

Open Letter: An Investment Alert for International and Foreign Financiers in Response to the Omnibus Bill on Job Creation

The Indonesian Government's oft-stated goal of boosting development is unfortunately jeopardizing the country's various environmental and social safeguards. This effect has been most notable during the past six years since President Joko Widodo took office. We, a group of Indonesian environmental and social-justice organizations, are addressing this warning letter to investors in order to alert them to the fact that Indonesia's current laws and regulations are no longer in compliance with globally accepted environmental and social safeguards, including specific standards adopted by major financing institutions. Moreover, the path ahead, particularly against a backdrop of the introduction of the Omnibus Bill on Job Creation, is likely to see the further dismantling of Indonesia's various environmental and social safeguards, moving the country ever further from generally accepted global standards for the financing of sustainable development.

Investors would be advised to pay extra attention to the following red flags:

1. **Significant setbacks as regards environmental impact assessments**, which are likely to run contrary to the standards of financial institutions concerning environmental and/or social safeguards, particularly World Bank (WB) Environmental and Social Standard 1 on the Assessment and Management of Environmental and Social Risks and Impacts, as well as International Finance Corporation (IFC) Performance Standard 1 and Asian Development Bank (ADB) Safeguard Requirement 1 on the Environment.
2. **Reduction in meaningful participation opportunities in relation to projects**, which are likely to run contrary to the standards of financial institutions concerning environmental and/or social standards, as well as WB Environmental and Social Standard 10, IFC Performance Standard 1 and ADB Safeguard Requirement 1 on the Environment.
3. **Inconsistent spatial planning provisions, which have the potential to lead to disproportionate environmental burdens being shouldered by marginalized groups, as well as accelerate the loss of biodiversity, endorse state-sponsored land grabs and discriminate against impacted communities, including indigenous people, as regards their access to justice and judicial processes.** The new provisions are likely to undermine the environmental standards and/or social standards of financial institutions as regards the protection of biodiversity and their habitats, as well as prohibitions on land grabs and displacement/forced evictions and the necessity of protecting indigenous peoples. The relevant standards in this context include WB Environmental and Social Standards 5, 6 and 7; as well as IFC Performance Standards 5, 6 and 7; and ADB Safeguard Requirements 1, 2 and 3.
4. **The remaining root causes of environmental crises and injustice that the Omnibus Bill leaves intact.** Indeed, the bill is likely to exacerbate these causes, enabling conditions that are likely to result in deterioration, crises and injustice.

A more detailed elaboration of the points outlined above can be found in **Appendix 1**, while an unofficial English translation of the Omnibus Bill on Job Creation, dated February 12, 2020, can be found in **Appendix 2**.

We, the undersigned, strongly urge international financial institutions, especially those either currently or contemplating financing development projects within Indonesia to:

1. Demand that the Indonesian parliament drops the Omnibus Bill on Job Creation from the list of pending bills and any further discussions.
2. Demand that the Indonesian Government focus on resolving bureaucratic problems by, among other possible approaches:
 - a. Finalizing and operating an integrated licensing and compliance information system and ensuring that this system is properly accessible by local government and is both transparent and accountable, not only to business actors but also to the general public;
 - b. Finalizing and operating accurate, transparent and updated one-map and one-data solutions;
 - c. Revoking regulations that weaken environmental and social safeguards, including but not limited to the Government Regulation on Online Single Submissions and its implementing regulations;
 - d. Resolving disharmonized regulations by thoroughly evaluating existing regulations based on proper and accountable methods that take sustainable development into account, as well as the use of existing institutions and resources, in a transparent and accountable manner;
 - e. Enacting regulations that ensure:
 - i. the protection of indigenous and marginalized peoples' right to a safe and healthy environment and to live according to their cultural history;
 - ii. the restoration of ecosystems in an effort to strengthen the country's capabilities as regards climate mitigation and adaptation.
 - f. Implementing strong monitoring and oversight processes as regards the implementation of points (a - e)
3. Demand that the Indonesian Government restructures its financial and investment policies in line with the country's constitution and regulatory hierarchy with the ultimate aim of achieving sustainable development goals.
4. Demand that borrowers comply with the environmental and social standards of financiers and offer incentives for compliance, as well as penalties for any infringements of said standards.

