Indonesian Constitutional Court Ruling Number 45/PUU-IX/2011 in relation to Forest Lands

Implications for Forests, Development and REDD+

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About this Brief

The brief is intended to provide informed insight into the potential implications of the recent Constitutional Court Decision No. 45/PUU-IX/2011.For use by government, donor agencies and other concerned stakeholders, the brief aims to reduce confusion pertaining to the decision and identify how the likelihood of negative outcomes can be minimised. Recommendations provided in this brief are aligned towards identifying actions and key actors that can play a role in ensuring outcomes are to the greatest overall benefit vis-à-vis the national Government's Green Growth agenda.

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This brief contains summaries of legislation and regulations. These summaries do not purport to be complete or accurate descriptions of the law, agreement or document to which they relate, and are qualified in their entirety by the full text of such law, agreement or document as the case may be.

Nothing in this brief should be construed as legal or investment advice.

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The Case

On 22nd July 2011, six plaintiffs filed Constitutional Court Case No. 45/PUU-IX/2011 (MK45), requesting review of Article 1(3) of Law No. 41 of 1999 on Forestry. This Article defines the process by which Indonesia's Forest Zone (*Kawasan Hutan*) is established.

The six plaintiffs, including five district heads, argued that large portions of their administrative districts (*Kabupaten*), containing populations of up to hundreds of thousands of people, had been designated as *Kawasan Hutan*, leaving them beholden to MoF for permission to undertake development activities, and thus unable to administer local government procedures authorised by law and required under the Constitution. In addition, local government and the public in general faced criminal sanctions for illegal occupation of *Kawasan Hutan* and risk of expropriation of property by the State.

On 21st February 2012, the Constitutional Court granted the plaintiffs' request, declaring the phrase "designated and or" in Article 1(3) to be unconstitutional and unenforceable. Article 1 (3) now reads:

"Forest Zone [*Kawasan Hutan*] is a particular area ~~designated [*ditunjuk*] and or~~ gazetted [*ditetapkan*] by the Government to be maintained as permanent forest [*Hutan Tetap*]."

Implications of this ruling are potentially profound, raising questions concerning (i) the current extent and legal status of the *Kawasan Hutan*, (ii) future ability of the Ministry of Forestry (MoF) to exert management authority over it, and (iii) changes to the formal and informal balance of power between central and regional government authorities in determining the allocation of land to forestry versus non-forestry purposes within provincial spatial plans.

Key Implications of MK45

As of 21st February 2012, the *Kawasan Hutan* covered c. 130.7 M ha (68.4%) of Indonesia's landmass, but only 14.2 M ha of this had been formally gazetted. This appears at first glance to imply the 130.7 M ha of *Kawasan Hutan* existing prior to the MK45 decision is now legally reduced to c. 14.2 M ha (the area formally gazetted), or c. 10% its previous extent. This interpretation assumes the decision applies retrospectively to past administrative decisions. However, regulations, and precedents relating to Constitutional Court rulings strongly suggest the decision is non-retrospective. In other words, *Kawasan Hutan* that was designated and or gazetted prior to the ruling remains *Kawasan Hutan*.

Even though *Kawasan Hutan* appears to remain unchanged, it is unclear how MoF authority will be exercised in the future over areas that have been designated but not gazetted, nor is it clear how the Forestry Law of 1999 will be implemented in the future to prevent further impairment of the plaintiffs' constitutional rights and that of other parties <u>into the future</u>. It is possible that (a) the Constitutional Court could, through interpretative guidance or further litigation, clarify how the decision is to be applied, possibly reducing the *Kawasan Hutan* to c. 14.24 M ha, or (b) other courts could rule on a case-by-case basis that restrictions imposed by the Forestry Law on areas designated but not gazetted are no longer enforceable. The need for certainty on these points is of utmost importance and achieving a negotiated solution between MoF and regional authorities should be a priority.

Uncertainty over MoF's ability to exercise management authority over areas of the *Kawasan Hutan* that have been designated but not gazetted appears to be a leading motivation behind MoF's recently announced ambitious plan to complete all outstanding gazettal by the end of 2014. Uncertainty

over MoF authority does not affect legality of existing forestry licences, but may limit MoF's ability to issue new licenses until gazettal is complete. Further, whereas MoF has previously considered instigating prosecution of district heads and companies for issuance of oil palm licences and development of plantations in areas allocated to forestry by MoF, post MK45 MoF may be unable to prevail on this point in a court of law and therefore less likely to initiate legal action. This may embolden districts to issue further licences in areas that are allocated to non-forestry purposes in existing provincial spatial plans, irrespective of MoF designations. Finalization of the gazettal process would eliminate this risk of conflict, but in the near term completion of provincial spatial plans offers a more immediate solution.

The established legal process for finalizing spatial planning across Indonesia places decision-making authority with MoF to approve proposed changes to the *Kawasan Hutan*. This has caused protracted disagreement with regional authorities concerning allocation of areas to forestry (controlled by MoF) versus non-forestry (controlled by the regions) preventing completion of spatial plans in 21 provinces across Indonesia. Although there is a question concerning legal validity of the process post MK45, two factors may motivate MoF and the provinces to achieve a workable compromise and complete spatial plans.

First, as noted MoF aims to complete gazettal over extremely large areas of the *Kawasan Hutan* in the next two years to improve legal certainty of its management authority. Second, regional authorities are empowered by law to manage the gazettal process. Post MK45, this second factor strengthens the position of provincial authorities to negotiate limits over land allocated for forestry because of the need for MoF to maintain productive working relations and expedite gazettal. The outcome of such negotiations will have far reaching implications for legality of past and future development of *Kawasan Hutan* by regional governments, gazettal process, and extent to which provincial spatial plans promote (or undermine) emerging Low Emission Development goals.

Implications for Indonesia's commitment to 7/26 Growth

Uncertainty arising from MK45 concerning the extent and especially MoF authority over *Kawasan Hutan* creates both risks and opportunities for advancing Indonesia's emerging Green Growth initiatives. Indonesian President Susilo Bambang Yudhoyono has committed the nation to reduce greenhouse gas emissions by at least 26% by 2020 or up to 41% with financial support from the international community, whilst realizing sustained 7% annual economic growth over that period (so-called 7/26 policy).

To achieve 7/26, future spatial planning and forest licensing must be based on Low Emissions Development (LED) planning, most importantly with respect to forests and peatlands. MK45 creates the need (and potentially the enabling conditions) for a rapid compromise between MoF and provincial authorities to agree upon delineation of areas allocated to forestry and non-forestry, and to finalise the gazettal process of *Kawasan Hutan* boundaries. This creates opportunity for releasing from *Kawasan Hutan* low carbon areas currently allocated for forestry, whilst bringing into the *Kawasan Hutan* high-carbon forested areas currently outside *Kawasan* boundaries and at risk of conversion. Such an outcome will require strong leadership and positive incentives both for MoF and especially regional authorities to consider forgoing short term benefits of developing high carbon landscapes (e.g. forested peatlands).

Site based REDD+ projects offer an opportunity to protect forests and reduce land-based emissions. However, post MK45, proposed REDD+ projects within *Kawasan Hutan* may find it more difficult to obtain a REDD+ project licence if the area overlaps with other pre-existing licenses (which might proliferate in the short term) or other development opportunities. To avoid this, post MK45 a more solid economic case must be made for REDD+ at provincial and district levels.

Numerous rural populations across Indonesia live within *Kawasan Hutan*. Their use of and customary tenurial rights over forests have long been a subject of controversy and source of conflict between

communities and companies issued licenses to operate by the State. The MK45 decision creates an opportunity to improve this situation, by redressing the historical failure of government to accommodate community rights during formal gazettal of the *Kawasan Hutan*. Recent efforts by MoF to experiment with community-based forest management in the *Kawasan Hutan* is a major step forward for central government recognition of community rights to manage forests on which they depend. Augmenting these efforts through a process of gazettal that ensures effective participation of local communities would provide greater clarity on the location and extent of customary forests, strengthening the position of local communities in future negotiations with all forms of business investment opportunity (including REDD+). Similarly, business would enjoy greater clarity concerning social risks and opportunities of pursuing investments in specific localities. In this context, it is important to emphasize, however, that accelerated gazettal in response to MK45 risks future conflicts with communities if the gazettal process is not carried out in a manner that ensures full and effective participation of local communities potentially affected.

Potential Outcomes and Solutions

The overall potential impacts of the MK45 decision range widely, from a 'worst-case' scenario in the absence of action to positive outcomes arising from targeted interventions. The 'worst case' scenario includes protracted disagreement between MoF and regional authorities over land allocation, leading to continued delays in finalizing spatial plans, coupled with complications to the gazettal process. This will exacerbate legal uncertainty, increase the potential for opportunists to exploit legal ambiguities over limits of MoF authority, undermine law enforcement, place communities at risk and potentially burden the State with litigation proceedings in the courts. This would risk uncontrolled degradation of forests, reduced investment security in forestry, increased social conflict, and severe constraints on the ability of Indonesia to achieve its 7/26 objectives.

A best-case scenario creates significant opportunity for a rational, consensus-based approach to spatial planning that maximises positive outcomes for forests, peatlands, economic development, and community rights. A leading best-case outcome might be a revised *Kawasan Hutan* that reflects real forest cover, allowing for expansion of agriculture and low emissions development in low carbon lands. Through completion of a gazettal process that includes full and effective participation of local communities, legal certainty surrounding the rights and responsibilities of communities and business would be improved, as well as enabling enforcement to protect those rights. The net effect would be an optimization of the forestry sector including REDD+, rehabilitation and community-based forestry leading directly to the promotion of forestry as a key element of 7/26 development.

Targeted pro-active interventions are required in the near term to avoid some of the potential 'worst case' outcomes outlined above. This might include expansion of the existing suspension on new licenses to include areas whose allocation to forestry versus non-forestry is disputed by MoF and regional authorities. The full potential for positive change arising from MK45 can only be realized through strong policy guidance from central government and effective collaboration among diverse stakeholder groups at regional and district levels. To achieve this, there is an urgent need for clarification of certain points arising from the MK45 decision, including procedural aspects of spatial planning that MK45 appears to invalidate. There is also need for independent review and revision of lands allocated to forestry, especially within provinces that retain high forest cover and/or peatlands (e.g. East Kalimantan, Central Kalimantan, Riau and Papua). Such review could provide the basis for finalizing spatial plans and gazettal of the *Kawasan Hutan*, if MoF and regional authorities work constructively towards a common goal, supported by strong guidance and innovative fiscal or financial incentives to the mutual benefit of both parties.

