solutions' (CIFOR and ISEAS, 2002).

<sup>5</sup> Kevin Black and Gerhard Gallagher, *The Greenhouse Gas Balance of Peatland Forest* (Coford Connects, 2010) <<http://www.woodenergy.ie/media/woodenergy/content/publicationsreports/The%20greenhouse%20gas%20balance%20of%20peatland%20forest.pdf>>.

<sup>6</sup> A Hooijer et al, 'Peat-CO<sub>2</sub>: Assessment of CO<sub>2</sub> Emissions from Drained Peatlands in SE Asia' (Delft Hydraulics report Q3943/2006, 2006). See also, Wahyunto and I Nyoman N Suryadiputra, 'Peatland Distribution in Sumatra and Kalimantan - Explanation of its Data Sets Including Source Information, Accuracy, Data Constraints and Gaps' (Wetlands International, 2008) <<http://www.wetlands.or.id/PDF/Atlas%20Review.pdf>>.

<sup>7</sup> Rizaldi Boer et al, 'Indonesia Second National Communication Under the United Nations Framework Convention on Climate Change' (Ministry of Environment, November 2010) <[http://unfccc.int/files/national\\_reports/non-annex\\_i\\_natcom/submitted\\_natcom/application/pdf/indonesia\\_snc.pdf](http://unfccc.int/files/national_reports/non-annex_i_natcom/submitted_natcom/application/pdf/indonesia_snc.pdf)>.

<sup>8</sup> REDD+ Task Force, 'Draft REDD+ National Strategy' (Jakarta, Indonesia, 2011) <[http://www.ukp.go.id/informasi-publik/cat\\_view/21-redd](http://www.ukp.go.id/informasi-publik/cat_view/21-redd)>; See also, UNDP and UN-REDD+ Programme, *Participatory Governance Assessment: The 2012 Indonesia Forest, Land and REDD+ Governance Index* (UNDP Indonesia, 2013) <[http://www.unredd.net/index.php?option=com\\_docman&task=cat\\_view&gid=3004&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=3004&Itemid=53)>.

<sup>9</sup> Susilo Bambang Yudhoyono, 'Intervention by H E Dr Susilo Bambang Yudhoyono President of the Republic of Indonesia on Climate Change' (Intervention at the G-20 Leaders Summit, Pittsburgh, US, 25 September 2009) <<http://forestclimatecenter.org/files/2009-09-25%20Intervention%20by%20President%20SBY%20on%20Climate%20Change%20at%20the%20G-20%20Leaders%20Summit.pdf>>.



Responding to Norway's support, the Indonesian Government issued *Presidential Decree No 19/2010 on the Establishment of the Task Force for the Preparation of a REDD+ Agency*. The Task Force's term ended on 30 June 2011. The results of this first REDD+ Task Force include the *REDD+ National Strategy, Presidential Instruction No. 10/2011 on Suspension of New Licenses and Improving Governance of Primary Forest and Peatland* ('*Presidential Instruction on Moratorium Phase I*'), and the selection and preparation of Central Kalimantan as a pilot province for a REDD+ program in Indonesia. *Presidential Decree No 25/2011*, which was then amended by *Presidential Decree No 5/2013 on the New Task Force*. This ended on 30 June 2013. The mandate for the new Task Force was to establish a REDD+ agency; a funding instrument; and a measurement, reporting and verification (MRV) institution; as well as to oversee the implementation of *Presidential Instruction on Moratorium Phase I*, which was the basis of the Task Force initiatives to develop and coordinate programs to improve forest and peatland governance.

### The national action plan to reduce GHGs emission

Following the Indonesian President's commitment in Pittsburgh, *Presidential Regulation No 61/2011 on National Action Plan to Reduce Green House Gasses (GHGs) Emission* ('*Presidential Regulation on GHGs Reduction*') was enacted. The *Presidential Regulation on GHGs Reduction* serves as a guideline for ministries, institutional agencies and regional governments to conduct planning, implementation, monitoring and evaluation in order to reduce emissions. The *Presidential Regulation* has two action-plan annexes that detail the targets and strategies to reduce emissions in five main sectors: agriculture, forests and peatlands, energy and transportation, industry, and waste management. The first annex discusses the main action plan and the second one provides details of the supporting action plan. The program to establish REDD+ institutionalisation, the REDD+ national strategy, and the establishment of the MRV and funding instrument are specifically dealt with in the second annex.

The *Presidential Regulation on GHGs Reduction* required all provinces to have a provincial action plan to reduce GHGs by 20 September 2012. To date, most provinces have complied.<sup>10</sup>

### Presidential instructions on suspension of new licenses

On 20 May 2011, the President of Indonesia, Susilo Bambang Yudhoyono, issued *Presidential Instruction on Moratorium Phase 1*, which basically ordered relevant authorities to suspend new licenses/permits/concessions as shown on the *Indicative Map on Suspension of New License (Peta Indikatif Penundaan Izin Baru ('PIPIB'))*. The areas included in the *PIPIB* are primary natural forests and peatlands located both within and outside of forest areas that have not previously been given licenses/permits/concessions. *Presidential Instruction on Moratorium Phase 1* is part of the agreement between Gol and Norway based on the Lol signed by both parties on 26 May 2010. This is not the first forest moratorium policy issued by Gol. A previous moratorium has been established in Aceh Province and Riau Province. However, the moratorium imposed by *Presidential Instruction on Moratorium Phase 1* received widespread attention because it applied nationally and acknowledged the need to improve governance of forests and peatlands.

The issue of *Presidential Instruction on Moratorium Phase 1* is also important in the context of preparations for the implementation of REDD+. It accelerates the development of the REDD+ infrastructure as well as demonstrating that efforts to improve governance of forests and peatlands is being given priority. Moreover, the *Instruction* has encouraged ministries and institutions to develop actions and programs to improve forests and peatlands governance, such as through the One Map Initiative/Movement (this Initiative is explained further below).

The *Presidential Instruction on Moratorium Phase 1* has mandated the Presidential Delivery Unit on Development Oversight and Monitoring (*Unit Kerja Presiden Bidang Pengawasan dan Pengendalian Pembangunan* or UKP4)/REDD+ Task Force to supervise actions taken by relevant ministries and heads of regional governments. To emphasise the priority status of the governance issues, the President has extended the moratorium for a further two years by issuing *Presidential Instruction No 6/2013 on Suspension of New Licences and Improving Governance of Primary Forest and Peatland*.

<sup>10</sup> By 19 December 2012, 27 Provinces had issued their *Provincial Action Plan to Reduce GHG*, see, *Jurnas.com*, *27 Provinsi Rampungkan Rencana Aksi Penurunan Emisi GRK* (19 December 2012) <[http://www.jurnas.com/news/78569/27\\_Provinsi\\_Rampungkan\\_Rencana\\_Aksi\\_Penurunan\\_Emisi\\_GRK/1/Sosial\\_Budaya/Lingkungan](http://www.jurnas.com/news/78569/27_Provinsi_Rampungkan_Rencana_Aksi_Penurunan_Emisi_GRK/1/Sosial_Budaya/Lingkungan)>.



## Beyond carbon: The national strategy on REDD+

'Beyond carbon towards governance of forest and peatland that benefits public in the current and next generation' is the message emphasised in the Indonesian *National Strategy of REDD+ (Strategi Nasional REDD+)*. This emphasises that REDD+ is a strategy designed to achieve long-term goals, namely: a reduction of GHG emissions originating from LULUCF, an increase in carbon stocks, an improvement in the preservation of biodiversity, and economic growth.

The strategy document is the result of extensive consultation with various stakeholders. It was initially developed and launched by the National Planning Agency in 2010, followed up by the Task Force, and finally issued in the *Head of REDD+ Task Force Decree No 02/Satgas REDD+/09/2012*.

