The GLOBE Forest Legislation Study

Indonesia’s Experiment in Regulating REDD+

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Contents

1. Executive Summary ........................................................................................................... 5
   1.1. Current Situation ................................................................................................. 6
   1.2. Options for Reform ......................................................................................... 8

2. Introduction .................................................................................................................. 10

3. Land, Forest and Carbon Tenure ................................................................................ 16
   3.1. Current Situation ............................................................................................... 16
   3.2. Options for Reform ......................................................................................... 22

4. Spatial Planning ............................................................................................................. 23
   4.1. Current Situation ............................................................................................... 23
   4.2. Options for Reform ......................................................................................... 25

5. Institutional arrangements ............................................................................................. 26
   5.1. Current Situation ............................................................................................... 26
   5.2. Options for Reform ......................................................................................... 30

6. Benefit Sharing ............................................................................................................. 30
   6.1. Current Situation ............................................................................................... 30
   6.2. Options for Reform ......................................................................................... 32

7. Safeguards .................................................................................................................... 32
   7.1. Current Situation ............................................................................................... 32
   7.2. Options for Reform ......................................................................................... 35

8. Public Participation ....................................................................................................... 35
   8.1. Current Situation ............................................................................................... 35
   8.2 Options for Reform ......................................................................................... 36

9. Monitoring, Reporting and Verification (MRV) ............................................................. 37
   9.1. Current Situation ............................................................................................... 37
   9.2. Options for Reform ......................................................................................... 39

10. Implementation and Enforcement ............................................................................... 39
   10.1. Current Situation ............................................................................................. 39
   10.2. Options for Reform ...................................................................................... 41
Indonesia

1. Executive Summary

Since a 2009 international commitment by President Susilo Bambang Yudhoyono to reduce greenhouse gas (GHG) emissions by 26% of ‘business as usual’ emission levels by 2020 through self-funding, or by 41% with international help, Indonesia has been an active participant in reducing emissions from deforestation and forest degradation (REDD+). Most noteworthy is a Letter of Intent (LOI) between the Indonesian government and the government of Norway, which outlines the development of demonstration activities, a National Action Plan, and a National REDD+ Strategy. A National REDD+ Managing Agency, established by Presidential Decree No. 62/2013 to replace the former REDD+ National Task Force, is tasked to help the President in coordinating, synchronising, planning, facilitating, managing, monitoring, overseeing and controlling REDD+ in Indonesia. The REDD+ Managing Agency is led by a Head who is directly responsible to the President of Indonesia. In November 2012 a National REDD+ Strategy was approved and adopted by the UN-REDD programme, which is partnered with the Indonesian Ministry of Forestry. With a total approved budget of 5.6 million USD, Indonesia completed Phase I of the UN-REDD Programme in October 2012, and has selected nine provinces to pilot REDD+ programs.

This report aims to show how Indonesia’s existing legal framework deals with or could deal with a number of relevant issues having implications for REDD+. It considers the broad spectrum of laws relevant to REDD, the most important of which are listed in Table 1. These issues are contained in the following eight themes: (1) Land, Forest and Carbon Tenure; (2) Spatial Planning; (3) Institutional

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Arrangements; (4) Public Participation; (5) Benefit Sharing; (6) Safeguards; (7) Measurement, Reporting and Verification (MRV); and (8) Implementation and Enforcement.

Table 1. Principal laws relevant to REDD+ in Indonesia

<table>
<thead>
<tr>
<th>Existing laws</th>
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<tbody>
<tr>
<td>Constitution of the Republic of Indonesia 1945 (as amended)</td>
<td></td>
</tr>
<tr>
<td>Law No.5/1960 concerning Basic Regulations on Agrarian Principles (Basic Agrarian Law)</td>
<td></td>
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<tr>
<td>Law No. 41/1999 on Forestry (Forestry Law)</td>
<td></td>
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<tr>
<td>Ministerial Regulation No. P.20/Menhut-II/2012 on Implementation of Forest Carbon</td>
<td></td>
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<tr>
<td>Law No. 32/2004 on Regional Government (Regional Autonomy Law)</td>
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<tr>
<td>Law No. 33/2004 on Fiscal Balance Between the Central and Regional Government (Fiscal Balance Law)</td>
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The consultation process carried out in the preparation of this report and analysis of documentary sources yielded the following main findings and recommendations.

1.1. Current Situation

**Land, Forest and Carbon Tenure**

Several types of land rights recognised under Indonesia’s Basic Agrarian Law have potential to provide suitable bases for REDD+ projects and programmes, including the right to use, the right to lease, the right to open up and the right to harvest forest products. The Ministry of Forestry has extensive power in determining forest tenure, including the authority to grant permits and licenses for forest use. In some instances, powers may also be delegated to provincial and district authorities. In a March 2013 decision by the Constitutional Court of Indonesia, the court’s recognition of the rights of indigenous peoples redefined the relationship between indigenous communities and the state regarding the management of indigenous forests, leading to important consequences for REDD+.

**Spatial Planning**

While a National Spatial Planning Law exists in Indonesia, it is primarily concerned with urban areas. Forest spatial management is under the authority of the Ministry of Forestry, through the Directorate General of Forest Planning, and is primarily concerned with planning for Forest Management Units. The President’s Office is currently developing a single forest map for the whole of Indonesia, and specific forest maps for provinces where REDD+ is being piloted. The President’s Office has made several unsuccessful attempts to improve coordination in spatial planning due to a reluctance of respective agencies to participate.
**Institutional Arrangements**

Through Presidential Decree No. 67/2013, the REDD+ Task Force was recently replaced by the REDD+ Management Agency, which will be responsible for assisting the President in coordinating, synchronising, planning, facilitating, managing, monitoring, overseeing and controlling REDD+ in Indonesia. Indonesia’s Moratorium Presidential Instruction calls for the cooperation of eight central-level agencies in addition to all provinces and districts, specifically the nine REDD+ pilot provinces. Existing regulations place the authority for issuing REDD+ permits primarily with the Ministry of Forestry, though there is also some role for districts and provinces.

**Benefit Sharing**

Benefit sharing agreements must be compatible with Indonesia’s current legislation governing natural resources extraction in the forestry sector, which requires revenue to be shared between national and regional governments. Ministry of Forestry Decree No. P.36/Menhut-II/2009 regarding Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests set out a REDD+ benefit sharing framework that divided revenues between government, communities and developers according to the type of forest involved. However, this Decree was rejected by the Ministry of Finance and therefore its validity is questionable.

**Safeguards**

The Law on Environmental Protection and Management is currently the only law recognising some form of safeguards that may be relevant to REDD+, and has the potential to provide a basis for specific REDD+ safeguards.

**Public Participation**

Indonesia’s Environmental Law and Freedom of Information Law provide for public participation in environmental decisions and require all state agencies to release public information requested by members of the public.

**MRV**

The newly established REDD+ Management Agency has been tasked with developing standards and methodologies for REDD+, along with consolidation and reports of GHG emissions and sequestrations from REDD+ programs, projects or activities. The REDD+ National Strategy states that the MRV system should, inter alia, be synchronised with the Safeguards implementation System for REDD+. According to Regulation No. P.30/Menhut-II/2009, the Ministry of Forestry is responsible for establishing two entities: (1) Independent Assessment Agency, an entity authorized
to verify REDD activity reports; and (2) REDD Commission formed by the minister and assigned to manage REDD implementation. The Directorate General of Forestry Planning is responsible for setting national emission reference levels.

Implementation and Enforcement
REDD+ management and implementation remains largely under the authority of the central government, in particular the Ministry of Forestry, though there has been some effort to delegate authority to provinces and districts.

1.2. Options for Reform
The context in which the proposed reforms summarized below will be carried out is discussed further throughout this paper. This section provides a brief outline of the proposed options by theme.

Land, Forest and Carbon Tenure
A range of steps are required to bring existing legislation and licenses in line with the March 2013 decision of the Constitutional Court regarding the rights of indigenous communities, and resolve conflicts between various REDD+ regulations and other laws to clarify carbon ownership. There remains little clarity on the ownership of carbon rights, though it appears a large degree of control remains with the Ministry of Forestry. Various laws conflict regarding the definition of tenure rights; therefore it is necessary to harmonize policies tangibly related to tenure issues, such as the Forestry Law, Basic Agrarian Law and Regional Autonomy Law. The Forestry Law and associated regulations on the issuance of permits and licenses must also be amended to reflect the Court’s decision on indigenous forests.

Spatial Planning
Indonesia currently has no master plan for national spatial planning, which leads to conflicts between policies and actions of national and provincial authorities as well as various Government agencies. Many key government agencies lack explicit spatial planning guidelines. For example, the Ministry of Forestry does not have a standard map of Indonesian forests, as the Law on Spatial Planning does not take into account the forestry sector. This results in overlapping claims over, and licenses for, forest areas. Land use decisions are generally made at the national level with little community participation. In order to prevent such overlaps and conflicts, national policies and legislation concerning spatial planning must be synchronized, and working coordination mechanisms between government bodies involved in spatial planning and land use decisions must be established. Finally, a revision to the Forestry Law would provide for more inclusive planning processes for land use decisions.
Institutional Arrangements
A lack of coordination between institutions has resulted in conflicting decisions and calls for action regarding REDD+, specifically which institutions are competent to issue forestry licenses. To address the absence of professional institutions for REDD+ implementation, measures should be adopted to overcome the overlap of authority in REDD+ administration and management. REDD+ institutions require a solid legal foundation that is not ad hoc in nature. It is also important that REDD+ institutions are not given complete power, which is demonstrated by holding three concurrent functions (steering, executive and oversight).