2. The Case

On the 22nd July 2011 six plaintiffs[1] filed for Constitutional Court review of Article 1(3) of Law No. 41 of 1999 on Forestry, as amended by Law No. 19 of 2004 (hereafter **"Forestry Law"**). Article 1(3) defines the process by which Indonesia's Forest Zone (*Kawasan Hutan*) is established, determining the area over which the Ministry of Forestry (MoF) holds management authority.

Constitutional Court decision No. 45/PUU-IX/2011 (MK45) was issued on 21st February 2012, granting the plaintiffs' request and declaring the phrase "designated and or" in Article 1(3)to be unconstitutional and unenforceable. Prior to MK45, Article 1(3) of the Forestry Law read:

> "Forest Zone [*Kawasan Hutan*] is a particular area designated [ditunjuk] and or gazetted [*ditetapkan*] by the Government to be maintained as permanent forest [*Hutan Tetap*]."

At the moment MK45 was issued, *Kawasan Hutan* covered an estimated 130.7 M ha,[2] or 68.4% of Indonesia's c. 191M ha land mass.[3] In 2009, 86.8 M ha of the *Kawasan Hutan* supported natural forest, 41 M ha was non-forest, and 2.8 M ha were tree plantations; a further 5.1 M ha of forest occurred outside the *Kawasan Hutan*.[4] Prior to the Forestry Law of 1999, the *Kawasan Hutan* could be established only through a process of gazettal[5] similar to that described in Article 15(1) of the Forest Law and related government regulations.[6] In practice, the process of gazettal has proceeded very slowly, with only 14.24 M ha fully gazetted as of 2011.[7] Nevertheless, since 1999 MoF exercised full management authority over areas designated (*ditunjuk*) as *Kawasan Hutan* but not yet gazetted, issuing licences for logging, forest plantations, and borrow-to-use (*pinjam pakai*) permits for non-forestry purposes within them (e.g. mining).

Over the past decade since regional autonomy, these far reaching MoF powers have caused tension between central government and the provinces. At the root of this is protracted disagreement over allocation of land to (a) *Kawasan Hutan* under MoF control versus (b) Land for Other Purposes (*Areal Penggunaan Lain*, APL) managed by regional authorities for local economic development. This disagreement has effectively prevented provincial authorities from fully exercising their legal right (and responsibility) under decentralization[8] to establish their own spatial plans (RTRWP; See Annex 1).

In MK45, the plaintiffs argued large portions of their administrative districts (known as *Kabupaten*), containing populations of up to hundreds of thousands of people, had been designated as *Kawasan Hutan*,[9] leaving them beholden to MoF for permission to undertake development activities, and thus unable to administer local government

[1] Regional Government of Kapuas (**"Applicant I"**), the Regents of Gunung Mas (**"Applicant II"**) , Katingan (**"Applicant III"**), Barito Timur (**"Applicant IV**") and Sukamara Regency (**"Applicant V"**) of the Central Kalimantan Province and a businessman from Central Kalimantan Province (**"Applicant VI"**).

[2] Rencana Kehutanan Tingkat Nasional (RKTN) 2011-2030, P. 49/Menhut-II/2011

[3] Statistik Indonesia (2011) Badan Pusat Statistik (BPS)

[4] These numbers are derived using Murdiyarso *et al*. 2011 & Rencana Kehutanan Tingkat Nasional (RKTN) 2011-2030; accuracy of these figures is not known.

[5] UU 5 1967 Article 1 (4)

[6] PP 44 2004

[7] Rencana Kehutanan Tingkat Nasional (RKTN) 2011-2030, P. 49/Menhut-II/2011

[8] UU 22 1999 Pemerintah Daerah

[9] A territory within Central Kalimantan Province with an area of approximately 15,300,000 ha was designated as Forest Zone on 12 October 1982 under Decree of the Minister for Agriculture No. 759/Kpts/Um/10/1982 on the Designation of Forest Zone in the Territory of Central Kalimantan ("Decree No. 759/1982"). Pursuant to the attachment to Decree No. 759/1982, the entire districts of Kapuas, Gunung Mas,

procedures authorized by law and required under the Constitution.[10] At risk of criminal prosecution to perform their job as elected officials, the claimants filed for Constitutional Court review.

The plaintiffs argued that the phrase "designated and or gazetted" (*ditunjuk dan atau ditetapkan*) in Article 1(3) violated their constitutional rights, including Article 28G (rights to protection of self, family, honour, dignity and assets, to a sense of security and protection from threats to conduct or not to conduct something which is a fundamental right) and Article 28H (property rights and rights against arbitrary acquisition), noting restrictions on:

- Issuing licenses for plantation and mining activities, housing, other facilities and infrastructure.
- Performance of functions associated with regional administrative autonomy.
- Implementation of the Regional Regulation on Regency/Municipality Spatial Planning and the Provincial Spatial Planning.

In addition, local government and the public in general faced criminal sanctions for illegal occupation of *Kawasan Hutan* and, as a result, risk of expropriation of property by the State. This was due in part to the National Land Agency (BPN) not processing local requests for land titles to property, out of concern that boundaries of the *Kawasan Hutan* were still under negotiation between MoF and the province.

Given the above, it is perhaps surprising the case was not brought to court sooner. The explanation is that until recently, it was not legally possible to mount a constitutional challenge to the Forestry Law, because article 50 of Law No. 24 of 2003 (MK Law) permitted MK review only for laws promulgated after the first amendment to the 1945 constitution (executed on 19 October 1999). This excluded the Forestry Law of 1999 from review, because it was promulgated on 30 September 1999. The MK Law was amended by removal of Article 50 on 20 July 2011, and case 45/2011 was registered at MK two days later on 22 July 2011.

In decision MK45, the Constitutional Court discussed its views of the matters under dispute in the following terms:

1. As Indonesia is a country ruled by law, an officer of the State must act in accordance with the laws and regulations.
2. The act of creating *Kawasan Hutan* without a process that engages stakeholders, and in a manner not in accordance with the law, is that of an authoritarian government. Boundaries of *Kawasan Hutan* that dominate the lives of so many people should not be created solely through designation without a formal process of gazettal.
3. Articles 1(3) and Article 15(1) are contradictory, with Article 15(1) defining designation (*penunjukan*) as step one in a multi-step process to gazette the *Kawasan Hutan,* whereas Article 1(3) states designation alone is sufficient to establish the *Kawasan Hutan*.[11]
4. The process of gazettal described in Article 15 (1) is in accordance with the principles of a country ruled by law. Furthermore Article 15 (2) states that the process of gazettal must

Katingan, Sukamara, and Barito Timur regencies had been designated as Forest Zone. According to the plaintiffs' arguments, Kapuas regency, for example, contained 329,440 residents, based on the 2010 census.

[10] Article 18 (2) Provincial, Regency and Municipality Governance shall independently regulate and manage their own governance affairs based on the principles of autonomy and assistance (*tugas pembantuan*); ... (5) Regional Governance shall carry out autonomy in the widest sense (*seluas-luasnya*), except for governance affairs which by laws and regulations are determined as affairs of the Central Government... (6) Regional Governance is entitled to promulgate regional regulations and other regulations to implement autonomy and assistance (*tugas pembantuan*). Article 18A (2) The relationship with regards to financial affairs, public services, utilization of natural resources and other resources between central and regional government shall be regulated and implemented in a fair and harmonious manner pursuant to the laws and regulations.

[11] Article 15 (1) describes the process of gazettal as a *'process of (a) Forest Zone designation, (b) administrative demarcation of Forest Zone boundaries, (c) Forest Zone mapping, and (d) Forest Zone determination.'*

take into account the spatial plans of a region, which in the opinion of the court allows for the possibility that rights of people and traditional rights may exist in those areas and as such should be excluded from *Kawasan Hutan* to protect those rights.

5. That as gazetting an area is the final step in the establishment of *Kawasan Hutan* the phrase '*designated and or*' in Article 1(3) is against the principles of a country ruled by law as required by the Article 1(3) of the Constitution and that the phrase contradicts Article 15, such that this results in legal uncertainty required by Article 28 D (1) of the Constitution.
6. That in the transitional provisions in Article 81 of the Forestry Law stating '*Kawasan Hutan that has been **designated and or gazetted** in accordance to laws and regulations, prior to the enactment of this law remain as such according to this law*', the Court deemed the phrase '***designated and or gazetted***' as legitimate and legally binding (see footnote[12])

[12] The MK's opinion on this transitional clause is most likely intended to preserve the integrity of past administrative actions, i.e. that areas designated remain designated, and areas gazetted remain gazetted, noting under the previous forestry law *Kawasan Hutan* needed to be gazetted to obtain forest area status.

3. Key Implications of MK45

A ruling by the Constitutional Court becomes effective immediately once it is read and cannot be appealed. Consequently, Article 1(3) now reads:

> "Forest Zone [*Kawasan Hutan*] is a particular area ~~designated [*ditunjuk*] and or~~ gazetted [*ditetapkan*] by the Government to be maintained as permanent forest [*Hutan Tetap*]."

The immediate implications of this change to Article 1 (3) are potentially profound. Five questions, in particular, merit careful consideration:

1. What are the boundaries of the *Kawasan Hutan* today, post MK45?
2. How does MK45 affect licenses issued by MoF that pre-date the decision?
3. How does MK45 affect the ability of regional authorities to finalize provincial spatial plans and, subsequently, forest boundary demarcation, mapping and gazettal?
4. How does MK45 affect authority of district government to issue oil palm licenses?
5. How does MK45 create opportunities to resolve conflict and strengthen tenurial claims by local communities over customary forests and traditional lands?

