

**REGIONAL OVERVIEW OF COUNTRY SAFEGUARD SYSTEMS
TO MITIGATE TRANS BOUNDARY INFRASTRUCTURE
MEGA PROJECT IMPACTS**

INDONESIA



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**Regional Assessment of Country Safeguard Systems
to Mitigate Trans-boundary Infrastructure
Mega Project Impacts:**

Indonesia

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I. INTRODUCTION

The purpose of this study is to tell how Indonesia's country safeguard system has been designed and implemented to address the current and potential transboundary impacts of mega infrastructure projects. More specifically, this study assesses the adequacy of the level of Indonesia's country safeguard system (CSS) to mitigate the impacts of trans-boundary infrastructure mega projects. In order to achieve these purposes, the study addresses several questions such as: how Indonesian legal system rules the overall infrastructure issues, including the scheme of cooperation and financing of infrastructure, the social and environmental impact assessment, national and regional remedy mechanism. In addition, the questions raised are also how the gap between Indonesia's CSS and ADB's Policy principle on Social and Environmental and other international norms and standards.

This study divides into six sections. Following this introduction, the study begins with a brief description of the profile of Indonesia including its political, economic, and social condition, major trends in financial investments and financing, and its cross-master plan. Next, the section three surveys and examines the current Indonesian laws and policies related to the issues of infrastructure and its social and environmental. Section four discusses Indonesia's judicial system and legal arrangements for social and environmental violations. In the section five, this study makes a comparative and gap analysis between Indonesian legal framework and ADB's Safeguard Guidelines. In the end, the study comes up with a conclusion or summary of findings and recommendations.

II. COUNTRY DESCRIPTION: INDONESIA COUNTRY PROFILE

A. Current political, economic, and social context

- Indonesia is the third largest democracy in the world. Today, the current government led by Joko Widodo who took power and won in the 2014 presidential election. Struggling to consolidate his power in the first-year period of presidency, today, Joko Widodo enjoys support from about 70 percent of the House of Representatives. Having maintained political stability, Indonesia secures the business environment for investors and economic growth.
- As the largest economy in Southeast Asia, Indonesia enjoys steady economic growth with the country's

GDP per capita in about \$3,603 in 2016¹. The current medium-term development plan which is the third phase of the long-term plan RPJMN-- runs from 2015 to 2020, focusing, among others, on infrastructure development and social assistance programs related to education and health-care.²

- Indonesia faces environmental and other social development challenges. While the rate of poverty decreased by 1% annually from 2007 to 2011³, more than 28 million Indonesians still live below the poverty line.⁴ About 40% of the total population remain vulnerable of falling into poverty, as their income float slightly above the poverty line.⁵ Another core challenge is corruption. Despite high-profile prosecutions, widespread corruption remained a problem, and some elements within the government, other law enforcement agencies, judiciary, and security forces obstructed the investigation and prosecution of corruption.⁶

B. Country trends in financial investments and financing

- Indonesia has determined its infrastructure targets for the period of 2016-2019 which were stipulated in the National Medium Term Plan (RPJMN 2015-2019). It contains a number of logistic and energy related projects. According to BAPPENAS, to achieve these targets, Indonesia requires an estimated investment of USD 386.9 billion or IDR 4796 trillion.⁷ But, Indonesia is only able to cover 30% of total infrastructure funding needs or about IDR 1433 trillion.⁸ To fill the funding gap, government relies on the private and state-owned enterprises participation. Further, the Government also seeks to fund from multilateral development banks, such as the World Bank Group, Asian Development Bank and Asian Infrastructure Investment Bank.
- Generally, total government infrastructure expenditure in Indonesia increased by a substantial 51% from IDR 139 trillion (USD 11.7 billion) in 2014 to IDR 209 trillion (USD 15.5 billion) in 2015.⁹ Further,

1 BAPPENAS, *Public Private Partnership Infrastructure Projects Plan in Indonesia 2015*, Jakarta May 2015.

2 See <http://www.worldbank.org/en/country/indonesia/overview>

3 <https://www.adb.org/country/indonesia/poverty>

4 ibid

5 ibid

6 <https://www.state.gov/documents/organization/252977.pdf>

7 BAPPENAS, *Public Pravate Partnership Infrastructure Projects Plan in Indonesia 2015*, Jakarta May 2015.

8 ibid

9 <https://www.pwc.com/id/en/cpi/asset/indonesian-infrastructure-stable-foundations-for-growth.pdf>

the government has increased planned infrastructure spending in the 2017 draft budget (RAPBN) to IDR 346.6 trillion.¹⁰ Since August 2016, however, cuts have been made to infrastructure components of the 2016 budget, on account of a deficit of fiscal revenue.

C. ASEAN Connectivity Master Plan and Indonesia's Cross-border Mega Infrastructure Project

- In ASEAN region, many cross-border infrastructure projects are driven by trade interest, in particular to reduce the high cost of transport and logistics. There are evidences that physical connectivity had positive effects on trade in the regions.¹¹
- Indonesia's cross-border infrastructure project follows an ASEAN connectivity master plan.¹² This plan contains physical connectivity including equipment and facilities infrastructure, transportation (airports, railways, ports), logistics services facilities, special economic zones. ICT (Fiber optic network) and energy (electric power and gas).
- There are several projects between Indonesia and its neighbour. with Malaysia, for instance, Indonesia agreed to develop the projects of Melaka-Pekanbaru Power Interconnection and West Kalimantan-Sarawak Interconnection Network.¹³ Another cross-border infrastructure project is ADB-funded Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT).¹⁴ Previously, with Singapore, Indonesia developed Indonesia-Singapore Gas Transmission Project.¹⁵
- Those projects involve several challenges since it required formal or informal institutional arrangements to lower transaction costs and/or reduce the risk of conflict. While the projects hint a potential benefit for shared history and cultural values especially the isolated communities, the risks also include with a spread of HIV/AIDS, trans-border pollution, erosion of social values and cultural identities, and trafficking of vulnerable groups.¹⁶ ASEAN countries unfortunately lack social and environmental safeguards in this matter.
- Since the vision of ASEAN connectivity only covers commitments, management and strategies, the

current ASEAN Connectivity Master Plan failed to include a legal framework for social and environmental protection into the plan.

D. Social and Environmental Impacts

- Civil Society Organizations have raised concern on social and environmental impacts of the infrastructure projects that are implemented by violating regulations, setting aside the human rights of the affected people as well as causing environmental problems.¹⁷ Some projects have been conducted without proper consultation that has resulted in social conflicts in the society and massive force evictions.¹⁸ For example, the national Slum Project will potential impact 9.7 million people in the slum area across Indonesia and may in fact create poverty: for example, in South Sulawesi the project potentially will deprive 17.114 poor families of their property and adversely impact the welfare of 68.456 poor people.¹⁹ This is exacerbated by the reality that the implementation of law in the Indonesian legal system is rarely consistent: thus seeking remedy for badly implemented development projects through the judiciary remains to be difficult. Issues related to lack of legal accountability and access to justice for the affected people in a notoriously corrupt judicial system present further challenge in safeguarding the projects so that they achieve their goals without sacrificing the weak.²⁰
- Related to this, criticism has also been raised against the government's decision to loosen the Country Safeguard System (CSS), namely the compilation of regulations and procedures to protect the environment and society from the adverse impacts of development projects, by establishing taking measures that include the deregulation for business permit to ease investment in four main sectors; infrastructure, plantation, maritime, and electricity.²¹ Responding to the critics, the government has tried to mitigate the social and environmental impact of infrastructure

10 ibid

11 Edmunds and Fujimura, 2006

12 ASEAN, Master Plan on ASEAN Connectivity 2025, Jakarta 2016, see <http://asean.org/storage/2016/09/Master-Plan-on-ASEAN-Connectivity-20251.pdf>