Benefit Sharing
As benefit sharing is closely tied to tenure rights, which remain uncertain in Indonesia, there is currently no authoritative legislation governing benefit sharing arrangements. Adopting legislation establishing benefit sharing entitlements in respect to REDD+ projects and programs must be done, at minimum, at the Governmental Regulation or Presidential Regulation level. Tenure issues relevant to benefit share must also be clarified, taking into account the recent Constitutional Court decision on the rights of indigenous peoples.

Safeguards
Neither the Forestry Law nor any of Indonesia’s REDD+ regulations contain provisions for the integration of REDD+ safeguards. While safeguards may be applied in individual REDD+ projects, and it is important to maintain the application of safeguards specific to certain projects and programmes, there is no overall framework for REDD+ safeguards. This leaves the concerned public uncertain as to which safeguards are being applied. The Corruption Eradication Commission and relevant State agencies, such as the Supreme Audit Agency and the Center for Financial Transaction Reporting and Analysis, could be involved with REDD+ institutions in the joint formulation of corruption prevention measures for REDD+ projects.

Public Participation
Existing REDD+ regulations in Indonesia do not include provisions for public participation in REDD+ activities. The Forestry Law also lacks means for the public to participate in forest-related decisions. The legal framework that will regulate REDD+ in the future should incorporate specific clauses providing for public participation in REDD+ activities and decision-making. In the event that a comprehensive reform of the Forestry Law is undertaken, it should include providing for greater public participation in forest-related decisions.
MRV
Existing systems for MRV in Indonesia are not considered to be credible by relevant parties, and are therefore not trusted. The REDD+ Management Agency should prepare a new MRV strategy, along with any other necessary arrangements for a successful MRV system.

Implementation and Enforcement
Indonesia’s National REDD+ Strategy does not include a solid legal foundation for implementation by relevant ministries and agencies. It is necessary that a legal foundation for REDD+ implementation exists in order to successfully employ national REDD+ mechanisms; therefore, measures should be taken to establish this legal framework. While there have been efforts to delegate power to provinces and districts, the enforcement infrastructure is still relatively undeveloped at these levels. Laws and regulations impeding coordination between state ministries and agencies, and legislation that hampers the implementation of the National REDD+ Strategy at the local level, should be amended or reformed to avoid complications and restraints. Law enforcement institutions should also be educated on REDD+ issues to facilitate improved enforcement.

Other Issues
Overall, the Indonesian legal framework relevant to forestry is ill-equipped for REDD+ due to a general lack of transparency, public participation and accountability. The following laws should be harmonized as a priority:
- Forestry law
- Basic Agrarian Law
- Regional Autonomy Law
- Spatial Planning Law

Replacement of the Forestry Law should also be made a priority, since it is incompatible with principles of contemporary forest management practices, thus failing to provide an appropriate legal foundation for REDD+ development. The Environmental Protection and Management Law may provide an appropriate basis for the development of a legal umbrella for REDD+ implementation.

2. Introduction
Indonesia can be considered as the ‘second birthplace’ of the REDD+, because it was in Bali-Indonesia that the REDD+ scheme was comprehensively discussed at the 13th Conference of the Parties (COP) of the United Nations Framework
Convention on Climate Change (UNFCCC). At this 13th COP meeting, the State parties not only successfully crafted the Bali Roadmap but also agreed to ‘urgently take further meaningful action to reduce emissions from deforestation and forest degradation’. The importance of Indonesia’s position in REDD+ discourse is also due to the fact that Indonesia has the third largest tropical forest in the world after Brazil and Congo. According to the statistics of the Ministry of Forestry in 2011, Indonesia has 187,670,600 hectares land territory and 52.4 percent of which have forest cover, equal to 98.56 million hectares. However, according to a Food and Agriculture Organization (FAO) report in 2009, Indonesia has the world’s highest deforestation rate, with 1.87 million hectares lost each year from 2000 to 2009. Even though the deforestation rate is declining, it is still significantly high. According to the official data of the Ministry of Forestry the level of deforestation in Indonesia from 2009 to 2011 was around 450,000 hectares per year. The accuracy of these data, however, has been questioned by several experts including government agencies in Indonesia, as it was considered too low and did not reflect the situation in the field. According to Greenpeace, the deforestation rate of Indonesia is much higher than the government figure.

As a result of high deforestation rates and bad practices in land use and forest management, Indonesia is the world’s third largest CO2 emitter after the USA and China, and the contribution of the Land Use, Land Use Change and Forestry (LULUCF) sector to these emissions is around 83 percent.

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3See the 13th CoP Agreement of the UNFCCC.
Aware of such high potential, the Indonesian government has pursued and continued to take part in the discourse of REDD+ issues at national and international forums for possibilities to curb the CO2 emission from the LULUCF sector and to generate economic benefit from the forestry sector without clearing the few remaining forests. The serious commitment of the Indonesian government can be seen in the speech of President Susilo Bambang Yudhoyono during the G-20 Leaders Summit in Pittsburg, 25 September 2009, which states that

...we will reduce our emissions by 26 percent by 2020...and...with international support, we are confident that we can reduce emissions by as much as 41 percent. This target is entirely achievable because most of our emissions come from forest related issues, such as forest fires and deforestation.10

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10See the full text of the speech at the official REDD+ Task Force website: http://www.satgasreddplus.org/en/documents/related-regulations (accessed 17 March 2013). This target, however, is considered too ambitious and the baseline for such a target is not clear to many people who work on the issue.
Following that historical speech, the Indonesian government started to open up communication with international communities and domestic stakeholders for the preparation of REDD+ pilot projects and REDD+ demonstration activities in almost all forested major islands of Indonesia. Based on Ministry of Forestry data, there are more than 40 REDD+ pilot projects and REDD+ demonstration activities all over Indonesia at the moment. It is important to note that the existing REDD+ projects can be classified into four project types: reforestation, avoided deforestation, avoided degradation, and restoration.

The exact location of these ‘projects’ can be seen in the ‘interactive map’ at the website bellow.11

![Interactive Map of Indonesia](http://www.redd-indonesia.org/index.php?option=com_content&view=article&id=205&Itemid=57)


The growing number of REDD+ demonstration sites and the enthusiasm of the Indonesian government to develop ‘full flag’ REDD+ projects in Indonesia, however, is not supported by adequate and solid national legislation. The current REDD+ projects are operating under legal uncertainty because all current REDD+ related laws and regulation are not adequate to regulate and manage all aspects of REDD+ projects in Indonesia. It is important to note that the existing laws and regulations are not only inadequate but also contradictory to each other. This contradiction

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11The above ‘interactive map’ gives the following information: (i) name of the project; (ii) location of the project; (iii) name of developers; and (iv) the objective (type) of the project. For more information, see http://www.redd-indonesia.org/index.php?option=com_content&view=article&id=205&Itemid=57 (accessed 18 March 2013).
can be seen in national legislation with several provincial and district regulations (vertical disharmony). There are also contradictions in ‘sectoral’ legislation such as that on forestry, spatial planning, land, mining and agriculture (horizontal disharmony).

Based on the above realities, this report seeks to discuss the current situation of legal problems surrounding REDD+ and several challenges faced by the Indonesian government in developing a solid legal basis for the implementation of REDD+ in Indonesia. In addition, it identifies options for reform that can be utilised by the Indonesian government and parliament to develop a future legal basis for REDD+ development in Indonesia.

The report is structured according to a set of key legal areas considered crucial for REDD+ development, namely the following: (1) Executive Summary; (2) Introduction; (3) Land, Forest and Carbon Tenure; (4) Spatial Planning; (5) Institutional Arrangements; (6) Benefit Sharing; (7) Safeguards; (8) Public Participation; (9) MRV; (10) Implementation & Enforcement.

**National REDD+ Strategy**

Indonesia adopted its National REDD+ Strategy in November 2012. In order to be familiar with the objectives and structure, as well as directions and recommendations presented in the National REDD+ Strategy, the following sets out several key components integrated therein. The National REDD+ Strategy sets forth three of its core objectives:

- The Short-term objective (2012-2014) is to strategically improve the governance and institutional system, spatial planning and investment climate in order to make good on Indonesia’s commitment to reduce emissions while maintaining a robust economic growth.
- The Medium-term objective (2012-2020) is to implement a governance system consistent with policies and procedures established in forest and peat land management agencies, in addition to financing space and mechanisms already identified and developed in the previous phase in order to achieve emissions reduction targets by 26-41 percent by 2020.
- The Long-term objective (2012-2030) is to establish Indonesia’s forest and land areas as a net carbon sink by 2030 through proper policy implementation in order to ensure the sustainability of economic functions and forest ecosystem services.

The aforementioned objectives are then translated into five management principles: effective, efficient, fair, transparent and accountable. This is complemented with five core pillars of the National REDD+ Strategy framework: (i) institutional
system and processes, (ii) legal and regulatory framework, (iii) strategic programs, (iv) shift in paradigm and work culture, and (v) multi-party engagement. These principles and strategies are expected to: (i) reduce emissions, (ii) increase forest carbon reserves, (iii) increase biodiversity and environmental services and (iv) maintain economic growth.