3.1 *Kawasan Hutan* post MK45

There are two possible competing interpretations of MK45. The first is that any area legally established as *Kawasan Hutan* on 20 February 2012 remained *Kawasan Hutan* on 21 February 2012, post-MK45. This view relies on a particular interpretation of MK's non-retrospectivity doctrine (see Annex 2), and the designation of *Kawasan Hutan* under authority of the Forestry Law as an administrative action that defines a certain set of rights, obligations and management authority to MoF in relation to particular areas of land. Such an administrative act would not normally be affected retrospectively by an MK decision, and so the area designated as *Kawasan Hutan* pre-MK45 remains the same post-MK45. Another competing interpretation is that areas *designated* by the MoF as *Kawasan Hutan* prior to M45 remain designated, but such areas are no longer subject to the full forestry regime that applies post-MK45 to areas of the *Kawasan Hutan* that have been fully gazetted. This latter interpretation does not necessarily rely on retrospective application of MK45, as it does not seek to challenge any administrative actions, but rather re-interprets the legal effect of such actions. This interpretation would also achieve a result that is more consistent with the underlying principles of justice which motivated the plaintiffs to file suit in MK45.

Either of the above interpretations might be upheld in further litigation. It is even possible a combination of both interpretations may be upheld by different courts, noting that the Indonesian legal system does not follow a principle of strictly binding precedent. This introduces a level of uncertainty that requires urgent resolution.

For example, if the second interpretation is followed, the immediate impact of this modification to Article 1 (3) would imply that the 130.68 M ha of *Kawasan Hutan* subject to full MoF authority prior to 21st February 2012 is (a) now legally reduced in extent to 14.24 M ha (the area formally gazetted at that date) and, (b) can only be expanded further by gazettal, a process that requires active support of the district government.[13] If this holds, then it implies the following: (i) The *Kawasan Hutan* falling unambiguously under MoF control is now c. 10% its former extent; (ii) MoF will have difficulty exercising full management authority over 90% of the *Kawasan Hutan* that is not yet gazetted; and (iii) provincial and district governments have gained significant control over land use allocation across very large areas and should be expected to finalize their spatial plans in the very near term.

[13] PP 44 2004

Constitutional Court Decisions and Retrospectivity

The legal concept of non-retrospectivity is a fundamental principle of MK Law[14] and associated regulations.[15] In its most basic form, non-retrospectivity means legal relationships or individual rights established or impaired prior to a court decision cannot be affected retrospectively by that decision. Article 47 of the MK Law provides that a decision of the MK becomes final and binding at the time it is read in plenary session open to the public, and Article 58 provides that a law under review by the MK is still valid until a decision that declares it inconsistent with the Constitution. Thus, the legal implications of the decision apply to future circumstances, not retrospectively to the past. Although there are some precedents where legal implications of MK decisions have been applied retrospectively (see Annex 2), MK45 appears to fall outside the scope of those precedents.

Given the above, it follows that:

1. As of 21st February 2012, designation (*penunjukan*) is no longer a legal basis for establishing future areas of *Kawasan Hutan* under the Forestry Law.
2. Administrative decisions made prior to MK45 remain valid. This is being interpreted by MoF as meaning that *Kawasan Hutan* created through designation prior to MK45 remains *Kawasan Hutan*. However, other competing interpretations are possible and may generate litigation.
3. Any licenses or contracts granted prior to this date remain valid. While there may be questions about how this works in practice, in principle the bundle of rights and obligations that constitute MoF licenses should not be affected until their expiry.
4. Any constitutional impairment occurring prior to MK45 should not be compensable or subject to remedies on the basis of MK45. As such, the plaintiffs are not granted any relief for constitutional impairment they suffered in the past (see Annex 2).

MK45 does not provide guidance on how, in practice, all other provisions of the Forestry Law should be implemented in the future. On the one hand, if boundaries of the *Kawasan Hutan* remain as they were pre-MK45, then this implies MoF remains empowered to impose restrictions on its use. On the other hand this would, in effect, result in continued impairment of the plaintiffs' constitutional rights and those of any other party into the future. This would seem logically inconsistent with the Court's mandate to prevent further impairment of constitutional rights. In the absence of a swift negotiated solution between stakeholders, it seems likely these ambiguities will be resolved either by the Constitutional Court itself, through issuance of additional interpretive guidance (though MK might consider this re-litigating the same point, which is not permitted) or through further litigation in lower courts (e.g. through a series of disputes over what is allowed in certain areas, or law suits asserting individual or collective rights).

The MoF's public position is MK 45 has no effect except that designation is not only the first step of gazettal.[16] However, uncertainty over MoF's ability to exercise management authority in areas designated but not gazetted as *Kawasan Hutan,* appears to be a leading motivation of the MoF's recently announced, ambitious plan to complete all outstanding gazettal of *Kawasan Hutan* by the end of 2014 (a nearly four-fold acceleration compared to previous years).[17]

In summary, given the laws, regulations, and precedents relating to the Constitutional Court, MK45 does not apply retrospectively. Consequently, there is a strong rationale that *Kawasan Hutan* designated and/or gazetted prior to the ruling remains as *Kawasan Hutan*. However, given the competing interpretation it is not clear how MoF authority will be applied in the

[14]UU 24/2003, as amended by UU 8 of 2011
[15] Articles 38 and 39 of MK Reg No. 06/2005
[16] Surat Edaran Tentang Putusan Mahkamah Konstitusi SE 3/Menhut-II/2012
[17] As of 2010, 222,452 km out of a total 281,873 km of the internal and external boundaries of the *Kawasan Hutan* have been marked, making it 75% complete, even though only 14.24 M ha are fully gazetted. (Rencana Kehutanan Tingkat Nasional (RKTN) 2011-2030, P. 49/ Menhut-II/2011)
[18] UU 24 1992

future over areas that have been designated but not gazetted, nor is it clear how the Forestry Law of 1999 will be implemented in the future to prevent further impairment of the plaintiffs' constitutional rights (or that of others similarly affected). In an extreme scenario it is still possible that (a) the Constitutional Court could, through interpretative guidance or further litigation, clarify how the decision is to be applied, possibly reducing the *Kawasan Hutan* to c. 14.24 M ha; or (b) other courts could rule on a case-by-case basis that restrictions imposed by the Forestry Law on areas designated but not gazetted are no longer enforceable. The need for certainty on these points is of utmost importance and achieving a consensus solution should be a top priority.

3.2 Forestry Licences

As a general principle, any licence issued by the Indonesian government is considered valid unless proven otherwise. With respect to MK45, Constitutional Court precedents appear to support the interpretation that forestry licences issued prior to MK45 are unaffected (see Annex 2). If the rights integral to a forestry license remain intact, then so too would management and other responsibilities associated with them, including MoF's role as management authority to oversee them. Even under an extreme scenario where *Kawasan Hutan* boundaries are re-interpreted, resulting in a forest concession being located outside *Kawasan Hutan*, the license should still remain valid until expiry.

However, the MK45decision leads to lack of clarity regarding new licences, or modification to existing ones, given ambiguity over the ability of MoF to exercise management authority in areas not yet gazetted. This appears to be especially true in cases where other rights or claims pre-exist in the area, such as customary rights of local communities or licenses issued by others for non-forestry activities (e.g. oil palm or mining). At present, within forestry licensing procedures, there is no requirement to complete gazettal prior to issuance of a license. Forestry and other land-based licenses typically include a requirement for the licensee to resolve claims of other parties with existing rights on the concession area that is granted. However, poor registration systems and land tenure uncertainty invariably create problems for investors and local stakeholders. This is at the root of many protracted company-community conflicts in the Indonesian forestry sector, where pre-existing local rights were either unknown to investors and/or were not legitimately accommodated (see Section 4.3 below). Execution of MoF's accelerated gazettal process, planned for the next two years; carries potential to provide greater certainty for both communities and the private sector (see Section 4.3). If successful, this would encourage future responsible investment in sustainable forestry and improve livelihood security for rural populations. However, if accelerated gazettal fails to ensure pre-existing rights are represented, then land disputes with communities and between companies will continue to be a chronic source of conflict to the detriment of the environment, community livelihoods and Indonesia's ambitions for Green Growth.

3.3 Spatial Planning Laws & Forestry

The 1999 Forestry Law, 2007 Spatial Planning Law, and their associated regulations, define procedures by which decisions are made concerning land-use across Indonesia. As discussed, under the current legal framework the MK45 decision is likely to have no immediate effect on existing boundaries of the *Kawasan Hutan*, at least not without further MK clarification or civil litigation. The decision could, however, directly influence the outcome of on-going revisions to provincial spatial plans across Indonesia, resulting in marked changes to boundaries of *Kawasan Hutan* in the future. This is because the MK decision has (a) created uncertainty surrounding procedures to complete the revision process, and (b) markedly shifted the balance of power toward regional governments in future negotiations concerning the amount of land allocated to forestry versus non-forestry purposes.

The Spatial Planning Law, administered by the Ministry of Public Works, enacted originally in 1992[18], and revised in 2007[19], assigns the landmass of Indonesia to either of two functions: land to be utilised for (i) production (*Kawasan Budidaya*) or (ii) protection

(*Kawasan Lindung*). According to provisions of the 2007 law, spatial plans are developed at the national (RTRWN), provincial (RTRWP) and district (RTRWK) level in a structured hierarchy, so that plans at one level must be consistent with plans at higher levels. Plans at lower levels add further resolution to boundaries of areas assigned as *Kawasan Lindung*, possibly enlarging them but never decreasing their extent. Land allocated for production purposes (*Kawasan Budidaya*) is further sub-divided into land intended for forestry (*Kawasan Budidaya Kehutanan*, KBK) and non-forestry purposes (*Kawasan Budidaya Non-Kehutanan*, KBNK). The boundaries of land allocated for forestry (KBK) are decided at the provincial level in the RTRWP, and must be followed by the districts in development of their plans (RTRWK).

Under terms of the 1999 Forestry Law, land area within the *Kawasan Hutan* can be allocated to three possible functions: Production forest, protection forest or conservation areas. Throughout the 1980's and early 1990's, these areas were designated across the whole of Indonesia based largely on biophysical factors, together covering 143 million ha or 75% Indonesia's landmass, referred to collectively as TGHK (Tata Guna Hutan Kesepakatan). Areas in *Kawasan Hutan* designated as *Production forest* by MoF are equivalent to *Kawasan Budidaya Kehutanan* under nomenclature of the Spatial Planning laws, and those designated *protection forest* and *conservation areas* are equivalent to *Kawasan Lindung*.