To achieve REDD+ strategic goals, the program framework consists of five inter-related pillars (illustrated in Figure 1):

1. Institutionalisation and process
2. Legal framework and regulations
3. Strategic programs
4. Changes to work paradigm and culture
5. Inclusion/involvement of stakeholders



Figure 1: The framework of national strategies based on five pillars

## National Action Plan for REDD+

The *National Action Plan for REDD+ ('REDD+ NAP')* is being prepared to provide more details for the implementation of the *National Strategy*, as mandated by the *Decree of Head of REDD+ Task Force No REDD 02/SATGAS REDD PLUS/09/2012 on REDD+ National Strategy*. Apart from *REDD+ NAP* at the national level, the *National Strategy* also requires that each province adopt a *REDD+ Provincial Strategy and Action Plan (PSAP)* based on the *REDD+ Strategy*.

The *REDD+ NAP* itself is being developed based on a series of consultations at the provincial level. To ensure a bottom-up process, programs that are part of *REDD+ NAP* must be those proposed at the provincial level



through the PSAPs. Therefore, it is expected that the *REDD+ NAP* can be the technical document and the framework that shows how national and regional priorities to achieve the *National Action Plan to reduce GHG emission* ('*NAP GHG*') from forests and peatlands align.<sup>11</sup>

### Provincial strategies and action plans

Individual PSAPs are required under the *REDD+ National Strategy*. They are plans for implementation of REDD+ that take into account the context and conditions of the province and are developed through an inclusive process. A PSAP must be developed based on the *REDD+ National Strategy* and be supported by other planning documents such as a *Medium Term Development Plan* ('*Rencana Pembangunan Jangka Menengah Daerah* ('*RPJMD*')).<sup>12</sup> This approach has been adopted to ensure that problems of implementation - an issue that has been acknowledged as often overlooked in Indonesian development plans, causing them to be ineffective - are considered during the planning phase.<sup>13</sup>

In 2012, the Governor of Central Kalimantan, the province in which the REDD+ program is being piloted, issued *Governor Regulation No 10/2012 on REDD+ Provincial Strategy* ('*REDD+ Provincial Strategy in Central Kalimantan Province*').<sup>14</sup> The Governor of Central Sulawesi has similarly issued *Governor Regulation No 40/2011* ('*REDD+ Provincial Strategy in Central Sulawesi*').<sup>15</sup> East Kalimantan, Riau, Jambi, West Sumatra and West Papua have finalised their PSAPs. Other provinces, namely: West Kalimantan, Papua, Aceh and South Sumatra, are preparing and/or finalising their PSAPs.

## REDD+ infrastructures

Three REDD+ infrastructures: REDD+ Agency, funding instrument and MRV Institution, are required by the *Presidential Regulation on GHGs Reduction* and the *Presidential Decree on REDD+ Task Force*.

### REDD+ Agency

In the *National Strategy on REDD+*, the REDD+ Agency is required: to coordinate, oversee and accelerate improvements in forests and peatlands governance in the context of reducing the rate of deforestation and degradation; and ensure effective funding mechanisms and fair distribution of benefits of REDD+ projects in accordance with the integrity requirements for REDD+ implementation systems (safeguards).<sup>16</sup>

The REDD+ Agency has been set up (i) as the designated national authority on REDD+ with strong governing functions, including authority to prepare regulatory frameworks for the implementation of REDD+ and to control the acceleration of improved forest and peatlands governance systems, (ii) to control the coordinating thematic functions and (iii) to execute strategic communications and stakeholder engagement effectively domestically and internationally.<sup>17</sup> The REDD+ Agency carries out a number of different functions, including a steering function involving REDD+ policies; planning and implementing according to its established mandate; and a supervisory function that involves monitoring the implementation of REDD+ programs. It is expected that the head of the new agency will be appointed at a ministerial level and report directly to the President.

In December 2012, the Coordinating Minister for Political, Law and Security Affairs was appointed by the President to coordinate discussions between the relevant Ministries and the REDD+ Task Force on the *Draft Presidential Regulation on REDD+ Institution*. The funding instrument and MRV Institution for REDD+ have been included in the *Draft Presidential Regulation*.

### Measurement, reporting and verification (MRV) institution for REDD+

The MRV of a REDD+ activity/project/program provides the basis of ongoing funding for the activity/project/program. In the *National Strategy*, the REDD+ Agency is tasked with facilitating the establishment of the MRV Agency. The MRV Agency is responsible for developing policies, standards and mechanism of MRV that

<sup>11</sup> REDD+ Task Force, *National Action Plan for the Implementation of REDD+*, draft-3, December 2012.

<sup>12</sup> REDD+ Task Force, *REDD+ National Strategy*, June 2012.

<sup>13</sup> Interview with Prof Hariado Kartodihardjo, one of the authors of PSAP (Jakarta, 13 May 2013).

<sup>14</sup> REDD-I, *Central Kalimantan Issued REDD+ Strategy and Action Plan*, 15 May 2013 <[http://www.redd-indonesia.org/index.php?option=com\\_content&view=article&id=462:kalteng-terbitkan-strategi-dan-rencana-aksi-redd&catid=1:fokus-redd&Itemid=50](http://www.redd-indonesia.org/index.php?option=com_content&view=article&id=462:kalteng-terbitkan-strategi-dan-rencana-aksi-redd&catid=1:fokus-redd&Itemid=50), 22 May 2012>.

<sup>15</sup> Notwithstanding the issue of REDD+ provincial strategies in Central Kalimantan and Central Sulawesi Provinces, several steps still need to be taken by both provinces to bring their strategies up to REDD+ NAP's standards and requirements.

<sup>16</sup> REDD+ Task Force, *REDD+ National Strategy*, June 2012.

<sup>17</sup> Ibid.



are in accordance with UNFCCC decisions. The MRV Agency operates independently and depends on the international community for verification of its measures.

To take advantage of the potential development of a voluntary carbon market, verification by an accredited independent third party will also be necessary.<sup>18</sup> Independently verified emissions reductions (VER) are important for the operation of the REDD+ scheme at the national and regional level as a basis of payments for the emissions offset achieved by project proponents.

### Funding instrument

The REDD+ Agency is also tasked with facilitating the establishment of a REDD+ funding instrument, which is based on potential funding sources, potential users and multi-party governance. Particularly, the financial instrument should be established to:

1. Support the development of REDD+'s programs/projects/activities in accordance with the potential for emissions reduction from forested lands and peatlands management.
2. Provide a credible mechanism for channelling funds internationally for potential donors and investors who want to encourage and/or benefit from REDD+ programs/projects/activities. This mechanism will be administered by the Fund for REDD+ in Indonesia (FREDDI). Based upon consideration of different options, the best legally available scheme would be if FREDDI formed a trust fund that adopts the format of fund-of-funds,<sup>19</sup> with principles set out under *Government Regulation No 10/2011 on Foreign Loan and Grant Management* and supplemented by *Presidential Decree No 80/2011 on Trust Fund*.
3. Encourage efficiency in the utilisation of funds and the equitable distribution of the benefits of development of REDD+ programs/projects.
4. Ensure that implementation complies with the three elements of the safeguards framework namely: fiduciary, social and environmental responsibilities.<sup>20</sup>

The funding instrument has a set of principles, criteria and indicators for the safeguards, known as PRISAI (Prinsip, Kriteria dan Indikator Safeguard REDD+ di Indonesia (Principles, Criteria, and Indicators for REDD+ Safeguards in Indonesia)). PRISAI incorporates existing standards, national and international legal frameworks and a participatory, bottom-up process involving various stakeholders. Implementation of PRISAI will ensure that REDD+ provides real and sustainable benefits to people, biodiversity and ecosystems, and supports improved governance, as well as ensuring that REDD+ programs are effective and reduce the risk of non-permanence. The challenge is to establish a world-class financing mechanism to channel international financial support. The design of the instrument needs to build in mechanisms for transparency, multi-stakeholder participation covering a broad executing agency base and civil society, as well as including private sector involvement in due course.<sup>21</sup>

### Improving forests and peatlands governance: Prerequisite for REDD+

The high rate of forest and peatlands deforestation and degradation has been driven by poor forest governance.<sup>22</sup> As already noted, the clear impact of poor forest governance on deforestation and degradation has led the President of the Republic of Indonesia to issue decrees which emphasise the importance of enhancing forest and peatlands governance.