13 ibid

14 <https://www.adb.org/countries/subregional-programs/imt-gt>

15 <https://www.adb.org/sites/default/files/project-document/80402/ln1357-pcr.pdf>

16 Asian Development Bank, A tool kit in cross-border infrastructure in the Greater Mekong Subregion, 2007

17 Vivaneews, 'Koalisi Masyarakat Sipil Tolak Pemerintah Tambah Utang', 2 Maret 2017 <<http://nasional.news.viva.co.id/news/read/889568-koalisi-masyarakat-sipil-tolak-pemerintah-tambah-utang>>

18 Vivaneews, 'Koalisi Masyarakat Sipil Tolak Pemerintah Tambah Utang', 2 Maret 2017 <<http://nasional.news.viva.co.id/news/read/889568-koalisi-masyarakat-sipil-tolak-pemerintah-tambah-utang>>

19 Elsam, 'Bahaya Proyek Utang Bank Dunia pada Proyek Kotaku', 14 October 2016 <<http://elsam.or.id/2016/10/bahaya-hutang-bank-dunia-dalam-proyek-kotaku/>>

20 <https://www.theguardian.com/global-development-professionals-network/2017/feb/04/indonesian-air-pollution-death-justice>

21 Rio Ismail, 'Pelemahan Country System Indonesia dalam Situasi Pelemahan ESS', [Date and presented in...] <<http://www.safeguardcomments.org/aiib-esf-ngo-comments.html>>

developments,²² and claimed that the national safeguard system for social and environmental protections are continuously being strengthened. It also further advocated for the international finance institutions (IFIs) to also follow the national safeguard systems and enhance the quality of the system to reduce the negative impacts of development.²³

III. Indonesia Laws and Policies

A. General Constitutional Provisions (1945 Constitution and Constitutional Court Decisions)

- The constitutional basis for the Indonesia country safeguard system can be traced in several articles in the 1845 Constitution. For instance, the right to a proper and healthy environment has been guaranteed explicitly in article 28H(1) of the Constitution 1945 as part of a human right of everyone. 'Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care'. There is no further explanation about the term 'good and healthy environment'. The court interpretation to that term was not purely ecological but also include the rights of land, water, air being free from pollution and human rights.
- In addition, article 33 (3) of the Indonesian Constitution states that the earth, water, and natural resources contained within shall be managed by the state for the full benefit of the people. Furthermore, Article 33 (4) of the Constitution states that "the organization of the national economy shall be based on economic democracy that upholds the principles of solidarity and efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency and by maintaining the balance between progress and the unity of the national economy."
- Guarantees of the right to water can also be found in the Constitution under Articles 27(2), 28A, 28C, and 28H. In fact, on 18 February 2015 the Constitutional Court, in Decision No. 85/PUU-XI/2013, cancelled Law No. 7 of 2004 on Water Resources, which would have allowed private companies control over water resources, and stated that the right to water was a basic human right and was needed for the realisation of other rights.
- Indonesia's Constitutional Court has recognized the constitutional rights of communities over good and

healthy environment. For instance, Judicial review to Law No. 18 of 2004 concerning Plantation, especially in relation to the criminal provisions that are often used as a reason to criminalize locals people who fight for their collective rights over natural resources was accepted by the Court. Other instances, the review to Law No. 27 of 2007 concerning Management of Coastal and Small Islands particularly related to the rights of management of coastal areas (HP3) that affected on the rights of indigenous people was accepted. Furthermore, the Constitutional Court decision No. 35/PUU-X/2012 of May 2013, which affirms the constitutional rights of indigenous peoples to their lands and territories, including their collective rights over customary forests and uses the UNDRIP and various human rights instruments including ILO Convention No. 169 on Indigenous and Tribal Peoples as its references. However, some of Constitutional Court's decisions have also undermined it. For instance, judicial review to Law No. 7 of 2004 concerning Water Resources was rejected by the Court with additional a constitutional conditionally clausal. Similarly, the review to Law No. 19 of 2004 concerning revision of Forestry Law especially on the legitimatization of mining permits or concessions in protected forest zones was rejected by the Court. The difference of those decisions showed inconsistencies, ambivalence on the interpretation of constitution.

- Indonesia also bound to the seven cores of international human rights treaties. Indonesia bound to the ICESCR which rule the obligation of the state party to respect, protect and fulfil the social and environmental rights of its citizen. Law No. 11 of 2005 on the Ratification of the International Covenant on Economic, Social and Cultural Rights also clearly states that the right to water is required for the right to an adequate standard of living. Meanwhile, despite not legally binding, Indonesia also should take into account several customary international laws on human rights and social and environment protection. It includes the United Nations Guiding Principles on Business and Human Rights (UNGP-HR) which refers to the Universal Declaration of Human Rights (UDHR).

- In the context of transnational, there is debatable issue whether the protection of citizen in the constitution also apply to the foreigner. Considering the universal values and standards of human rights, it should be understood that the provisions of human rights in the constitution must be applied to everyone.

22 As stated by the Minister of State Agency Development Planning.
23 Berita Satu, 'Bappenas: Sistem Perlindungan Sosial dan Lingkungan Harus di Perkuat', 10 April 2017 <<http://id.beritasatu.com/home/bappenas-sistem-perlingdungan-sosial-dan-lingkungan-harus-diperkuat/158780>>

B. Infrastructure Provisions and Policies

- Currently, the Indonesian government has put in place a robust legal and institutional framework to support its infrastructure plans. It includes 13 deregulation packages focusing on the deregulation of investment and tax incentives. The goal is to upgrade country's attractiveness and competitiveness for investment.²⁴
- The packages include some provisions regarding cooperation between government and business entity in Infrastructure projects. The main provision, for instance, is Presidential Regulation 38/2015, issued by Government as replacement of Presidential Regulation 67/2005 and its amendments (Presidential Regulations 13/2010, 56/2011, and 66/2013), establishing the cross-sector regulatory framework for implementing Public Private Partnership (PPP) in the provision of infrastructure. This regulation sets out the provisions necessary for PPP implementation. These include tender procedures, project preparation, outline of CA or PPP contract, cooperation schemes, unsolicited projects, etc. The regulation also specifies the eight infrastructure sectors,²⁵
- In addition, some provisions already exist for project guarantees and operational guidelines, such as the Presidential Regulation 78/2010 on the provision of government guarantees for PPP infrastructure projects through IIGF,²⁶ and BAPPENAS Regulation 3/2012, which establishes the cross-sector operational guidelines. Furthermore, Indonesia has sets regulation for environmental assessment and protection²⁷ and land acquisition.²⁸ However, the issue of adequacy, consistency, and effectiveness of the existing safeguard system remain a question.

24 BAPPENAS, Public Private Partnership Infrastructure Projects Plan in Indonesia 2015, Jakarta May 2015. A key target announced by the President is to raise Indonesia's position in the World Bank's Ease of Doing Business index to 40 by 2017. Indonesia has moved to position 109 this year, compared to 120 last year, out of 189 economies, but it is still behind directly competing Association of Southeast Asian Nations (ASEAN) countries such as Singapore, Malaysia and Thailand.

25 Ibid. Such as transportation, road network, irrigation network, drinking water network, waste water treatment, waste management, information and telecommunications, Electricity, energy and energy conservation, Infrastructure areas, tourism facilities and related infrastructure, health, sports and educational facilities, oil and gas infrastructures, and social housing projects.

26 A single-window mechanism. The Ministry of Finance Regulation (PMK) 260/2010 establishes the procedure for requesting and providing such guarantee, whereas PMK 223/2012 regulates the Viability Gap Fund.

27 Government Regulation 27/2012 on environmental permits which replaces the previous Government regulation on environmental impact assessment

28 Law 2/2012 on Land Acquisition for development projects serving the public interest and its implementing Presidential Regulations 71/2012.

