

Strengthening the Social Component of a Definition of Legal Wood Origin and Production for Indonesia

Discussion Draft

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Report prepared for The Nature Conservancy

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1. Context of Study:

International concern about the destructive effects of ill-regulated logging has been growing for over four decades. Sustained efforts to reform forestry practices, through institutional strengthening, improved logging techniques and silviculture, voluntary third-party certification and by the devolution and decentralization of forest management to local communities and local government, have failed to curb worst practice.

During the 1990s, environmental NGOs and intergovernmental organisations began to provide detailed documentation about the volumes of internationally traded timber that were being extracted contrary to national laws and regulations, notably in excess of countries' annual allowable cut. For some countries and regions, volumes of 'illegal timber' being traded have far exceeded legal supplies. Besides the often serious local impacts on communities and livelihoods, a negative effect has been to depress timber prices and thus discourage forestry reform and investment in improved forest management. 'Illegal logging' and timber markets flooded with cut-price timber drive a downward spiral of increasingly short term forest exploitation, in which forests, communities and national economies are all losers.

Intergovernmental and national efforts to curb 'illegal logging', these days often called *Forest Law Enforcement and Governance (FLEG)* initiatives, have proliferated, and include proposed measures by European importing countries to halt the import of 'illegal timber' and to insist that government procurement officers should only acquire 'legal timbers' for public construction purposes.

To comply with these new (draft) regulations and codes of conduct, customs officials and procurement officers in consumer countries need to be able to distinguish easily between legal and illegal timbers. In other markets, such as the United States of America and also Europe, environmental NGOs have pressurised timber traders and retailers of forest products to source the provenance of the timber they buy and ensure that they only buy timbers which have been, preferably, sustainably but, at least, legally harvested and processed.

To meet this demand, efforts have begun to develop 'legal verification' processes, whereby forest management, logging, timber processing and marketing operations are assessed for their compliance with 'relevant' laws and, where appropriate, verified accordingly.

Forest Law Enforcement as a response to 'illegal logging' is not without its detractors. CIFOR, in particular, has expressed concern that **crudely applied** law enforcement measures could undermine the livelihoods of the rural poor and forest-dependent people, whose rights have not been adequately respected by forestry laws.² Case studies in Indonesia³ and several other countries show that, indeed, crude forestry law enforcement initiatives do unevenly target the poor, ignore their rights under other laws and weaken their livelihoods. In some cases legal and administrative reforms

² Kaimowitz 2002.

³ Obidzinski 2003.

may be needed, before enforcement measures are applied, if the rights and livelihoods of forest-dependent communities are to be protected.⁴

The Government of Indonesia has also been greatly concerned about the extent to which timber is being illegally extracted and has embarked on a number of initiatives to curb these illegalities. These measures include a Memorandum of Understanding (MoU) on *Cooperation to Improve Forest Law Enforcement and Governance and to Combat Illegal Logging and the International Trade in Illegally Logged Timber and Wood Products* signed between the UK Government, represented by the Department of Environment, Forestry and Rural Affairs (DEFRA) and the Department for International Development (DfID), and by the Ministry of Forestry (MoF), on behalf of the Government of Indonesia.⁵

While the MoU was being negotiated and first implemented, several British and Indonesian NGOs expressed concern that this forest law enforcement initiative should take care to protect the rights of forest-dependent communities. They demanded that any measures to brand timbers as legal or illegal should be preceded by a careful participatory review of all forest-related legislation to determine what a definition of 'legal timber' would really mean, and to identify suitable measures to protect the rights and interests of rural communities.

DfID, as the lead agency for the UK Government charged with implementing the MoU in Indonesia, has been responsive to these concerns. The agency is directed by British law to adopt a rights-based approach to development⁶ and has adopted policies to combat poverty and secure sustainable livelihoods.⁷ The Government of Indonesia has similar goals. The MoU Action Plan, accordingly, has established a joint team to combat illegal logging, including through:

- Reform of forest related legislation
- Action to prevent harvesting, transport and processing of illegal timbers
- Technical support and capacity-building to promote legal compliance verification and the accompanying legal and administrative reforms
- Support for the involvement of civil society to curb illegal logging and monitor the implementation of compliance verification
- Data gathering and exchange
- Collaboration between the enforcement agencies of the two countries.⁸

This study was commissioned by TNC as a contribution to these tasks.

⁴ Colchester 2004.

⁵ Heydir et al. 2003.

⁶ HMG 1997:27.

⁷ DfID 2000.

⁸ Minister of Forestry Decree No. 89/Kpts-II/2003; Presentation by Agus Setyarso of DfID to TNC Workshop on the MoU Legality Standard, 9 September 2004.