The laws relating to regional autonomy, reinforced by implementing regulations for spatial planning[20], empower provincial and district governments to issue licences for agriculture or other productive activities (e.g. oil palm, rubber, coffee) within areas allocated to non-forestry purposes (*Kawasan Budidaya Non-Kehutanan*) in provincial and district spatial plans. Through a process regulated and controlled by the National Land Agency (BPN), land rights are granted to parties for a period of 60 years through issuance of a business use right (HGU)[21]. Provinces or districts are also permitted to issue such licences within certain parts of the *Kawasan Hutan*, but only in production forest areas allocated for conversion (*Hutan Produksi Konversi*, HPK) and subject to approval by MoF for release from the *Kawasan Hutan*.

Until 2010, spatial planning and delineation of the *Kawasan Hutan* were effectively separate, parallel processes. As a result, in many provinces there is significant divergence in areas defined as *Kawasan Hutan* by MoF compared to that defined by provincial and district government. Efforts were made during the 1990's to harmonise MoF and provincial delineations of *Kawasan Hutan* through the so-called *Peta Paduserasi* (Harmonisation Map) process, but these were never completed for Central Kalimantan, Riau, and East Kalimantan. In the case of Central Kalimantan, protracted dispute between parties prevented reconciliation, culminating in this Constitutional Court case (see Annex 1).

The Spatial Planning Law outlines a process for assigning allowable uses to land, but not management authority over them. It is, therefore, within the legal rights of provinces to designate areas for forestry and non-forestry purposes, but there are limitations on their freedom for doing so. In 2010, implementing regulations[22] of the spatial planning law were enacted making it a requirement for areas allocated to forestry in revised RTRWP to be in agreement with those defined by MoF. The law and implementing regulations outline four stipulations to ensure this is achieved:

1. Until the RTRWP revision process is completed, the extent and function of the *Kawasan Hutan* should refer to the previous RTRWP.

[19] UU 26 2007
[20] PP 15 2010
[21] PP 40 1996
[22] PP 15 2010 *Penyelenggaraan Penataan Ruang*
[23] PP 10 2010 Tata Cara Perubahan Peruntukan dan Fungsi Kawasan Hutan

2. The extent and function of the *Kawasan Hutan* in the RTRWP revision should use the previous RTRWP plan as a basis.
3. Any changes in *Kawasan Hutan* extent and function must be in accordance with the Forestry Laws and regulations (i.e. independently evaluated, recommendations reviewed by DPR, and approved by the MoF)[23]
4. A minimum of 30% of watersheds should be *Kawasan Hutan* in order to maintain and preserve balance and prevent against floods, erosion, sedimentation, and droughts.

Post MK45, two key central government regulations (PP 10 & PP 15 of 2010) defining spatial planning procedures to reconcile allocation of land for purposes of forestry are no longer clear. PP 10 2010 regulates the change in function and extent of *Kawasan Hutan*, permitting this to be completed at the provincial level as part of spatial planning. The process described is one of designation for adding or removing areas proposed by the province to the MoF; requiring an independent expert review, approval of the review by the DPR, and formal acceptance or rejection by MoF. Whilst designation (*penunjukan*) is a valid process for purposes of spatial planning, post MK45 it cannot be used to define *Kawasan Hutan*. This, in turn, potentially invalidates relevant articles in the regulation and may undermine completion of the RTRWP revision process. Alternatively, if the phrase *Kawasan Hutan* within PP 10 2010 and PP 15 2010 is taken to mean *Kawasan untuk Kehutanan* (Area for the Purposes of Forestry), not *Kawasan Hutan* as defined in the Forestry Law, then the processes described in these regulations would not violate the MK45 decision. There is an urgent need for clarification of this legal uncertainty in order for the RTRWP process to move ahead on a sound legal basis for the remaining 21 of 33 provinces yet to finalise their new spatial plans[24].

Assuming such uncertainty can be clarified and the RTRWP revision process moves forward, two related factors may drive the provinces and MoF rapidly towards a practical compromise. First, as described earlier, post MK45 the MoF aims to complete gazettal over extremely large areas of the *Kawasan Hutan* within the next two years in order to improve legal certainty of its management authority. Second, regional authorities play an integral part in the gazettal process, empowered to manage the process, with final approval of gazettement via ministerial decree from the MoF.[25]

Post MK45, this second factor strengthens the position of provincial authorities to negotiate limits over land allocated for forestry, due to the imperative for MoF to maintain constructive relations with the provinces and districts to expedite gazettal. Under the Forestry Law and regulations, regional authorities have full control of the demarcation process of *Kawasan Hutan*. In exchange for district level cooperation to complete the gazettal process, district officials may seek several outcomes. For example, they might aim to excise areas where licences have already been issued for estate crops within MoF-defined *Kawasan Hutan* (see Section 3.4 below), as well as undeveloped, deforested areas suitable for agricultural crops in the future. This would eliminate threats of prosecution of regional officials for past contravention of the Forestry Law and secures areas for future development, and would also enable MoF to consolidate and regain secure management authority over gazetted areas of *Kawasan Hutan*. This situation also creates positive opportunities for integrating Low Emissions Development (LED) within regional planning, by creating enabling conditions to reassign the function of deforested low carbon areas within *Kawasan Hutan* to non-forestry purposes, and forested areas currently outside the *Kawasan Hutan* to be designated for purposes of forestry (totalling at least 5 M ha throughout Indonesia[26]). This opportunity is discussed further in Section 4.

[24] http://www.penataanruang.net/informasi.asp#fragment-11 accessed 06/04/2012
[25] PP 44 2004
[26] Derived from Murdiyarso *et al*. 2011 & Rencana Kehutanan Tingkat Nasional (RKTN) 2011-2030; accuracy of these figures is not known.

3.4 Oil Palm Licences within *Kawasan Hutan*

The Spatial Planning Law forbids a licence to be issued in an area not assigned for the appropriate function according to national, provincial or district spatial plans. A licence issued in contravention of spatial plans can be revoked, requiring remediation of the area, and presenting risk of criminal prosecution punishable by fines and/or imprisonment.[27] Historically, in Central Kalimantan, many oil palm licences have been issued in areas defined as *Kawasan Hutan* by MoF, but allocated for non-forestry purposes in the proposed RTRWP 2003 that was never approved by MoF (see disputed area in Table 1). Approximately 170,000 ha of *Kawasan Hutan* supports mature oil palm, and even larger areas have been planted in recent years. As discussed, the MK decision creates increased uncertainty over the ability of MoF to enforce management rights over portions of the *Kawasan Hutan* not yet gazetted, and it is therefore possible that provinces and/or districts may be emboldened to continue issuing more licenses in areas allocated for conversion under RTRWP 2003, irrespective of MoF designations.

In addition to provisions of the Spatial Planning law that prohibit development of oil palm in areas allocated to forestry, Articles 50 and 78 of the Forestry Law also make establishment of oil palm estate in the *Kawasan Hutan* a criminal offence. Post MK45, a defendant charged with this crime could argue they had a right to develop the estate because they were issued a valid license in accordance with provincial or district spatial plans, and that central government had infringed upon their constitutional rights to execute the license by designating the area *Kawasan Hutan*. This reasoning is further supported by implementing regulations for the Spatial Planning Law, which state a licence remains valid as long as its issuance was valid under the previous spatial plan.[28] It is uncertain how a court might rule on this, but regional parties may be prepared to take this risk, based on the assumption that MoF will be disinclined to assert management authority until gazettal is complete. In the near term, it seems clear that post MK45 conditions create the potential for accelerated licensing of forest conversion to industrial agriculture in areas of Central Kalimantan currently allocated for non-forestry under RTRWP 2003, whether or not such areas fall outside MoF-defined *Kawasan Hutan*.

[27] Article 37 UU 26 2007
[28] Article 207 PP 15 2010

4. Implications for 7/26 Growth

Following momentum created at UNFCCC COP 13 in Bali, Indonesian President Susilo Bambang Yudhoyono made a voluntary commitment at the G-20 meeting in Pittsburgh[29] to reduce GHG emissions by 26% against a business as usual (BAU) projection in 2020, or up to 41% with financial support from the international community. This reduction is planned to be achieved not by reducing economic growth, but rather through investments in Green Growth designed to reduce emissions at least 26% and sustain 7% annual growth. Indonesia's commitment to "7/26 growth" was thus born.

The Green Growth mindset embodied in 7/26 has attracted considerable national and international attention. In May 2011, the President declared a two-year suspension on new licenses on primary forest and peatlands[30] to limit development on these areas while Indonesia takes steps toward implementing a National Action Plan for Greenhouse Gas Emissions Reduction (RAN-GRK),[31] establishing the National REDD+ Agency and formalizing the National REDD+ Strategy. With an estimated c. 85% of Indonesia's annual emissions originating from land use, land use change and forestry (LULUCF)[32] any significant changes to allocation of land among forest versus non-forest uses potentially carries significant positive or negative implications for 7/26 growth. Such land use decisions can be made at large scales by provincial authorities through spatial planning processes described above, or at more local scales through *ad hoc* decisions by MoF to release areas of the *Kawasan Hutan* for non-forest activities. Post MK45 these decisions present both risks and significant opportunities for advancing Indonesia's Green Growth agenda.

4.1 Regional Autonomy and Low Emissions Development

To achieve 7/26 growth, future spatial planning and forest licensing must be based on low emissions development (LED) planning. In its most basic formulation, LED requires that future development activities involving conversion of forested ecosystems must be redirected toward low carbon-stock lands, such as low stature secondary vegetation types on mineral soils, and peat lands avoided. In this context, uncertainty created by MK45 (including possible future law suits challenging MoF authority) provides a compelling motivation for MoF and provincial authorities to agree on areas to be allocated to forestry and non-forestry purposes in on-going RTRWP revisions. In particular, the allocation of high carbon areas or peatlands to forestry (KBK) under either MoF or community management, and allocation of low carbon areas (suitable for agriculture) for conversion to non-forest (KBNK), would directly support 7/26 objectives.