It is evident that the objectives, principles and strategies of REDD+ development mentioned above do not differ much from the expectation of respondents who wish for a just, transparent and accountable forest management mechanism. With regard to legislation relevant for forest management and REDD+, the National Strategy calls for the re-assessment of all laws, regulations and policies to ensure harmonization. This is in accordance with the expectation of respondents interviewed for this survey.

The National REDD+ Strategy explicitly states that:

In order to implement the REDD+ scheme in an effective, efficient and sustainable fashion, it is essential to strengthen legal foundation and reform policies and legislation. Both aspects are necessary for rearranging spatial planning and land use, managing tenurial rights, improving the management of permits, resolving various conflicts and technical issues on the ground, and enforcing the law.

To achieve this, the National REDD+ Strategy mandates the revision of relevant laws and regulations, among which are the Forestry Law and Spatial Planning Law, in addition to other applicable laws.

The National REDD+ Strategy also specifically underscores the need to resolve tenurial issues to provide the people with clarity on matters related to boundaries and management rights of natural resources. In line with this, the National REDD+ Strategy: (i) instructs the Ministry of Home Affairs and BPN (Badan Pertanahan Nasional or National Land Agency) to take stock of existing indigenous communities and other local populations, (ii) supports BPN in facilitating tenurial conflict resolution through out-of-court settlement mechanisms, and (iii) aligns and revises laws and regulations, and other relevant policies directly related to natural resource management and utilization.

It should be noted that these instructions are consistent with the expectation of survey respondents and as such should be comprehensively implemented. The National REDD+ Strategy, however, does not provide details on which areas in relevant legislation need to be amended or reformed. Hence, there is still a need for a comprehensive study of legal provisions to identify specific areas in laws and regulations related to REDD+ development and management in Indonesia. This
study is expected to complement the National REDD+ Strategy in accentuating the need to harmonize applicable laws and regulations as instructed in the National REDD+ Strategy.

3. Land, Forest and Carbon Tenure

3.1. Current Situation

One of the most important legal aspects of REDD+ project development and management is the certainty of the legal status of the land or forest, because such status has an impact on the rights of people over land and forest. Since the legal status of land and forests in Indonesia is governed by a wide variety of laws and regulations, the issue of tenure over land and forest is still unclear or at least still considered a contentious issue.

In order to understand the certainty of tenure over land and forest, we need to revisit the Indonesian Constitution because Article 33 (3) explicitly states that:

The land and waters, and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people.

Based on this provision, all rights over land, waters and natural resources, such as forests and minerals found within shall be under State control. Nevertheless, the State can partly delegate such rights to citizens or groups of citizens and legal entities, according to applicable laws and regulations.12

If we define ‘tenure’ as ‘right’ as described in Law No.5/1960 concerning Basic Regulations on Agrarian Principles (Basic Agrarian Law), matters related to land tenure are therefore governed in detail in the Basic Agrarian Law. Article 4(1) of the Basic Agrarian Law stipulates that:

...the State has the power to determine whether different types of rights over the earth’s surface, referred to as land, can be given to persons, either individually or collectively with other persons or to legal entities (italicized by the author).

Furthermore, Article 9(2) stipulates that:

Every Indonesian citizen, either male or female, has equal opportunities to secure his or her right to land, and to benefit from its yields, either for personal or family use.

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12See Articles 4 and 9 (2) of the Basic Agrarian Law.
Both articles clearly show that land tenure, including forest areas, is within the ambit of the Basic Agrarian Law because the earth’s surface also encompasses forests contained therein, and even natural riches found beneath the earth’s surface. The Basic Agrarian Law specifically states that every citizen has the right to utilize the land and to harvest forest products.\textsuperscript{13} Nevertheless, this Law also recognizes ‘land tenure’ based on customary law, such as hak ulayat (communal rights to land), if such practices still exist and are duly recognized by the people or local community.\textsuperscript{14}

The Basic Agrarian Law also recognizes the following types of land rights:\textsuperscript{15}

- Right of ownership,
- Right to cultivate,
- Right to build,
- Right to use,
- Right to lease,
- Right to open/clear the land,
- Right to harvest forest products,
- Other rights not included in the above rights.

More detailed provisions on conditions for granting the respective rights mentioned above are specified in several Government Regulations.\textsuperscript{16} Some of these rights, such as the right to use land, right to lease land, the right to open up land, the right to harvest forest products and some other rights not mentioned in the above provision are relevant to use as legal bases when developing REDD+ projects and programmes in Indonesia.

It is also important to note that the state agency that has the power to administer and determine land rights is the BPN. As this is the only state agency with the power to issue land certificates, it is crucial to take this entity into account when drafting national REDD+ policies in the future.

Apart from Basic Agrarian Law, another relevant law in establishing forest tenure is Law No. 41/1999 on Forestry (Forestry Law) because it contains certain clauses that

\textsuperscript{13}See Article 46, Basic Agrarian Law. See also the Explanatory Notes on the Basic Agrarian Bill which describes itself as a basic Law on issues related to land and natural resources.

\textsuperscript{14}See Article 3, Basic Agrarian Law.

\textsuperscript{15}See Article 16(1), Basic Agrarian Law.

\textsuperscript{16}Among the relevant Government Regulations are Government Regulation No. 40/1996 concerning the Right to Cultivate, Right to Build and Right to Land Use and Government Regulation No. 24/1997 on Land Registration.
govern on the legal relationship between forests and people. The Forestry Law mainly seeks to ensure that forest areas are managed for the betterment of the people in an equitable and sustainable manner by:\textsuperscript{17}

- guaranteeing adequate availability of forest areas with proportionate dispersion;
- optimizing different forest functions in a balanced and sustainable manner;
- increasing the carrying capacity of watersheds;
- building the people’s capacity in an equitable and environment-friendly manner;
- ensuring fairness and sustainable distribution of benefits.

To achieve these objectives, the Forestry Law has laid down the appropriate provisions and management tools.

Similar to the Basic Agrarian Law, Article 4(1) of Forestry Law also explicitly states that:

\begin{quote}
All forest areas within the territory of the Republic of Indonesia, including natural riches contained therein, shall be controlled by the State for the greatest benefit of the people.
\end{quote}

In addition, Article 4(2) of Forestry Law states that the Ministry of Forestry has the power to:

- administer and manage all aspects related to the forest, forest areas and forest products;
- establish the status of a given area as a forest area, or determine that a forest area is not a forest area; and
- administer and determine the legal relationship between people and forests, and manage forest-related legal conduct.

Given the extensive power of the Ministry of Forestry, particularly regarding the second and third points, the Ministry thereby holds the authority to decide on forest tenure for the people. The Ministry of Forestry can even establish a ‘forest area as not being a forest area’ and is authorized to determine the ‘legal relationship between people and forests’.

Such authority is manifested into the power to grant permits and licenses for the utilization/cultivation of forest areas that covers:\textsuperscript{18}

\textsuperscript{17}See Article 3, Forestry Law.
\textsuperscript{18}For more information, see Articles 23 to 39, Forestry Law.
• utilization of designated forest area,
• utilization of environmental services,
• utilization of timber and non-timber forest products, and
• harvesting of timber and non-timber forest products, etc.

These powers are then translated into a number of implementing regulations, such as:

• Government Regulation No. 44/2004 on Forestry Planning;
• Forestry Ministerial Regulation No. 6/Menhut-II/2009 on Establishment of KPH (Forest Management Unit).
• Forestry Ministerial Regulation No. 6/Menhut-II/2010 on Norms, Standards, Procedures and Criteria for Forest Management in KPH Lindung (KPHL or protected forest management units) and KPH Produksi (KPHP or production forest management units).

In practice, all permit applications for forest exploitation are under the responsibility of the Ministry of Forestry. It can therefore be said that the Ministry of Forestry is the only government body conferred with absolute authority to determine the status and utilization of forest areas.

Article 66 of the Forestry Law explains that the Ministry of Forestry may partly entrust authority to the provincial and district/city government. Based on this article, it can be inferred that provincial and district/city governments also have the power to give license but their power is very limited compared to the Ministry of Forestry.

Indonesia has a dual land tenure system, which is tenure derived from formal (state made laws) and tenure derived from adat law (customary law). This condition has created uncertainty in land, forest and carbon tenure and this condition creates challenges in the development of REDD+ projects in Indonesia.

While the Forestry Law recognizes the existence of customary land rights, it also subjects them to several uncertainties and conditionalities. First, ‘indigenous forests’ are defined by the law as ‘state’s forest situated in indigenous law community area’ (emphasis added), thereby providing the state with a high degree of control over indigenous lands. The law similarly defines forests as only

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19 Article 1(6) of the Forestry Law, No. 41/1999.
Based on their limiting effects on the realization of indigenous peoples’ land rights, these provisions were, among others, challenged by a range of indigenous peoples’ groups in the Constitutional Court, arguing they were incompatible with certain provisions of the Constitution guaranteeing respect for indigenous peoples’ rights. In a landmark 2013 decision, the Constitutional Court ruled partially in favour of the petitioners, deciding that:

- The word ‘state’s’ should be removed in the definition of indigenous forests, thereby distinguishing between state forests and indigenous forests, while the definition of forests as only including state and title forests is unconstitutional;
- Article 4 (3) should be construed as requiring recognition and respect of indigenous peoples’ rights (rather than just ‘taking into account’) and their existence would be recognised as long as they are in fact still in existence and such existence is in accordance with societal development and national principles and regulated by law.20

While this decision has been lauded by indigenous people and many activists, it has also reinforced the existence of a ‘dual tenurial system’ in Indonesian forest. There now remains significant work to be undertaken in acting upon the decision of the Constitutional Court and adapting the legal framework to reflect it. The Government must, for example, adapt legislation to adequately recognise indigenous communities’ rights and work to resolve the claims of current licensees who, in some cases, have overlapping permits granting them access to forests which properly belong to indigenous communities.21 Therefore, there remain important challenges in amending the legislation to provide for the appropriate balance between state and customary rights.