2. Drafting the MoU Legality Standard:

To develop a standard of Legal Timber, the MoU Team recruited an Indonesian NGO, *Yayasan Madanika*, to carry out multi-stakeholder consultations and research the available literature and laws. Information from a variety of ‘stakeholders’ was solicited through the use of questionnaires, after which a series of five workshops were carried out, two at district level in Pelalawan and Berau, two at Provincial Level in Riau and East Kalimantan and a final national workshop. These workshops included Government officials, forest dependent communities and forest industry representatives, who were identified as ‘primary stakeholders’, and NGOs, academics, Parliamentarians and members of international organisations, who were defined as ‘secondary stakeholders’.⁹

The results of these consultations, and the resulting draft set of principles of legality, were not considered to be definitive by the MoU team and only resulted in a draft report which was never finalised. The consultations and draft report revealed sharp differences of opinion about legality, between local and national authorities, dissatisfaction among local communities about the way laws were applied to limit their rights in forests, and confusion in forestry companies about how they should comply with the multitude of, often contradictory, forestry regulations.¹⁰

The disputes about legality, between district and national authorities, stem from recent shifts in Indonesian administration. In 2000, the Government embarked on a major decentralization programme which gave increased powers to district level authorities. Regional forestry offices were placed under the authority of provincial and local districts and the district heads (*bupati*) were given authority to issue small-scale timber cutting permits to local cooperatives and small businesses. However, following abuse of this system, widespread complaints about the damaging social and environmental consequences, and expressions of concern from large-scale forestry companies that these permits often overlapped their concessions making sound management impossible, in 2002 the Government reasserted central government authority over the issuance of permits (PP 34/2002). Regional forestry offices, however, remain decentralised. Many local authorities still consider the central government’s reassertion of authority over forests to be ‘illegal’ and appeals have been lodged in the courts on the grounds that the re-centralization of power over forests is contrary to higher laws devolving powers to the districts. Divided views about legality have not only made elaboration of an agreed definition of ‘legal timber’ difficult but also serious compromise concerted law enforcement efforts.

In 2002, just prior to the initiation of the MoU team’s efforts to develop a definition of legality, The Nature Conservancy (TNC) also commenced a process to develop and test a third-party wood legality verification and tracking system in East Kalimantan.¹¹ The process was part of a coordinated effort between TNC and WWF-Indonesia called the *Alliance to Promote Forest Certification and Combat Illegal Logging in Indonesia* mainly funded by USAID and The Home Depot. The system was also designed to complement an existing programme of collaboration between TNC and large-scale timber corporations, which aims at promoting responsible forestry by

⁹ Ibid.

¹⁰ Heydir et al. 2003.

¹¹ URS/SGS 2002.

building market incentives for good practice. Bar-coding systems were developed to facilitate the tracking of timbers from stump to ship. A consortium of two international consultancies, URS and SGS, was contracted to develop this work. Following preliminary scoping, two companies were identified as expressing interest in participating in this pilot scheme – PT Sumalindo Lestari Jaya, a member of the Hasko Group and part-owned by Barito Pacific, and PT Daisy Timbers. Brief meetings were also held with the national environmental forum, WALHI, and the local community forestry NGO, SHK-Kaltim, to assess civil society views about the initiative.¹²

In 2003, the MoU team decided to contract the work of developing the Legality Standard to TNC, building on TNC's initiative with URS/SGS. After a review of forest-related laws a draft standard was given limited circulation by TNC for comments in November 2003.¹³ In response to comments that the draft standard was not in conformity with recent advances in Indonesian law recognising the rights of local communities and would be unlikely to protect their rights,¹⁴ TNC and DfID set up an informal contact group to strengthen the social protections in the draft. Major inputs, in the form of comprehensive dossiers of relevant laws, were made to the process by IHSA, ICRAF and AMAN.¹⁵ The draft standard then went through several iterations and was finally made available for public comment in May 2004.¹⁶ A number of informal meetings were then held in Jakarta and Bogor to assess the draft's likely acceptability by NGOs and Certification Bodies. At the same time preparations were made by TNC and URS/SGS to audit the concession of PT Sumalindo Lestari Jaya II in the Upper Mahakam as a pilot test of the draft standard.

The draft standard takes into account some 900 Indonesian laws, regulations and decrees related to forests and seeks to identify a sub-set of those most important to ensure good practice. The Standard is designed to be applied to large-scale forestry operations in natural production forests (HPH), plantation production forests (HTI) and conversion forests on the Outer Islands, as well as to the forestry operations of the para-statal company Perum Perhutani on Java. It is widely recognised that the laws for establishing these operations were, to a large extent, written at a time when there was less appreciation of the importance of recognising community rights than there is today.

In sum, in accordance with existing laws, the Legality Standard invokes procedures designed to respect communities' rights, notably to their lands, forests and resources and to free, prior and informed consent, in the processes of :

- ❑ Gazettement of Forest Areas,
- ❑ Achieving consistency with Provincial Land Use Planning
- ❑ Gazettement of timber licenses
- ❑ Application of Social and Environmental Impact Assessments
- ❑ Developing Management Plans to exploit licensed areas
- ❑ Implementing Benefit-sharing measures (PMDH/ Bina Desa schemes).