Appendix 1

Indonesian Environmental and Social Safeguards: Red Flags

Observations of various events that took place during the development of the Omnibus Bill suggest that the bill is intending to justify existing reductions in the various environmental and social safeguards that the executive government has already introduced through the issuance of various implementing regulations. Upon closer observation, it has become clear that the bill is likely to lead to a further deterioration in the already fragile environmental and social safeguards that the country already has in place.

The Omnibus Bill claims that it will resolve the issue of the current lack of harmony between different regulatory frameworks, which are seen as hampering the investment climate in Indonesia. However, the various techniques employed during the formulation of the bill have been criticized by many parties and it appears that dangerous legal maneuvering has been employed, in clear contradiction with the nation's civil-law tradition and systems of checks and balances. The bill proposes radical alterations to many of the country's laws within a single bill through the partial revision of a handful of provisions set out under each law. However, the revisions that are likely to pass with the bill will undoubtedly threaten progress towards establishing a sound climate for sustainable investment and environmental and social justice.

Prior to the Omnibus Bill, the executive government passed a number of regulations, including Government Regulation No. 24 of 2018 on the Online Single Submission Licensing Service (GR OSS), which was one of the most significant turning points. This regulation reverses much of the progress that Indonesia has made through its EIA system. This systematic effort to weaken the country's environmental and social safeguards is addressed in the following sections:

A. Significant setback to Environmental Impact Assessments

Several provisions contained within the Omnibus Bill and the GR OSS clearly undermines the essence of the EIA as an instrument aimed at preventing environmental pollution and damage (see note A.1.1). These provisions run contrary to financial institution standards concerning environmental and/or social safeguards, which require social and environmental risk assessments to be conducted in relation to all projects prior to any such projects being allowed to commence.

World Bank (WB) Environmental and Social Standard 1 on the Assessment and Management of Environmental and Social Risks and Impacts is especially important here and requires social and environmental risk assessments to be completed in relation to all projects before their commencement so as ensure that projects are both environmentally and socially sound and sustainable.

International Finance Corporation (IFC) Performance Standard 1 is also relevant and also requires environmental risk assessments to be completed in relation to all projects before their commencement.

Moreover, *Asian Development Bank (ADB) Safeguard Requirement 1 on the Environment* requires borrowers to undertake environmental assessments during an early stage of any project preparation.

Finally, *Asian Infrastructure and Investment Bank (AIIB) Environmental and Social Standard 1* requires environmental and social assessments to be made available by clients during the preparation and implementation of projects.

The Omnibus Bill and GR OSS compromise the quality of EIA (see note A.1.2), expand exemptions from the EIA obligation for seriously impactful activities (see note A.1.4 and A.2.3), determine an unreasonable timeline for the drawing up of EIA (see note A.1.3) and attenuate environmental instruments, which as a whole undermine the principle of non-regression (see note A.2.2, A.2.4 and A.2.5.). Furthermore, the unclear concepts and provisions concerning “Risk-Based Licensing” as set out in the Omnibus Bill will undoubtedly lead to increased risk and regulatory uncertainties (see notes A.2.1). These provisions also contradict various financial institution standards, which require (among other things) that any environmental and social assessment should be proportionate to the potential risks and impacts of a given project.

WB Environmental and Social Standard 1 is also relevant here and also requires (among other things) that any environmental and social assessment should be proportionate to the potential risks and impacts of a given project.

IFC Performance Standard 1 is also relevant and requires (among other things) that environmental and social assessment and management systems be consistent with good international industry practice, as well as that the level of detail and complexity in any management program and the priority of the identified measures and actions should be commensurate with the relevant project’s risks and impacts.

ADB Safeguard Requirement 1 on the Environment is also applicable here and requires environmental assessments to consider all of the potential impacts and risks associated with a given project by taking into account the costs and benefits of various alternatives, including the alternative of no project at all.

Finally, *AIIB Environmental and Social Standard 1* requires environmental and social assessment and management measures to be proportional to the risks and impacts of a given project. According to this standard, the EIA requirement should be quality-oriented and should support more sustainable impact management and thus a reasonable timeline in order to create quality reports is of the utmost importance.