In Central Kalimantan, approximately 5.3 M ha (41%) of the *Kawasan Hutan* no longer supports natural forest (note, some of this 'non-forest' is plantation; see Box 1 and Table 1), whereas nearly 1 M ha of natural forest, including c. 100,000 ha of carbon-dense peat lands, occurs outside *Kawasan Hutan* designated by RTRWP 2003. This represents significant potential for revising RTRWP in line with 7/26 criteria, with: (1) low carbon areas allocated to agriculture and development, (2) high carbon stock areas allocated for sustainable forestry, and (3) deforested lands on marginal terrain allocated for reforestation and restoration. It must be emphasized, however, that decision-making criteria to guide spatial planning under the current system are based

[29] A speech to G20 leaders by President Susilo Bambang Yudhoyono in September 2009
[30] Inpres No. 10/2011
[31] Perpres 61 2011
[32] PEACE 2007

on broad classes for suitability, not emissions potential, and therefore will not necessarily lead to outcomes that support 7/26 unless this is an explicit objective. Addressing this should be a high priority during long-overdue RTRWP revisions.[33]

It must also be emphasized in this context that rational spatial planning consistent with 7/26 is best seen as necessary but not sufficient to ensure LED pathways will be pursued. Such development comes at significant short-term opportunity costs to regional authorities and thus requires long-term perspective on development planning. For example, in East Kalimantan substantive recommendations were made for LED planning undertaken jointly by the National Council on Climate Change (DNPI) and East Kalimantan government,[34] but provincial planners did not closely follow these recommendations, due in part to lack of positive incentives to forego planned development in high carbon areas (for example in the mangrove areas of Balikpapan Bay). In Aceh, where regional authorities have been receptive to REDD+, the Governor has recently voiced frustration over the absence of significant funding to incentivise Green Growth:

> *"Every day they* [the international community] *are saying they want clean air and to protect forests … but they want to inhale our clean air without paying anything*."[35]

Thus, while MK45 creates opportunities to advance 7/26 growth via the spatial planning process, the outcome remains highly dependent upon leadership and incentives from Central Government to guide this process. The presidential regulation on National Action Plan for Greenhouse Gas Emissions Reduction (RAN-GRK) requires provinces to develop plans for reducing emissions (so-called RAD-GRK) in support of national targets presents an opportunity to align RTRWP revision processes with RAD-GRK objectives.[36] This combined with the activities of the REDD+ Taskforce and REDD+ Pilot Province activities in Central Kalimantan under the Indonesia-Norway Letter of Intent[37] provides an opportunity to enable a comprehensive study, and the development of fiscal and policy mechanisms to broaden support for LED planning and implementation. This might include mechanisms for mobilizing resources to facilitate low-cost re-allocation of land between forestry and non-forestry uses.

[33] Green Growth in Central Kalimantan, Preliminary draft, Durban 2011
[34] Draft East Kalimantan Environmentally Sustainable Development Strategy http://www.dnpi.go.id
[35] www.watoday.com.au/world/former-aceh-chief-denies-orangutans-died-in-burn-20120405-1wff4.html
[36] Perpres 61 2011
[37] Letter of Intent (LOI) signed between the governments of Indonesia (GoI) and Norway (GoN) on the 26th May 2010 to support efforts for reducing greenhouse gas (GHG) emissions from deforestation and forest degradation in Indonesia

Table 1. Distribution of major land cover classes (Miettinen *et al.*2012[38]) across Central Kalimantan and within areas designated as Kawasan Hutan by (a) MoF (SK 292/Menhut-II/2011) and (b) the Provincial Government of Central Kalimantan (2003). Also highlighted are disputed areas between the two parties. Natural forest cover includes vegetation classes that would generally be considered by MoF as 'Primary' and 'Secondary' forest. Areas of oil palm are mature plantations only and thus underestimate total planted area.

Land Cover	Central Kalimantan province		Land Cover in alternative Forest Zone designations				Disputed Area	
			Per MoF		RTRWP 2003			
	M ha	% of Area	M ha	% of Area	M ha	% of Area	M ha	% of Area
(a) Natural forest cover								
Natural Forest on Mineral soils	6.28	41	6.11	48	5.46	53	0.68	22
Natural Forest on Peat & Mangrove	1.47	10	1.42	11	1.34	13	0.10	3
Total Natural Forest	**7.75**	**50**	**7.54**	**59**	**6.80**	**66**	**0.78**	**26**
(b) Non-forest land cover								
Mature Oil Palm	0.50	3	0.24	2	0.08	1	0.17	6
Other Non-Natural Forest	7.17	47	5.07	39	3.45	33	2.09	69
Total Non-Natural Forest	**7.66**	**50**	**5.30**	**41**	**3.53**	**34**	**2.26**	**74**
(c) Total Area	**15.41**	**100**	**12.84**	**100**	**10.33**	**100**	**3.04**	**100**

[38] Miettinen, J., Shi C., Tan W.J. and Liew S.C. 2012. 2010 land cover map of insular Southeast Asia in 250m spatial resolution. Remote Sensing Letters 3: 11-20

BOX 1

Central Kalimantan – Opportunities to Reconcile Economic Development and Forest Conservation

According to MoF, 83% (12.8 M ha) of the landmass of Central Kalimantan is designated *Kawasan Hutan*. Of this area, only 59% (7.54 M ha) currently supports vegetation classified as natural forest; 5.3 M ha supports non-natural forest or other non-forest vegetation. Approximately 200,000 ha[1] of areas classified as non-natural forest support industrial forest timber plantations, leaving just over 5 M ha *Kawasan Hutan* currently un-productive for forestry purposes. A further c. 342,000 ha of the *Kawasan Hutan* has been licensed for industrial timber plantations but currently supports natural forest. In Central Kalimantan, there is therefore considerable potential within deforested (low carbon) areas currently designated as *Kawasan Hutan* to:

1. Increase the extent of timber plantations or community forestry.
2. Reclassify deforested lands within *Kawasan Hutan* for other (non-forestry) purposes managed by regional authorities to support local economic development.
3. Undertake restoration projects on deforested portions of the *Kawasan Hutan* that are not suitable for timber plantations or other purposes, or have intrinsic ecosystem service value.

According to existing provincial spatial plans for Central Kalimantan (RTRWP 2003), total allocation of land to forestry is 3.04 M ha less than MoF designations (referred to as "disputed area"). Of this, 2.26 M ha is deforested or supports non-natural forest, including 170,000 ha of mature oil palm (roughly half the total area planted to oil palm across the province). Much of this area, as well as other deforested areas outside the disputed area, could be developed for oil palm or other non-forestry uses without incurring major environmental costs.[2] Conversely, a total of 940,000 ha of forest occurs outside forest lands defined by RTRWP 2003 (780,000 ha of which is defined as *Kawasan Hutan* by MoF), and is thus vulnerable to conversion.

Given the relatively large area of natural forest falling outside boundaries of the *Kawasan Hutan* defined in RTRWP 2003, and extensive deforested areas within the *Kawasan Hutan* defined by MoF, there is a clear and urgent need for compromise between MoF and provincial authorities to rationalize spatial planning in line with 7/26 growth. Such compromise would provide legal security over existing non-forestry development within the *Kawasan Hutan* (especially oil palm), allow future low-emissions development of non-forestry (agro-forestry and estate crops) where natural forest has been eliminated, and consolidate MoF management authority over areas allocated for forestry or conservation.

[1] Estimated by overlaying MoF IUPHHK-HT licenses over 2010 Forest Cover map (Miettinen 2012), 542,000 ha of industrial timber estate licenses exist in Central Kalimantan.

[2] WRI estimates the total area of such lands in Central Kalimantan as c. 3.3 M ha http://wri.org/publication/identifying-degraded-land-sustainable-palm-oilindonesia

4.2 REDD+ Projects

Licences for REDD+ projects already issued are not affected by MK45 and any future legal interpretation of the decision is likewise unlikely to threaten licences already granted. Post MK45, however, proposed REDD+ projects situated within production forest allocated for conversion (*Hutan Produksi Konversi*, HPK) will (a) likely find it more difficult to obtain a REDD+ project licence covering such areas, and (b) face increased risk overlapping licenses with other local interests, unless a solid economic case can be made for REDD+ in provincial and district contexts.

REDD+ projects require clear and secure ownership or use rights over areas managed to maintain or enhance measureable carbon stocks. At present, REDD+ projects of a commercial scale require a licence issued by the MoF for the purposes of sustainable forestry, ecosystem restoration, or afforestation. Such a licence must fall within production forest, classified either as permanent forest (HP & HPT) or production forest for conversion (HPK). Within the context of a revitalised RTRWP revision process, and given the improved balance of power between regional authorities and MoF, it is likely that proposed REDD+ projects within HPK may encounter difficulties in obtaining a license. This is because HPK areas are the primary target of regional authorities for reallocation to non-forestry uses under regional control (e.g. oil palm or other crops). In the high profile case of the Rimba Raya REDD+ project near Tanjung Puting National Park in Central Kalimantan, the project proponents included areas of HPK that were licensed by local government for oil palm, including peatlands with extremely high emissions potential. Under the current dynamic between MoF and regional government authorities, it has proven impossible to maintain these HPK areas given overlapping, local licensing interests.

Due to the need for MoF to secure cooperation of local governments to accelerate gazettal, the MK45 decision would appear to increase the chances of MoF accepting district government requests to place HPK under regional authority rather than MoF-controlled forestry purposes, including REDD+ project areas. Similar to discussions of LED above, any proposed REDD+ project on HPK post MK45 would need to provide strong fiscal or financial incentives to local government to compensate for the forgone short term development it replaces. It remains uncertain as to whether a compelling economic argument can be presented to district governments in this regard, but the future of REDD+ in Indonesia is contingent upon it.

4.3 Community Rights, Forest Tenure and *Kawasan Hutan*

According to the Constitution, the land area of Indonesia is controlled by the State, to be managed for prosperity of the people.[39] The State is compelled, however, to recognize and respect traditional rights under Article 18B (2) of the Constitution (included in the second amendment), and under the Basic Agrarian Law[40], which acknowledges customary rights to land provided such rights do not conflict with interests of the State. In practice, some customary forests managed by local communities have been formally recognized by government as encumbered by traditional rights, but such examples are relatively few in Indonesia.

This historical subordination of customary claims vis-à-vis those of the State and other actors has created pervasive insecurity over local community rights and land tenure in many parts of rural Indonesia, leading in turn to conflict between companies and communities whose rights have not been adequately taken into account. Historically, such conflict was dealt with on an *ad hoc* basis, commonly in a manner that defended rights of business actors licensed by the State over those of local communities. This has begun changing post-1998, however, with increasing focus on resolving conflict through multi-stakeholder dialogue to negotiate mutually acceptable solutions.