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The 2013 decision follows a decision in 2011 which ruled that the Ministry of Forestry is not entitled to simply ‘designate’ forests as state forests, but must rather go through the full formal process of ‘gazetting’ them. Since only some 10% of forests designated as state forests have been formally gazetted this decision similarly entails important consequences for land tenure and requires significant work on the part of the Government to address its implications. Arguably, the decision opens up opportunities for increased participation of local communities and indigenous peoples to participate in the formal gazetting process of the remainder of state forests. However, as of the time of writing the Government has yet to make substantial progress in addressing the implications of this decision.

In addition, unlike land and forest tenure, we cannot find any definition or reference to ‘carbon tenure’ in the Basic Agrarian Law, Regional Autonomy Law or Forestry Law. Similarly, several Ministerial Decrees issued by the Ministry of Forestry on REDD+ projects also have no clear definition and explanation about ‘carbon tenure’. Nevertheless, since forest and land are mostly under State control, carbon tenure should not be separated from land and forest tenure.

The question that arises is whether indigenous communities also have ‘rights’ to carbon (carbon tenure) given the fact that the existence of customary forests is recognized by the Constitution, Agrarian Law and Forestry Law. It is difficult to provide a definitive answer to such a question, because the existing laws are silent about ‘carbon tenure’. In addition, since indigenous communities traditionally only have rights over forest and land, which does not include carbon, this creates another legal issue in determining the status of carbon tenure in relation to indigenous communities. However, since the carbon stock cannot be separated from the existence of land and forest, the indigenous communities should be also entitled to carbon tenure or at least be able to enjoy economic benefits generated from REDD+ projects in Indonesia.

After examining the above laws and several ministerial regulations issued by the Ministry of Forestry, we can conclude that tenure issues remain to be a contentious legal issue, but, in reality, the Ministry of Forestry is still the main State agency that has authority to make decisions on forest tenure, including carbon tenure. This condition can be seen in the following regulations, where the Ministry of Forestry plays a central role in every aspect of REDD+ development in Indonesia:

- Ministerial Regulation No. P.68/Menhut-II/2008 on Organizing REDD (Reducing Emissions from Deforestation and Forest Degradation) Demonstration Activities;

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22 Constitutional Court decision No. 45/PUU-IX/2011 (MK45), 22 July 2011.
• Ministerial Regulation No. P.30/Menhut-II/2009 on REDD (Reducing Emissions from Deforestation and Forest Degradation) Procedure;

These regulations set out partially conflicting application and approval processes for REDD+ activities, with some requiring approval only from the Ministry of Forestry and others dividing authority among the Ministry of Forestry and district and provincial authorities. However, in all cases, the lead institution remains the Ministry of Forestry, indicating that its authority in this field remains paramount.

In 2012 Indonesia adopted a new regulation on REDD+\(^{23}\) which seeks to streamline and consolidate the three regulations listed above. However, it has not been successful in streamlining all elements, and some aspects of the earlier regulations remain in force. Moreover, all licenses issued under the earlier regulations still exist.

3.2. Options for Reform

• Based on the foregoing explanations, lawmakers (the government and House of Representatives (DPR)) could seek to harmonize laws tangibly related to tenure issues, such as the Forestry Law, Basic Agrarian Law and Regional Autonomy Law, given the overlapping nature of these laws.
• Synchronization and reform efforts cannot be done partially or in a makeshift manner as they will only create a different set of legal problems.
• If comprehensive synchronization is not currently possible, the government and DPR should at least focus on replacing the Forestry Law as it is no longer suitable for the present situation, and address the issue of excessive powers conferred upon the Ministry of Forestry. Such replacement should seek to address the implications of the two recent Constitutional Court decisions in 2011 and 2013, namely clarifying the correct procedures for designating State forests and provisions recognising and giving effect to the tenure rights of indigenous peoples.
• In addition, the respective Ministerial Regulations governing REDD+ issues as mentioned earlier should be fully streamlined, potentially through the adoption of a higher level law, as they remain to some extent in contradiction with each other and with principles and provisions set forth in other laws and regulations.

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\(^{23}\) Ministerial Regulation No. P.20/Menhut-II/2012 on Implementation of Forest Carbon.
4. Spatial Planning

4.1. Current Situation

The spatial planning process in Indonesia suffers from a number of uncertainties. These are exacerbated by the absence of a master plan on national spatial layout, particularly for the forestry sector. As a consequence, managing and determining forest allocations is extremely problematic because the relevant government bodies are working without any clear direction. The following factors have been identified as contributing to deforestation: (i) conversion of forest lands for other purposes, such as plantation, farming, mining or human settlement, (ii) illegal logging and (iii) forest and land fires. This is compounded by the following facts: (i) overlapping policies and authorities among government agencies, (ii) absence of a valid national forest map, (iii) strong sectoral egos among different government institutions and (iv) inconsistencies among national and sub-national state agencies in implementing principles of spatial planning, that significantly contribute to Indonesia’s high deforestation rate.24

It is essential to map out sectors involved in forest exploitation as there are no explicit spatial planning guidelines from relevant parties, such as Ministry of Forestry, Ministry of Agriculture, Ministry of Mining, Ministry of Energy and Mineral Resources, as well as the provincial and district/city government.

National spatial planning is regulated by Law No. 26/2007 on Spatial Planning (Spatial Planning Law), but it does not significantly influence forestry spatial planning although the main purpose of this Law is to achieve the following goals:25

- Ensure harmonization between natural and human-made environments;
- Ensure cohesiveness in the utilization of natural and synthetic resources by taking into account human resources; and
- Ensure protection of spatial functions and prevention of negative impacts on the environment due to spatial utilization. (italicized by the author)

The inability of the Spatial Planning Law to influence forestry spatial arrangements is due to the absence of specific provisions or clauses that govern forestry issues, although this Law expressly states that national, provincial and district/city spatial planning encompasses lands, waters, the atmosphere and space within the earth.26

24These factors are a result of interviews conducted by the author and confirmed by several reports, such as: Sunderlin and Resosudarmo. 1996. Rates and Causes of Deforestation in Indonesia. See also Indarto, G.B. et al. 2012. The Context of REDD+ in Indonesia: Drivers, Agents and Institutions, Working Paper No 92, CIFOR, Bogor, Indonesia.
25See Article 3, Spatial Layout Law.
26See Article 15, Spatial Layout Law.
in reality, however, the Spatial Planning Law concentrates more on regulating spatial allocations of urban areas (non-forest areas) along with areas/regions which are considered strategic by the government.  

Forest spatial management remains under the authority of the Ministry of Forestry because, as mentioned previously, the Ministry is authorized to decide on the status and use of forest areas. In relation to forest planning, the Ministry of Forestry is equipped with a special directorate called the Directorate General of Forest Planning. The main task of this directorate is to manage KPHs. Unfortunately, up to this day, the Ministry of Forestry has no one standard map of the Indonesian forest. As a result, there are a lot of overlapping claim and licenses in the Indonesian forest areas.

In order to create one standard map of the Indonesian forest, the Presidential Office, through its Delivery Unit for Development Monitoring and Oversight (UKP4)\(^{28}\) and the National Agency for Survey and Mapping Coordination (Bakosurtanal),\(^{29}\) have begun gradually to take over the Ministry of Forestry’s authority in developing a ‘standard forest map’ through the ‘One Map Policy’ and ‘Indonesia Nine’ that aims to produce a valid national forest map and nine other forest maps for nine provinces where REDD+ projects are piloted. The nine provinces are Aceh, Jambi, West Kalimantan, Central Kalimantan, East Kalimantan, Papua, West Papua, Riau and South Sumatera. The involvement of UKP4 and Bakosurtanal is necessary because the Ministry of Forestry has failed to develop a valid standard forest map. It is important to note that since the UKP4 is considered a ‘temporary’ agency and may not survive after the current administration, this may create institutional problems in the future. However, if they can successfully produce a single map of the Indonesian forest, such a map can be utilized by all relevant government agencies in Indonesia, including the Ministry of Forestry.

These maps, which are still being prepared at the moment, are expected to be used as a reference material for all REDD+ projects and all related forest development programs in Indonesia. In short, this map will be used as the main reference by all stakeholders (government agencies, forest dependent people, Civil Society Organizations (CSOs), international communities) to enhance the quality of REDD+ project management and forest governance in Indonesia.

\(^{27}\)Definition of strategic regions: ‘National strategic areas are regions where their spatial layout is prioritized because of their national importance toward state sovereignty, defense and security, the economy, socio-culture, and/or the environment, including areas designated as World Heritage Sites’ (see Article 1(28), Spatial Layout Law).