A.1. Existing rules

A.1.1. GR OSS allows some activities to be carried out before the completion and approval of EIA

It should be noted that the GR OSS allows project proponents to carry out various activities prior to the completion and approval of the relevant EIA. These permitted activities include land acquisition, alterations of land areas, procurements of equipment and facilities, provision of human resources, completion of certification of worthiness, implementation of production trials and/or implementation of production (Art. 38 GR OSS). When describing all of the above-listed activities that a business can undertake without the need to have already secured an OSS license, the GR OSS also states that a business which has already secured the OSS business license but which has not yet completed the relevant EIA will only be prohibited from constructing buildings.

A.1.2. The EIA Terms of Reference will be severely compromised in terms of quality, particularly in relation to the scope of the EIA

Under the OSS scheme, EIA ToR must be developed and approved **within 30 days of the issuance of an ‘environmental permit with commitment,’** with only 10 days allowed for approval. On the other hand, the OSS GR and the MOEF regulation require additional screening for EIA, specifically in terms of: (a) whether or not the project falls under the scope of the OSS system; (b) the relevant project category. Furthermore, the approval of EIA ToR, which had previously been assigned to the EIA Committee, a body that counted community representatives among its membership, has now been left solely to the technical committee under the OSS scheme. The substance required in the EIA ToR has also now been simplified, specifically the requirement to include an environmental baseline, as well as spatial-plan compliance, bibliographies and appendices, has now been removed;

A.1.3. GR OSS requires an unreasonable timeline for EIA completion

Under the GR OSS, the EIA completion timeline has been shortened, while additional bureaucratic points are to be imposed in relation to EIA screening. Specifically, GR No. 24 of 2018 trimmed down the time limit for each stage of EIA development. Meanwhile, MOE Regulation 38/2019 subsequently went on to set out three categories of EIA, each with different maximum time limits, as follows: (a) Category A: max. 180 days; (b) Category B: max. 120 days; (c) Category C: max. 60 days. In this regard, large projects such as coal-fired power plants only fall into Category B. Moreover, across all projects, the basic environmental data required in order to ensure that EIA are drawn up to reliable environmental baselines are often non-existent.

A.1.4. Expanded EIA exemptions

While the 2009 EPMA and 2012 Environmental Permit GR do recognize some exceptions, the recent MOEF Regulation 38/2019 expands and promotes EIA exceptions by detailing some exception mechanisms. Under the 2019 regulations, EIA are not required under the following conditions: (a) locations are already covered by detailed spatial plans, as informed by strategic environmental assessments (SEA); (b) locations within protected areas are already covered by management plans and/or detailed spatial plans for protected areas, as informed by SEA; (c) areas are already covered by forest product utilization activity plans in order to protect and

manage peatlands; (d) activities which are carried out during any disaster response; (e) activities which are carried out inside industrial estates, special economic zones, port zones and free-trade zones; (f) environmental remediation activities which are carried out in areas in which permits and all kinds of environmental studies are not required.

In addition, a number of provisions grant privileges relating to the acceleration of business operations under Nationally Strategic Projects, meaning that various licensing procedures and requirements can be ignored. In this regard, the issuance of Presidential Regulation No. 91 of 2017 and the GR OSS allowed for the issuance of temporary business licenses. This means that licensing requirements which include the fulfillment of commitments can be completed after the relevant business operations have commenced.

Government Regulation No. 24 of 2018 was subsequently issued and also eased procedures for the implementation of Nationally Strategic Projects. This easing relates to the issuance of various permits, such as location permits and water location permits for Nationally Strategic Project activities, which can be granted without the need to adhere to any commitments, including the EIA obligation (see: GR No. 24 of 2018, Art 33 [1] g). Moreover, building permits are not required in relation to the issuance of business licenses in cases where buildings are constructed as a part of Nationally Strategic Projects (see: GR No. 24 of 2018, Art. 36). As a result, licenses/permits used as command and control instruments cannot fulfill their normal function in relation to Nationally Strategic Projects. This is because by positioning license/permit requirements as commitments that can be fulfilled later, after operations have already commenced, they lose their power as administrative prerequisites. And this is against a background of the other breaks which are currently being granted to Nationally Strategic Projects.

A.2. Omnibus Bill

A further step backward is the likely result if proposed reforms set out under the Omnibus bill are signed into law:

A.2.1. New risk-based licensing regime introduced under Omnibus Bill

At this stage, it remains unclear how this system will interact with the 'significant impact' determination that currently governs EIA requirements. The Indonesian Government has made the argument during a series of discussions that high-risk activities are activities that will have a significant impact on their surroundings. However, it appears that this argument has not been taken account of in the new provisions set out under the Omnibus Bill.