The assessment that forests and peatlands governance in Indonesia is poor is supported by findings carried out by the United Nations Development Programme (UNDP) in collaboration with UN-REDD Program on participatory governance assessment (PGA). The findings from this research gave Indonesia's Forest, Land and REDD+ Governance a score of less than three on key aspects of governance,<sup>23</sup> as shown in Figure 2.

<sup>18</sup> Ibid.

<sup>19</sup> The fund-of-funds is a mutual fund that invests in other mutual funds.

<sup>20</sup> REDD+ Task Force, *REDD+ National Strategy*, June 2012.

<sup>21</sup> REDD+ Task Force, *Principles of Indonesian Safeguards Principles, Criteria and Indicators-PRISAI, version 001*, 2012.

<sup>22</sup> REDD+ Task Force, *REDD+ National Strategy*, June 2012. See also, UNDP and UN-REDD+ Programme, *Forest, Land and REDD+ 2012 Index in Indonesia* (UNDP Indonesia, 2013) <[http://www.unredd.net/index.php?option=com\\_docman&task=cat\\_view&gid=3004&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=3004&Itemid=53)>.

<sup>23</sup> UNDP and UN-REDD Programme, above n 22.





**Figure 2: Forest, land and REDD+ PGA Index**

Note: Component A: Laws and regulations, Component B: Government Capacity, Component C: Citizen Capacity, Component D: Indigenous, Local and Women Capacity, Component E: Business Actor Capacity, and Component F: Performance.

Three stages of forests and peatlands governance are discussed in this paper: planning, utilisation and supervision/law enforcement. Problems and some of the actions that have been initiated to tackle and/or improve the poor forests and peatlands governance system in Indonesia will also be discussed.

## Issues in forest and peatlands planning

### Lack of integrated forest and peatlands maps

At present, each government ministry and sectoral institution at central government and regional level has its own map of forests and peatlands that serve their different purposes, including as a reference for issuing licenses/permits. The maps vary in scale and validity, and, in many cases do not necessarily mirror the situation in the field. Consequently, there are overlaps of licenses and claims over land.

### Different criteria of protected and productive areas between each sector

A further complicating factor with the usefulness of the maps is the variation in the criteria used to designate protected areas and productive areas within and outside of forests. Within forest areas, three aspects should designate forest type: slope gradient, soils type and rainfall intensity.<sup>24</sup>

The condition of peatlands has traditionally not been considered when designating forest status. There is generic regulation for protected areas under *Law No 26/2007 on Spatial Planning* ('*Spatial Planning Law*') that requires consideration of depth and position of peatlands<sup>25</sup> occurring outside of forest areas. However, peatlands that are more than three metres deep and located within forest areas are usually designated as productive forest instead of as a protected area. For instance, in Padang Island, Riau Province, one corporation had been given a concession of 13.748 ha of peatlands that is more than three metres deep.<sup>26</sup>

### Discrepancy between designated forest planning and spatial planning

To rectify the discrepancy in the maps, the new *Spatial Planning Law* requires a single spatial plan for both forest and non-forest areas. However, as of 8 March 2013, only 14 Provinces out of 34 have completed spatial plans,<sup>27</sup> even though, by law, provincial spatial plans should have been completed by 26 April 2009.<sup>28</sup> Similarly

<sup>24</sup> *Government Regulation No 44/2004 on Forestry Planning*, art 24(3)b.

<sup>25</sup> *Law No 26/2007 on Spatial Planning*, explanation of art 5 para (2); and *Presidential Decree No 32/1990 on Management of Protected Area*, arts 3 and 4.

<sup>26</sup> REDD+ Task Force, 'Legal Review and Law Enforcement' (Working Group Report No 05/REDD+/PM/12, January 2012).

<sup>27</sup> There are 33 Provinces in Indonesia, see, Ministry of Public Works, *Indonesia Spatial Plan Recapitulation Completion Progress* (2013) <<http://sikumtaru.penataanruang.net/view/template.asp?idtipeproduk=Lap& modul=5b1bcc01ae021b8e5f2be71432ab67ac>>.

<sup>28</sup> *Law No 26/2007 on Spatial Planning*, art 78 para 4(b).



only 279 out of 491 municipal spatial plans have been completed,<sup>29</sup> even though all should have been completed by 26 April 2010.<sup>30</sup> One of the problems in the completion of spatial planning is the need for the approval of the plans by the Ministry of Forestry.<sup>31</sup>

In the provinces where spatial plans have not been finalised, discrepancy has caused legal uncertainty for the licenses/permit/concession holders, particularly in Central Kalimantan Province, Riau Province and Riau Islands Province.<sup>32</sup>

In addition to forest planning, there are other planning documents that are based on production, such as Area for Mining (*Wilayah Izin Usaha Pertambangan* or WIUP),<sup>33</sup> or based on biophysical conditions, such as protected or productive peatland area.<sup>34</sup> To ensure their integrity, such sectoral maps will require spatial planning at provincial and district levels as their primary reference point to determine the function of a site. Finalisation of a provincial and district spatial plan is important to ensure all planning documents are harmonised.

#### Incompleteness of gazettal of forest areas

According to the *Forestry Act*, the gazettal of forests should follow four steps: designation of the forest area, demarcation of the forest area boundary, mapping of the forest area, and forest area gazettal.<sup>35</sup> In 2012, even though 80 per cent of forest areas have had their boundaries marked out and mapped, only 16.6 per cent had been gazetted.<sup>36</sup>

What is defined as a forest area is important for Indonesian forest management. The problem is that what is considered as a forest area in the *Forestry Act* differs from article to article in the *Act*. To standardise the definition, the Constitutional Court passed decision *No 45/PUU-IX/2011*.<sup>37</sup>

However, standardising the definition has not resolved all issues slowing down the gazettal process. A major factor hampering gazettal of a forest area are objections by villagers located in and around a forest area to the gazettal. Currently, there are 31,957 villages located in or around the forest areas:<sup>38</sup> 1305 villages are located inside forest areas (4.08%), 7,943 villages (24.86%) are located on the borders of forest areas and 22,709 villages (71.06%) are located around the designated forest areas.<sup>39</sup>

#### Tenure issues

An important issue in forest governance is clarifying tenure rights. The tenure system creates a bundle of rights or a set of rights for certain individuals or groups;<sup>40</sup> that is, there is a determination of who has the right to use certain resources at certain times. Currently, there are disagreements about who legally has rights and who, in fact, is using the resources.<sup>41</sup>

There are around 1700 tenure conflicts recorded in Indonesia. The conflicts relate to plantations, forestry and mining.<sup>42</sup> The main trigger for conflict is a lack of recognition of a community's land right claims, in particular

<sup>29</sup> Ministry of Public Work, *Indonesia Spatial Plan Recapitulation Completion Progress* (2013) <<http://sikumtaru.penataanruang.net/view/template.asp?idtipeproduk=Lap&modul=5b1bcc01ae021b8e5f2be71432ab67ac>>.

<sup>30</sup> *Law No 26/2007 on Spatial Planning*, art 78 para 4(c).

<sup>31</sup> *Government Regulation No 15/2010 on Implementation of Spatial Planning*, art 3. See also, *Law No 41/1999 on Forestry*, art 4(2).

<sup>32</sup> Ministry of Forestry, *Ministry of Forestry Decree No P.50/Menhut-III/2009 on Status Confirmation and Function of the Forest Area*, consideration letter (f) (2009).

<sup>33</sup> This is required by *Law on Mining No 4/2009 on Mining, Mineral and Coal*; WIUP is established to set an area for mining. Mining concession in WIUP will be issued based through tender process.

<sup>34</sup> Protected and productive peatlands areas will be established through a government regulation on peatlands, with the final draft currently being discussed for finalisation.

<sup>35</sup> *Law No 41/1999 on Forestry*, art 15 (1) ('*Forestry Act*').

<sup>36</sup> Director General of Forest Planology, Ministry of Forestry, 'Policy to Accelerate Forest Gazettment' (Toward Fair and Justice Forest Workshop, 13 December 2012).

<sup>37</sup> The decision amended art 1(3) of the *Forestry Law No 41/1999*, hence the article now reads: 'Forest Area (*Kawasan Hutan*) is a particular area gazetted (*ditetapkan*) by the Government to be maintained as permanent forest (*Hutan Tetap*)'.