¹² URS/SGS 2002.

¹³ SGS/TNC 2003.

¹⁴ FPP 2003.

¹⁵ IHSA 2004; World Agroforestry Centre/ Working Group on Forest Land Tenure 2004.

¹⁶ SGS/TNC 2004. see also www.illegal-logging.org

3. Purpose of Study:

As set out in the Terms of Reference, the purpose of this study is to strengthen the social component of the draft Legality Standard and associated audit procedure. The original intention was that the study should comprise an independent assessment of SGS/URS's audit, using the draft legality standard, of the PT Sumalindo Lestari Jaya II concession in the Upper Mahakam River of East Kalimantan, in order to assess the social implications. Field visits and community interviews were to be complemented with interviews of NGOs, Certification Bodies and other interested parties and the draft findings presented to and discussed at a workshop in Bogor. Based on these findings, the consultant was to make recommendations of how the legal definition, guidance and audit procedures could be strengthened or modified.¹⁷

Limitations:

Just prior to the field visit, however, PT Sumalindo Lestari Jaya decided to suspend or delay the legal audit and so the planned field visit had to be abandoned. The study was thus limited to interviews with interested parties in Bogor and Jakarta, complemented by a workshop discussion in Bogor and a literature review. The revised Terms of Reference, in summary, required the consultant to:

- ❑ Interview key 'stakeholders' and propose mechanisms for further engagement with them
- ❑ Review and provide detailed critique of the draft legality standard
- ❑ Compare the legality requirements of FSC certifications with the draft legality standard
- ❑ Assist with a workshop to discuss the draft legality standard
- ❑ Make recommendations to strengthen draft legality standard
- ❑ Write a report on all this.¹⁸

All parties involved, especially the consultant and including TNC, recognise that the resulting report is necessarily more speculative than conclusive and that a field trial is a vital next step before any firm conclusions can be drawn about the social implications of this legal verification. Hopefully, this report can help to ensure that both the pilot audit and the assessment of the audit, when they are eventually carried out, will be better informed, and will look more thoroughly into key issues of concern.

Scope:

This study has only aimed to elicit information and draw some conclusions regarding the implications for local communities of legal verification using the current draft legality standard. The standard, however, includes important provisions to protect the legal rights of workers in timber industries, but this study has not sought to examine this aspect. So far as the author is aware, to date there have been no consultations with trades unions about the standard nor about how the proposed criteria and indicators relating to workers' rights should be verified by auditors. No attempt has been made to interview trades unions to examine the implications of the legality standard and the audit for the labour force in the timber industry. This task remains to be undertaken by TNC.¹⁹

¹⁷ See Annex 1 for original TORs

¹⁸ See Annex 2 for revised TORs

¹⁹ See Annex 6 for list of most relevant international labour standards

4. Findings:

This section of the report summarises the findings of this study. These findings derive from interviews carried out with a number of concerned parties,²⁰ a workshop convened by TNC which was held on 9 September 2004 in Bogor, and from a review of the literature.²¹

The findings are grouped into five sub-sections, as attempts to answer the following five sets of questions:

- ❑ How satisfactory has the process of developing the draft legality standard been?
- ❑ How sound are the social protections in the draft Legality Standard? Are they legal and enough?
- ❑ How can high standards of verification be ensured?
- ❑ How many people will be affected ? How widely might the draft Legality Standard be applied ?
- ❑ What are the legal and policy implications of the draft Legality Standard ?

Section 5 of the report summarises the information available on other forms of legal verification being undertaken in Indonesia and compares the legality requirements of the draft standard with those implied in FSC and LEI certification procedures.

Finally, section 6 makes recommendations to strengthen the social component of the draft Legality Standard process.

4.1 The Process of Developing the Draft Legality Standard:

No consultation process is ever perfect. A number of interviewees and workshop participants expressed frustration and/or disappointment with the quality of participation in the first phase of the development of the draft standard. Notable complaints or concerns include the following:

- ❑ The consultations were unduly controlled by the MoF and so discussions were limited and the author unable to finalise a report to his liking.
- ❑ There was a lack of clarity about the process of selecting invitees to the district and regional consultations
- ❑ Community members were selected by government officials, while proposals for participants named by people's organisations (*Organisasi Rakyat - OR*)²² were ignored.

²⁰ See Annex 3 and Acknowledgements for lists of institutions and individuals interviewed. Unless explicitly held in quotation marks, the summaries made below are not verbatim.

²¹ See References for the full set of documents referred to.

²² Indonesian laws regulating civil society organisations recognise a distinction between NGOs and people's organisations, often referred to as Community Based Organisations in other parts of the world. However, in Indonesia, the acronym CBO is used to refer to Constituency Based Organisations, so the acronym OR is used here to refer to people's organisations such as trades unions and indigenous peoples' organisations.