In addition, there are reasons to believe that the new legislative framework will have negative consequences in terms of environmental protection, including: (a) the possibility that the new framework will shift a large number of previously controlled small- and medium-scale polluters into the uncontrolled category; (b) the risk-based formula that has been proposed suggests that any 'significant impact' activities which have less likelihood of occurring may be able to be undertaken without the need for any permission to be granted; (c) a failure to articulate the relationship between the risk-based approach and the sectoral approach that the new framework

seeks to replace, i.e. how 'risk-based licensing' for business permits will link up with an EIA's 'significant impact' determination. See: Articles 9, 10 and 11 of the Omnibus Bill.

In addition, practices implemented by many different countries reveal the importance of making data and inventories available (i.e. natural resources inventories, compliance histories, etc.) so that risk-based licensing can be effectively implemented. Unfortunately, these are some of the most important problems that Indonesia needs to focus on, as the country currently possesses an unintegrated database and lacks baseline data. This being the case, it remains doubtful that all of the relevant significant aspects will be taken into consideration during the licensing process.

A.2.2. Deletion of environmental permits and alteration of environmental approvals proposed under Omnibus Bill

One of the main criticisms of the Omnibus Bill concerns its proposed removal of environmental permit requirements and the introduction of the so-called environmental approvals. It should be noted that under the Omnibus Bill, only one license will be required to be held by interested parties, specifically a business license.

The Omnibus Bill proposes the removal of all of the current licenses and the introduction of a simple approval system, which encompasses environmental approvals. This removal downgrades the essence of the environmental license as, under Indonesian administrative law, licenses are recognized as the highest form of consent that can be granted by the government as regards engaging in any business activities. Approvals are undoubtedly weaker than licenses in terms of the various prerequisites that have to be met in order to obtain them and also in terms of their enforcement.

In this regard, the Indonesian Government is clearly neglecting the non-regression principle, which is internationally acknowledged. Under this principle, states, sub-national entities and regionally integrated organizations are not allowed to pursue any actions that will have the net effect of diminishing the legal protection of the environment or of diminishing access to environmental justice. Unfortunately, the removal of the environmental permit framework signals that the Indonesian Government is not obeying this principle.

A.2.3. More obscure, potentially arbitrary EIA 'significant impact' criteria to be introduced under Omnibus Bill.

The Omnibus Bill proposes the deletion of the EPMA's current framework of 9 (nine) criteria which are to be used in order to determine activities that are likely to have a 'significant impact', subject to EIA. Furthermore, the bill also proposes that the phrase 'on the environment, society, economy and culture' be added in relation to the phrase 'significant impact.' In practice, this is likely to reduce the EIA's reach. Such changes will also grant greater flexibility to the executive (as the administrator) as regards determining which activities will be subject to the EIA. See: Art. 23 of RUU Cipta Kerja, the proposed revision to Article 23 of the 2009 EPMA.

A.2.4. Significant reduction in environmental impact studies to be introduced through a shift from UKL-UPL to standards.

The Omnibus Bill proposes to change the nature of UKL-UPL, specifically from the level of study to standards. This means that a simpler kind of environmental impact study will prevail in relation to activities that are not considered to have any 'significant impact'. Through this proposed change, UKL-UPL will not require any environmental feasibility decision to be made. Instead, a statement of environmental management ability is all that will be needed.

In addition, there are also problems with the mechanism used to develop the above-mentioned standards. Specifically, it remains unclear under the Bill: a) who will be responsible for the development of the new standards; b) what aspects will be taken into consideration during the development of the new standards. In this regard, it also remains unclear to what extent environmental issues will be taken into consideration; c) what processes will be implemented during the development of the standards; d) what period of time will be set aside to draw up the standards. This is particularly important as the standards themselves will be set out under an implementing regulation, which is always problematic in Indonesia due to the often lengthy periods required to draft said implementing regulations.

A.2.5. Changes to the supervision and enforcement mechanism

Under the Omnibus Bill, the supervision and enforcement mechanism is inseparable from the overall shift in the decision-making process to the central government. The supervision of compliance with permission (or standards) will also be centralized and will encompass the cancellation of the various institutional arrangements which currently allow for decentralized supervision.