C. Social provisions for social protection

1. Indigenous People and other vulnerable communities
 - The third amendment to the Indonesian Constitution recognizes indigenous peoples' rights in Article 18b-2. In more recent legislation, there is an implicit recognition of some rights of peoples referred to as masyarakat adat (customary societies) or Masyarakat Hukum Adat (customary legal societies). This recognition can be seen in Act No. 5/1960 on Basic Agrarian Regulation, Act No. 39/1999 on Human Rights, and Indonesia's Legislative MPR Decree No X/2001 on Agrarian Reform, Law No. 27/2007 on Management of Coastal and Small Islands²⁹ and Law No. 32/2010 on Environment. The Indonesia country safeguards system for environment also recognized the protection of Indigenous peoples and other vulnerable communities.³⁰
 - Politically, the issues of indigenous people also strongly supported by the current government. In 2014, Indonesia's current President Joko Widodo included six commitments related to the recognition, fulfilment, and protection of indigenous peoples' right in his election platforms, the 'Nawacita'. He reaffirmed his promise in several times.
 - Indonesia is a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). But, the concept of indigenous peoples is not applicable as all Indonesians, with the exception of the ethnic Chinese, are indigenous and thus entitled to the same rights. Consequently, the Government has rejected calls for specific needs by groups identifying themselves as indigenous. In addition, Indonesia did not support the recommendation to "consider ratifying ILO Convention No. 169."³¹

29 Law No. 27/2007 on Management of Coastal and Small Islands Article 1, Paragraph 33 states that "Customary legal community is a group of people who hereditarily reside in a certain geographic area... due to ancestry, strong ties with land, area and natural resources...." and Article 1, Paragraph 35. States that "Traditional community is a fishery traditional community whose traditional right is still recognized is catching fish or carrying out other legal activities in a certain area..."

30 See Article 3 Minister of Environment Decree (Permen LH) No. 5/2012 on Types of Business Plans and/or Activities Requiring AMDAL (Decree 5/2012)

31 ...[though it] supports the promotion and protection of indigenous people worldwide, given its demographic composition, Indonesia, however, does not recognize the application of the indigenous people concept as defined in the UN Declaration on the Rights of Indigenous Peoples in the country".

- The Indonesian law defines the vulnerable societies in the context of involuntary resettlement. They include those below the poverty line, the landless, the elderly, women and children, indigenous people and those without legal title to land.³²

2. Involuntary resettlement

- The social impact of involuntary resettlement should cover all aspects of the life of affected persons or groups/communities. Human rights approach in dealing with the issue should ensure that the right to property is respected and protected, and the government policies should ascertain that there are just and effective remedies for rights violations. Since Indonesia has ratified most of the core human right instruments, including the Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights, it is bound by obligations to provide effective remedies mechanisms for the victims of human right violations. It means that all faulty processes in land acquisition that are considered as 'human rights violations' should be given remedies.

- While Indonesia ratified ICESCR, the analysis for legal arrangement of social impact in this part primarily be based on Law No. 12/2012 on Land Acquisition for Development in the Public Interest and Presidential Regulation (PR) No. 71/2012 on Land Acquisition for Development in the Public Interest. The substances of this law contradict in several circumstances with the ICESCR, especially in the prohibition of forced eviction.

- In general terms, the objective of land acquisition in the Public Interest shall have the objectives to make land available for development to improve the welfare and prosperity of the people, state and society by guaranteeing the legal interest of the Land Rights Holder. However, the emphasis of the law only states that the goal of land acquisition is to achieve welfare, and not specifically to improve the livelihood of the affected persons/group. Further, Law No 2/2012 emphasize on physical displacement rather than economic displacement, although some provision can be considered will also cover some economic displacement.

- Law Number 2 Year 2012 requires that land acquisition processes should be conducted in four stages; (i) planning; (ii) preparation; (iii) implementation; and (iv) land handover. Those processes should include provision of information and public consultations and they shall involve all affected parties, including the land right holders.

³² Article 40 Law No. 2 of 2012 on Land Acquisition for Development in the Public Interest; Article 17 (2e), Article 21-22 Presidential Regulation No. 71 of 2012 on Facilitating Land Acquisition for Public Project Purposes

- Regarding public consultation, Article 16 of Law 2/2012 emphasizes that the public consultation will be conducted by the agency needing the land and the provincial government, and it shall involve the Land Rights Holders and the affected community (or host communities) and be held at the location the development is planned to take place or at an agreed-upon place. In terms of indigenous people, it would not be treated differently, which means that public consultation where the affected people is indigenous people, they should be involved in the process. However, there is no obligatory provision to include concerned nongovernment organizations in public consultation.

- On the compensation provisions, the assessment is taking a very economic approach. However, the law does not specifically address the needs of the affected people in the designated area if they are to be relocated, i.e. to ensure the improvement of their standard of living, including infrastructures for social life. To overcome this issue, the process in seeking agreement on compensation through dialogue can be used to negotiate the compensation of these matters.

3. Labour Health and Safety

- Indonesian laws ensure the rights of workers and the local communities to health and safety work condition.³³ The scope of protection includes prevention from accidents, injuries and disease.

- Concern on public health in AMDAL process is regulated in Decree Letter of Head of Bappedal No.124/1997 on guideline of public health aspect analysis in preparation of AMDAL document. Further, technical guideline for the analysis of environmental health effect also regulated in Decree of Minister of Health No. 876/2001 regarding technical guideline for environmental health impact analysis.³⁴ However, Public health aspect in AMDAL document is limited on public health levels and not specifically to the health condition of the workers.³⁵

³³ Article 35 (3), Article 86-87 Law No. 13 of 2003 on Employment

³⁴ Appendix 1

³⁵ Ministry of Environment Regulation No. 16/2012, Appendix II (preparation of AMDAL document)

4. Physical Cultural Resources

The Indonesia country safeguards system recognized the protection of physical cultural resources.³⁶ The primary legal provision to this protection can be found in the Law No. 11 of 2010 regarding Cultural Heritage properties.³⁷ This law provide national criteria for assessing and determining Indonesian cultural heritage properties.³⁸ The law also accompanied by Government Regulation No. 10 of 1993 regarding Implementation of Law No. 5 of 1992 regarding Cultural Heritage Objects, and the Ministry of Culture and Tourism Regulation No. PM49/UM001/MKP/2009 regarding Guidelines for the Preservation of Cultural Heritage Objects and Sites.

According to the Law No. 11 of 2010 The main points of cultural heritage are the cultural heritage methods consist of Management, Preservation, Protection, Rescue, Custody, Zoning, Preservation, Adaptation, Utilization, and Multiplication; the historical building can be owned by the state or individuals; a change to the function of the building is also allowed, as long as it doesn't go in the contrary with the rules. Cultural Heritage Management is divided between 2 main principals, i.e. Department of Culture & Tourism and Ministry of Education & Culture. The cultural heritages found by government (local or national) are declared to Department of Culture & Tourism, while the properties found by individuals and community will be declared to

36 There are some guidance such as ADB Safeguard Policy Statement (2) 2009; World Bank Physical Cultural Resources Operational Policies OP 4.11; Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 (UNESCO World Heritage Convention). Physical cultural resources also know as 'cultural heritage', 'cultural patrimony', cultural assets. According to WB, physical cultural resources are defined as movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance. Physical cultural resources may be located in urban or rural settings, and may be above or below ground, or under water. Their cultural interest may be at the local, provincial or national level, or within the international community. The following projects are classified during the environmental screening process as Category A or B, and are subject to the provisions of this policy: (a) any project involving significant excavations, demolition, movement of earth, flooding, or other environmental changes; and (b) any project located in, or in the vicinity of, a physical cultural resources site recognized by the borrower. Projects specifically designed to support the management or conservation of physical cultural resources are individually reviewed, and are normally classified as Category A or B.