[39] Article 33 (3) Indonesian Constitution UU Dasar 1945
[40] UU 5 1960

While this is a positive sign, conflict between companies and communities caused by insecurity of tenure remains common, and negatively affects rural livelihoods as well as long-term security of forestry investments necessary for a well-managed and responsible, low emissions forestry sector.

The MK45 decision creates an opportunity to improve this situation, by redressing the historical failure to accommodate community rights fully during formal gazettal of the *Kawasan Hutan*.

Under the Forestry Law, forests encumbered by traditional rights are referred to as *Hutan Adat* (traditional forest) - as opposed to *Hutan Hak* (forest encumbered by rights) -and as such are construed as part of the *Kawasan Hutan*.[41] Such areas are therefore considered part of State lands and fall under management authority of MoF unless or until they are excised from the *Kawasan Hutan* during the process of gazettal. The regulatory and administrative process to gazette *Kawasan Hutan* in Indonesia[42] has long been a subject of criticism by civil society and researchers in Indonesia[43] due to apparent failures of the process to uphold Constitutional guarantees for recognition and incorporation of traditional rights in development planning. In particular, the gazettal process does not include adequate provisions to ensure the full and effective participation of local communities during gazettal, and consequently often fails to detect and/or account for (i.e. enclave) customary forest areas where local communities have long-standing, legitimate claims to forest. Consequently, even in areas where gazettal has been

BOX 2

Promotion of Community-based Forest Management in the Kawasan Hutan

In recent years, the MoF has begun experimenting with administrative tools for promoting community-based forest management within the *Kawasan Hutan* as a means of delivering a greater share of forest-derived benefits to communities whilst maintaining MoF authority over the *Kawasan Hutan*. These efforts centre on issuance of three different types of licenses to encourage local participation in forest management at the project or landscape scale, including: (i) *Hutan Kemasyarakatan* (HKm); (ii) *Hutan Tanaman Rakyat* (HTR); and (iii) the *Hutan Desa* (Village Forest) program. HKm and HTR are licenses issued to communities for utilisation of land area within *Kawasan Hutan*, and *Hutan Desa* is a relatively new legal instrument that confers a broadly defined right to communities for managing forests where no pre-existing licenses occur (and no future licenses may be issued without consent of the community).

The MoF has made explicit, time-bound commitments to accelerate licensing for community based forest management across Indonesia, with targets of formally licensing 2.5 M ha of *Hutan Desa* and/or HKm by 2014 (*Permenhut* No. 6/2011).

These instruments do not, in a formal sense, resolve land ownership claims rooted in traditional practice and customary law, but they provide a legal framework for communities to enjoy direct economic benefit from forests and strengthen their position vis-a-vis other forestry actors, including the private sector. They also create enabling conditions for promoting a low-carbon alternative to intensified community agriculture, such as mixed-species agro-forestry.

[41] This practice appears to contravene the Basic Agrarian Law and potentially the Constitution and is currently the subject of another constitutional review: http://www.mahkamahkonstitusi.go.id/index.php?page=website.Berita.Berita&id=6632

[42] See PP No. 44/2004 tentang Perencanaan Hutan, Permenhut No P.47/2010 tentang Panitia Tata Batas; Permenhut P.50/2011 tentang Pengukuhan Kawasan Hutan.

[43] See e.g. Fay et al. (2005) Getting the Boundaries Right: Indonesia's Urgent Need to Redefine its Forest Estate

completed, it is still possible – indeed, very likely – that traditional use rights have not been fully acknowledged.

Recent efforts by MoF to experiment with community-based forest management in the *Kawasan Hutan* is a major step forward for central government recognition of community rights to manage forests on which they depend (see Box 2). Augmenting these efforts by a more inclusive approach to gazettal of the *Kawasan Hutan* would provide greater clarity on the location and extent of customary forests, simultaneously strengthening the position of local communities in future negotiations with all forms of business investment (including REDD +) and providing greater clarity to business concerning the social risks and opportunities of pursuing investments in specific localities. MoF's stated plans to accelerate completion of gazettal for the *Kawasan Hutan* creates such an opportunity, provided the process is carried out with appropriate safeguards and local participation. If it is not, there is a risk that accelerated gazettal triggered by MK45 could exacerbate conflict in regions where investment pressures are high.

5. Potential outcomes

Potential overall net impacts of the MK45 decision range considerably. In this final section we discuss the full range of possible outcomes, from a 'worst-case' scenario in the absence of action, to an optimal scenario based on specific interventions. The optimal scenario (section 5.2) draws attention to significant opportunities for Indonesia to lay ground work for a 7/26 development trajectory. We expand on recommendations towards achieving this optimal outcome in section 5.3.

5.1. 'Worst case' scenario

This scenario assumes "business-as-usual" without rational intervention, and results in negative impacts for forests, development, and communities, and increases polarisation between local and national interests. We classify this scenario as a "missed opportunity" compared to the alternative "best case scenario" described later. Key elements of this scenario include but are not limited to:

Protracted disagreement over land allocation. Based on contrasting interpretations of MK45, tensions may continue between regional government and MoF over the allocation of *Kawasan Hutan*. The outcome of this is the suboptimal partition of forest function and development areas.

Extended delays to resolution of provincial spatial plans. With the shift in balance of negotiating power, uncertainty created in the process, and in the absence of a consensus on the allocation of land to *Kawasan Hutan,* extended delays to the finalisation of spatial plans may occur particularly in Central Kalimantan, Riau, and East Kalimantan.

Extended delays to finalisation of *Kawasan Hutan* gazettal. As of 21st February 2012, "designation" is no longer a legal basis for defining *Kawasan Hutan* under Forestry Law. Progress in gazettal, highly dependent upon collaboration between regional government and MoF, could be severely delayed due to lack of consensus between parties.

Increased issuance of local licenses in non-gazetted *Kawasan Hutan*. One of at least two possible interpretations of MK45 may embolden regional government to accelerate issuance of licenses for agriculture and mining on non-gazetted *Kawasan Hutan*, in order to test the MK45 decision in practice, and to advance negotiating position related to spatial plans. The overall outcome of this will be ongoing degradation of forested areas.

Increased litigation in courts. Ambiguities in the MK45 decision may be tested through further litigation in lower courts such as district or administrative courts; either disputes brought by concession holders or local government, or law suits asserting individual or collective rights. The diversity of outcomes of these cases may introduce further ambiguity in MK45 interpretation, rather than reduce it - ultimately undermining the intentions of the MK45 decision.

Reduced law enforcement authority in *Kawasan Hutan*. While concession licenses are unaffected by MK45, the MoF may face difficulties with new licenses, or modifications to existing ones. Authority for forest protection could weaken where gazettal has not been finalised.

Further weakening of investment security for forestry. Increasing overall uncertainty due to law enforcement, weak boundaries, tenure and absence of regional government support could further undermine the forestry sector, reducing capital flows to management of forest concessions. This overall decline in investor interest could strengthen the economic case for conversion to agriculture.

Constraints on REDD+ project development. REDD projects, situated within forest land allocated for conversion (HPK), could face increasing threats due to local licensing for agriculture or mining, occurring in the absence of accruable benefits for the province or district of comparable scale.

Increased conflict from community rights in *Kawasan Hutan*. In an accelerated programme to gazette all remaining *Kawasan Hutan* before 2014, there may be insufficient time and resources to adequately map and enclave pre-existing community rights. A potential outcome of this is ongoing tension, increased conflict and potential displacement of people, undermining human rights and long-term stability of land-use designations.

5.2 'Best case' scenario

The MK45 decision creates a new urgency for finalisation of provincial spatial plans, and for rapid gazettal of *Kawasan Hutan*. This, in itself, presents a significant opportunity for a rational, consensus-based process that maximises positive outcomes related to forest integrity, economic development and community rights. A specific case-study for "best case scenario" in Central Kalimantan is described in Box 1. In general terms, key elements of this optimum scenario include:

Revised *Kawasan Hutan* boundaries that reflect real forest cover. Rationalisation of *Kawasan Hutan* boundaries based on existing forest cover has the triple benefit of (1) increasing the amount of forest within *Kawasan Hutan* by up to 5.1 M ha; (2) prioritising forest authority and management resources to those areas that support forests; and (3) identifying non-forested, degraded areas for either rehabilitation or development and agriculture.

Expansion of agriculture and economic development in non-*Kawasan Hutan*. Areas of non-forest excised from *Kawasan Hutan* can be prioritised for agriculture and economic development without risk of criminal prosecution and in accordance with regional priorities. The new consensus-based forest frontier will benefit from increased regional stakeholder support.

Completion of gazettal for all *Kawasan Hutan*. Acceleration and finalisation of the process of gazettal for *Kawasan Hutan* and concessions can remove ambiguity, strengthen legal certainty, and promote much needed investment in the declining forestry sector.

Integration of community rights within *Kawasan Hutan*. During the gazettal process, responsible mapping of pre-existing community rights can facilitate the rational allocation of tenure between concession holders and communities, reducing conflict, enhancing livelihoods, and increasing overall integrity of *Kawasan Hutan* boundaries.

Initiation of a new era of forest protection enforcement. Consensus delineation of revised *Kawasan Hutan* boundaries, enhanced local community support, and the ability to focus resources on targeted areas of *Kawasan Hutan*, can together provide a starting point for a new phase of effective law enforcement and management of Indonesia's forests.

Optimisation of forestry sector including REDD+, rehabilitation and community forestry. The positive impacts above together provide a foundation for revitalisation of the forestry sector. This includes the integration of REDD+, rehabilitation of forests on degraded land, and the promotion of community-based models as integrated components of a new national forestry strategy.

Promotion of forestry as a key element of 7/26 development. The rational and equitable allocation of land-use between forestry and development areas, the prioritisation of development on degraded lands, and the promotion of forests for conservation or sustainable management, collectively represent the key influencing factors for achieving 7/26 development goals.