Moreover, the Omnibus Bill proposes to divide up the intensity levels of supervision based on the new risk-based licensing framework. In other words, the higher the risk, the greater the intensity of the supervision. However, as previously mentioned, there is a possibility that small- and medium-scale polluters will be classified as not being under any significant controls, due to their lower levels of risk. This means that the supervision of these small- and medium-scale polluters will be relatively relaxed in comparison with the existing rules.

B. Reduction in meaningful participation opportunities in relation to environmentally degrading projects

The various alterations set out under the Omnibus Bill neglect the fact that most Indonesian communities, particularly those living in lesser developed regions, lack the capabilities necessary to participate properly in the environmental decision-making process and to use the law effectively in order to defend their right to a healthy environment and environmental protection throughout the process (see notes for part B). The various provisions relating to public participation which are set out under the Omnibus Bill contradict various financial-institution environmental and social standards that address the meaningful engagement of all potentially affected stakeholders

throughout the entirety of a given project cycle, from the earliest possible stage of project preparation.

World Bank Environmental and Social Standard 10 is relevant here and addresses the engagement of all potentially affected stakeholders during project preparation, as well as the requirement to undertake early meaningful consultations and to disclose all relevant information so that stakeholders can understand the various risks and impacts of a given project.

International Finance Corporation Standard 1 is also relevant and requires adequate engagement with affected communities and, where appropriate, other stakeholders, throughout the entire project cycle, as well as to ensure that relevant environmental and social information is disclosed and disseminated.

Asian Development Bank Safeguard Requirement 1 on the Environment also applies in this context and requires the incorporation of all of the relevant views of affected people and other stakeholders into any decision-making process.

Finally, *Asian Infrastructure and Investment Bank (AIIB) Environmental and Social Standard 2 on Involuntary Resettlements* is also applicable and requires meaningful consultations to be completed through informed participation with any persons and host communities that will be displaced by a project, as well as with NGOs, while these parties should be involved in the planning, implementation, monitoring and evaluation of any resettlement plans.

B.1. Existing rules

B.1.1. Less meaningful public participation

In an attempt to reduce the time limit for EIA development and approvals, the GR OSS downgrades the importance of the socialization timeframes previously made available during the completion of the EIA process. The OSS scheme removes the announcement requirement for permit applications. Furthermore, the OSS scheme has also now shortened the period for post-announcement comment submissions, from 10 days to just 5 days. The permit-issuance announcement requirement will also be relaxed, requiring such announcements to only be listed on the OSS page, whereas under the non-OSS scheme, announcements had to be made via the mass media, relevant to the administrative scale of projects (national/provincial/regency-city).

B.1.2. Environmental organizations and indirectly impacted communities will no longer be informed or consulted

The subjects that must be consulted during the public participation process under the OSS scheme include only '[directly] impacted communities.' This is a backward step from the 2009 EPMA, which set out a broader definition of the public required to be consulted that included environmentalists and all parties influenced by any decisions during the EIA process.

B.2. Omnibus Bill

B.2.1. Significant reduction in public participation through the proposed deletion of the multi-stakeholder EIA committee

This committee is currently the main participation platform and must involve the participation of local communities, environmental NGOs and experts (Article 30 EPMA). Not only will this committee be removed, but any determination of the appropriateness of an EIA, which under the 2009 EPMA requires a recommendation to be made by the committee, will become the sole authority of the central government through the implementation of a so-called 'feasibility test'. See: Article 23 of RUU Cipta Kerja, proposed deletion of Articles 29, 30 and 31 of the EPMA, proposed revision to Article 24 of the EPMA.

B.2.2. Limited subjects to be allowed to participate, access to information to be reduced

The Omnibus Bill proposes a revision of the subjects required to be consulted during the EIA process, as well as a revision of the permit announcement requirements, so as to bring them into line with the GR OSS (see points 5 - 6 of the OSS changes). The bill seeks to replace the currently required announcements for environmental permit requests and decisions with a one-time announcement after an environmental feasibility decision (*SKKLH*) has already been granted. The Omnibus Bill also seeks to replace the requirement to ensure that announcements are conducted 'in a way that is easily accessible to the public' into 'announcements through electronic systems or other methods determined by the central government.' See: Article 23 of RUU Cipta Kerja, the proposed revision to Articles 26, 39 (1), 39 (2) of the 2009 EPMA.