- ❑ Some invitations to the national level workshop were made at the last minute, leaving insufficient time for participants to prepare for the discussions.
- ❑ The DfID-funded MoU process did not make the most of the networks built up under the DfID-funded Multi-stakeholder Forestry Programme (MFP).

The second phase of evolution of the standard, which commenced in mid-2003, is widely perceived as having been even less transparent. No formal national workshops were convened by TNC to discuss the draft until September 2004 and drafts of the standard were not made public until May 2004. On the other hand, extensive informal consultations and one-to-one meetings were held repeatedly with companies, certification bodies, research institutes, NGOs and OR. Notwithstanding, a number of interviewees said they had felt 'left out' of the TNC process, with one noting that his organisation detected a 'don't call us, we'll call you' attitude.

The fact that the process is funded by USAID and DfID, is being administered by an international NGO (TNC), which has subcontracted key tasks to a consortium of two trans-national consultancies (SGS and URS), has served to distance Indonesian civil society from the process. Indeed, the only Indonesian agency formally involved in the development of the standard is the Ministry of Forests (MoF), which many Indonesian civil society organisations feel is not responsive to their concerns. The process is felt to be 'coming from outside' Indonesia, and to be unduly 'donor-driven' and 'North dominated', being developed primarily to suit the interests of foreign markets. At the workshop, participants made a number of comments, which confirmed this sense of unease with the ownership of the process. Questions were asked about who would 'own' the final draft Legality Standard, when it was finally agreed, and who would control its subsequent evolution as the law evolves.

If the draft standard is to receive wider acceptance and 'buy in', concerted efforts are now needed to make the next stages in the process more transparent, participatory and accountable.

4.2 Soundness of the Social Protections:

Indonesian laws regarding the rights of local communities, especially with regard to forms of self-governance, representation, exercise of customary law, land tenure, control of natural resources and administrative decentralization, are in a phase of (potentially) radical reform. It is agreed at the highest level of the state, that the main laws relating to land and natural resources, established between the early 1960s and late 1990s, have generated widespread land conflicts and permitted, or even encouraged, a destructive use of natural resources. The National Assembly, the highest chamber of the Legislature, has issued instructions calling for the replacement of these laws, **including the revised forestry law** (UU 41/1999). These revised laws have yet to be promulgated, however.

The draft Legality Standard thus stands uncomfortably on two bodies of law, which are mutually contradictory but not entirely discreet. During the interviews and workshop a number of NGOs, researchers and development agency personnel voiced concerns that the draft Standard gives greater emphasis to the older laws and less to

the new laws. If widely deployed, they fear therefore, the Standard could serve to entrench the old and now legally questionable forestry regime.²³

The discussion is made all the more difficult due to the fact that there remains a great deal of confusion within government and NGOs about all these laws. It is therefore necessary to set out the legal parameters, before assessing the way the draft Legality Standard deals with them.

4.2.1 Land Tenure:

The Basic Agrarian Law (BAL) (UU 5/1960) makes a basic distinction between private and public lands. Private lands, for the large part, include areas of permanent settlement and extensive permanent agriculture, where the State recognises individual rights in land as rights of private ownership (*hak milik*). All other lands, even where subject to leases, possessory rights, corporate use rights, usufruct or collective tenure according to custom, are deemed to be State lands.

In theory all land in Indonesia is zoned into the categories of private and public lands and all tenures registered in provincial and district cadastres. Authority for administering lands is vested in the National Land Agency (*Badan Pertanahan Nasional* - BPN). In practice, BPN barely has the capacity to deal with private tenures and corporate leaseholds. Year by year, the proportion of holdings registered by the BPN actually **decreases**, as the creation of new holdings outstrips the capacity of the agency to survey and register them.

The BAL recognises custom as a source of rights in land, subject to it being in the national interest. The main tenure provided in law for the recognition of collective tenures is *hak ulayat*, which is deemed to be a usufructory right on State lands. Regrettably no clear regulations for the recognition of *hak ulayat* have been developed, so these rights while affirmed in law have not been registered either as titles or in land cadastres.²⁴

4.2.2 Forest Tenure:

Following a legal tradition introduced by the Dutch, modified by the Basic Forestry Law of 1967 (UU 5/1967), all forests in Indonesia, whether on public or private lands, are subject to the jurisdiction of the Ministry of Forests. The current Forestry Act (UU 41/1999) distinguishes two forms of forest areas, namely forest areas 'with rights attached' called 'rights forests' (*Kawasan Hutan Hak*) and forest areas unencumbered with rights called 'State forest areas' (*Kawasan Hutan Negara*).