37 Article 1 (#) defines physical cultural resources as Cultural Heritage Objects that mean 'immaterial in nature in form of Cultural Conservation Object, Cultural Conservation Building, Cultural Conservation Structure, Cultural Conservation Site and Cultural Conservation land and/or water that their existence should be preserved since they have significant value for the history, science, education, religion, and/or cultural through the stipulation process.' Article 1 (#) defines safeguarding cultural heritage object as the program to maintain and prevent the cultural conservation from threat and/or disturbance. It includes physical development threat from loss, damage, destroy or demolish.

38 Article 5 (five) under the Law 11/2010 on Cultural Property

BalaiPelestarianCagarBudaya (BPCB) under Ministry of Education & Culture.

D. Environmental Provisions, Laws, Executive Orders

1. Environmental Impact Assessment (EIA)

The primary legislation for the Indonesia country safeguard system for environment is Law No. 32 of 2009 regarding Environmental Protection and Management that requires environmental impact assessment (AnalisisDampakLingkungan; AMDAL).³⁹ This law covers and became a basis for all sectors that contain applicable environment provisions, such as laws concerning forestry,⁴⁰ plantation,⁴¹ industry, land,⁴² spatial planning,⁴³ mining,⁴⁴ water and irrigation,⁴⁵ energy,⁴⁶ and other infrastructures.

Law No.32 of 2009 covers people's right for a good and healthy environment;⁴⁷ People's right for participation in environmental management;⁴⁸ the obligation to prepare an Environmental Impact Analysis (EIA/AMDAL) for any planned business/activity that has large and significant impact;⁴⁹ the obligation for an authorized official to include conditions and obligations to carry out environmental impact control measures in the business license issued;⁵⁰ the authority of the Minister of Environment to issue waste disposal licenses;⁵¹ to supervise the compliance of any party responsible for a business and/or activity with environmental legislation;⁵² to order

39 Article 23 Law No. 32 of 2009 on Environmental Protection and Management

40 Law No. 41 Year 1999 regarding Forestry; Law No 18 Year 2013 regarding Prevention and Eradication of Forest Destruction; Ministry of Environment and Forestry Regulation No. P.12/Menlhk-II/2015 regarding Development of Plantation Forests.

41 Law No. 18 of 2004 concerning Plantation

42 Law No. 5 Year 1960 regarding the Agrarian Basic Principles; Law No. 2 Year 2012 regarding Land Acquisition for the Development of Facilities for Public Use.

43 Law No. 2 of 1992

44 Law No. 4 of 2009 on Mineral and Coal Mining

45 Law No. 7 Year 2004 regarding Water Resources; President Regulation No. 33 Year 2011 National Policy on Water Management; Government Regulation No. 42 Year 2008 regarding Water Management; Government Regulation No. 43 Year 2008 regarding Groundwater; Government Regulation No. 82 Year 2001 regarding Management of Water Quality and Control of Water Pollution; Government Regulation No. 37 Year 2010 regarding Dam; Government Regulation No. 28/PRT/M/2015 regarding River Border Zones; Government Regulation No. 38 Year 2011 regarding River; Government Regulation No. 28/PRT/M/2015 regarding River Border Zones.

46 Law 30/2007 on Energy

47 Article 5 Law No. 32 of 2009

48 ibid

49 Article 15

50 Article 18

51 Article 20

52 Article 22

mandatory an environmental audit;⁵³ a requirement for the Government to establish a special agency for environmental impact control;⁵⁴ recognition of the use of mediation and arbitration as alternative environmental dispute settlement mechanisms;⁵⁵ recognition of the strict liability principle (liability without fault) for a number of activities;⁵⁶ recognition of the class action procedure;⁵⁷ recognition of the legal standing of Non-Governmental Organizations (NGOs);⁵⁸ the provision on environmental civil servant investigators (PPNS LH);⁵⁹ and recognition of the corporate criminal liability principle, which will impose sanctions to corporations as a legal entity, as well as the top management of a company and the person who gives the orders.⁶⁰

• However, there are several weaknesses on the AMDAL regime. Despite any planned business/activity required an Environmental Impact Analysis (EIA/AMDAL)⁶¹, environmental permit,⁶² and Strategic Environmental Studies (KLHS)⁶³, in practice, both AMDAL and Environmental Permit are not link to the provision of location permit and land acquisition permit which the rights of people affected by the project and the rights of public participation often neglected. As a result, AMDAL is only a formality stage for the fulfilment of procedure and not the crucial stage which determine the continuation of the project or business activities.

2. Trans-boundary and Global Environmental Assessment

• Law No. 32 of 2009 also rules trans-boundary and global environmental impact. The provision primarily related to climate change and green house emission reduction. Law 32 of 2009 Article 57(4) a. provides that “(t)he conservation of the atmosphere function shall include mitigation and adaptation to climate change. Article 63 (1) states that in protecting and managing the environment, the government shall be assigned and authorized to: m. stipulates and implement policies, protection and/or damage of inter-state border

53 Article 29

54 Article 23

55 Article 30-33

56 Article 35

57 Article 37

58 Article 38

59 Article 40

60 Article 46

61 Government Regulation No. 27 of 1999 on Environmental Impact Analysis

62 Government Regulation No. 27 of 2012 on Environmental Permit/licenses

63 Government Regulation No. 46 of 2016 on Strategic Environmental Assessment (KLHS)

environment. In addition, coverage area of concern of environmental impact also include transnational.⁶⁴

• Government also formulates several lower regulations for trans-boundary issues such as Minister of Environment Regulation 15/2013 on Measuring, Reporting, and Verifying Mitigation Action of Climate Change and Decree No. 62/2013 on Managing Agency for the Reduction of Emission[s] from deforestation and Degradation of Forest and Peatlands.

3. Natural Habitats and Biodiversity

• One area of the Indonesia country safeguard system is the protection of natural habitats.⁶⁵ Classifications of habitats are critical, natural, and modified habitats mentioned in the Law No. 26/2007 on spatial planning. In the Ministry of Environment No. 05/2012, Appendix III has set 20 kinds of protected area.

• Government of Indonesia has ratified international regulation on biodiversity through the Law No. 5/1994 on United Nation convention regarding biodiversity, in fact, before issuing the above law, Indonesia has issued the the Law No. 5/1990 on conservation of bio-natural resources and its ecosystem concerning protection for

64 Article 6 (1) (d) Holistic Evaluation of the Environment, Attachment II Part B (4) Based on the review if the interconnection and interaction of Hypothetical Significant Impact (DPH), information on areas that require particular attention (area of concern), as well as their coverage (local, regional, trans-national or international). Decree No. 16 of 2012 on Guidelines on Preparation of Environmental Documents

65 There are several guidelines on Natural habitats including The World Banks Natural Habitats OP4.04; ADB Safeguard Policy Statements of 2009; IFC Environmental and Social Performance Standards of 2012. Using a definition from WB OP 4.04, Natural habitats are land and water areas where (i) the ecosystems' biological communities are formed largely by native plant and animal species, and (ii) human activity has not essentially modified the area's primary ecological functions. All natural habitats have important biological, social, economic, and existence value. Important natural habitats may occur in tropical humid, dry, and cloud forests; temperate and boreal forests; natural arid and semi-arid lands; mangrove swamps, coastal marshes, and other wetlands; estuaries; sea grass beds; coral reefs; freshwater lakes and rivers; alpine and sub alpine environments, including herb fields, grasslands, and paramos; and tropical and temperate grasslands. Biodiversity outside of natural habitats (such as within agricultural landscapes) is not covered under this policy. It is good practice to take such biodiversity into consideration in project design and implementation. Critical natural habitats are: (i) existing protected areas and areas officially proposed by governments as protected areas (e.g., reserves that meet the criteria of the World Conservation Union [IUCN] classifications), areas initially recognized as protected by traditional local communities (e.g., sacred groves), and sites that maintain conditions vital for the viability of these protected areas (as determined by the environmental assessment process); or (ii) sites identified on supplementary lists prepared by the Bank or an authoritative source determined by the Regional environment sector unit (RESU). Such sites may include areas recognized by traditional local communities (e.g., sacred groves); areas with known high suitability for bio-diversity conservation; and sites that are critical for rare, vulnerable, migratory, or endangered species. Listings are based on systematic evaluations of such factors as species richness; the degree of endemism, rarity, and vulnerability of component species; representativeness; and integrity of ecosystem processes.

biodiversity. Although, it seems not enough information for biodiversity, even though the Ministry of Environment No. 29/2009 has issued.