B.2.3. Complete elimination of public participation opportunities for non-EIA projects

The proposed change from the UKL-UPL mechanism (which was formerly required in relation to any activity which did not require an EIA) to a standard certificate will completely deprive the public of participation opportunities by eliminating the announcement and comment opportunity requirement which is currently included under the environmental-permit announcement requirements. See: Article 23 of RUU Cipta Kerja, the proposed revision to Article 1 (12) and Art. 34 of the 2009 EPMA.

The Omnibus Bill neglects the fact that the awareness of citizens as regards the importance of participating in the decision-making process is still lacking and thus proactive systems that raise awareness of these matters among local communities are of vital importance. Electronic systems remain less than ideal instruments in terms of access for most communities across Indonesia (see note B.1.1 and B.2.2). Public participation should be conducted prior to decision making and sufficient time must be set aside for citizens to be able to understand what is at stake and to offer input.

Failure to communicate and to obtain prior informed consent from local communities prior to commencing any business operations is only likely to postpone and worsen social and environmental risk later on. The role of a multi-stakeholder EIA committee which includes environmentalists, as addressed under the EPMA, is not only to assist impacted communities to

better understand the potential impact of business activities (and thus to make better decisions during the consultation process) but also to help ensure that environmental protections will not be trampled upon.

C. Inconsistent spatial-planning provisions have the potential to causes disproportionate environmental burdens, increase biodiversity loss, endorse state-sponsored land grabs, and discriminate against impacted communities, including indigenous persons, as regards access to justice

Existing regulations and the Omnibus Bill allow for developments and nationally strategic projects to compromise spatial plans. Specifically, Government Regulation No.13 of 2017 allows for the requirement to comply with spatial plans to be waived in relation to nationally strategic projects (C.1.1). Meanwhile, the spatial-plan provision set out under the Omnibus Bill ultimately leads to greater legal uncertainty (C.2.1) and strengthens the special treatment of nationally strategic projects (C.2.2). Finally, the bill undermines the protection of forest areas by eliminating the minimum limit that the government must allocate for watershed and/or island areas, which is currently set at 30% (C.2.3). The inconsistency of regulations which address spatial planning and the overall weakening of spatial plans as instruments of environmental protection potentially violate:

- The environmental standards and/or social standards of financial institutions which include the protection of biodiversity and habitats, the prohibition on land grabs which include displacement/forced evictions, and the provision of protection to indigenous communities.
- The following World Bank standards:
 - *Environmental and Social Standard 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources*, which addresses the identification and protection of critical habitats and the consistency of the legal status of protected areas;
 - *Environmental and Social Standard 5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*, which requires borrowers to engage in meaningful consultations during any decision-making processes relating to resettlement and livelihood restoration;
 - *Environmental and Social Standard 7 on Indigenous Peoples/Sub-Saharan African Historically Under-Recognized Traditional Local Communities*, which requires borrowers to obtain the free, prior and informed consent of any affected indigenous people regarding the impacts of projects and/or to relocate said persons from their land and natural resources subject to traditional ownership.
- The following International Finance Corporation standards:
 - *PS6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources)* which addresses the identification and protection of critical habitats and the consistency of the legal protection status of protected areas;

- *PS5 (Land Acquisition and Involuntary Resettlement)*, which requires borrowers to engage in meaningful consultations during decision-making processes relating to resettlement and livelihood restoration;
- *PS7 (Indigenous Peoples)*, which requires borrowers to obtain the free, prior and informed consent of affected indigenous people regarding the impacts of projects and/or to relocate said persons from their land and natural resources subject to traditional ownership.
- The following Asian Development Bank standards:
 - *Safeguard Requirement 1 on the Environment*, which forbids project activity from being implemented in areas of critical habitat;
 - *Safeguard Requirement 2 on Involuntary Resettlement*, concerning meaningful consultation with affected peoples and which requires the incorporation of all of the relevant views of affected people into decision making, including project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.
 - *Safeguard Requirement 3 on Indigenous Peoples*, which requires the seeking of prior consent and agreements with indigenous peoples in a process of good faith negotiations relating to project design, implementation activities, and the impact on and/or relocation of indigenous peoples as a result of any commercial development in relation to their cultural and natural resources.
- The following Asian Infrastructure and Investment Bank (AIIB) Standards:
 - *Environmental and Social Standard 1 on Environmental and Social Assessment and Management*, which requires:
 - The prohibition of activities within critical habitats;
 - Ensuring that there will be no significant conversion or degradation if a project is to be implemented in an area of natural habitat.
 - *Environmental and Social Standard 3 on Indigenous People*, which requires engagement with indigenous peoples in FPIC and the securing of the broad support of any affected indigenous peoples if activities during a project will: (a) have an impact on any land and natural resources which are subject to traditional ownership or under customary occupation or use; (b) require the relocation of indigenous peoples from areas of land and limitations on access to natural resources subject to traditional ownership or under customary occupation or use; or (c) have significant impacts on the cultural heritage of indigenous peoples.