Confusingly, but consistent with the BAL which deems collective rights, such as *hak ulayat*, to be tenures on State land, the law recognises customary forests (*hutan adat*) as falling within State forest areas. Consistent with Article 18 of the revised constitution, the Forestry Act recognises *hutan adat* (customary forests) as being State forests located in areas of customary jurisdiction. In addition, the Act permits the

²³ Moniaga 2004.

²⁴ For a more detailed treatment see Colchester, Sirait and Wijardjo 2003:123-133.

establishment, of Special Purpose Areas within State Forest Areas, which may be allocated to local communities (Articles 8 and 34).

Under the Act, the Ministry of Forests has the responsibility to; determine which parts of Indonesia are ‘forests’ and assign them to the category of ‘forest areas’ (*Kawasan Hutan*); zone all these forest areas into conservation, protection, production forests; and then determine which areas are ‘rights forests’, and which are ‘State Forest Areas’ through the process of gazette. Following gazette, the Ministry then has the authority to lease concessions within State Forest Areas to individuals, private companies, cooperatives and State-owned enterprises. Concessionaires, in turn, then have the responsibility to survey, delineate and gazette their concessions, during which process they must identify and excise areas encumbered with rights, including *hutan adat*.

Today one of the main problems facing concessionaires in Indonesia is conflict with local communities which, for the large part, result from:

- ❑ The weak tenures accorded customary communities under the Agrarian and Forestry laws;
- ❑ The lack of clear regulations setting out how to recognise these albeit weak tenures;
- ❑ The confusion in the Forestry Law itself about which ‘areas with rights attached’ should fall within ‘rights forests’,²⁵ be classified as ‘customary forests’, or be classified as ‘Special Purpose Areas’;²⁶
- ❑ The lack of regulations for recognising ‘rights forests’, ‘customary forests’ and ‘Special Purpose Areas’;
- ❑ The inadequacies of the process of forest gazette;
- ❑ The inadequacies of the process of concession gazette;
- ❑ New laws which have decentralized some aspects of the State’s jurisdiction over lands, forests and other natural resources to district authorities;
- ❑ New laws which recognise the legitimacy and rights of local communities, which have yet to be accommodated by revised land tenure and forestry laws.

The following sections pick their way through this legal jungle, noting how the draft legality standard seeks to deal with the difficult issues which arise.

4.2.3 *Gazette*:

According to government statistics and data furnished by ICRAF, of the 122 million hectares of Indonesia currently ‘assigned’ as Forest Areas, only some 16% (ie some 19 million hectares) have so far been through the whole process²⁷ of gazette.²⁸

²⁵ UU 41/1999: Articles 1.5, 5.1.a. and 37.

²⁶ UU 41/1999: Article 1.6, 5.2, 5.3, 5.4, 8, and 34.

²⁷ The process includes **designating** forests according to their ascribed function, **delineating** the areas on maps, **demarcating** the areas on the ground and then making the areas subject to a specific **decision**, confirming that due process has been followed, which decision is then finally **recorded** in the official record (gazette).

²⁸ Fay and Sirait 1999; Fay, Sirait and Kusworo 2000; Fay and Michon 2004; Fay and White 2004.

Preliminary **impressions** of the data suggest that within these 122 million, there has been a higher proportion of gazettement of the 19 million hectares of conservation forests (*Hutan Lindung*), with the majority of the remaining areas of gazettement falling within the remaining 59 million hectares of Production Forests (*Hutan Produksi*). This means that over two thirds, and more likely some 80-90%, of timber concessions set up in production forests have been handed out without these forests being gazetted.

In accordance with the law, the draft Legality Standard requires completion of gazettement procedures, meaning that, were the Standard to be generally applied today, the majority of concessions would not pass an audit.

Insistence on correctness in gazettement procedures is a vital protection of community rights, as gazettement is the main process by which determinations are (meant to be) made about which lands are already encumbered with rights. Gazettement procedures involve elements of the Ministry of Forests, local government, the national land agency and, in the later versions of the regulations, require the participation and consent of local communities.²⁹

A correct application of the law should mean that forests gazetted as State Forest Areas do not include forest 'areas with rights attached'.³⁰ Accordingly, the draft Legality Standard does require evidence of due **process** in the gazettement, not just in terms of a signed document showing that the gazettement has been completed but in terms of the content of the minutes recording this process,³¹ which should show that adequate consultations were undertaken.

The third level of protection of local communities' rights in the forestry laws comes from requirements for the subsequent gazettement of the concession areas handed out in (theoretically) gazetted State Forest Areas. The procedures require concessionaires, subject to the approval of local government, local forestry officials and communities, to delineate, demarcate and register the boundaries of their concessions to ensure that they do not contradict provincial land use plans, overlap protection and conservation forests, nor overlap customary areas. The draft Legality Standard likewise requires fulfilment of these procedures.