- This protection comes from some regulations in various sector including forest,⁶⁶ plantation,⁶⁷ coastal and island,⁶⁸ water⁶⁹ and natural sources and biological diversity.⁷⁰ However, Indonesia facing a problem of massive deforestation⁷¹ due to forest conversions⁷² and illegal logging.
- However, some regulations undermine the safeguard. For instance, Indonesian regulations offer the possibility to use forest area for plantation through forest swap and forest relinquishment.⁷³ Further, ecosystem, habitat, and biodiversity conservation are not indicators to determine whether a specific area can be released or swapped. The requirements to change the status of forest area lack norms, standards, and criteria to protect biodiversity.⁷⁴
- In addition, Law No. 26 of 2007 on Spatial Planning provide more time flexibility to change the planning from 10-25 years to only 5 (five) years.⁷⁵ In fact, this law results in inconsistency in planning and provide a legitimation to the violation of spatial planning. It occurs especially in the context of competing interest between national government and local governments.

66 Law No. 19 of 2004 concerning revision of Forestry Law

67 Law No. 18 of 2004 concerning Plantation

68 Law No. 27 of 2007 concerning Management of Coastal and Small Islands

69 Law No. 7 of 2004 concerning Water Resources

70 Law No. 5 Year 1994 regarding Ratification to the United Nations Convention on Biological Diversity; Ministry of Environment Regulation No. 29 Year 2009 regarding Guidelines for Biodiversity Conservation at Local Governments; Ministry of Environment Regulation No. 03 Year 2012 regarding Biodiversity Parks; Government Regulation No. 28 Year 2011 regarding the Management of Nature Reserves and Conservation Areas.

71 Global Forest Watch in 2010 estimated that from 1950 to 2000 around 40% of Indonesia's forests were disappeared.

72 By 1997 around 7 million ha of forest had been approved for conversion to estate crop plantations (Global Forest Watch 2010) and by 2004 it was considered that two-thirds of all currently productive oil palm plantations involved forest conversion (WRM 2004).

73 Forest area in Indonesia is categorized according to three basic functions: conservation forest, protected forest, and production forest. Regulations in the forestry sector provide the possibility to change the status and functions of forest areas i.e. forest swap, forest relinquishment, and forest function change (Act No.41/1999, PP No.10/2010).

74 The administrative requirements are related to land, vegetation, area size, boundary, and permit.

75 Law No.2 of 1992 on Spatial Planning rules the period of planning for 25 years for National, 15 years for Province and 10 years for City or Municipal.

IV. Judicial System and Legal Arrangements for social and environmental violations

A. Provisions for public participation and Information

1. Meaningful Consultation

• Indonesia's CSS ensure the rights of everyone,⁷⁶ communities⁷⁷ and CSOs⁷⁸ in participation in EIA process. In addition, the rights of participation of women is also recognised.⁷⁹ However, the involvement of women in EIA consultation is not specifically mentioned in community participation.⁸⁰

• The term of 'meaningful consultation' is not specifically mentioned in EIA regulations. But, several conditions, such as equal position,⁸¹ transparent and complete information,⁸² fair and prudent settlement mechanism,⁸³ can be seen as closer or equivalence to the purpose of the meaningful consultation.

• The involvement of stakeholders may take various forms including monitoring, objection, complaint, and reporting.⁸⁴ This Involvement occurs since the project preparation process to ensure that their concerns taken into account by decision-makers. It continues along and after the project implementation to monitor any related issues to be addressed.

76 Article 65 (2) Law 32/2009, Environmental Protection and Management; Minister of Environment Decree Number 17 of 2012 on Public Participation in AMDAL and Environmental License

77 Article 70 (1) Law 32/2009, Environmental Protection and Management

78 Article 26 (3b) the communities shall include people who are interest in environmental issue (interest group/NGO); Law 32/2009, Environmental Protection and Management

79 Indonesia ratified the Convention on the Elimination of All Forms of Discrimination Against Women with Law 7 of 1984 on the Enactment of Convention on the Elimination of All Forms of Discrimination Against Women. Article 3 of the law states that "States Parties shall take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

80 Ministry of Environmental Regulation No. 17 of 2012 on Community Participation does not specifically mention women's participation in AMDAL.

81 Article 70 (1) Law 32/2009, Environmental Protection and Management

82 Article 1 (3) Minister of State for Environment Regulation 17/2012, Guidelines on Community Involvement in the Process of Impact Assessment and Environmental Permit

83 ibid

84 Article 70 (2) Law 32/2009, Environmental Protection and Management

2. Public information disclosure; provisions for access, citizens' report card

- Indonesia's CSS ensure the rights of everyone for public information in EIA process.⁸⁵ The government and every business activity oblige to provide correct and accurate information on the environment and disseminate it to the public.

- Technical provision of the disclosure of environmental assessment can be found in Ministry of Environment Decree No. 17 of 2012. The attachment of the Decree contains the obligation of Ministry of Environment, Governor and Mayor to announce and discloses the final environment licenses issued in maximum five days after the issue date.⁸⁶

- In general sectors, the access of public to information disclosure is ensured by Public Information and Disclosure Act (PIDA).⁸⁷ Under this law, everyone has the right to obtain public information and this right includes to see and to know public information, to attend public meetings, to obtain public information, to obtain copies of public information, and to disseminate public information in accordance with the legislation.⁸⁸ This law provide rules and minimum service standards on the mechanism, types and kinds of information that should be accessible. The Law also provides mechanism to settle disputes related to information disclosure.

- Meanwhile Public information related to land acquisition should be informed at an early stage. The institution needing should prepare a plan for acquisition of land, that shall refer to the Regional Spatial Planning and the development priority as stated in the Medium-Term Development Plan, the Strategic Plan, and the Working Plan of the relevant Agencies.⁸⁹ The detailed information on the land acquisition plan shall have at least the following information; the objectives and purposes of the Development Plan, consistency with the Regional Spatial Planning and the National/Regional Development Plan; land location; land size needed; general description of the land status; estimated period of the implementation of Acquisition of Land; estimated period of the implementation of construction; estimated land value; and budget plan.⁹⁰ The announcement of development plan should be made directly or indirectly to the affected people to the community living at the

85 Article 65(2) Law 32/2009, Environmental Protection and Management

86 Attachment Part C. Disclosure of Environmental Assessment Ministry of Environment Decree No. 17 of 2012

87 Law No. 14 of 2008 on Public Information Disclosure

88 Article 4 Law No. 14 of 2008 on Public Information Disclosure

89 Art 14(2) law 2/2012

90 Art 15 Law 2/2012

planned location.

3. Public Participation in Environmental Compliance and Enforcement

- Law 32 of 2009 Article 63(1)(r) obliges the government to "develop and implement policies on the management of public complaints" related to "protecting and managing the environment."

- The Minister of Environment Decree No. 19 of 2004 is a legal basis for a public complaint mechanism for suspicion of pollution or environmental damage. Under this provision, any individual who is aware of, suspects and/or suffers losses due to environmental pollution and/or damage may file a report and complaint in writing or verbally to the Ministry of Environment in or relevant agencies and complain centres in local and province level.