\(^{28}\)See the profile of this agency at http://www.ukp.go.id/.

\(^{29}\)See the complete profile of this agency at http://www.bakosurtanal.go.id/.
An explanation is also necessary concerning coordination at the central level spearheaded by the Presidential Office and UKP4 along with the REDD+ Task Force also involving the following state ministries and agencies: (a) Finance, (b) Agriculture, (c) Forestry, (d) Energy and Mineral Resources, (e) State Ministry of National Development Planning (BAPPENAS), (f) Environmental Affairs, (g) National Land Agency, (h) Cabinet Secretariat and (i) UKP4. These relevant agencies are supposed to work in harmony in REDD+ development and forest governance development in general, but in reality they rarely consult each other as each agency considers itself to be more important than other. The Ministry of Forestry, for example, still insists that their mandates and functions are well described under the Forestry Law and they will only work based on the scope of their mandate and power under that particular law. Therefore, several coordination efforts initiated by UKP4 or other government agencies in spatial planning are always treated with suspicion, because they are afraid of losing or compromising some of their powers. Similarly, in the area of spatial planning, agencies are always reluctant to share information with each other. This kind of situation has created difficulties in coordinating all REDD+ pilot/demonstration projects.

4.2. Options for Reform

Synchronization of all relevant national policies and legislation is necessary, and cannot be partially solved with the establishment of ‘one standard map’ of the Indonesian forest and other ‘nine maps’ of REDD+ pilot provinces.

Development of forest maps is only the initial step and requires comprehensive improvements to ensure that national spatial planning is developed based on a mutual need of the people and all relevant government agencies. Therefore, the following government agencies – (a) Forestry, (b) Agriculture, (c), Energy and Mineral Resources, (e) Ministry of Home Affairs, (f) BAPPENAS, (g) Environmental Affairs, (h) National Land Agency and (i) Bakosurtanal – need to sit together to synchronize their ‘over-lapping claims and authorities’.

Legal reform in the field of forestry, land, environment, spatial planning, agriculture, energy and mineral resource and regional autonomy needs to be restructured in order to attain equitable and effective forest governance and REDD+ development. The first and the most important legal reform needed by Indonesia is the revision of the current Forestry Law because that particular law is not developed for more inclusive processes in forest governance and at the same time some of its provisions are not suited to the current situation, especially the development of REDD+ projects.
5. Institutional Arrangements

5.1. Current Situation

The first government agency established for the development of REDD+ in Indonesia was the REDD+ Task Force, established under Presidential Decree No. 19/2010. Among other responsibilities, the REDD+ Task Force was charged with preparing the National REDD+ Strategy and National Action Plan on Greenhouse Gas Reduction, providing for the establishment of REDD+ institutions, preparing an MRV framework and assisting in the readiness of pilot provinces.30 The REDD+ Task Force was extended through a later Decree,31 which added additional tasks to its mandate, including monitoring the implementation of the Presidential Instruction on the forest concession moratorium. This addition enhanced coordination with provinces and districts on implementing the Moratorium Instruction, especially the nine REDD+ pilot provinces. However, in reality, it remains extremely difficult to coordinate effectively because each ministry and agency still operates on the basis of its respective sectoral laws.32

It is important to note that the legal basis of all existing sectoral legislation on forestry, mining and environment are governed under Undang-Undang Law which is higher and overrides the presidential instruction. From a number of policies issued by the government concerning the pilot projects, all REDD+ pilot projects are directed at peat lands and primary natural forests. Hence, virtually all pilot projects and demonstration activities are targeted at peat lands and primary natural forests. Nevertheless, the Ministry of Forestry has issued the three Ministerial Regulations mentioned earlier that allow for REDD+ demonstration activities and pilot projects in the other areas. Pilot projects and demonstration activities can therefore also be carried out in areas beyond peat lands and primary forests. This situation shows that even the President and Ministry of Forestry time and again have issued different policies that do not support each other. Efforts should be made to rectify this situation in coming years.

As was foreseen in its founding documents, the REDD+ Task Force was discontinued in 2013 and replaced by the REDD+ Managing Agency, a ministerial-level body that is tasked to:

31 Presidential Decree No. 25/2011 on the Preparatory Task Force for the Creation of REDD+ Institutions.
help the President in coordinating, synchronising, planning, facilitating, managing, monitoring, overseeing and controlling REDD+ in Indonesia.\(^{33}\)

This task and function are considered too broad because they combine the three main government functions, namely: steering, executive and oversight functions. In addition, this new agency has no clear mandate on which government agencies will be coordinated by this new agency. It is important to note that before the full and complete formation of the management team of the REDD+ Managing Agency, its task will be carried out by the current UKP4.\(^{34}\)

This new agency also created confusion among REDD+ observers in Indonesia, because the legal foundation of this agency does not address the complication of the existing overlapping agencies that claim to have power to manage climate change-related issues such as: Ministry of Environment, National Council on Climate Change, Ministry of Forestry and several other ministries that close to forestry issues such as Ministry of Agriculture and Ministry of Energy and Mineral Resources. In addition, this Presidential Regulation does not automatically invalidate the existing Ministerial Regulations on REDD+. As a result the following Ministerial Regulations are still valid and are still relevant to the discussion:

- Ministerial Regulation No. P.68/Menhut-II/2008 on the Organizing of REDD (Reducing Emissions from Deforestation and Forest Degradation) Demonstration Activities;
- Ministerial Regulation No. P.30/Menhut-II/2009 on REDD (Reducing Emissions from Deforestation and Forest Degradation) Procedure;
- Ministerial Regulation No. P.36/Menhut-II/2009 on Licensing Procedure for the Utilization of Carbon Sequestration and/or Storage in Production Forests and Protected Forests;
- Ministerial Regulation No. P.20/Menhut-II/2012 on Implementation of Forest Carbon.

Ministerial Regulation No P.68/2008 clearly states that all applications are to be addressed to the Ministry of Forestry which will alone approve applications without the involvement of other ministries or the provincial and district/city government.

The Ministry of Forestry then issued Ministerial Regulation No. P.30/2009 which allows REDD+ project developers to apply for operating permits in the following areas: (i) natural forest, (ii) plantation forest, (iii) community forest, (iv) people’s

\(^{33}\) See Article 4 of the Presidential Regulation No. 62/2013, Regarding Managing Agency for the Reduction of Emission from Deforestation and Degradation of Forest and Peatlands.

\(^{34}\) See Article 27(2) of the Presidential Regulation. No 62/2013.
plantation forest, (v) ecosystem restoration, (vi) production forest management unit, (vii) protected forest management unit, (viii) conservation forest management unit, (ix) conservation forest, (x) customary forest and (xi) privately held forest.\textsuperscript{35}

Permit applications for REDD+ projects in natural forests, plantation forests, community forests, people’s plantation forests and ecosystem restoration are submitted to the Ministry of Forestry after obtaining recommendation from the local government.\textsuperscript{36} The licensing process for REDD+ projects in customary forests and privately-held forests also involves the local government. The final decision on the approval or rejection of a REDD+ project, however, rests with the Ministry of Forestry.

Before long, both regulations were ‘refined’ through Ministerial Regulation No. P.36/Menhut-II/2009 on Licensing Procedure for the Utilization of Carbon Sequestration and/or Storage in Production Forests and Protected Forests (Ministerial Regulation No. 36/2009). This Ministerial Regulation lays down the licensing procedure, but does not assign a significant role to provincial and district/city governments. It is different from the two previous Ministerial Regulations because the term REDD+ is not included in its title, instead opting for carbon ‘sequestration’ and ‘storage’, although its essence is no different from the purpose of REDD+ projects.

The distinguishing factor between both previous Ministerial regulations is that Ministerial Regulation No. 36/2009 pertains to the management of sustainable production forests instead of simply concentrating on the conservation of existing forests. To increase carbon sequestration, this Ministerial Regulation encourages forestry operators to improve their planting, maintenance, harvesting and marketing mechanisms to remain consistent with good silvicultural practices. With regard to carbon storage, this Ministerial Regulation calls for the lengthening of felling cycles and rotation periods, the adoption of environmental-friendly felling of trees and other appropriate measures.\textsuperscript{37}

The second major difference concerns the licensing mechanism that allows districts, provinces and the Ministry of Forestry to conduct their own licensing processes. When all requirements are met, the district head/mayor can issue the appropriate permits. The same criteria also apply for permits granted by the governor and minister. The Ministry of Forestry intervenes in the issuance of

\textsuperscript{35}See Article 3, Ministerial Regulation No. 30/2009.
\textsuperscript{36}See Article 5, Ministerial Regulation No. 30/2009.
\textsuperscript{37}See Article 3, Ministerial Regulation No. 36/2009.
permits by the district head/mayor and governor during the verification of requirements conducted by the proposal Appraisal Team that, among others, consists of representatives from several directorate generals under the Ministry of Forestry.38

As discussed above, Ministerial Regulation No. P.20/2012 seeks to streamline these conflicting regulations, but only partially succeeds in this regard.