<sup>38</sup> Minister of Forestry, *Minister of Forestry Regulation No P.51/Menhut-III/2010*; Minister of Forestry, *Strategic Plan 2010-2014* (2010).

<sup>39</sup> H Rahmina et al, 'Ordinances and Procedures of Community Based Forest Management Program in Framework of Law No. 41/1999' (December 2011) <[http://www.redd-indonesia.org/pdf/Buku\\_Saku\\_PHBM\\_web.pdf](http://www.redd-indonesia.org/pdf/Buku_Saku_PHBM_web.pdf)>.

<sup>40</sup> James C Ridell, 'Land Tenure and Agroforestry: A Regional Overview' in John B Raintree (Ed), *Land, Trees and Tenure: Proceedings of an International Workshop on Tenure Issue in Agroforestry* (ICRAF and Land Tenure Centre, 1987). See also, Noor Fauzi, 'Tenurial Conflicts: That were Created but not Intended to be Settled' in A Lounela and R Y Zakaria (eds), *Land Conflict: Perspectives Studies in Campus and Villages* (Insist Press, Anthropology Journal of Universitas Indonesia and KARSA, 2002).

<sup>41</sup> Noor Fauzi, above n 40.

<sup>42</sup> Agrarian Reform Consortium, *Anxiety in Agrarian Intellectual* (7 February 2013) <<http://www.kpa.or.id/?p=1153>>.





the claims of vulnerable communities confronting companies who have been issued permits to exploit natural resources.<sup>43</sup>

In the context of forestry, there are several levels of issues related to the ownership of rights in forest areas. On the surface, conflicts arise because licences are issued without considering local conditions, resulting in indigenous people and/or the local community losing rights that, generally, have not been formally certified. The problem of certification as a proof of recognition of indigenous people and/or local community rights over land is the crux tenure conflict. There are many reasons for this problem; above all is the lack of harmony among laws and regulations.<sup>44</sup>

*Constitutional Court Decision No 35/PUU-X/2012* has attempted to resolve this lack of harmony by removing the clause that designate indigenous people forest as part of state forest.<sup>45</sup> The general impact of this Constitutional Court decision is positive, because it enables indigenous people to claim their tenure rights of a forest area. By owning forestland, indigenous people's rights over the forest will be secured and the opportunity arises to implement customary knowledge to protect the forest.<sup>46</sup>

Another tenure problem is the limited access that indigenous people and/or local communities have to the resources in forest areas. Data from the *National Forestry Plan* shows overlaps in the utilisation of forest areas between corporates and communities. Forest areas that are utilised by businesses for large-scale plantations and mining, and transmigration programs, cover 41,032 million ha (98.37%) of forest areas. Forest areas utilised by indigenous people and/or local communities (that is, community plantation forests (*Hutan Tanaman Rakyat* or HTR), village forest (*hutan desa* or HD) and community forest (*hutan kemasyarakatan* or HKm)) are 676 million ha (1.62%) of the total area of the forest that can be utilised.<sup>47</sup> The root cause for this issue will be discussed below.

### Conclusion of problems and planning a way forward

In response to the technical and tenure issues highlighted above, several initiatives are currently being implemented to improve governance at planning stage.

#### One Map Initiative/Movement

The One Map Movement aims to create one map as a single reference for all sectors. As explained above, the existence of many maps by various government agencies at both the central and regional levels leads to overlapping licences being granted and tenure conflicts. *Law No 4/2011 on Geospatial Information, Information Geospatial Agency* ('*Badan Informasi Geospasial*' ('BIG')) in combination with UKP4, has initiated the creation of one map.

The One Map Initiative is not merely a project to develop a map using the business-as-usual approach, it aims to deliver a map produced through cross-sectoral and central-regional collaboration to break silos and build trust. It, therefore, provides a foundation for better natural resources governance and bureaucratic reform, and builds upon the existing initiatives of the National Spatial Data Network.

The One Map Initiative aims to create one reference for basic geospatial information, and one standard for thematic mapping-sector(s). The map is a crucial tool to avoid overlapping tenure conflict and to ensure that basic data and information is consistent, thus avoiding a lack of harmony between government agencies. It is expected that the first basic map will be released for the public by the end of 2013.

Apart from creating basic maps, the one map movement also aims to have one integrated database of spatial and non-spatial information across-sectors, and one geoportal system, including for licences, to ensure public transparency and participation.

<sup>43</sup> Indonesian Forum for Agrarian Justice, *Petition Letter on Settlement of Agrarian Conflict to the President of the Republic of Indonesia* (7 February 2013) <<http://pphafh.ub.ac.id/wrp-con/uploads/2013/02/Petisi-kepada-Presiden-untuk-Penyelesaian-Konflik-Agraria-.pdf>>.

<sup>44</sup> See Arnold Contreras-Hermosilla and Chip Fay, *Strengthening Forest Management in Indonesia Through Land Tenure Reform: Issues and Framework for Action* (2005) <[http://www.forest-trends.org/documents/files/doc\\_107.pdf](http://www.forest-trends.org/documents/files/doc_107.pdf)>.

<sup>45</sup> The decision amended art 1(6) of the *Forestry Law No 41/1999*, hence the article now reads: 'Indigenous Forest [*Hutan Adat*] is Forest located inside indigenous people's (*masyarakat hukum adat*) areas.

<sup>46</sup> Tenure right ownership leads to improved forest management because, based on research, land insecurity is a key factor in deforestation. See Contreras-Hermosilla and Fay, above n 44.

<sup>47</sup> Minister of Forestry, *Ministry of Forestry Regulation No P.49/Menhut-II/2011 on Forestry Plan at the National Level Year of 2011-2030* (2011).



### Program to promote acceleration of forest area gazettal

Several institutions have begun to take action to accelerate gazettal of forest areas in order to guarantee legal certainty, including the Ministry of Forestry, the REDD+ Task Force and the Corruption Eradication Commission.

The Ministry of Forestry, in December 2012, issued *Regulation No P.44/Menhut-II/2012 on Forest Area Gazettment*, which replaced *Minister of Forestry Regulation No P.50/Menhut-II/2011*. This regulation introduces several new aspects, which will ease the process of forest area gazettal, such as the introduction of virtual stakes in areas that are inaccessible. There are, however, several technical and strategic matters that need to be further regulated - particularly matters to do with transparency, participation and conflict resolution in the forest gazettal process. The budget for 2013 for forest gazettal has been increased by 300 per cent to speed up the gazettal process. The Ministry of Forestry has also established five new Regional Forestry Offices for Planning and Inventory (*Balai Pemantapan Kawasan Hutan* (BPKH)) located in Banda Aceh Region, Aceh Province; Pekanbaru Region, Riau Province; Bandar Lampung Region, Lampung and Bengkulu Province; Palangkaraya Region, Central Kalimantan Province; and Kendari Region, Southeast Sulawesi Province.<sup>48</sup>

The REDD+ Task Force has a pilot program at Barito Selatan in Central Kalimantan to study ways of how to best achieve transparency, participation and conflict resolution in the process of forest gazettal in the area. It is expected that lessons learnt from this pilot project can be included in amending regulations to take into account these three aspects in the gazettal process.

The Corruption Eradication Commission (*Korupsi Pemberantasan Korupsi* or KPK), in cooperation with UKP4/REDD+ Task Force, has initiated the coordination of 12 ministries/institutions to accelerate forest gazettal through a memorandum of understanding (MoU). This program is based on the recognition that, in order to accelerate the pace of forest area gazettal, various ministries/institutions need to be involved. The MoU was signed on 11 March 2013 by 12 ministries/institutions before the President.<sup>49</sup> It was agreed that a detailed action plan will be developed and overseen by KPK and UKP4. The MoU recognised that it is necessary to ensure synchronisation and harmonisation of laws, regulations and plans, and establish a fair conflict resolution processes. The action plan for this MoU currently in the process of development.

