

A/R Clean Development Mechanism Project Activities: Legal Framework in Indonesia

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Introduction

The United Nations Framework Convention on Climate Change (UNFCCC) and its protocol are international treaties that have to be implemented accordingly by the Parties involved. Following the obligation of Parties, Article 12 of the Kyoto Protocol is one of the few articles that provide a platform at which developed and developing countries could collaborate under the Clean Development Mechanism (CDM). In such projects developed countries could achieve the quantitative emission reduction targets. Since CDM has dual objectives, project participants should, however, also consider and comply with rules and regulations at the national level, which one way or the other will ensure that the objectives of sustainable development and other national interests will be met.

This policy brief describes the legal framework available at both international and national levels in relation to the implementation of afforestation and reforestation (A/R) CDM project activities. The document is prepared in connection with technical assistance of the Asian Development Bank to the government of Indonesia on carbon sequestration through CDM (Project code: TA 4137-INO).

International perspectives

After almost 10 years since the UNFCCC was ratified by the government of Indonesia there are legal instruments to implement projects in the forestry sector. The long negotiation progresses through a number of sessions of the Conference of Parties (CoP). These instruments include the Kyoto Protocol and its well-known Article 12 on CDM, and a number of decisions that outline modalities and procedures to implement A/R projects under CDM. The provisions of the UNFCCC, Kyoto Protocol (namely CDM), and CoP Decisions may be considered as international legal perspectives to implement A/R CDM project activities (see Figure 1).

The development of a Project Design Document (PDD) and the implementation of A/R CDM project activities will be very much guided by decisions 19/CP.9 and 14/CP.10 of the CoP. Therefore, it is necessary to observe the details and the associated annexes, which further describe the technicalities of the project. The difference between large- and small-scale projects is the simplified nature for the latter in terms of baseline and monitoring methodologies to achieve a maximum additionality of 8 kt CO₂/year. In addition, small-scale projects are provided with ‘debundling’ procedures that are not found in large-scale projects.

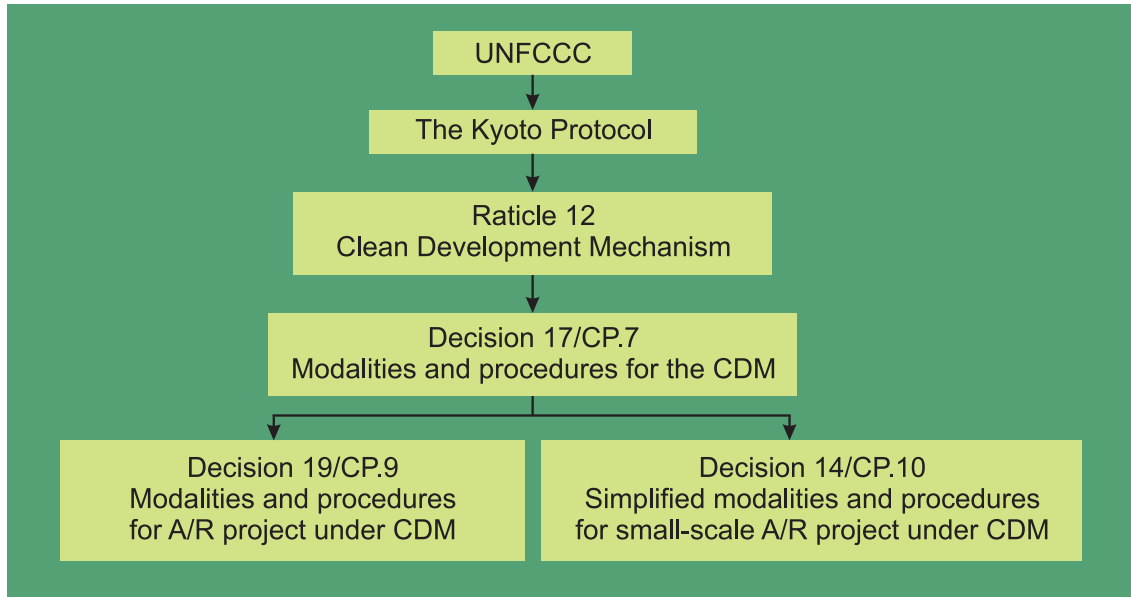


Figure 1. International legal framework of A/R CDM project activities

National legal framework related to A/R CDM project activities

At the national level there are several levels of legal documents to be considered as regulatory framework in implementing A/R CDM project activities. In descending order the Indonesian legal systems consist of Constitution (UUD), Law (UU), Government Regulation (PP), Ministerial Decree (Kepmen) or Ministerial Regulation (Permen), and Local Government Regulation (Perda).

As a matter of approval process the UUD has to go through the People Representative Assembly, while the UU and PP are approved by the Parliament. In many cases UU and PP have to be technically described to express sectoral scope and objectives by Kepmen and Permen. Therefore, the existence of cross-sectoral or sectoral UUs is always considered or recalled. The following describes some of the legal instruments at national level that are relevant to the implementation of A/R CDM project activities.