It is important to underline that this decentralized licensing process may be changed or modified by the newly established REDD+ Managing Agency in the future. It should also be noted that BAPPENAS, the National Council on Climate Change (DNPI) and the Ministry of Environmental Affairs also assume a vital role in REDD+ development in Indonesia because all three entities are involved in the drawing up of the National REDD+ Strategy, but their roles are only confined to policy development and currently have no authority in issuing permits for REDD+ projects.

As indicated in section 3 on land, forest and carbon tenure, institutional responsibility for forestry matters is mostly concentrated at the national level in Indonesia. Governors and district heads/mayors have grievances over restrictions imposed on powers held by the provincial and district/city government because according to Law No. 32/2004 on Regional Government (Regional Autonomy Law), central government authority is limited to the following areas:39

- foreign politics
- defense
- security
- judiciary
- national monetary and fiscal issues
- religion

In order to put a limit on the authority of local governments, the central government then issued Government Regulation No. 38/2007 concerning the Division of Government Affairs between the Government, Provincial Governments and Local Government of Regency/Municipality (Division of Government Affairs Regulation). Based on this Government Regulation, central government authority was broadened to include an additional 31 areas, including the forestry sector.40 Many

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38See Articles 9, 10 and 11, Ministerial Regulation No. 36/2009.
39See Article 10, Regional Autonomy Law.
40See Article 2 (4), Division of Government Affairs Regulation. This Article stipulates that: ‘Government affairs as referred to in clause (3) comprise of 31 (thirty one) areas of governance: (a) education, (b) health,... (z) agriculture and food resilience, (aa) forestry (italicized by the author).
governors and district heads/mayors consider that this Government Regulation undermines the spirit of autonomy because it removes some of their powers.\(^{41}\)

Nevertheless, the provincial and district/city government retains a certain degree of authority with implications for the forestry sector, such as in the following areas: (i) development planning and control, (ii) spatial planning, utilization and oversight and (iii) environmental control.\(^{42}\) These powers have implications for the forestry sector but local governments do not have full authority over the forestry sector and are obliged to consult the Ministry Forestry in developing forestry-related policy.

5.2. Options for Reform

- Adopt measures to overcome the overlapping of authority in REDD+ administration and management.
- Ensure that REDD+ institutions have a solid legal foundation that is not ad hoc in nature to ensure that they are not manipulated by sectoral ministries with authority over the forestry sector.
- Establish REDD+ institutions that are not conferred with extensive powers as set forth in the National REDD+ Strategy because such authority will overlap with the Ministry of Forestry. The institutions should also not hold three concurrent functions (steering, executive and oversight) as laid down in the National REDD+ Strategy because this may create opportunities for corruption.

6. Benefit Sharing

6.1. Current Situation

There is currently no sound regulation and policy on benefit sharing in Indonesia. The REDD+ pilot/demonstration projects currently in operation have no clear and transparent benefit sharing mechanisms. As a result, both REDD+ developers, central government, provincial and local government and forest dependent people have no standard or valid mechanism to determine benefit sharing. This kind of situation has created uncertainty among relevant stakeholders due to lack of clarity on regulation.

\(^{41}\)It should be kept in mind that according to Law No. 22/1999 concerning Regional Governance (the first regional autonomy regime), local governments have autonomous power over the forestry sector, but this power was later revoked following the enactment of the Forestry Law and the Government Regulation on Governance Functional Assignments.

\(^{42}\)See Article 7 of Government Regulation No. 38/2007.
It is important to note that based on current ‘general law’, benefit sharing between the central, provincial and local government is governed by Law No. 33/2004 on Fiscal Balance between the Central and Regional Government (Fiscal Balance Law). This law spells out the mechanism of benefit sharing from the revenue of natural resources extraction including the forestry sector. Benefit/revenue sharing from the forestry sector is stipulated under Article 14 of the Fiscal Balance Law which states:

The sharing of State revenue derived from natural resources as referred to in Article 11 clause (3) is determined as follows:

- Forestry-related revenue from the receipt of forest concession fees and forest resource provisions generated from the concerned region is to be shared at the ratio of 20% (twenty percent) for the Government and 80% (eighty percent) for the Region.
- Forestry-related revenue from reforestation funds is to be shared at the ratio of 60% (sixty percent) for the Government and 40% (forty percent) for the Region.

However, this particular law does not regulate the benefit sharing from REDD+ projects because at the time of the enactment of the Law, REDD+ issues were not as developed as they are today. Nevertheless, the benefit sharing mechanism as laid out in this Law can be used as the basis or comparison in determining ‘benefit sharing’ from REDD+ projects.

It is true that the Ministry of Forestry has issued Ministerial Regulation No. P.36/ Menhut-II/2009 on Licensing Procedure for the Utilization of Carbon Sequestration and/or Storage in Production Forests and Protected Forests for the benefit-sharing mechanism on REDD+ pilot/demonstration projects. This Regulation, for example, came up with the following formulation for benefit sharing of REDD+ Projects:

<table>
<thead>
<tr>
<th>License Holder/Developer</th>
<th>Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Government</td>
</tr>
<tr>
<td>Natural forest concession permit</td>
<td>20%</td>
</tr>
<tr>
<td>Plantation forest concession permit</td>
<td>20%</td>
</tr>
<tr>
<td>Ecosystem restoration concession permit</td>
<td>20%</td>
</tr>
<tr>
<td>People’s plantation forest concession permit</td>
<td>20%</td>
</tr>
<tr>
<td>People’s Forest</td>
<td>10%</td>
</tr>
<tr>
<td>Community Forest</td>
<td>20%</td>
</tr>
<tr>
<td>Customary Forest</td>
<td>10%</td>
</tr>
<tr>
<td>Rural Forest</td>
<td>20%</td>
</tr>
<tr>
<td>Forest Management Unit</td>
<td>30%</td>
</tr>
<tr>
<td>Special Purpose Forest Area (KHDTK)</td>
<td>50%</td>
</tr>
<tr>
<td>Protected Forest</td>
<td>50%</td>
</tr>
</tbody>
</table>
The benefit-sharing formula presented above was rejected by the Ministry of Finance\(^{43}\) because it is considered to be groundless as it contradicts with the benefit sharing as stipulated by the Fiscal Balance Law. The Ministry of Finance also questions the power of the Ministry of Forestry to decide on benefit sharing that has widespread implications beyond the Ministry of Forestry. It is important to note that based on the Indonesian law principles, ministerial regulation is only binding within the specified authority of the particular ministry. Therefore, the formula introduced by the Ministry of Forestry is rejected by other ministries, especially the Ministry of Finance, because it has a wider implication beyond the Ministry of Forestry.

As mentioned in section 5, benefit sharing is not an easy thing to deal with because it is linked to rights, especially tenurial rights over land, forest and carbon as explained above. As such, benefit sharing must be prudently dealt with to ensure that it does not contradict with other national laws, such as Law No. 32/2004 on Regional Autonomy Law, Fiscal Balance Law and other sectoral laws.

6.2. Options for Reform

- Establish a law that clarifies tenure issues on forest-related rights, taking into account the recent decision of the Constitutional Court, especially on the right of community and forest dependent people because this will have a special impact on benefit sharing of REDD+ projects.
- Establish a ‘benefit sharing mechanism’ for REDD+, through a new instrument that should be at the level of, at a minimum, a Government Regulation or a Presidential Regulation, because it has a wider impact beyond forestry.

7. Safeguards

7.1. Current Situation

Safeguards hold particular importance in Indonesia due to the country’s weak and problematic forest governance system. The absence of a national forest master plan and standard forest maps, unsynchronized sectoral laws on natural resource

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\(^{43}\)Although the Ministry of Finance has not issued a formal letter on its rejection of the benefit-sharing scheme, this issue was featured in several media channels, one of which is: Natalia, G. 2011. Kemenhut Bahas Rumusan Harga Karbon, ‘Bisnis Indonesia’ (23 August), whereby the Director General for Forestry Cultivation Development, Iman Santoso, stated that the Ministry of Finance would be consulted with regard to the benefit-sharing mechanism. See http://www.bisnis.com/articles/kemenhut-bahas-rumusan-harga-karbon (accessed 23 November 2011).
management, overlapping powers among government agencies, pervasive corruption, a large proportion of forest-dependent peoples, lack of harmonization between customary and statutory laws related to the forestry sector and an ambiguous legal foundation for the people’s right to land and forest areas harbour the potential for vulnerabilities and conflicts. Therefore, the government should have already prepared the necessary safeguards adequate for preventing undesirable outcomes over time.

From the number of REDD+ regulations introduced by the Ministry of Forestry, not a single clause mentions on the importance of ‘safeguards’ for REDD+ pilot projects in Indonesia. The Forestry Law is also without the appropriate safeguards that could have been applied to the development of REDD+ safeguards in the future. The only national law closely related to REDD+ that contains certain norms applicable for safeguards is the Law on Environmental Protection and Management.

The entire list of norms embodied in the Law on Environmental Protection and Management is set forth in Article 2 that reads:

Environmental protection and management shall be implemented according to the following principles:

- state responsibility
- conservation and sustainability
- compatibility and balance
- cohesion
- benefit
- cautious
- justice
- eco-region
- biodiversity
- polluter-pays
- participatory
- local wisdom
- good governance
- regional autonomy.