According to ICRAF, the data currently available data from the Ministry of Forests records that only 47 of the approximately 600 logging concessions issued to date have fully defined their boundaries, representing only some 7% of production forests.³²

From a market perspective, the huge failures in forest and concession gazettement now pose a major problem for identifying 'legal timber'. Owing to lax performance by State agencies charged with gazetting forests and further problems gazetting

²⁹ Colchester, Sirait and Wijardjo 2003.

³⁰ Though *hutan adat* areas might still fall inside gazetted State Forest Areas.

³¹ *Berita acara tata batas (BATB)*.

³² Full definition of boundaries means that they have defined a closed polygon around their concession (ICRAF interview). GR 31/2001, requires that delineation be completed within three months of the issuance of concession licenses. Concessions issued between 1968 and 2001 should have been delineated within 3 years of issuance. If the laws were properly enforced, all HPH issued up until 2001, where delineation has not yet been carried out, are now forfeit (Colchester, Sirait and Wijardjo 2003).

concessions, very little if any timber extracted from production forests is strictly legal, according to the draft Legality Standard.

However, from a social development perspective, this very lack of gazettelement now presents an important opportunity for due process to be carried out and rights recognised. If the Legality Standard provides an incentive to government and concessionaires to recognise and regularise forest boundaries and community tenures, then it could have positive implications for forest-dependent communities (and see Local Solutions below).

4.2.4 Environmental and Social Impact Assessments: AMDAL

The draft Legality Standard also requires compliance with the social protections of the Social and Environmental Impact law and associated regulations. However, interviewees have little faith in AMDAL, believing them to be essentially paper exercises carried out by consultancies with little real consideration for communities and environments.

One NGO activist with considerable prior experience as an environmental impact assessor, noted that AMDAL offer inadequate protections and are just a formality. Even where companies and auditors have completed all the requisite documents – as required by the Standard also (AMDAL, the ANDAL, the RKL and RPL and the monitoring reports) – these provide no real evidence of what is being implemented. It is asserted that many AMDAL are developed mechanically ('cookie cutter' approach) with no real basis in local environmental differences. Assessors lack knowledge about local ecological differences and so are unable to discern matters of importance. Moreover, although compliance with AMDAL does require an identification of potential social impacts, there is no obligation to have a participatory process. Most of the assessment is left to the experts, who rely for the most part on the distribution of questionnaires in which the questions are pre-determined by the assessor. There are no requirements to hold public meetings. Cynicism about the value of AMDAL is widespread in NGO and academic circles.

4.2.5 Reform Processes:

Since the fall of Suharto and the upsurge of popular movements demanding recognition of their rights in land and forests, there has been a series of progressive reforms in administration, land tenure and natural resource law. The revised Constitution recognises the rights of customary law communities, which are also reaffirmed under the Human Rights Act. They are also implicitly affirmed through Indonesia's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on Biological Diversity. Legislative Act No. 9 Concerning Agrarian Reform and Natural Resource Management passed by the National Assembly (MPR) in 2001 (TAP MPR IX/2001), instructs parliament (DPR) to completely overhaul the natural resource laws in order to strengthen the rights of communities and resolve conflicts over resources. Among the laws, which logically require substantial revision in line with this Legislative Act is the Forestry Act (UU 41/1999). However, the past three years have seen little action by the Executive, notably the Ministry of Forestry, to follow up the requirements of TAP MPR IX/2001.

The Ministry of Forestry has recognised the need to resolve conflicts of interest in forests and deal with the pressing demands for recognition of land rights by local communities. A 'Working Group on Land Tenure' (WGLT) was set up under the Ministry of Forestry to look into these matters and advise on possible solutions, but progress has been stalled in recent months and now awaits the appointment of the new Cabinet. Meanwhile a new national commission on resolving agrarian conflicts (*Komite Nasional Untuk Penyalasan Konflik Agraria – KNUPKA*), working on the agrarian sector, is not in communication with WGLT.

In 2003, the MPR reviewed all its previous Legislative Acts to assess their continued relevance. The MPR found that, *inter alia*, TAP MPR IX/2001 was still valid. The body accordingly issued a further Legislative Act (TAP MPR VI/2003) which confirms that TAP MPR IX/2001 remains valid until new laws and regulations are in place dealing with these issues.

Further laws relating to lands and forests are now in various stages of preparation for consideration by Parliament. These include a revised Autonomy Act, a new Agrarian Reform Bill, which is already being discussed in the DPR, a Land Rights Bill still in draft form and a Natural Resource Management Bill, also still at a drafting stage. As and when these new laws come into force, steps will need to be taken to incorporate them into the Legality Standard.

It is important to note that the provisions of the Constitution, TAP MPR IX/2001 and TAP/MPR IV/2003 are more recent and of higher authority than the Forestry Act, which was hurriedly redrafted during the earlier phases of transition to democracy. Accordingly, where the provisions of the Forestry Act contradict or are inconsistent with constitutional or National Assembly provisions, it is the latter which should be observed.