5.3 Recommendations

The MK45 decision presents an opportunity to improve land-use decision making and balance the maintenance of forest function with economic development. It also reaffirms the pivotal role of MoF and the forestry sector in realizing Indonesia's long-term sustainable development ambitions. However, active interventions are required in the near term to avoid some of the potential 'worst

case' outcomes outlined above. Full extent of the potential for positive change can only be realised through strong, clear policy guidance supported by effective collaboration among diverse parties. In this spirit, the following recommendations are made:

1. **Need for visionary policy guidance** to ensure that outcomes support development goals of Indonesia both nationally and regionally (in particular with respect to forestry and agriculture), especially reduced emissions from deforestation and protection of local community rights. *Given the urgency, a Presidential Instruction may be the most effective instrument to guide implementation at this critical time, as a refinement of the national action plan for greenhouse gases.*

2. **Need for independent review and revision of lands allocated for forestry**, to ensure a balance between national and regional development needs, with priority given to provinces with high forest cover and where MoF agreement has not yet been secured via the spatial plan (i.e. Riau, Central and East Kalimantan). *Carried out by an independent, multi-disciplinary expert team, this rationalisation process should consider:*

    a. Current forest cover (both primary and secondary) and peatlands, including above and below ground carbon potential for storage or sequestration.

    b. Provincial development priorities, with consideration of land suitability for agriculture, and identification of areas with established infrastructure.

    c. Rights of local communities, recognising dependencies on forests, agro-forestry and agriculture, and locations of established settlements.

    d. Areas suitable for forest industry, including both natural forest logging and intensive plantations.

    e. Areas appropriate for reforestation or forest rehabilitation, especially in locations either suitable for community forestry or unsuitable for agriculture.

    f. Areas suitable for conservation of biodiversity and maintenance of critical ecosystem services, e.g. watersheds.

3. **Need for finalisation of provincial spatial plans** based on the above analysis and according to a schedule that is realistic but ambitious with a priority for Central Kalimantan, Riau, and East Kalimantan. *This requires close collaboration of MoF and regional government, working to a shared vision of 7/26 growth, with both parties aware of the urgency and negative implications of under-performance.*

4. **Need for clarification of the term *Kawasan Hutan*** within spatial planning regulations relating to allocation of areas for the purpose of forestry in the context of finalising provincial spatial plans to ensure the process can be completed. Specifically, within relevant sections of PP 10/2010 and PP 15/2010, the term *Kawasan Hutan* should be interpreted as "Forest zone for the purposes of forestry".. *This may require a joint decree by the relevant ministries or presidential decree to provide the necessary guidance on implementation of those regulations.*

5. **Need for legal clarification of aspects of the MK45 decision** in advance of the sensitive process of gazettal and completion of provincial spatial plans, in particular in relation to non-retrospectivity of MK45 decision and the authority of MoF to manage *Kawasan Hutan* that has not been gazetted. *Such legal clarification could be provided by the Constitutional Court (under new litigation or by providing an interpretation) or by Parliament passing new legislation.*

6. **Need for a temporary suspension on issuing new licences (including mining licences) in areas where allocation is disputed by MoF and provincial authorities**, until such time either that the provincial spatial plan is completed or *Kawasan Hutan* is gazetted. *The current Presidential Instruction No. 10, 2011 regarding the "Suspension of Granting New Licenses and Improvement of Natural Primary Forest and Peatland Governance" could be extended to cover this specific need. However, a Presidential Instruction may be subject to challenge if it attempts to restrict the ability of local governments to issue licenses within their authority under existing laws. A Government Regulation in Lieu of Law ("Perpu") would give more certainty.*

7. **Need for acceleration of the gazettal process,** with sufficient funds and technical resources provided to MoF, regional governments and civil society groups to ensure the process is thorough, especially with respect to mapping of community land rights, the exclusion of these areas from *Kawasan Hutan* or immediate recognition of such rights through licensing for community forestry. *Ministry of Forestry should have primary responsibility for fast-tracking this process through provision of technology and outsourcing, implemented in collaboration with regional governments, civil society groups, and donor countries interested in reducing LULUCF. Where Forest Management Units (Kawasan Pengelolaan Hutan,* KPH) have *been established, they could greatly assist the process.*

8. **Need for incentives and financial support** for provinces and MoF to complete spatial plans and gazettal in accordance with low carbon criteria, and to reallocate development to degraded lands. *National government can provide finance and facilitate funding mechanisms that leverage international support, including within the emerging REDD + framework.*

5.4 Closing Statement

The ruling of the Constitutional Court number 45/ PUU-IX/2011 modifies the Forestry Law in a manner that, ultimately, will enhance legal certainty and protect the constitutional rights of Indonesian citizens. Normally, a Constitutional Court decision concerning past administrative decisions does not apply retrospectively, and therefore boundaries of the *Kawasan Hutan* remain the same pre- and post-MK45 and licenses issued by MoF prior to MK45 remain valid. However, post-MK45 areas 'designated' but not 'gazetted' could be interpreted as (a) no longer subject to the full extent of MoF authorities that apply to gazetted areas of the *Kawasan Hutan*, or(b) if such authorities do apply, then they will be vulnerable to legal challenges in the courts. Reflecting uncertainty about management authority over the *Kawasan Hutan*, MoF has committed to accelerate completion of the gazettal process, creating both opportunities and risks to advance positive outcomes.

Completion of the gazettal process initiated by MoF requires regional government support, at a time when 21 of Indonesia's 33 provinces are working to complete their spatial plans and require MoF approval for doing so. These two factors combined create an unprecedented alignment of interests that, with strong leadership, clear vision and adequate funding could improve Indonesian forest management, strengthen community rights, and stimulate economic growth, whilst at the same time putting in place building blocks to achieve significant long-term emission reductions. This will only be possible, however, if MoF and regional authorities are supported to work constructively toward a common vision of rationalizing forest boundaries and implement spatial plans consistent with promoting long-term, low emissions economic growth for Indonesia.

ANNEX 1: Protracted Dispute over the Forest Zone in Central Kalimantan: Central Government Authority vs Regional Autonomy

In 1982 the entire landmass of Central Kalimantan was designated Forest Zone by the Minister of Agriculture[44] (who controlled forests at that time), in a series of forest designations across the national territory referred to as Tata Guna Hutan Kesepakatan (TGHK). In 1993, Central Kalimantan developed its own provincial spatial plan, designating c.11.1 M ha of *Kawasan Hutan*, and c.4.2 M ha for other uses[45] in a plan referred to as Rencana Tata Ruang Propinsi (RTRWP). In years that followed, a process of negotiation to agree upon extent of the *Kawasan Hutan* was carried out between the province and MoF, but final agreement was never reached. On 7th May 1999, the Law on Regional Autonomy was enacted, providing provincial and district governments far-reaching new powers. One week later, the Governor of Central Kalimantan signed a map declaring a compromise between the 1982 TGHK (MoF) and 1993 RTRWP (Province),[46] allocating 10.4 M ha to *Kawasan Hutan* and 5.3 M ha to other purposes. This map was never approved by the MoF. Four months later, in September 1999 the new Law Number 41 on Forestry was passed, declaring all areas previously designated or gazetted (*ditunjuk dan atau detetapkan*) as *Kawasan Hutan* by the MoF as falling under management control of MoF.[47]

In 2003, Central Kalimantan revised its RTRWP,[48] slightly reducing the extent of *Kawasan Hutan* from 10.4 to 10.3 M ha, but this map was never approved by MoF.

Just prior to this, MoF issued a decree stating provinces that had not yet completed formal reconciliation of TGHK and RTRWP (including Central Kalimantan) must treat TGHK as the reference map defining *Kawasan Hutan*.[49] As a result of persistent disagreement between MoF and Central Kalimantan concerning extent of the *Kawasan Hutan*, it is no surprise that once district and provincial government officials became empowered to issue licences for agricultural crops in 2003, officials began issuing such licenses in areas outside the *Kawasan Hutan* according to RTRWP 2003, irrespective of MoF designations.[50]

A new spatial planning law was introduced in 2007 defining terms under which provinces were compelled to revise spatial plans,[51] including a requirement for MoF approval of delineations for the *Kawasan Hutan*.[52] Repeated proposals by Central Kalimantan for defining the *Kawasan Hutan* were rejected by MoF and, on 31st May 2011, MoF issued a decree[53] defining the *Kawasan Hutan* of Central Kalimantan as 12.8 M ha (83% of the total area), creating a disputed area of 3 M ha (Table 1).

Currently, >240,000 ha of *Kawasan Hutan* per MoF has been planted to oil palm, in violation of Forestry Law. MoF has threatened to prosecute district officials that issued licences for such conversion, a fact that partly explains the claimants' motivations for requesting Constitutional Court review of the Forestry Law in this case.

[44] Kepmentan Nomor 759 Tahun 1982
[45] Perda Tingkat I Kalimantan Tengah Nomor 5 Tahun 1993 revised with Surat Menteri Dalam Negeri Nomor 68.
[46] Peta Padusarasi TGHK/RTRWP, Keputusan Nomor 008/965/4/BAPP, 14/05/1999
[47] UU 41 1999 Forestry law
[48] Perda Tingkat I Kalimantan Tengah Nomor 8 2003
[49] Surat Edaran 404/Menhut-II/03
[50] Licences for the development of estate crops such as oil palm can only be issued in areas outside the Forest Zone. Production forest for conversion (HPK) is eligible for conversion but development may only occur after the area has been released by MoF from the Forest Zone.
[51] UU 26 2007 Penataan Ruang
[52] PP 15 2010 Management of Spatial Planning
[53] SK 292/Menhut-II/2011

ANNEX 2: The Constitutional Court and Retrospectivity

1. The Constitutional Court

The Constitutional Court (*Mahkamah Konstitusi* or "**MK**") was established in 2001 under the third amendment to the 1945 Constitution of the Republic of Indonesia ("**Constitution**"). During the transitional period preceding commencement of MK operations, its functions were assigned to the Supreme Court. On 13 August 2003, Law No. 24 of 2003 regarding the Constitutional Court was promulgated, later amended by Law No. 8 of 2011 ("**MK Law**"). The MK was convened and began functioning on 15 October 2003.

The MK's powers are set out in Article 24C of the Constitution and include (a) review of laws with respect to the Constitution (constitutional review); (b) jurisdictional disputes between national institutions whose authority is granted by the Constitution; (c) the dissolution of political parties; and (d) electoral disputes. The MK has original jurisdiction and its decisions cannot be appealed. The MK is also empowered to render decisions on impeachment disputes brought to it by the Parliament ("**DPR**").