- This report also can be filed to the Indonesian Police since they responsible to supervise and follow up the investigation conducted by the Inspection officers or Civil Servant Investigator (PPNS) within the Ministry of Environment.⁹¹

B. Grievance mechanism; offences and penalties, compensation mechanisms

1. Environmental Inspection and Monitoring

- Referring to Ministry of Environment Decree 09/2010 on Guidelines on Community Grievances and Handling of Grievances caused by environmental pollution and or degradation, grievance is an information submission written or unwritten by a person to the [responsible] authority concerning pollution and or environmental degradation caused by activities during planning, implementation or after implementation of an activity.⁹²

- The Ministry of Environment with its deputies for inspection collects and acquires data on the implementation of environmental management plans (RKL) and environmental monitoring plans (RPL) submitted by businesses/activities, data from public complaint officials, and data on industrial compliance through inspection/supervision.

- The environmental inspectors has the authority to conduct monitoring, request additional information and evidence, make copies of documents, enter certain places, take photographs and audio visual records, take samples, check and inspect equipment and installations

91 See Indonesia Criminal Code of Procedure (KUHP)

92 Article 1 (1) Ministry of Environment Decree 09/2010 on Guidelines on Community Grievances and Handling of Grievances caused by environmental pollution and or degradation

facilities.⁹³ Further, the inspectors also can decide to stop the continuation of certain violations.⁹⁴ In addition, there is also a prohibition to anyone who prevents, disturbs and obstructs the execution of environmental inspectors tasks.⁹⁵

2. Environmental Offences and Compensation

- The enforcement to the breach of environmental provisions is primarily mandated to the Ministry of Environment. However, there are several key institutions can also receive a complaint and enforce the laws such as the police and public prosecutor, judiciary and other state-based non-judiciary grievance institutions including National Human Rights Commission and Ombudsman.

- With several circumstances, the Ministry of Environment has the authority to enforce administrative,⁹⁶ criminal⁹⁷ and civil legal mechanisms.⁹⁸ In case of the violation is not categorised as criminal offence, the environmental inspectors through governor and institution issuing the permit,⁹⁹ imposes an administrative sanction in various forms such as an obligation to conduct an environmental audit, a warning, payment order, and/or atemporary license suspension penalty.¹⁰⁰

- Another option available for the environmental inspectors and also for is to undertake out-of court civil mechanism¹⁰¹ or alternative dispute resolution such as mediation,¹⁰² negotiation and arbitration or if it cannot be avoided they can file administrative lawsuit¹⁰³ and or a civil lawsuit in court by themselves¹⁰⁴ or by encouraging CSOs.¹⁰⁵

- Meanwhile, if the breach is classified as a criminal offense, the Ministry of Environment take over the case from local environmental agencies and started the inquiry and investigation by sending a Notice of the Start of An Investigation (SPDP) to the Prosecutor's Office and through the National Police Headquarters Department

93 Article 74 (1) Law No. 32 of 2009 on Environmental Protection and Management

94 Article 74 (1)

95 Article 74 (2)

96 Articles 79-83 of the Law No. 32 of 2009 and other relevant regulations

97 Law No. 32 of 2009 on Environmental Protection and Management and other relevant regulations.

98 Article 84 and 85 Law No. 32 of 2009 and other relevant regulations

99 Article 79

100 Article 76 Specific for toxic and hazardous waste

101 Article 84 Law No. 32 of 2009 on Environmental Protection and Management

102 Supreme Court Regulation No.1 of 2008 on Mediation

103 Article 93

104 Article 90

105 Article 91-92

for Coordination of Civil Servant Investigators (PPNS). When the investigation complete, environmental inspectors or investigators send the case files including the suspects to the Public Prosecutor's Office through the National Police Headquarters (Supervisor Coordinator of PPNS) to be tried in the District Court. All the process follows the Indonesian criminal code of procedure (KUHAP).¹⁰⁶

- The criminal sanction for environmental crimes may be in the form of: (1) a jail sentence between 3-15 years; (2) a fine between IDR 3 billion and IDR12 billion (between US\$ 215,000 – US\$ 857,000); or (3) Additional penalties such as: (1) confiscation of benefits from the crime; and/or (2) closing part of or an entire company; and/or (3) rehabilitation of the impact of the crime; and/or (4) obligation to do what was neglected without any rights; and/or (5) nullification of what is neglected without any rights; and/or (6) to place the company under reprieve for a maximum period of three years.¹⁰⁷

3. Regional Mechanism and the barrier of cross-border law enforcement

- The ASEAN Human Rights Declaration (2012), which was adopted by ASEAN governments to affirm and complement the Universal Declaration on Human Rights (UDHR), contains specific principles including the right to development and the right to a 'safe, clean and sustainable environment',¹⁰⁸ identifying these as particularly important in ASEAN region. However, several challenges due to different legal system, political commitments and the gap of national safeguards between countries often undermine those rights.

- The present of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) in addressing human rights issues in the region failed to cover a problem of trans-boundary human rights violations by government agencies and private and state-owned companies due to lack of authorities and political support. In the absence of effective regional mechanisms or provisions by ASEAN countries to address the adverse human rights consequences of cross-border investment and infrastructure development projects, the role of AICHR became critical to provide remedy for affected communities.

- There are some guidelines to ensure the fulfilment of extraterritorial obligation in the context of cross-

106 Law No. 8 of 1981 on Indonesia Criminal Code of Procedure

107 Article 119

108 Article 28 (F) ASEAN Human Rights Declaration, 18 November 2012

border infrastructure development impacts in ASEAN. International human rights treaties mandated a state party to maximise its available resource and to develop international cooperation to achieve the fulfilment of human rights.¹⁰⁹ Further, the Maastricht Principles¹¹⁰ provide more comprehensive and extended guideline for the scope and form of the international cooperation which can be applied in addressing transboundary mega infrastructure project impacts.

V. Comparative Analysis of Country Legal Framework to that of the Safeguard Policy Statement (Using ADB's Safeguard Guidelines)

- This comparative analysis compares the existing Indonesia's national safeguards systems to the ADB SPS Policy Principles on environment and involuntary resettlement. The main purpose of this comparative analysis is to identify gaps and to determine level of equivalency between Indonesia's legal frameworks with all relevance legal instruments and ADB SPS Policy Principles. When the Gaps identified, recommendations to fill the gaps are formulated with the objective to strengthen Indonesia safeguards systems and to reach the full status of equivalence with ADB Safeguard Guidelines. To make it easier in comparison, this analysis borrowed and used ADB's matrix model of equivalence assessment. However, this analysis is also accompanied by human rights standards including several treaties, general comments and the UNGPs on Business and Human Rights.
- The preliminary review to Indonesia Safeguards System conducted by ADB found that the level of equivalence for Indonesia's CSS for environment is high since it is found that the Indonesia legal framework is fully equivalent with 10 of the 11 policy principles (91%) and with 40 of the 41 key elements (98%) of the ADB's environmental safeguard.¹¹¹ Against that result, this review

109 Article 2 (1) IESCR states ““Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” See also (A/HRC/26/28 §26; see also item 34 of the Maastricht Principles, 2012)

110 The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011)

111 ADB, Country Safeguards Review: Indonesia Consultation Draft, March 2007; Appendix 4: Equivalence Assessment Matrix for Environmental Safeguards.

found that the level of equivalence is lower. We found that Indonesia's CSS for Environment is only partially equivalence with 6 of the 11 ADB's policy Principles.¹¹²

- A number of Key element identified as partially equivalent are:
 - o Policy Principle 1; concern on the early screening to determine extent and type of environmental assessment. But, the type of Indonesia environmental assessment is not suitable to the affected people by involuntary resettlement.
 - o Key Element 5, Policy Principle 2; concerns ton the identification of socio-economic impacts (including impacts on livelihood through environmental media, health and safety, vulnerable groups, and gender issues). The Indonesian CSS is partially equivalent with respect to provisions for vulnerable groups, since the Indonesian CSS provides only for customary communities and poor people, whereas the ADB SPS has a broader definition of vulnerable groups, including those below the poverty line, the landless, the elderly, female-headed households, women and children, Indigenous Peoples, and those without legal title to land.
 - o Key Element 3, Policy Principle 8; Indonesia CSS Lack of information and guideline on biodiversity
 - o Key Element 2, Policy Principle 9; The energy conservation has not been explicitly stated in Ministry of Environmental Regulation No. 16/2012 for it is mentioned in Government Regulation No. 70/2009 regarding Energy Conservation
 - o Key Element 1, Policy Principle 11; Conserve physical cultural resources and avoid destroying or damaging them by using field- based surveys, since the Indonesian CSS absent of strict and clear conditions to remove physical cultural resources.