UU No. 1/1967-Foreign Investment. In general the law supports foreign investments that support local business and protects local business from the negative impacts of foreign investment. Since the nature of A/R CDM project activities will involve foreign investment, it is important to observe this law and the associated regulations, where the positive and negative lists of investment are regularly revisited.

UU No. 41/1999-Forestry Law. This law provides general guidance regarding management, planning, research, development, and extension, in addition to the definitions of forest status and functions. Based on its function the law defines forestry activities that may take place in production, protection, and conservation areas, but provides no guidance for converted forestlands. The law also provides mechanisms for settlement of conflicts and sanctions against trespassers.

UU No. 17/2004-Ratification of Kyoto Protocol. This law was enacted in October 2004 following approval of the legal text by the Parliament on 24 June 2004. The depositary of ratification instrument has been received and announced by the United Nations on 3 December 2004. It means that Indonesia is an eligible Party to the Kyoto Protocol when it enters into force on 16 February 2005.



PP No. 34/2002-Forest Land Use and Land Allocation. The environmental services provided by forestlands, including carbon sequestration in protection and production areas, are specifically described in this regulation. Further, it also regulates permit issuance, which is limited to 1000 ha of forestland with the duration of 10 years.

Permen No. 1/2004-Social Forestry. Under this regulation the community is allowed to utilize forestlands owned by the government, but their status and function remain unchanged (Article 7). Therefore, the concept of social forestry is slightly different from that of community-based forest management, by which ownership of the land by the community is secured.

Permen No. 14/2004-Rules and Procedures of A/R CDM Implementation.

A newly enacted regulation especially tailored following the Kyoto process, this legislation is accompanied by three appendices that describe technical issues associated with the development of PDD. Since it is a relatively new regulation, further effort to raise public awareness is necessary. The regulation emphasizes, among others, the importance of holding the applicable permits. While following the definition of A/R decided by the CoP, the regulation also introduces the definition of forest as plots of at least 0.25 ha in size and with a minimum canopy cover of 30 percent from trees that at the end of their growing period potentially reach at least 5 m in height.

Kepmen (to be issued) - /MenLH-Designated National Authority. The CoP to the UNFCCC requires specification of a designated national authority (DNA). In Indonesia the authority is formed by ministerial decree (in progress) and consists of officials from various sectors. In many countries such authority is heterogeneous in terms of membership but very lean to ensure an efficient project approval process. The simplicity of structure is usually compensated by the significantly high capacity in handling project documents.

Perda. Upon the enactment of UU No. 22/1999 on local government and UU No. 25/2000 on the authority of local government, many local government regulations were launched. Most of them went through local parliaments and some entertained public hearings at the local level. Although some of them are subject to being revisited, it is advisable to carefully look at those associated with investment and permits requirement.

Contractual arrangements

Contracts between sellers in developing countries and buyers in developed countries may be arranged between two governments, between government and private entity, or between two private entities. There are two forms of agreements that may be followed, each requiring a different legal document. One, a (government or private) buyer from a developed country agrees with a (government or private) seller from a developing country on the purchase of carbon credits produced by projects implemented in the developing country with minimum involvement of the buyer. In this case the buyer only guarantees the market. And two, a buyer is heavily involved in project development, implementation, monitoring, pricing, and issuance of the certificate.



Anticipating regulatory barriers

In the case of some regulatory aspects constraining project implementation, the following steps may be taken by both parties involved in the development of the PDD.

Streamlining. The PDD may be streamlined to satisfy the regulatory requirement. For example, if the project area designated for large-scale A/R CDM exceeds the requirement, it will have to be reduced. If projects that were originally designed as small-scale A/R CDMs combine several small areas, debundling procedures have to be implemented.

Harmonization. Harmonization is needed in the case of conflicting cross-sectoral regulations. A Joint Letter of Understanding (known as SKB) may be issued. Although not a legal procedure, it is common practice in Indonesia. Additional or collateral benefits from the project have to be identified and achieved to compensate any compromise actions involved.

Amendment. The most difficult pathway, amendment, may entail a lengthy process since Parliamentary procedures have to be taken. Upcoming regulatory instruments, such as that related to genetically modified trees, may be 'warned' well in advance since it is unacceptable for use in A/R CDM project activities.

National agenda and programs

A number of ongoing forestry programs and projects are being implemented that have a strong perspective of the sustainable development objective. It would be appropriate to synergize the A/R CDM project activities with those agendas and programs. Among these are the development of a national forestry program facilitated by the United Nations Forum on Forest, the Food and Agriculture Organisation, and the Collaborative Partnership on Forests.

The recently launched national movement on forest land rehabilitation (known as GERHAN) may be linked to the activities. It is very likely that national budget earmarked under the Reforestation Fund (known as DR) and regulated under PP No. 35/2002 will be mobilized. Such information should be integrated into the PDD.

In addition to the regional approach described above, the government has centrally planned to rehabilitate degraded forests and lands using watershed approaches. Priority has been set for these watersheds to be afforested and reforested based on Kepmen No. 284/Kpts-II/1999.

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