### Promoting settlement of tenure conflict through Presidential Instruction

Early in 2013, the President of the Republic of Indonesia issued *Presidential Instruction No 2/2013 on Handling National Security Disturbances*. The scope of the *Presidential Instruction* is broad, not only promoting settlement for tenure conflict but also other conflicts which might lead to disturbances in national security.

The *Instruction* proposed establishing cooperative mechanisms between central and regional governments, and security authorities, including Police Force and Indonesian National Army (*Tentara Nasional Indonesia* or TNI), to respond and resolve emerging conflicts effectively. This *Presidential Instruction* has to be read together with *Law No 7/2012 on Social Conflict Management*. A major development arising from this new law and the policy is that there will be one specific task force responsible for identifying and helping to resolve conflicts. The Social Conflict Management Task Force (*Satuan Tugas Penyelesaian Konflik Sosial*) should operate across all levels of government: central, provincial and region/city, in the event that there is no customary institution (*pranata adat*) or social institution (*pranata sosial*) to deal with the conflict. It should be noted that there are many reservations regarding the *Presidential Instruction*, particularly concerning the approach for solving social conflict through repressive means, with an emphasis on the role of the security authority.<sup>50</sup>

### Government regulation draft on swamp and peatlands management

One of Indonesia's important assets, from the natural resources perspective, is its vast areas of peatlands. Unfortunately, the area peatlands decreases significantly year-by-year. It is recorded that in 1981 Indonesia had a land area of 26.5 million ha of peat. By 2004 the peatland area had decreased to approximately 20.6

<sup>48</sup> Ministry of Forestry, *Ministry of Forestry Regulation No P.16/Menhut-II/2013 on Organization and Management of BPKH*, 2013.

<sup>49</sup> The 12 Ministries/Institutions are: Ministry of Internal Affairs, Ministry of Justice and Human Rights, Ministry of Finance, Ministry of Energy and Mineral Resources, Ministry of Agriculture, Ministry of Forestry, Ministry of Public Works, Ministry of Environment, Ministry of Planning/National Development Planning Agency, National Land Agency, the National Geospatial Information and National Human Rights Commission.

<sup>50</sup> See, Tempo.co, *Presidential Instruction on Conflict Resolution is not a way to resolve agrarian conflict*, (7 February 2013) <<http://www.tempo.co/read/news/2013/02/07/078459817/Inpres-Kamnas-Bukan-Solusi-Konflik-Agraria>>; See also, vhr-media.com, *President shall revoke Presidential Instruction on Conflict Resolution* (22 February 2013) <[http://www.vhrmedia.com/new/berita\\_detail.php?id=1677](http://www.vhrmedia.com/new/berita_detail.php?id=1677)>.



million ha. Based on the latest data held by the Ministry of Agriculture in 2011, only 14.09 million ha of peatlands remain. The loss of peatlands from 1981 to 2011 is about 12 million ha.

In the context of reducing GHG emission, peatlands have a very important function, because they store large amounts of carbon. Because of their crucial role in capturing carbon as well as providing other environmental services, special arrangements regarding the protection and preservation of peatlands are needed. There are two draft government regulations currently being discussed to deal with this issue. The first is a draft on the protection and management of ecosystems of peatland (*Peatland Draft*) based on the initiative of Ministry of Environment. The second is a draft government regulation on swamps (*Swamp Draft*) based on an initiative of the Ministry of Public Works.

These two drafts will regulate a number of crucial issues, including providing an operational definition of peatland to ensure one reference for peatland mapping. Another important aspect is the introduction of emissions as criteria for designating a protected area and productive area in peatlands. In addition, the criteria for peatlands damage in each area will be regulated.

Currently, the *Swamp Draft* is in State Secretariat while the *Peatland Draft* has been returned to the Ministry of Environment for further improvement. The regulation of peatlands focuses the attention of policy makers on this type of ecosystem - something that has rarely occurred.

### Issues related to forest and peatlands utilisation

#### The issue of licenses that violate the law

Problems with the issue of licences include overlapping licenses; and licenses, including in forest areas, that do not conform to legal procedures. The Ministry of Forestry, for example, released data that shows that there are 749 plantation licenses covering around 8.5 million ha and 1727 mining licenses covering around 8.9 million ha of forest areas in eight provinces (Central Kalimantan Province, East Kalimantan Province, West Kalimantan Province, North Sumatera Province, Riau Province, Jambi Province and West Java Province) that do not conform to legal procedures.<sup>51</sup> The Supreme Audit Agency (Badan Pemeriksa Keuangan (BPK))<sup>52</sup> also found that plantation and mining licenses inside Central Kalimantan forest areas have been operated without proper licences from the Ministry of Forestry.

The issue of licenses that violate the law has several causes:<sup>53</sup>

1. The procedures for the issues of licenses are not integrated across sectors and levels of government.
2. There is a lack of equity and fairness protocols to discourage regional governments from issuing new licenses that will effect forest areas.
3. Legislation which tends to give considerable discretion to the license issuer.
4. Weak forest governance organisations in terms of capacity to monitor and control the issue of licenses.
5. Weak governance in the licensing process including complicated procedures, lack of transparency and public participation and corrupt practices.
6. Weak compliance and law enforcement so that unlawful practices continue to spread between license granters and business agents.

#### Lack of transparency, public participation and synchronisation

The problems surrounding the licensing process is significantly affected by the complexity of government bureaucracy, leaving the the licensing process vulnerable to corruption.<sup>54</sup> Since the establishment of the KPK, there have been at least six forestry sector corruption cases, revealing the different sectors of the forest governance system that are prone to corruption, including licensing, administration and forestry development planning.<sup>55</sup>

<sup>51</sup> Director of Investigation and Forest Security, Ministry of Forestry, *Monitoring and Law Enforcement in Forest and Peatlands*, in Focus Group Discussion on Legislation Reform of Forest and Peatlands Laws and Regulation, 27-28 February 2013.

<sup>52</sup> BPK, 'Second Semester Examination Result' (Report TA 2008 No 36/LHP/XVII/02/2009, Central Kalimantan, 23 February 2009).

<sup>53</sup> ICEL and Kemitraan, *Intergrated License Toward Forest Governance Reform in Indonesia: Central Kalimantan Case Study*, (2012). See also, Commission Eradication Commission, *Corruption Impact Assessment: Corruption in the Presence of Weak Legal Certainty* (2010).

<sup>54</sup> Tina Soreide, 'Forest Concession and Corruption' (2007) 3, *U4 Issue*.

<sup>55</sup> Anti Forest Mafia Coalition, 'Initial Performance Evaluation of Corruption Eradication Commission in Combating Corruption in the Forestry Sector: Corruption Eradication in Forestry Sector is not completed!' (Press Release, 2012). The largest case is *Tengku Azmun v Suwana Abdul Fattah*.



A reason for the proliferation of corruption in the forestry sector is the high profits that can be earned by perpetrators, and the low penalties and sanctions for committing the crimes. One corruption case involving the issue of a licence on forest land revealed that the perpetrator gained 1.2 trillion IDR (approximately US \$120 million) and caused massive natural forest and environment degradation.<sup>56</sup> Studies show that there are potential losses to the State of around US \$2 billion a year from such cases.<sup>57</sup> This is an alarming figure because State revenues from the forestry sector are only around 1.3 trillion IDR (approximately US \$130 million) per year.<sup>58</sup>

There are several theories to explain the corruption in the forestry sector. One theory is that there is asymmetrical information regarding forest governance caused by the complexity of the bureaucracy and lack of regulations coordinating different agencies.<sup>59</sup> The complexity of the bureaucracy also impacts upon the type of information passed from principal to agent to client. When convoluted and unsupported by effective regulations to manage coordination, information can be changed and opened up to corruption. For example, the absence of adequate mechanisms to reconcile revenues obtained by the Ministry of Forestry, the Ministry of Finance, and the central and regional governments opens the way for corruption.<sup>60</sup> The process of timber administration is highly complex, involving many documents and many agencies: a list of forest products must be drawn up, logging and timber products reports need to be made, timber validity certificates need to be made and logs transportation report kept. All these reports and certificates need to be reported to the Regional Forest Service, summarised by the Regent, and then summarised again by the Governor. This complexity is very difficult to supervise. The problem is worsened when supervision over timber management itself does not work consistently.