• Meanwhile, the preliminary review to Indonesia Safeguards System conducted by ADB found that the level of equivalence for Indonesia's CSS for Involuntary Resettlement is high since it is found that the Indonesia legal framework is fully equivalent with 8 of the 12 policy principles (67%) and with 31 of the 36 key elements (86%) of the ADB's Involuntary Resettlement safeguard.¹¹³ Against that result, this review found that the level of equivalence is lower. We found that Indonesia's CSS for involuntary resettlement is only partially equivalence with 10 of the 12 ADB's.¹¹⁴ The full equivalents are only for the principle 9 and 11.

112 Annex II.

113 ADB, Country Safeguards Review: Indonesia Consultation Draft, March 2007; Indonesia Equivalence Assessment matrix for Involuntary Resettlement safeguards.

114 Annex III

- A number of Key element identified as partially equivalent are attached in Annex III.

VI. Case Study: Celebrated case to showcase this assessment

- Indonesian CSOs coalition study to several infrastructure projects¹¹⁵ revealed several problems such as a failure to implement the World Bank, IFC and ADB social and environmental safeguards, including a lack of public disclosure, public consultation and mis-categorization of environmental and social risks.¹¹⁶ The coverage of those cases, however, occurred in domestic infrastructure projects.
- The information related to the application of Indonesia country safeguards for environment in cross-border infrastructure projects between Indonesia and its neighbour countries is limited.

Local Initiatives to redress the impact of Infrastructure project

- There are several best practices regarding how local communities address the impact of infrastructure project. For instance, in 2017 there is initiative of National Indigenous People Alliance (AMAN) and MayarakatAdatSeko (Seko tribe) in South Sulawesi to defend their rights which affected by development of coal-fired power plant (PLTU)Seko in Luwu Utara (North Luwu) by PT Seko Power Prima.¹¹⁷ In this case, AMAN and CSOs coalition accused the project has a camouflage from its genuine interest to the operation of mining company and to relocate local communities.

Local Initiatives to redress the impact of Infrastructure project

- There are several best practices regarding how local communities address the impact of infrastructure project. For instance, in 2017 there is initiative of

115 Ecological Justice, ILRC, Walhi, etc, Social and Environmental Safeguards for Infrastructure Finance supported by Multilateral Development Banks; The case of Indonesian Infrastructure Financial Intermediaries, Funds, and Investments, April 2016

116 The case of PT. Indonesian Infrastructure Finance (IIF): WB support; Equity held by IFC, ADB, Germany's DEG (with IFC, ADB and DEG, combined, holding over 50% of IIF equity); AUSAID support for business plan; PT. Indonesian Infrastructure Guarantee Fund (IIGF): World Bank support, guaranteeing coal power plants, including the controversial 2 x 1000 MW Batang mega-coal plants, with IFC as lead advisor; Indonesian Infrastructure Finance Development project (IIFD): World Bank – project in pipeline; Indonesian Regional Infrastructure Development Fund (RIDF): World Bank, Switzerland – \$500 million project in pipeline; Indonesia Infrastructure Finance Development Trust Fund (IIFDTF): World Bank, Canadian Trust Fund.

117 <http://www.mongabay.co.id/2017/05/09/cerita-dari-persidangan-amisandi-yang-terjerat-hukum-gegara-tolak-plta-seko/>

National Indigenous People Alliance (AMAN) and MayarakatAdatSeko (Seko tribe) in South Sulawesi to defend their rights which affected by development of coal-fired power plant (PLTU)Seko in Luwu Utara (North Luwu) by PT Seko Power Prima. In this case, AMAN and CSOs coalition accused the project has a camouflage from its genuine interest to the operation of mining company and to relocate local communities.¹¹⁸

- This study also highlight several cases of Infrastructure project which rejected by local communities, environmental experts and activists for various reasons, from a lack of consultancy, damage to environmental and socio-cultural, the fact that the project location to close to residential area, corruption and many more. Fro instance, a reclamation project in North Jakarta Bay and Bali, which rejected by local, experts and activists due to the negative impact to environment and local communities.

- There is also rejection by local and activists and NGOs to mega coal-fired power plant in Batang, Central Java. It is the first project to be developed under a public-private partnership scheme with Bhimasena Power Indonesia (BPI), a consortium consisting of Jakarta-listed PT Adaro Energy, J-Power Electric Power Development Co. Ltd. and Itochu Corp., which won the tender for the Batang project in 2011.¹¹⁹

- Indonesia environmental NGOs also showed its concern for the impacts of the Jakarta-Bandung High Speed Rail Train project. In it's release, Walhi West Java revealed some violations and inconsistency in the implementation of environmental regulations such as improper of environmental impact assessment (EIA), lack of public participation, and a violation of spatial planning law.¹²⁰ The government, however, keep continuing the project until now.

VII. Summary of Findings and Policy Brief

A. Summary of Finding

- The Indonesian safeguard system to mitigate the impact of cross-border infrastructure project is inadequate. The current CSS failed to address the problem of cross-border impacts with its complexities. The provision on cross-border environmental protection primarily

118 <http://jakartaglobe.id/news/reclamation-project-serious-breach-environmental-standards-walhi/>; <http://www.thejakartapost.com/news/2016/04/21/almost-all-reclamation-in-indonesia-illegal-claims-environmental-group.html>

119 <http://www.thejakartapost.com/news/2016/03/02/supreme-court-ruling-paves-way-batang-megaproject.html>

120 https://business-humanrights.org/sites/default/files/documents/High%20Speed%20Rail%20Train_WALHI%20west%20java%20complain%20to%20CDB_0.PDF

and only coverage to climate change, green house emission reduction and deforestation. Similarly, the provision on social protection is also failed to cover all subject and vulnerable communities within and beyond Indonesian territory.

- Limited coverage of the scope of social and environmental protection. The scope of social protection includes Indigenous people and vulnerable communities, labour health and safety and physical cultural resources, but it does not cover the comprehensive international standards on indigenous people rights, Labour rights and other socio-cultural rights. Similarly, the scope of environmental protection that includes natural habitats and biodiversity failed to covers all aspect of environmental protection as required by international standards.
- Government of Indonesia undermine the country safeguard system for the protection of social and environmental. The inconsistency of environmental policies, especially on forestry law on forest swap and relinquishment, undermine country safeguard system rather than strengthen it.
- A wide gap between Indonesia CSS and ADB's Policy Principles. Analysis shows low level of equivalence between Indonesia's country safeguards system and ADB policy Principles. There is a wide gap between Indonesian law and policies on safeguards system and ADB's Policy Principles.
- Absence of safeguards in Southeast Asian region. There is no legal and institutional framework in ASEAN to deal with the impact of cross border mega infrastructure project. The current ASEAN Master Pan on Connectivity lack of norm and mechanism to address the issue of Infrastructure Impacts. Similarly, the AICHR also lack of authority and very limited mandate to address the issue of the adverse impact of cross-border infrastructure project.

B. Recommendation (Policy Brief)

- Government of Indonesia should continue and prove its willingness to strengthen the current country safeguard system for the protection of social and environmental. A necessary measure to be taken includes:
 1. To revise the Environmental Impact Assessment legal framework, particularly, Law 32/2009 on Environmental Protection and Management and Government Regulation No. 27 of 1999 on Environmental Impact Analysis, Government Regulation No. 27 of 2012 on Environmental Permit/

licenses, in particular to ensure the link between AMDAL/EIA, Environmental permit, Location Permit and Land Acquisition Permit. In addition to ensure AMDAL as a crucial stage which will determine the continuation of the project or business activities rather than only formality stage which no bring consequences to the project.