4.2.6 Free, Prior and Informed Consent:

A key provision of the Legality Standard is the requirement for the Free, Prior and Informed Consent (FPIC) of local communities in decisions about issues such as: forest gazettement; concession boundary gazettement; developing management plans; the identification of communities and their customary rights. The drafting group of the Legality Standard concluded that FPIC is required under Indonesian law, in accordance with the Convention on the Elimination of All Forms of Racial Discrimination, the National Environmental Law, the Vulnerable Families and Populations Law, UU 41/1999 and the Convention on Biological Diversity.³³

Interviewees raised concerns about the extent to which communities would really be informed of their rights and of due process before giving consent and noted in particular that the provisions in para 3.1.1 of the Legality Standard are ambiguous or weak.

Other interviewees noted that changing the way that companies deal with communities will require a cultural shift – a change in corporate culture - on the part of companies and also communities. Strong State support for industry, coupled with

³³ UU 5/1994 made the CBD part of Indonesian national law.

legal obligations to treat the communities as objects of charity, rather than partners in development, has encouraged the development of patronising attitudes and dependency. According to some interviewees, expecting remote communities to speak their minds freely in such circumstances is unrealistic. It was noted that the audit will be unlikely to pick up on whether there is really consent unless long term field visits are made. To improve participation, information sharing and transparency it was recommended that social fora need to be established, like the regional consultative fora (*Forum Konsultasi Daerah*) required in LEI certifications.

In the absence of new legislation or regulations identifying who are community representatives, verifying whether consent has been given or not is an art and not a science. Certification bodies recommend that the social experts on audit teams should be in the field for 10-15 days in order to have any chance of getting a good sense of community feelings and should attempt to interview both traditional authorities (*kepala adat, dusuns* etc) and local government officials (*kepala desa* etc) as well as talking with the broader community. One interviewee noted that not all members of communities feel it is their place to express opinions about these matters and, especially in traditionally hierarchical societies, they customarily defer to traditional authorities.

4.2.7 Local Solutions:

The Ministry of Forestry recognises the problem of land conflicts in concessions. As noted above there are some major obstacles to resolving these issues. These obstacles include the absence of:

- ❑ revised national laws on lands, forests and natural resources;
- ❑ gazettment of forests
- ❑ gazettment of concessions
- ❑ clear regulations for the recognition of customary rights in land (*hak ulayat*)
- ❑ any regulations for the recognition of customary forests (*hutan adat*).

The issue is further complicated by the Autonomy Laws and ensuing legislation, which, in part, have granted greater authority to district governments to resolve land disputes.³⁴

In March 2004, the Minister for Forests issued an 'instruction' to the regional and local forest services recommending that *kabupaten* issue local laws (*Perda*) to recognise customary forests (*hutan adat*).³⁵

A number of interviewees agree that, in the absence of framing national laws and regulations, and taking into account the great diversity in the way customary rights in land are exercised and asserted, regularisation of customary rights through *Perda* offers the best existing way to legally secure community rights in lands and forests. Interviewees note that quite a large number of *Perda* are now in process that have

³⁴ For example, Presidential Decree 34/2003 on land conflicts gives *bupati* the responsibility to resolve land disputes.

³⁵ *Surat Edaran* 11 March 2004. An 'instruction' of this kind is a low level executive order. *Perda* on the other hand are genuine legislative acts, the DPRD being recognised elements of the legislature. However, some *Perda* have been disputed by central government on the grounds that they do not comply with national framework laws.

recognised community forests, lands and customary institutions. These include *Perda* that have been issued, or which are in draft, in Malinau, Kutai Barat, various parts of Lampung, Sekoh, Landak, Toraja, Badui, Wonosobo, parts of Aceh, Batu Kerbau (Jambi), Merangin (Jambi) and parts of Maluku. A detailed review of these *Perda* was beyond the scope of this study.

However, other interviewees question the feasibility of resolving land and forest disputes in this way. The following concerns were raised :

- ❑ lack of local government capacity and budgets at the local level
- ❑ lack of Ministry of Forestry officials at the local level
- ❑ many HPH overlap *kabupaten* boundaries, meaning that multiple *Perda* in different jurisdictions would be required to sort out conflicts
- ❑ procedures for the participation of local communities in the required 'land use studies' for defining *hutan adat* are not clear

4.3 Control of verification quality:

Widespread concerns were voiced by a number of interviewees and repeated in the workshop about how to ensure that auditors would rigorously and consistently apply the Legality Standard. It was suggested that, as in certification processes, procedures would be required to accredit verifiers and steps should be in place to ensure transparency and accountability of both the verification and accreditation processes.