C.1. Existing rules

C.1.1. Assumed compliance of nationally strategic projects violating spatial plans

Presidential Regulation No.3 of 2016 on Nationally Strategic Projects, Art. 19 allows spatial planning “adjustments” to be made in relation to listed nationally strategic projects which are not in compliance with the relevant provincial and/or city/regency level spatial plans. Moreover, Presidential Regulation No. 58 of 2017, which revised PR No. 3 of 2016, allows location suitability recommendations to be issued even though the location of a given project is in clear violation of

provincial or city/regency level spatial plans. Government Regulation No.13 of 2017 further promotes this practice by creating a fiction of compliance for any Nationally Strategic Project found to be violating provincial and/or city/regency level spatial plans, by simply allowing for the issuance of a Ministry of Agrarian Affairs and Spatial Planning recommendation, as outlined under Art. 114A.

This move ultimately destroyed the fine nexus between spatial planning and environmental protection, whereby strategic environmental assessments were mandated at every level of planning in order to ensure that carrying capacities and pollution loads were well reflected. Moreover, this move also denied protection to law-abiding property owners, leading to more unpredictable risks.

C.2. Omnibus Bill

C.2.1. Overlapping and centralized authorities for spatial approvals potentially create inconsistencies and impacts in spatial planning policies which are determined far from affected communities

The Omnibus Bill grants the central government authority to take over the authority of local government as regards the issuance of approvals for confirmations of spatial plans to business activity applicants in the absence of any detailed spatial plan (see: Article 16 [1 - 2], Omnibus Bill). The Omnibus Bill achieves this by transferring the authority for spatial-plan confirmation approvals to the central government, while the authority to enact detailed spatial plans is still held by local governments in their respective regions. However, the absence of a detailed spatial plan should not mean that the central government is authorized to issue the approvals for confirmations of spatial plans, as then there would be a potential mismatch between such approvals and the regional conditions that should be contained within a detailed spatial plan. Ultimately then, there is the potential for inconsistencies to emerge and/or for any spatial policy determined by the central government to not take affected local communities sufficiently into consideration.

C.2.2. The Omnibus Bill affirms that changes to spatial plans will receive special treatment in relation to nationally strategic projects, which may aggravate environmental burdens

The Omnibus Bill seems to mandate for unclear, arbitrary EIA/permit exemptions and ease of implementation for various government activities, nationally strategic projects and public-interest development projects. The Omnibus Bill introduces different types of relaxations in relation to the three categories mentioned above, without detailing or clarifying any of the relationships or overlaps between these three categories. The relevant ease of implementation and relaxed rules include: (a) flexible spatial-plan adjustments for nationally strategic projects; (b) easier land procurement for public-interest developments; (c) waivers in relation to various requirements for public-interest development projects, including conformity with spatial plans, technical considerations, declarations that projects lie outside forest areas and mining areas, declarations that projects lie outside peatlands /coastal conservation lines, and environmental impact assessments; (d) more flexible land-conversion processes for nationally strategic projects; and (e) government assistance in relation to nationally strategic projects.

The Academic Paper of the Omnibus Bill states that spatial planning is often an obstacle to the implementation of national policies. In fact, spatial planning is an environmental protection instrument and reviews of spatial plans should thus only be undertaken if any abnormal environmental damage is sustained, in the interests of national security or in relation to natural disasters. Adjustments that are made to spatial plans that have been established based on environmental considerations, economic interests and political policies will ultimately lead to environmental problems, impacting the protection of biodiversity, as well as lead to both horizontal and vertical conflicts with local communities and indigenous peoples.