While jurisdiction of the MK is described in the Constitution, its functions are set out in more detail under the MK Law and Law No. 48 of 2009 on Judicial Power. The MK has issued its own regulations concerning how reviews are conducted, notably MK Regulation No. 06/PMK/2005 regarding Guide to Procedure in the Constitutional Review of Laws ("**MK Reg 06/2005**").

2. Retrospectivity under Indonesian Law

A decision is said to apply retrospectively, when a decision made today affects legal rights, status or actions taken in the past in accordance with a law that is later challenged and ruled invalid by a competent jurisdiction.

The basic principle of legal non-retrospectivity adhered to in Indonesia is a feature shared in common with legal systems in many other countries. It is normally centred on the right to freedom from criminal punishment on the basis of retrospective laws – i.e. where an action is designated a crime after it was taken. The MK describes its views on the genesis and scope of these matters in MK Decision No. 110-111-112-113/PUU-VII/2009 (the "**Elections Case**"), at paragraph 3.34.

In Indonesia, this basic principle of non-retrospectivity of laws is found in Article 28(I) of the Constitution, which provides protection from prosecution ("*dituntut*") under retrospective laws is a human right that cannot be derogated under any circumstance. The MK has pointed out, however, that despite the above, under some circumstances, retrospective court decisions are commonly made by the administrative, civil and criminal courts. In fact, the MK itself has made an exception to the non-retrospectivity principle, where gross abuses of human rights are involved.[54]

3. Non-retrospectivity of MK decisions

Whether and under what circumstances MK decisions apply retrospectively is central to understanding implications the MK45 decision featured in this Brief.

Non-retrospective (prospective) implementation of MK judgments is a basic principle enshrined under MK Law, and reinforced in Articles 38 and 39 of MK Reg No. 06/2005. In its most basic formulation, non-retrospectivity means legal relationships or individual rights established or impaired prior to a court decision cannot be affected retrospectively.

The MK has also developed its own jurisprudence regarding retrospectivity. It emerges from this jurisprudence that MK follows a general rule whereby its decisions cannot affect individual rights or legal relationships established in the past. Consequently, licenses and contracts issued or concluded in the past on the basis of law which has been declared

[54] See MK Decision No. 065/PUU-II/2004.

unconstitutional remain valid until they expire.[55] The reverse is also true – the MK is of the view that, as a general rule, violations of individual rights that have occurred in the past cannot be put right or erased by an MK decision.[56]

It is important to understand the effect of this doctrine, as at first glance, the inability of an MK decision to protect or restore the rights of individuals affected by unconstitutional laws seems counter-intuitive and at odds with the MK's jurisprudence on legal standing, discussed below. In this respect, Article 51 of the MK Law requires a plaintiff to demonstrate how its constitutional rights or authorities have been impaired by the passage of a law. Since 2005,[57] the MK has maintained that two of the five elements of legal standing (i.e. the requirements a plaintiff must meet in order to be able to bring a case) are that (i) the alleged impairment of constitutional rights and authorities must be specific and actual (or sure to occur); and (ii) there is a possibility that if the MK were to grant the relief sought, the impairment of constitutional rights and/or authorities claimed by the plaintiffs would be avoided or would no longer occur.

In MK Decision No. 132/PUU-VII/2009, the plaintiff argued that the MK's standing jurisprudence meant that in some sense an MK decision must be given retroactive effect, otherwise it would not be possible to satisfy the standing provisions.[58] In that decision, the MK did not address this argument, deciding instead the plaintiffs did not satisfy the standing requirements and so further consideration of the plaintiff's case was unnecessary. We are not aware of any cases in which the MK has addressed this point directly, but given existing jurisprudence, it is unlikely the MK would be sympathetic toward such arguments.

The MK's position emerges with some clarity in several cases in which plaintiffs have requested the MK to issue injunctions to prevent or delay actions which would impair their constitutional rights while a case is ongoing, which impairment could not be undone even if the plaintiff's claims were granted. In most cases, the MK has responded that it will not issue an injunction precisely for the reason its decisions do not have retrospective effect. Constitutional cases are intended to review abstract norms rather than individual cases or rights.[59] Or put differently, constitutional plaintiffs might be likened to public interest plaintiffs. They themselves must be able to show impairment of rights or authorities in order to prove standing, and may only seek an outcome (decision) that *benefits or protects a class of subjects or activities occurring in the future* and from which they themselves may well receive no benefit.

The MK has made some limited exceptions to the above, which many plaintiffs have subsequently (and largely unsuccessfully) tried to draw upon. In particular, the MK may consider cases involving requests for injunctions against violations of basic human rights such as the presumption of innocence. In MK Decision No. 133/PUU-VII/2009, the MK

[55] See, for example Decision No. 3/PUU-VIII/2010 re Law No. 27 of 2007 regarding the Management of Coastal Areas and Small Islands ("**Coastal Areas Case**"), in which the MK held "*... in accordance with Article 58 of the MK Law, Constitutional Court Decisions have legal consequences as of their pronouncement and are valid prospectively and not retrospectively. Therefore, all contracts and licenses in the field of coastal and small islands management which have been signed and issued based upon Law 27/2007 remain valid until the contract or license expires or is no longer valid*" (paragraph 3.15.13). A similar formulation was used in arriving at an analogous result in Decision No. 001-021-022/PUU-I/2003 regarding Law No. 20 of 2002 on Electricity.

[56] See, for example, MK Decision No. 77/PUU-VIII/2010.

[57] MK Decision No. 006/PUUIII/2005 and No. 010/PUU-III/2005.

[58] At paragraph 39, the plaintiff argued that "If we follow the logic set out in Article 47 and Article 58 of the MK Law, it is clear that an MK decision may not be retroactive. Since the determination of the political party seat distributions and elected legislative candidates has been conducted by the General Elections Committee [KPU], a non-retroactive decision clearly does not provide any benefit to the Plaintiff if his suit is upheld. On the other hand, it has been MK jurisprudence since [...] that one of the legal standing criteria which will bring us to the gateway of a substantive case examination is the possibility that by granting a plea, the constitutional impairment claimed will not or will no longer occur. Therefore, in order for this decision to give the Plaintiff some benefit, we plead the MK order that the KPU appoint the Plaintiff as the elected candidate [...] which the MK has done in [the Elections Case].

[59] Human rights are set out under Chapter XA, Articles 28A-28J of the Constitution. In Decision No. 42/PUU-VIII/2010, the MK held that "***First***, in judicial review, MK decisions only examine abstract norms, and do not decide concrete cases such as the investigation or detention in the criminal case against the Plaintiff; because the plea for an injunction regards a specific case, the MK cannot grant it. ***Second***, in accordance with the first reason, the MK must refuse the plea for an injunction relating to the investigation and detention

granted an injunction on the grounds that it was necessary to protect the Plaintiff's human rights while the case was being decided, the prejudice to which could not be reversed in the MK's final decision.[60]

Based on the above, MK's interpretation of non-retrospectivity appears rather strict, amongst other things, in the following ways:

1. In most cases it will not provide injunctive relief because the outcome of the case will have no bearing on the pre-existing rights of the parties that bring it.
2. Licenses and contracts existing prior to a decision that a law or provision is unconstitutional will not be affected.
3. More generally, individual rights or relationships impaired or affected by action taken pursuant to an unconstitutional law prior to the declaration of unconstitutionality may not be restored by the decision.

4. Exceptions to the non-retrospectivity of MK decisions

MK has been willing to make exceptions to the principle of non-retrospectivity, but only where *implementation* of the law is challenged rather than the text. In such cases, the MK has declared laws to be *conditionally constitutional*.[61] In other words, where a law is deemed constitutional as long as it is interpreted and applied in a particular manner. Correspondingly, any substantive results arrived at by a constitutionally impermissible interpretation are unconstitutional and should not be permitted to remain valid, *even if they have taken place in the past*. In this manner, the MK has reached back in time and effectively undone past events. In the Elections Case, in relation to Article 58 of the MK Law, the MK recalled that, as a law is valid until the day it is annulled (it is invalid *ex nunc*, i.e. is not deemed invalid as if it had never come into force), the decision has no effect on pre-established legal relationships. It noted that if this rule were implemented rigidly with no exceptions, then it would in some circumstances not achieve the constitutional protections intended, that the Administrative, Criminal and Civil Courts would issue decisions that would carry retrospective implications (e.g. that Administrative Courts would surely in some circumstances deal with some matters which related to constitutional protections). Therefore, the legal effect of a decision can be retroactive to cover certain past events, including the confirmation or cancellation of electoral commission vote counts and seat allocations. Without this kind of retrospective application, the relevant constitutional protections intended and protection of public order required would not be achieved. The court stated that in interpretive cases, it is natural for such a decision to have a retrospective impact, effective from the moment the relevant laws and regulations were created.

In cases where the MK finds a law to have been 'unconstitutional as applied', or 'conditionally constitutional' then past application of an incorrect legal interpretation of a valid law gives rise to a defective result, which is cancelled retrospectively. The law itself remains valid but its misapplication in the past is corrected.

In MK45, the decision of the court was not to declare Article 1(3) conditionally constitutional, the plaintiffs alternative petition, but to rule that the phrase 'designated and or' unconstitutional and unenforceable.

conducted by the Prosecutor because an MK decision regarding norms in a judicial review case is of an *ergaomnes* nature. This means that it is general and binding for all cases in Indonesia. Therefore, the MK cannot decide a concrete case which is directed only at one instance such as the current plea because if it were done, it would be in conflict with that *ergaomnes* character. ***Third***, an MK decision is prospective in accordance with MK Law Article 58 along with Articles 38 and 39 of MK Regulation No. 06/PMK/2005 regarding Guide to Procedure in Judicial Review Cases, so that whatsoever the content of the MK's decision in this case will not apply retroactively with respect to the specific case which is underway. In accordance with these reasons, the MK reiterates, that it rejects the Plaintiff's request."

[60] In MK Decision No. 133/PUU-VII/2009, the MK granted an injunction against an order dismissing an Anti-Corruption Commission commissioner from his post because he had been accused of a crime, in accordance with Article 32 of Law No. 30 of 2002 regarding the Commission for the Eradication of the Criminal Act of Corruption, which stated that "Leaders of the Pimpinan Corruption Eradication Commission shall stand down or be stood down if, … c. they are accused of a crime."

[61] Elections Case, paragraph 3.34(5) '*The MK's practice in several decisions has been to declare a Law constitutional on certain conditions (conditionally constitutional)'*.