The above principles are highly relevant with REDD+ safeguards if implemented effectively and consistently. REDD+ safeguards in the future can draw from these principles as they are sourced from the principles of international environmental law. It is arguable that if these principles are systematically developed into REDD+ regulatory norms in Indonesia, they will bring about the highest benefit possible for the betterment of the people if consistently implemented as prescribed.
Specifically regarding REDD+ safeguards, the Indonesian Civil Society Foundation for Climate Justice\(^{44}\) has drawn up a list of safeguards that needs to be prepared in order to ensure that REDD+ projects generate the expected benefits for the public at large. From these identified safeguards, it is recommended that the following elements are taken into account: \(^{45}\)

<table>
<thead>
<tr>
<th>Rights</th>
<th>Relevant safeguards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to information</td>
<td>FPIC: information in advance, complete, unbiased.</td>
</tr>
<tr>
<td>Procedural rights</td>
<td>Legal advice &amp; negotiation support for affected forest dwelling people</td>
</tr>
<tr>
<td>Right to accept or refuse REDD scheme</td>
<td>Free, Prior and Informed Consent (FPIC) facilitated independently, with a genuine right to decide not to accept</td>
</tr>
<tr>
<td>Redress and remedy</td>
<td>Adequate compensation, paid to appropriate members of the community, for lost rights and opportunities</td>
</tr>
<tr>
<td>Access to forest resources</td>
<td>Guarantee of access for livelihoods needs — recognition of customary rights at appropriate levels</td>
</tr>
<tr>
<td>Benefit sharing</td>
<td>Socially appropriate mechanisms for benefit sharing which uphold communal values and non-financial values of forests</td>
</tr>
<tr>
<td>Freedom from all forms of violence and intimidation</td>
<td>No/appropriate use of law enforcement agencies in REDD process</td>
</tr>
<tr>
<td>A healthy natural environment</td>
<td>Maintenance of biological diversity within human-used landscapes</td>
</tr>
<tr>
<td>Cultural rights</td>
<td>Acknowledge and respect customary institutions and systems for land and resource management</td>
</tr>
</tbody>
</table>


Due to lack of transparency in all existing REDD+ pilot projects, the public is uninformed on safeguards that the government (Ministry of Forestry) and developers may have prepared to secure ongoing REDD+ pilot projects.

As a result, existing REDD+ projects are prone to misconduct by developers and the government, in this case the Ministry of Forestry and certain provincial and

\(^{44}\)HuMa (2010), Preliminary Study on the Safeguards Policies of Bilateral Donors to REDD Programs in Indonesia. HuMa, Jakarta, Indonesia.

\(^{45}\)I have not included a particular right (right to self-determination) that was incorporated into the table by HuMa, because in my opinion recognition of such a right does not solve the problem but instead will create new problems, since recognition of the right to self-determination will lead to new friction between the Government and indigenous communities.
district/city governments. Hopefully, past experiences from reforestation projects undertaken during the Soeharto administration\textsuperscript{46} will not recur in REDD+ projects in the future.

To prevent wrongdoing and mismanagement from occurring in the future, lawmakers (government and DPR) need to guarantee the inclusion of safeguards into REDD+ policies.

7.2. Options for Reform

- Adopt specific safeguards to be applied to REDD+ projects and programmes.
- The most important safeguard is to ensure that REDD+ projects and programmes are managed in a transparent, accountable and incorruptible manner.
- To assure corruption-free REDD+ management, REDD+ institutions could involve the Corruption Eradication Commission (KPK, Komisi Pemberantasan Korupsi) and relevant state bodies, such as the Supreme Audit Agency (BPK, Badan Pemeriksa Keuangan) and Center for Financial Transaction Reporting and Analysis (PPATK, Pusat Pelaporandan Analisis Transaksi Keuangan) in the joint formulation of corruption prevention measures for REDD+ projects in Indonesia.
- Forest-dependent communities can be involved in the decision-making process for REDD+ project development in their respective regions, while guaranteeing their right to avail themselves of non-timber forest products, yet at the same time maintain forest biodiversity.

8. Public Participation

8.1. Current Situation

A critical element in guaranteeing effective REDD+ project development and management is public support. Public support can be mobilized by having appropriate forums or mechanisms in place that the public can rely on to convey their opinions and concerns. REDD+ actors also understand the importance of FPIC from the general public, primarily forest-dependent communities prior to the commencement of REDD+ projects and other initiatives because without support from these affected communities, REDD+ is unlikely to be successful.

Regrettably, none of the three Forestry Ministerial Regulations concerning REDD+ described in previous sections recognizes the importance of public participation, nor do they make this a prerequisite for the application of REDD+ pilot projects. This has roots in the disposition of the Forestry Law which may recognize the importance of community values in forestry management, but largely treats people as ‘objects’ rather than ‘subjects’ who should be involved in decision-making.

We therefore will not come across phrases such as ‘access to information’ and ‘duty to consult’. The Forestry Law and several Ministerial Regulations on REDD are rightfully challenged by REDD+ and environmental observers.

In contrast to the Forestry Law, Law No. 32/2009 on Environmental Protection and Management (Environmental Law) on the other hand is highly progressive because access to information and participation is incorporated as the primary rights of every person. Article 65(2) for example stipulates that:

Every person is entitled to environmental education, access to information, access to participation and access to justice in an effort to fulfill their rights to a healthy environment.

The absence of provisions on public participation is also contradictory to the spirit of Law No. 14/2008 on Freedom of Information (FOI Law) that requires all state bodies to release public information requested by members of the public. The FOI Law is binding for all public institutions. The Ministry of Forestry and other public bodies therefore have no reason to withhold information from the public, specifically public information that should be accessible to the people.

Due to lack of transparency in all existing REDD+ pilot projects, the public is uninformed on safeguards that the government (Ministry of Forestry) and developers may have prepared to secure ongoing REDD+ pilot projects.

8.2 Options for Reform

The legal framework that will regulate REDD+ in the future shall incorporate specific clauses providing for public participation in REDD+ activities and decision-making. In the event that comprehensive reform of the Forestry Law is undertaken, this could include providing for greater public participation in forest-related decisions.
9. Monitoring, Reporting and Verification (MRV)

9.1. Current Situation

To date, Indonesia has yet to establish a specific entity recognized for its credibility and competency in conducting MRV. One of the primary duties of the REDD+ Task Force was to make the necessary preparations for the establishment of MRV institutions. The Task Force has now been replaced by the REDD+ Management Agency, and this Agency has been tasked with:

- developing standards and methodologies to measure GHG emissions and sequestration from REDD+ programs, projects or activities and consolidation and reporting of data on GHG emissions and sequestration from REDD+ programs, projects or activities.\(^{47}\)

This is also embodied in the National REDD+ Strategy that hopes to create MRV institutions that meet the following criteria: \(^{48}\)

- consistent
- complete
- accurate
- transparent
- comparable
- independent

Furthermore, an MRV institution is expected to perform the following tasks: draw up MRV policies and standards; conduct an inventory of greenhouse gases; handle registration and clearing house; develop a reporting mechanism; integrate the measurement of social and environmental safeguards; synchronize the MRV system with the Safeguards Implementation Information System for REDD+ (SIS-REDD+); integrate forest resource monitoring mechanisms; provide information on verification results on emissions reduction; build measurement and reporting capacity; and strengthen coordination capacity of sub-national MRV institutions.\(^{49}\)

It is important to note that before the REDD+ Task Force was dissolved in 2013, it drafted the Strategy and Implementation Plan for REDD+ Measurement, Monitoring, Reporting, and Verification (MRV) in Indonesia. This MRV Draft document was

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\(^{47}\)President of the Republic of Indonesia Decree No. 62 Year 2013 Regarding Managing Agency for the Reduction of Emission from Deforestation and Degradation of Forest and Peatlands, Article 5 (6/f).

\(^{48}\)See National REDD+ Strategy, p. 17.

\(^{49}\)See National REDD+ Strategy, p. 18.
developed based on Intergovernmental Panel on Climate Change (IPCC) guidelines and other available international standards.\textsuperscript{50} It is hoped that this ‘draft’ can be finalized by the newly established REDD+ Management Agency in the near future.

Apart from the above Draft, it is also important to compare it with MRV procedures and standards established by the Ministry of Forestry through Ministerial Regulation No. P.30/Menhut-II/2009 on REDD (Reducing Emissions from Deforestation and Forest Degradation) Procedure, even though this standard is no longer relevant because its capability is being questioned by many parties, and as a result its credibility was not recognized by the REDD+ Task Force.

Nevertheless, it may be relevant to include this in this study for comparison and as lessons learned. According to the Ministerial Regulation No. 30/2009, the Ministry of Forestry should establish two entities: (i) an Independent Assessment Agency, an entity authorized to verify REDD activity reports and (ii) a REDD Commission formed by the minister and assigned to manage REDD implementation.\textsuperscript{51}

Based on this Regulation, the Director General of Forestry Planning is responsible for setting national emissions reference levels\textsuperscript{52} for use later as the basis for monitoring and reporting. Monitoring and reporting outcomes are then handed over to the REDD Commission for verification and certification. REDD Commission will subsequently instruct the Independent Assessment Agency to verify and certify, which will then submit a report to the REDD Commission as the basis for issuing the Carbon Emissions Reduction Certificate. The accreditation of the Independent Assessment Agency is granted by the National Accreditation Committee (KAN, Komite Akreditasi Nasional)\textsuperscript{53}, an institution that many people know for its lack of knowledge on carbon emissions and REDD in general.