Problems also occur in the implementation of regulations that govern transparency. Inaccessible information related to forestry data and information, such as decisions on licensing of forest products or allocations of forest areas, have impaired the ability of the public to oversee the Government's forest governance system. Lack of transparency has created loopholes and discretion for corruption. Corruption in the licensing process can lead to arbitrariness in the issue of licenses, resulting in, not only the destruction of forests, but also the seizure of lands nominally belonging to other parties, leading to land conflict. The issue of corruption becomes more complex when officers who should be at the front line to combat forest crime are involved in the crime, as revealed in the case of illegal logging in Ketapang in 2008.<sup>61</sup>

Another theory of corruption put forward by Klitgaard is that a lack of accountability can trigger corruption. Lack of accountability can be connected to monopoly power and high discretion.<sup>62</sup> Klitgaard explains that monopoly power and discretion without accountability in bureaucratic structures provides incentives for corruption. In the licensing regime for plantations, licences are given by different levels of government depending on the location of plantations. Most licences are located in regional areas, hence the licensing process is under the authority of the Regional Government; there is no capacity for the community to comment on the issue of the licence and there is no obligation on the Regent to report on the reasons for the issue of the licence to the Ministry of Agriculture. The result is issues of overlapping business licenses for hundreds of units and millions of hectares of forest areas without the Central Government knowing about it.<sup>63</sup>

Incomplete decentralisation in Indonesia also creates opportunity for corruption. This situation occurs when the duty is conferred to care for a resource without the necessary authority to manage the resources, giving rise to ambiguity and legal uncertainty,<sup>64</sup> and a loss of control and role clarity.<sup>65</sup>

<sup>56</sup> Supreme Court of the Republic of Indonesia, *Supreme Court Decision No 736K/Pid.Sus/2009*, 2009.

<sup>57</sup> Human Rights Watch, *Wild Money: The Human Rights Consequences of Illegal Logging and Corruption in Indonesia's Forestry Sector* (2009) <<http://www.hrw.org/sites/default/files/reports/indonesia1209webwcover.pdf>>. Human Rights Watch, using industry standard methodology, estimated that the Indonesia government lost an average of almost US \$2 billion annually between 2003 and 2006 due to illegal logging, corruption, and mismanagement.

<sup>58</sup> Kontan, *Forestry Sector Non-Tax State Revenues 1.3 Trillion Rupiah*, 15 July 2010 <<http://nasional.kontan.co.id/news/sektor-hutan-setor-pnbp-rp-13-triliun-1>, 15 July 2010>.

<sup>59</sup> Johann Lambsdorff, 'How Corruption Affects Public Welfare - A Review of Theories' (Discussion paper 9, Center for Globalization and Europeanization of the Economy, 2001).

<sup>60</sup> Doddy Sukadri, Bambang Widiyantoro and Herman Prayudi, 'An Analysis of Government Policy in the Context of Accelerating Natural Forest Management for Sustainable Production' (Pengelolaan Hutan Alam Produksi Lestari (PHAPL)) achievement (The International Tropical Timber Organization dan Asosiasi Pengusaha Hutan Indonesia, 2009).

<sup>61</sup> Hukum Online, *Illegal Logging Law Enforcement Enters into a New Round*, (25 April 2008) <<http://www.hukumonline.com/berita/baca/hol19093/function.require>>.

<sup>62</sup> Robert Klitgaard, 'Healing Sick Institutions' in Silvio Borner and Martin Paldam (eds), *The Political Dimension of Economic Growth*, (Macmillan for the International Economic Association, 1998).

<sup>63</sup> This has been admitted by the Ministry of Agriculture on many occasions, eg in the Workshop on integrated licensing mechanism held by REDD+ Task Force on 13 August 2012 in Le Meridien Hotel, Jakarta Indonesia.

<sup>64</sup> Subadi, *Forest Land Tenure and Utilization*, (Prestasi Pustaka, 2010).

<sup>65</sup> Herbert Kaufman, *Red Tapes: Its Origins, Uses and Abuses* (Brooking Institution, 1977).



Whatever the reasons, when corruption occurs, the functions of government become paralysed, creating the impression that the government is incapable of undertaking its mandate. It is difficult for regional governments to conduct supervision of the timber business if officials are being bribed. Legal officers will also find it difficult to enforce the law if State Officials are partners in the crime. In such context, Lambsdorff explains, corruption could be the root of the problem or the symptom of poor governance. There exist reciprocal flows between poor governance and corruption.<sup>66</sup> Klitgaard warns that when corruption has become systemic, eradication actions through training, regulations complexity reduction and privatisation are no longer sufficient; instead shocks to the system will be necessary.<sup>67</sup>

### Challenges in achieving sustainable forest management

One of the triggers of deforestation and forest degradation is unsustainable forest management activities. One of the conditions for licenses holders is to comply with technical regulations. However, in reality, many activities ignore the license conditions.

An independent assessment agency undertook an assessment of the performance of sustainable forest yield in the period of 2002 to 2009. The result shows that 45 per cent of the total of 204 companies with licenses to utilise timber from forest in natural forest performed poorly.<sup>68</sup> Furthermore, various cases related to forest management have shown that companies are still using destructive practices, including logging beyond the annually allocated areas, logging that exceeds the quota, accepting timbers from illegal logging, refusing to conduct silviculture required for the management unit, refusing to conduct enrichment practices, providing fictitious information, and refusing to conduct border management. Because enforcement is rarely present, there is incentive to exploit the work area destructively.

Those companies attempting to operate in good faith do not obtain market advantages but are still subject to the high cost of operating in the wood products distribution system.<sup>69</sup>

### Limitation of public access

In order to accommodate public access to forests, the Ministry of Forestry has implemented a scheme of community-based forest management (*pengelolaan hutan berbasis masyarakat*) for community forests (*hutan rakyat* or HR),<sup>70</sup> village forests (*hutan desa* or HD), community forest (*hutan kemasyarakatan* or HKM),<sup>71</sup> and community plantation forests (*Hutan Tanaman Rakyat* or HTR). However, there are problems with this scheme because the community, particularly indigenous people, want to have full authority to manage their forest and protect their ownership. This is complicated because the *Forestry Law* considers forests occupied by indigenous people as state forests. Thus, the access of the indigenous people is restricted by a licensing process. As has been discussed above, the Constitutional Court decision has attempted to resolve this problem<sup>72</sup> but the implementation of the decision is crucial for ensuring that the rights of indigenous people to the forest are acknowledged.

Another problem with the public access scheme is the bureaucratic complexity for the community. There is a lack of clear boundaries for land allocated under the three land access categories. Clarity should mean that there are no competing rights under government licences to the forest. The rights of indigenous people are hampered because the existing regulations do not yet technically give management rights to the indigenous community.

<sup>66</sup> Johann Lambsdorff, *How Corruption Affect Public Welfare* (Center for Globalization and Europeanization of the Economy, 2001).

<sup>67</sup> Robert Klitgaard, 'Healing Sick Institutions' in Silvio Borner and Martin Paldam (Eds), *The Political Dimension of Economic Growth* (Macmillan for the International Economic Association, 1998).

<sup>68</sup> Forest Watch Indonesia, *Portraits of Indonesia Forest 2000-2009* (2011).

<sup>69</sup> See, Harianterbit.com, *70 Companies in Forestry Sector are Under Bankruptcy Threat*, <http://www.harianterbit.com/2012/09/21/70-perusahaan-kehutanan-terancam-bangkrut/>, 21 September 2012. See also, Suaramerdeka.com, *Asmindo Reject Timber Legality Certification*, <<http://suaramerdeka.com/v1/index.php/read/cetak/2012/02/11/176805/Asmindo-Tolak-Sertifikasi-Legalitas-Kayu>>, 11 February 2012.

<sup>70</sup> Community Forest (*hutan rakyat* or HR) is given in Private Forest (*Hutan Hak*). Private Forest is an area that qualifies as a forest but private rights might be given <Minister of Forestry, *Ministry of Forestry Regulation No P.03/2004* on Community Forest Guideline (*Hutan Rakyat*)>.