C.2.3 The 30% minimum forest area limit that must be maintained for each watershed and/or island area is to be removed

The Omnibus Bill removes the provisions originally set out under Forestry Law No. 41 of 1999 which address a minimum limit of 30% of any watershed and/or island area that must be maintained by the government in order to optimize environmental, social and economic benefits for local communities. In the Omnibus Bill's Academic Paper, the removal of this 30% minimum limit has been proposed following recent analysis which reveals that on the island of Java, the total amount of forested area is now less than 30%. However, the insertion of this provision into the Omnibus Bill means that the protracted deforestation of Java, where the 30% limit has already been exceeded, will now be allowed to be repeated across the country's other islands.

In addition, determining the extent of any forest areas that must be maintained under the Omnibus Bill only takes physical and geographical conditions into consideration, without mandating for any environmental considerations. This issue is set to be further addressed under a Government Regulation, meaning that if the Omnibus Bill is ultimately passed without being immediately followed by said Government Regulation, a legal vacuum will be created as regards the extent of the forested areas that must be maintained. Even worse, the Academic Paper states that the forthcoming Government Regulation will allow for exemptions to be made as regards the obligation to maintain sufficient forest coverage for the benefit of infrastructure development in relation to nationally strategic projects.

D. Underlying Problems and Impacts

In addition to the various problems outlined above, there are still a number of unresolved prerequisites that should be sorted out in order to create an accountable licensing and enforcement system, despite provisions set out under already existing laws.

D.1. Disharmonized and hyper-regulation

The Academic Paper for the Omnibus Bill on Job Creation underlines the current disharmony between regulations, as well as the phenomenon of hyper-regulation in terms of investment in Indonesia. However, the Bill proposes a strange solution to these problems by amending several articles across 73 laws through the introduction of many disintegrated norms, as partially discussed in the notes above, which only focus on a few environmental and social aspects.

Despite the tendency to hyper-regulation, a lot of explicitly mandated regulations under the relevant laws have yet to be enacted. However, the Bill delegates more than 400 topics to be further addressed by lower regulations.

Considering the government's track record as regards resolving and implementing the existing laws, any alteration of the current licensing system and weakening of environmental and social standards will only slow down progress towards accountability. In the end, such changes will lead to more unwanted risks for investors.

D.2. Unresolved spatial planning and integrated maps

Up to the present time, only 54 regions across Indonesia have formulated detailed spatial plans. This discrepancy in data, particularly spatial data, poses a big hurdle as regards the requirement to adjust to detailed spatial plans. Moreover, different ministries and government institutions put together different maps which often overlap with each other. By law, conflicts among sectoral ministries governing the utilization of land and natural resources should have been resolved through the formulation of accurate spatial plans. Spatial plans should also be based on Strategic Impact Assessments, which include assessments of environmental and social carrying capacities. A detailed spatial plan should be the final reference for the further management of development across each region.

D.3. The lack of environmental and natural-resource inventories, emissions-sources databases and compliance histories

Unintegrated databases and a prevailing lack of inventories have always been problems that the Indonesian Government has had to deal with. Unfortunately, these issues represent crucial elements in terms of environmental management and protection. At the upstream level, the lack of any environmental and natural-resource inventories has meant that environmental permits have been issued without any proper baselines being taken into consideration. In many cases, spatial planning - as a basis for the issuance of environmental permits - is determined without any proper consideration of environmental carrying capacity, due to a lack of inventories. Moreover, emissions-sources databases, which are supposed to be the basis upon which determinations of environmental carrying capacities are made, are also mostly unavailable. As a result, an environmental permit will often be granted, even though the relevant environmental carrying capacity within a given area may be already incapable of accommodating such projects.

Furthermore, as previously outlined above, the government has argued that the Omnibus Bill will alter the complexity of the current permit regime as we move to a risk-based licensing framework that will ultimately strengthen monitoring in order to ensure environmental protection. Therefore, the availability of compliance histories becomes important to ensure the effectiveness of any monitoring. Compliance histories are a crucial part of efforts to track the compliance of permit holders with their permits, as well as with regulations. Also, compliance histories should be the basis upon which permit holder's compliance is determined within the context of law enforcement. In addition, compliance histories are essential as the basis for conducting regular monitoring, since they comprise data from previous monitoring efforts. Indeed, it has been proved that there

can be no successful monitoring process without access to a proper compliance history database. Under the current condition whereby histories lack compliance histories, the effectiveness of the monitoring process will in turn become questionable.