As all MRV processes prescribed by this Regulation are nationally based, and known to lack the knowledge and credibility with regard to advanced emissions reference and monitoring mechanisms, they are not seriously considered by various relevant parties, and thus have never been used as a benchmark for


\textsuperscript{52}For further information on national emissions reference standards and computations, see Annex 5 of Ministerial Regulation No. P.30/Menhut-II/2009.

\textsuperscript{53}For more information see Articles 16 to 18 Ministerial Regulation No. P.30/2009.
conducting MRV. As such, the newly formed REDD+ Management Agency should place priority on the establishment of reliable MRV standards if Indonesia wishes to become a credible player in the global carbon market.

**9.2. Options for Reform**

- Prepare the necessary legal foundation for the creation of credible MRV institutions as mandated in the National REDD+ Strategy.
- The newly established REDD+ Agency could expedite the finalisation of the MRV Draft developed by the REDD+ Task Force.

**10. Implementation and Enforcement**

**10.1. Current Situation**

Even though the formulation of the National REDD+ Strategy has been finalized, it does not immediately facilitate the implementation of different aspects it puts forward. This is because the finalized National REDD+ Strategy to date does not have a legal foundation for implementation by relevant ministries and agencies. As a consequence of this lack of legal foundation, enforcement will be increasingly difficult as relevant ministries and agencies do not feel obligated to implement the National REDD+ Strategy.

As discussed above, management of the forestry sector is still very much under the control of the Ministry of Forestry through a highly centralized structure. Hence, REDD+ management and implementation mostly remains under the authority of the central government. Nevertheless, there are a number of central government policies that can be considered as an attempt to delegate authority, as evident in the issuance of Ministerial Regulation No. P.47/Menhut-II/2011 on the Partial Assignment of Governance Functions in the Forestry Sector to the District Heads of Berau, Malinau and Kapuas Hulu With Regard to REDD Demonstration Activities. This Ministerial Regulation specifically devolves certain powers from the Ministry of Forestry to three district heads to undertake the following actions:\(^\text{54}\)

- Measure of forest carbon stock;
- Make the necessary preparations for the monitoring of forest carbon stock;
- Make the necessary preparations for the implementation of efforts aimed to reduce carbon emissions from deforestation and forest degradation.

\(^{54}\)See Annex to Ministerial Regulation No. P.47/ 2011.
Nevertheless, this transfer of power is still ad hoc by nature and at any time can be taken over by the Ministry of Forestry. This manner of delegation will be inadequate for facilitating the smooth implementation of REDD+ projects in the future.

The delegation of central government powers is also apparent in Presidential Instruction No. 2/2007 on Accelerating the Rehabilitation and Revitalization of Peat Land Development Zones in Central Kalimantan. An important aspect of this Presidential Instruction concerning the delegation of powers for expeditious implementation is the designation of the Central Kalimantan Governor as the person-in-charge of the integrated implementation of programs in peat land development zones and the establishment of a Secretariat in Palangkaraya, whereby the Governor has the authority to determine the work mechanism, membership and other key tasks necessary to implement the Presidential Instruction.55

It can finally be concluded that the delegation of powers for speeding up the implementation of REDD+ projects remains inadequate because enforcement infrastructure is still not well developed in provinces and districts/cities. This acceleration approach is also on an ad hoc basis and solely intended to build the capacity of Central Kalimantan as the first pilot province, and as such nearly all donor agencies were at hand to assist the Central Kalimantan local government in accelerating the achievement of targets set by the central government as set forth in the Letter of Intent between Indonesia and Norway.56

As indicated in section 4 on spatial planning, Indonesia is implementing several pilot projects in nine provinces. The pilot projects were initially assessed by an Evaluation Commission that comprises representatives from the following institutions: Ministry of Forestry, DNPI, UKP4, Kemitraan, International Centre for Research in Agroforestry (ICRAF), Alliance of Indigenous Peoples of the Archipelago (AMAN) and universities.

Assessment criteria are as follows:57

- A biophysical condition suitable for REDD+ implementation (breadth of forest and peat land cover, risk of deforestation and forest degradation);
- Socio-economic condition (economic value of forest resources, people’s dependence on forest resources);

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55See Instruction No. 4 and No 5 of Presidential Instruction No. 2/2007 on Accelerating the Rehabilitation and Revitalization of Peat Land Development Zones in Central Kalimantan.
56For information on targets to be met and phases involved in REDD+ implementation in Central Kalimantan, read the Letter of Intent between Indonesia and Norway.
- Data availability and human resource capacity related to REDD+ implementation;
- Governance condition pertaining to the correlation between economic programs and REDD+, and effective, efficient and transparent governance.

All nine pilot provinces appear to be selected based more on the first and second criteria (biophysical and socio-economic condition) because the quality/capacity of human resources and the governance system in these provinces are still inadequate compared to other provinces in Indonesia. Therefore, serious attention is needed if we want to see these pilot REDD+ projects in these nine provinces successfully implemented.

10.2. Options for Reform

In light of the weak implementation and enforcement infrastructure for national REDD+ policies, lawmakers could rapidly provide a solid legal foundation for the implementation of the National REDD+ Strategy.

The government and DPR could amend certain laws and regulations that impede coordination between state ministries and agencies.

Legislation that hampers the implementation of National REDD+ Strategy at the local level could be improved and reformed to avoid significant complications and constraints.

Law enforcement institutions could be educated on REDD+ issues since they will inevitably be involved when problems arise in enforcing legislation and policies related to REDD+ development.

11. Conclusion

Upon examining the explanations provided above, it can be concluded that REDD+ development and management in Indonesia can only be implemented when lawmakers (government and DPR) demonstrate their seriousness and commitment, and are willing to sit together and jointly reform relevant laws and regulations to ensure that they do not contradict each other.

Laws that need to be immediately harmonized are as follows: (i) Forestry Law, (ii) Basic Agrarian Law, (iii) Regional Autonomy Law and (iv) Spatial Planning Law. All four laws are closely linked to issues on land, forest and carbon tenure rights which constitute the cornerstone of REDD+ development and management. These
laws also carry implications for spatial arrangements and the relationship between central and local governments. We must, however, allow for the fact that the harmonization of all four laws can only be assured in the long term.

The Forestry Law in particular should immediately be replaced in its entirety because the essence of the Law is no longer compatible with the principles of good and contemporary forest management practices, thus it cannot become the legal foundation for REDD+ development in Indonesia.

The Environmental Protection and Management Law on the other hand has the prospect of being developed into a legal umbrella for REDD+ development in Indonesia, but the REDD+ Task Force and National REDD+ Strategy do not recommend this. This is indeed regrettable because norms and ideals contained in this Law can accommodate key principles for effective REDD+ management.

Using the Environmental Protection and Management Law as the legal foundation for REDD+ development and management in Indonesia means that overall all pertinent laws need not be altered because from the outset the Environmental Protection and Management Law is designed as an umbrella provision to allow for further development that governs technical issues associated with REDD+ development and management in Indonesia.

A range of lower level regulations on forestry also exists. These regulations cannot accommodate REDD+ development and management processes in Indonesia because they are not equipped with fundamental preconditions for REDD+ management that places emphasis on transparency, public participation and accountability.

Concerning benefit sharing of existing REDD+ projects, the Ministry of Forestry has issued specific provisions, but the benefit-sharing formula was rejected by the Ministry of Finance, thus improvements are essential in order to be consistent with other laws. The benefit-sharing mechanism needs to be spelled out in future REDD+ provisions and ensure that forest-dependent communities can gain benefit from REDD+ projects in their respective areas. In addition, benefit-sharing arrangements must pay heed to other provisions that govern on fiscal management, fiscal balance between the central and local government, and taxation.

With regard to safeguards for REDD+ projects, Indonesia has yet to establish well-defined provisions, primarily for specific environmental and social safeguards, as well as those necessary to prevent leakages and corruption that may emerge from REDD+ projects.
Abbreviations

AMAN  Alliance of Indigenous Peoples of the Archipelago
BAPPENAS  State Ministry of National Development Planning
BPN  Badan Pertanahan Nasional or National Land Agency
BPK  Badan Pemeriksa Keuangan or Supreme Audit Agency
COP  Conference of the Parties
CSO  Civil Society Organization
DNPI  National Council on Climate Change
DPR  Indonesian House of Representatives
FAO  Food and Agriculture Organization
FOI  Freedom of Information
FPIC  Free, Prior and Informed Consent
GHG  Greenhouse Gas
ICRAF  International Centre for Research in Agroforestry
IPCC  Intergovernmental Panel on Climate Change
KAN  Komite Akreditasi Nasional or National Accreditation Committee
KHDTK  Special Purpose Forest Area
KPH  Forest Management Unit
KPHL  Protected Forest Management Unit
KPHP  Production Forest Management Unit
LOI  Letter of Intent
LULUCF  Land Use, Land Use Change and Forestry
PPATK  Pusat Pelaporandan Analisis Transaksi Keuangan or Center for Financial Transaction Reporting and Analysis
REDD+  Reducing Emission from Deforestation and Forest Degradation
SIS-REDD+  Safeguards Implementation Information System for REDD+
UNFCCC  United Nations Framework Convention on Climate Change
UKP4  Presidential Delivery Unit for Development Monitoring and Oversight
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