<sup>71</sup> Community Forest (*hutan kemasyarakatan* or HKM) is given in State Forest (*Hutan Negara*). State Forest is an area where there are no private rights over the area <Minister of Forestry, *Ministry of Forestry Regulation No P.52/Menhut-III/2011* on Community Forest (*Hutan Kemasyarakatan*)>.

<sup>72</sup> The Case No 35/PUU-IV/2012 brought by the Alliance of Indigenous People (*Aliansi Masyarakat Adat Nusantara* (AMAN)) to conduct judicial review of art 1(6), 4(3), 5(1-4), 50(2), 67. See above n 45-46.



Although the Central Government has agreed to provide rights to the community, there is a lack of will on the part of most regional governments.<sup>73</sup> Even should land be available, communities often lack the capacity to access the licensing process, nor do existing regulations support building the capacity of the community to access forest resources. At the provincial level, some provinces have passed enabling regulations to establish and protect the rights of indigenous or local communities and business agents. For example, Aceh Province has regulations on forestry; Papua Province has regional regulations for the protection and management of forest resources by the indigenous community; and Central Kalimantan Province has regulations on forest products and forest area utilisation, institutions of *Dayak*,<sup>74</sup> customary laws and customary rights over customary lands. However, the laws lack operational regulations to support the establishment and protection of the community's rights, in particular the rights of indigenous and local communities to manage the forest and land.<sup>75</sup>

### The way forward

Several programs have been initiated to respond to the issues discussed above.

### Improving governance of licensing process

There are many factors needed in a licensing mechanism to ensure it serves its purpose: transparency, participation, accountability, harmonisation and simplicity. The current licensing system needs to be modified to ensure harmonised licensing procedures for plantation and mining in forest areas, facilitate information management and strengthen disclosure, facilitate public participation, strengthen supervision, and reduce opportunities for corruption.

In order to integrate the licensing process in line with the duties, functions and authority of each agency, it is necessary to have a legal policy. At the moment there is a policy on One Door Integrated Licensing (*Perizinan Terpadu Satu Pintu* ('PTSP')) based on *Minister of Internal Affairs Decree No 24/2006 on Guidelines of One Door Integrated System Implementation*. To ensure the effective implementation of this policy, *Presidential Instruction No 1/2013 on the Prevention and Combating of Corruption* has set various action plans. The same instruction also lay down action plans related to transparency and utilisation of information technology, for example on mining permits.

At the project level, the REDD+ Task Force/UKP4 is initiating and preparing an information management system (IMS) prototype. The prototype will be tested in several regions of Central Kalimantan Province such as Barito Selatan, Kota Waringin Timur and Kapuas. The IMS provides facilities for centrally collecting and managing concession data including mining, plantation and forestry licences. Such data can be used nationally to prepare plans and programs; for licensing purposes, it can reduce the chance of licences overlapping; and at the enforcement level, the data is important to conduct due diligence and enable law enforcement at the administrative or at the criminal enforcement stage. In addition to the Central Kalimantan project, a licence review process is also being conducted in East Kalimantan. Early in 2013, the Governor of East Kalimantan issued a letter to halt the issue of licenses for mining, plantation and forestry activities in East Kalimantan till the license review is completed.<sup>76</sup>

The amendment to *Minister of Agriculture Regulation No 26/Permentan/OT.140/2/2007 on Guidelines of Plantation License ('MOA Regulation on Guidelines of Plantation License')*, currently underway, will impact the plantation sector. This regulation has a strategic role to provide standards for plantation licensing. As already noted, under regional autonomy and plantation laws, the head of the regional government (Regent) allocates plantation licenses. Among the issues being discussed in the amendment process of the *MOA Regulation on Guidelines of Plantation License* are setting limitations on the land ownership of groups of companies, clarifying and detailing plans and partnership regulations, improving transparency in the licensing process and introducing second-line administrative oversight by the central government. The upcoming amendment is also expected to clarify the obligations of operators to obtain cultivation rights prior to beginning work. This is

<sup>73</sup> Kemitraan, *Planning and Budgeting Toward Community Based Forest Management in Indonesia* (2012) <[http://www.kemitraan.or.id/uploads\\_file/20130131070905.studi%20perencanaan%20dan%20penganggaran%20CBFM.pdf](http://www.kemitraan.or.id/uploads_file/20130131070905.studi%20perencanaan%20dan%20penganggaran%20CBFM.pdf)>. See also, Kemitraan, *Accelerating Community Forest and Village Forest Programme* (2011) <[http://www.kemitraan.or.id/uploads\\_file/20110714135502.Policy%20Brief%204%20EEG%20draft%2005%20web.pdf](http://www.kemitraan.or.id/uploads_file/20110714135502.Policy%20Brief%204%20EEG%20draft%2005%20web.pdf)>.

<sup>74</sup> Dayak Tribes are the indigenous people of Kalimantan. See Rhett A Butler, *The People of Borneo* (12 June 2013) <[http://www.mongabay.com/borneo/borneo\\_people.html](http://www.mongabay.com/borneo/borneo_people.html)>.

<sup>75</sup> UNDP and UN-REDD+ Programme, *Forest, Land and REDD+ 2012 Index in Indonesia* (UNDP Indonesia, 2013) <[http://www.unredd.net/index.php?option=com\\_docman&task=cat\\_view&gid=3004&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=3004&Itemid=53)>.

<sup>76</sup> East Kalimantan Regional Government, *East Kalimantan Regional Government Letter No 180/1375-Hk/2013 on License Review in Mining, Plantation and Forestry License* (25 January 2013).



different from existing regulations which are not clear on this matter. Many companies have been reported to have started their operations even before cultivation rights have been obtained.

### Supervision and law enforcement

Supervision of activities in forests and peatlands by central and regional government is mandatory.<sup>77</sup> One of the most important aspects of supervision is the active involvement of the community. *Law No 14/2008 on Public Access to Information* and *Law No 25/2009 on Public Services* guarantee the general principles of transparency in supervision as well as minimum standards for the public complaint mechanism. At the operational level, only a small number of ministries/agencies and regional governments have implemented procedures for supervision and dealing with community complaints. Only the National Police Department has regulations determining the handling of community complaints (*Head of National Police Regulation No 2/2012 on Public Complaints Handling Mechanism*). Ministries such as the Attorney Generals Office and the Ministry of Forestry have not yet issued regulations related to mechanism for dealing with community complaints as instructed by *Law on Public Service*.<sup>78</sup> There is no obligation to provide feedback to those who have filed a complaint, or to increase the capacity of the community to play an effective role in forests and peatlands supervision.

Other weakly regulated matters are mechanisms to follow-up findings of corruption in forests and peatlands management. Nor is there a mechanism for central governments to supervise regional governments in managing, protecting and supervising forest areas.<sup>79</sup>

On the other hand, regulations concerning law enforcement (administrative, civil and criminal) are already adequate, although there are weaknesses in their enforcement.<sup>80</sup> The annual reports of the Supreme Court shows that a small number of cases related to forestry were submitted to the Supreme Court, and minimum penalties given for each crime. In 2009, there were 106 cases: 11 per cent had 'not guilty' verdicts, 24 per cent had 'guilty' verdicts and sentenced to less than a year's imprisonment, and 75 per cent were found guilty and sentenced to between one and five years. In 2010 there were 66 cases: 9 per cent had 'not guilty' verdicts, 24 per cent were sentenced to less than a year imprisonment, and 67 per cent were sentenced to between one and five years imprisonment. In 2011, there were 42 cases on forestry: 14 per cent had not guilty verdicts, 29 per cent were sentenced to less than a year imprisonment, and 57 per cent were sentenced to between one and five years.<sup>81</sup> The number of cases of forestry being handled by the Supreme Court is decreasing, while cases related to forestry are reported to be increasing due to concessions overlapping.