2. To revise Law No. 12/2012 on Land Acquisition for Development in the Public Interest and Presidential Regulation No. 71/2012 on Land Acquisition for Development in the Public Interest and to harmonize with a prohibition of forced eviction as ruled by ICESCR and General Comment No. 7 UN Committee of CESR.
 3. To reveal the provision of protected forest swap as allowed by Law No.41/1999 and Government Regulation No.10/2010.
 4. To revise Law No. 26 of 2007 on Spatial Planning which provide more time flexibility to change the planning from 10-25 years to only 5 (five) years. And to ensure inconsistency in spatial planning policies.
 5. To revise the Presidential Regulation No. 38 of 2015 on Public Private Partnership (PPP), especially by incorporating safeguards system for the protection of social and environmental into the PPP framework.
 6. To closer the gap between Indonesia Country Safeguard System and ADB's policy principles (see table of gap analysis in the previous chapter).
 7. To incorporate all international standards on human rights and environment into the Indonesia's CSS.
- Government of Indonesia must consistently implement the safeguard system and must review the current cross-border infrastructure project and address the current, on-going and potential negative impact to society and environment. In addition to provide an effective remedy and compensation or rehabilitation of the victims or affected communities and nature.
 - ASEAN should revise the Master Plan for connectivity and to introduce the safeguard system to mitigate the impact of cross-border infrastructure projects. There are several critical questions to be addressed by ASEAN Countries, as follow:
 1. How to reconcile the gap between countries' safeguard system?
 2. What is a main consideration for a reconciliation of different level of adequacy of CSS in ASEAN?
 3. What kind of regional mechanism to address the impact of cross-border infrastructure projects?
 4. Should ASEAN formulate a same safeguard system

that affect and bind to all member countries?

- ASEAN countries to ensure and encourage CSO participation and engagement in the implementation of safeguard system to mitigate impact of cross-border infrastructure projects.

Annex I. Indonesia Legal Framework for Cross-border Infrastructure Impact (in hierarchy)

A. Constitution: UUD 1945 / Indonesian Constitution

B. Supreme People Assembly Decree: Decree of Supreme People Assembly) No. IX/MPR/2001 on Agrarian Reform and Natural Resource Management

C. Laws:

1. Law 5/1960 on Basic Stipulation of Agrarian Regulation
2. Law 5/1990 on Conservation of Living Natural Resources and Ecosystems
3. Law 32/2009 on Environmental Protection and Management
4. Law 39/1999 on Human Rights
5. Law 26/2007 on Spatial Plan
6. Law 41/1999 on Forestry
7. Law 45/2009 on Fishery
8. Law 1/2014 (Amendment to Law of 27/2007 on the Management of Coastal Areas and Small Islands
9. Law 12/1992 on Cultivation of Plants
10. Law 30/2007 on Energy
11. Law 36/2009 on Health
12. Law 11/2010 on Cultural Heritage
13. Law 12/2014 on Geothermal
14. Law 14/2008 on Disclosure of Public Information
15. Law 13/2003 on Labour
16. Law 24/2007 on Disaster Management
17. Law No. 4 of 2009 on Mineral and Coal Mining
18. Law 17/2013 on Civil Society Organizations
19. Law 18/2013 on Prevention and Eradication of Forest Destruction
20. Law 17/2004 Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change
21. Law 19/2009, Ratification of the Stockholm Convention on Persistent Organic Pollutants
22. Law 5/1994 on Ratification of UN Convention on Biodiversity (UN-CBD)
23. Law 11/2005 on Ratification of the Covenant of Economic, Social and Cultural Rights.
24. Law 7/1984 Ratification of CEDAW

D. Government Regulations:

1. Government Regulation 27/2012 on Environment License Holders' Responsibility.
2. Government Regulation 82 of 2001 on Management of Water Quality and the Control of Water Pollution
3. Government Regulation 30/2009 on Implementation Procedures for Reducing Emissions from Deforestation and Forest Degradation (REDD)
4. Government Regulation 70/2009 on Energy Conservation
5. Government Regulation 1/2010 on Water Pollution Control System
6. Government Regulation 6/2010 on Norms, Standards, Procedures and Criteria for Forest Management in Protected Forest Management Units
7. Government Regulation 12/2010 on Living Environment Management and Monitoring Efforts and Statement of Capability to Manage and Monitor the Living Environment
8. Government Regulation 17/2012 on Guidelines for Community Involvement in the Process of Impact Assessment and Environmental Permitting
9. Government Regulation (Minister of Agriculture) 64/2013 on Organic Agriculture System
10. Government Regulation 145/2013 on Measuring, Reporting and Verifying Climate Change Mitigation Actions
11. Government Regulation Number 101/2014 on Hazardous and Toxic Waste Management.
12. Government Regulation (Minister of Agriculture) 1/2007 on Active Materials of Prohibited and Restricted Pesticides
13. Government Regulation (Minister of Agriculture) 42/2007 on Pesticide Monitoring
14. Government Regulation 21/2008 on Disaster Management
15. Government Regulation 102/2000 on National Standardization

E. Presidential Decree and Regulations:

1. Presidential Instruction 9/2000 Mainstreaming Gender in the Development Process
2. Presidential Decree 32/1990 on Management of Protected Areas
3. Presidential Decree 46/2001, Operation of the National Greenhouse Gas Inventory
4. Presidential Regulation 23/1992 on Ratification of the Vienna Convention for Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer as Adjusted and Amended by the Second Meeting of the Parties London, 27-29

- June 1990
5. Presidential Substances Decree 23/1992 on Ratification of the Montreal Protocol on that Deplete the Ozone Layer
 6. Presidential Decree 46/2005 Amendment to the Montreal Protocol on that Deplete the Ozone Layer
 7. Presidential Regulation 10 of 2011 on National Institution of Coordination of Agricultural, Fishery and Forestry Counseling.
 8. Presidential Regulation 61/2011, on National Action Plan for Greenhouse Gas Emission Reduction

13. Minister of Agriculture Decree 11/2015 on Principles and Criteria for Indonesian Sustainable Palm Oil Certification

F. Ministerial Decrees:

1. Minister of Environment Decree 5/2012 on Types of Business Plans and/or Activities Subject to Environmental Impact Analysis
2. Minister of Environment Decree 16/2012 on Guidelines for Preparation of Environmental Documentation
3. Minister of Environment Decree 17 of 2012 on Public Participation in AMDAL and Environmental License
4. Decree of the Head of Environmental Impact Management Agency 299/1996 on the Technical Direction of Social Assessment in EIA/AMDAL.
5. Decree of the Head of Environmental Impact Management Agency 124/1997 on the Public Health Assessment in EIA/AMDAL
6. Decree of Minister of Environmental Affairs 45/2005 on Guidelines for the Formulation of Reports on the Realization of Environmental Management Plans (RKL) and Environmental Monitoring Plans (RPL)
7. Minister of Labor Decree 5/1996 on Work Safety and Health Management System
8. Minister of Public Works Decree 9/2008 on Management System for of Worker Safety and Health in the Construction of Public Works
9. Minister of Environment Decree 31/2009 on Direction and Control of implementation of Environmental Management, Ecolabelling, Clean Production, and Environmental Technology Use in Regions.
10. Minister of Environment Decree 9/2010 on Guidelines on Community Grievances and Handling of Grievances Caused by Pollution and/or Degradation
11. Minister of Environment Decree 15 of 2013 on Measurement, Notification, and Verification of Mitigation Actions for Climate Change
12. Decree 62/2013 on Managing Agency for the Reduction of Emissions from Deforestation and Degradation of Forests and Peat lands