The causes of ineffective supervision and law enforcement include:

1. Lack of clarity of the status of the forest area. This uncertainty results in difficulties in enforcing the law in forest areas.
2. Ineffective offence formulation and sanctions. The majority of criminal offences require proof of the issue of a licence from the Ministry of Forestry and knowledge about the status of the forest area. This situation has created *izin terbang*, meaning false licences (literally means flying licenses) where a licence is issued at the time when a crime is being investigated.<sup>82</sup>
3. Use of conventional evidentiary mechanisms Despite the existence of a general clause in *Law No 11/2008 on Electronic Information and Transaction*, electronic evidence such as emails (electronic mail), wiretaps, cellular phone data etc are generally perceived as not legitimate in criminal cases including forestry cases.<sup>83</sup> However, forestry criminals use such technologies and, thus, it is essential for courts to consider allowing the utilisation of electronic evidence.<sup>84</sup>
4. Poor capacity and coordination between law enforcers. Due to the nature of forestry crime, forestry cases require good coordination between relevant agencies, such as between police and prosecutor.

<sup>77</sup> *Law No 41/1999 on Forestry*, art 60.

<sup>78</sup> UNDP, above n 75.

<sup>79</sup> Corruption Eradication Commission, *Corruption Impact Assessment: Corruption in the Presence of Weak Legal Certainty*, (2010).

<sup>80</sup> Yunus Husein, 'Theory and Implementation of Corporate Criminal Liability in Natural and Environmental Resources Cases' (Paper presented at the Theory and Practice of Corporate Criminal Liability in Natural and Environmental Cases National Seminar and Workshop, 21 May 2013).

<sup>81</sup> Indonesian Supreme Court, *Annual Reports 2009, 2010, 2011*.

<sup>82</sup> Indro Sugianto et al, *Illegal Logging Manual Investigation with Forestry Law, Money Laundering Law and Anti-Corruption Law* (ICEL and Kemitraan, 2006).

<sup>83</sup> Hukumonline.com, *Electronic Records as Evidence is Debatable*, (24 December 2009) <<http://www.hukumonline.com/berita/baca/lt4b336c3540de3/rekaman-elektronik-sebagai-alat-bukti-kembali-diperdebatkan>>.

<sup>84</sup> Agus Mulyana et al, *Guidelines on Investigation of Forest Crime through Anti-Corruption and Anti-Money Laundering Approach* (Indonesian Working Group on Forest Finance, UNODC and Indonesian Financial Transaction Reports and Analysis Centre, 2012).



However, due to reasons, including limitation of infrastructure and facilities, different points of view and institutional ego coordination is, in some cases, difficult to achieve. In addition, law enforcement on forestry and peatland requires specific expertise, which many law enforcers do not possess.<sup>85</sup>

5. Corruption. Poor law enforcement in the forestry sector is also caused by practices of a 'judicial mafia' in the law enforcement process.<sup>86</sup>
6. Poor transparency and accountability in supervision and law enforcement. This causes poor public control. Neglect by the community to use its capacity to be involved in supervision of forestry activities and law enforcement has also become a problem.

In response to these problems of supervision and law enforcement, two initiatives are being implemented:<sup>87</sup>

1. Guideline to handle cases by using a 'multi-door' approach; and
2. Corporate crimes prosecution guideline.

In addition there are programs to combat corruption in the law enforcement sector through *Presidential Instruction No 1/2013 on the Prevention and Combating of Corruption*.

#### Guidelines for cases handling by using multi-door approach

Illegal activities in forests and on peatlands, for example, illegal logging or forest fires, happens because of various motives. Whether it is to benefit from logging or obtain the land for other use, such as plantation or mining, the motivation is to gain financial benefits through illegal means. The environmental and social costs and state financial loss (including the loss of the potential income from tax) from illegal practices are enormous; crimes in the forestry and natural resources sector are multi-sectoral crimes. Thus, they require a 'multi-door' approach to remove incentives, to ensure perpetrators can be sued and suitably punished, including responsibility for restoring the ecological and economic loss resulting from their crimes. The multi-door approach uses law enforcement based on implementation of criminal sanctions contained in a combination of various legislation, such as environment, forestry, spatial, plantation, mining, taxation, corruption and money laundering criminal acts, related to the environment and natural resources in forests and peatlands.

The criteria that need to be considered in implementing the multi-door approach are any one or combination of:

1. Indications of violation in a licensing process. For example, issuing plantation licences without conducting an environmental impact assessment or obtaining an environmental permit.
2. Indications of activities exceeding the permit or carried out without a permit. Examples include mining or plantation activity outside a concession area.
3. Indications of crimes being committed in ecologically vulnerable areas, for example in conservation areas, protected areas and deep peatlands.
4. Indication of the loss of the state's resources or loss of state's income. for example, corporations that undertake land clearing without paying the necessary taxes or abiding by certain provisions.

Using the multi-door approach has benefits:

1. Preventing criminal perpetrators from escaping because of limitations in a legislation's scope.
2. Making sure that the perpetrators are cautious about conducting similar crimes. This is particularly relevant in relation to criminal syndicates.
3. Promoting comprehensive responsibility and creating deterrent effects through requiring corporations to return state money and restore degraded environments.
4. Facilitating international cooperation, in particular, chasing assets and suspects, and gaining cooperation related to criminal acts by the utilisation of anti-money laundering or anti corruption laws.
5. Maximising the process of reimbursing the state for its losses, including from the tax sector.

In ensuring the utilisation of this approach, the *Guidance to Handle Criminal Acts Related to Environment/Natural Resources in the Forest and Peatland by Using Multidoor Approach* was recently issued.<sup>88</sup> The *Guidance* was prepared jointly by the Ministry of Forestry, Ministry of Living Environment, Ministry of

<sup>85</sup> Bappenas, *National Strategy for Access to Justice* (2009) <<http://ditkumham.bappenas.go.id/home/ham/Strategi%20Nasional%20Akses%20thd%20Keadilan.pdf>>.

<sup>86</sup> Ahmad Dermawan et al, *Preventing the Risk of Corruption in REDD+ in Indonesia* (CIFOR and UNODC, 2011) <<http://www.cifor.org/online-library/browse/view-publication/publication/3476.html>>.

<sup>87</sup> Besides initiatives that lay down laws, there are also specific programs, including a bureaucratic reform agenda and specific presidential regulations on the prevention and combating of corruption.

<sup>88</sup> The *Guidance* was issued and signed on 20 May 2013.





Finance, Attorney General, Police Department of Republic of Indonesia, and Indonesian Financial Transaction Reports and Analysis Center.

The guidelines details the coordination mechanisms that are important in using multi-door approach. Two aspects of the guidelines are the coordination of law enforcement in the multi-door approach, and the investigation and inquiry phase up to the prosecution phase.

Apart from being useful for providing instructions for how to handle criminal acts through the use of the multi-door approach, the guidelines will function as one of the documents for training in the multi-door approach.

#### Guidelines for arranging indictments and the evidentiary technique for corporate crimes

In handling criminal matters in the area of environment and natural resources, the issue of corporate crime is central. Corporate crime prosecution is expected to send not only field actors but also intellectual actors to court. In this way, the deterrent effect will be more effective and environment rehabilitation can be forced upon the holders of capital.

The REDD+ Task Force, supported by the Attorney General Office and the Supreme Court, are studying this issue with a view to providing the necessary technical guidelines on corporate criminal liability.

### Concluding remarks

The Government of Indonesia is committed, nationally and internationally, to address the issue of deforestation and forest degradation. Tackling the issue of deforestation and forest degradation is a long and complex processes. It should be acknowledged that the Government of Indonesia has made considerable progress in addressing governance challenges. The highlight of the commitment has been encapsulated by the *Presidential Instruction No 6/2013 on Suspension of New Licenses and Improving Governance of Primary Forest and Peatland*, which mandates related ministries and agencies to implement concrete actions to improve forests and peatlands governance.

In Indonesia, REDD+ should be used as an entry point to protect Indonesia's forests and to promote significant governance reform in natural resources management. Major challenges that confront Indonesia's REDD+ agenda are to ensure high-level political support that is fully translated into state policies and actions. The establishment of the operational wings of REDD+, namely the REDD+ Agency, the MRV Institute and Funding Instrument and other relevant agencies is fundamental to guaranteeing openness, participation and accountability in decision-making and implementation of REDD+ in Indonesia.