Interviewees urged:

- ❑ wider stakeholder involvement in the audit process to ensure accountability
- ❑ openness of the process and the results to civil society monitoring,

Without agreed verification standards, accreditation, transparency and civil society participation, there is a risk that the legal verification processes, even if nominally 3rd party, will become perfunctory or questionable as is alleged is the problem already with the AMDAL, BRIK and LPI processes, which are widely seen by NGOs as tokenistic paper exercises that just affirm the status quo. A major area of concern voiced by interviewees, but outside the terms of reference of this study, concerns the rigour of chain of custody certifications, which some interviewees feel are not adequate to prevent the laundering of illegal timbers through certified or verified concessions.

4.4 How many people are likely to be affected? How widely is the Legality Standard likely to be applied?

To gauge the implications of the legal verification process for local communities, it is necessary to get some sense of both the applicability and likely up-take of the process by the government or by companies. For a number of reasons, noted below, most interviewees believe the number of independent legal verifications that will be embarked on in the short to medium term will be very low.

4.4.1 Forest-dependent communities:

Neither the Indonesian government nor researchers have reliable data about the number of people dependent on 'forests' in Indonesia. This fact has been repeatedly noted by analysts of the forest situation in Indonesia but never rectified. Guesstimates continue to be published that there are between 20 and 60 million forest-dependent people in Indonesia, but these figures should not be accepted as more than educated guesses. A concerted effort to document the numbers and situation of forest peoples in Indonesia is long overdue and is vitally needed if appropriate policy responses are to have sound basis in reality.

4.4.2 Numbers of HPH:

According to interviewees and documents in the grey literature, an estimated 600 HPH have to date been issued in Indonesia, with the maximum number of extant licenses at any one time being estimated at 450. Since the 1990s there has been a steep decline in the numbers of active HPH, from a peak of 450 to about 270 today, of which only about 60 are considered to be economically viable. Certification bodies suggest that only some 10-30 of current HPH have any chance of qualifying as legal under the draft Legality Standard and that even fewer are likely to apply for verification under current circumstances, unless verification were to become mandatory.

4.4.3 Trends within HPH:

Interviewees from NGOs and CBs also noted that the numbers of concessionaires asking for any kind of verification or certification is in decline. Researchers note that many HPH are in financial crisis at the moment. Problems of legal compliance, difficulties with local authorities and unresolved conflicts with local communities have brought many concessions to a near standstill. Illegal logging is so widespread that compliance with the regulations has become pointless and uncompetitive. In addition, the new 'Soft Landing Policy', which has reduced both annual allowable cuts and the extent of annual cutting permits, has reduced legal production from concessions by up to 40% per year. Increasingly, the main sources of timber in Indonesia are land clearance and illegal, often relatively 'small-scale', extraction. CIFOR observes widespread lay offs of workers in concession areas in East Kalimantan and Jambi.

In the circumstances some NGOs question whether the focus of the draft Legality Standard on regularising HPH is appropriate. Those relatively few large-scale HPH in good natural forests which may yet qualify for the assessment are mainly located in West Papua and the centre of Borneo. It is suggested that additional research on the legal framework under the Special Autonomy Law and on the populations in HPH in Papua, should be undertaken.

4.4.5 Market demand:

Currently the main demand for legal timber is coming from Europe and North America. Interviewees note that, by contrast, the main markets for Indonesia timbers are China (especially for illegally exported raw logs), Japan and Korea. Within Asian markets, that next most likely to start pressing for legality verification is Japan. The decision at the recent Asia Forest Partnership to institute timber tracking procedures and demand legal verification are considered to be political posturing for the large part and it may take (perhaps a long) time before they make a real difference on the market.

4.4.6 Community Forestry:

One of the most commonly expressed concerns about the current draft Legality Standard is that it does not address community based forest management. Concerns are voiced that by establishing standards only for HPH, HTI and IUPHHK, the Standard will send a signal to the Ministry of Forestry that large-scale forestry is more important than small-scale and community-based forestry. Conceivably, also, a widespread application of the Standard could disadvantage timber from Community-based Forest Management in the market place, which would be unable to gain equivalent verification.

However, there are a number of reasons for believing the draft Legality Standard will have little impact on community forestry options. The following considerations are advanced:

- Most timber from community forestry is for domestic markets which do not require legality certificates.
- Very few community forests could qualify for legal verification anyway as they are also located in ungazetted forests and, to a large extent, do not comply with the other requirements of the law.

4.4.7 Summary of extent of likely impact:

The immediate social impact of the application of the draft Legality Standard is not likely to be great unless it becomes mandatory. This is mainly because very few timber harvesting operations are likely to seek independent legal verification in the near future. The main reasons are that:

- Only a very few concessions have been legally established
- Even fewer manage their concessions according to the law
- Concessions are presently in recession
- Verification (especially if done in a socially sensitive way) is costly
- Verification, like certification, attracts exaggerated scrutiny from NGOs and provokes rent-seeking behaviour from local government officials
- Only a small proportion of the market (Europe and USA) is demanding 'legal timber' anyway.

4.5 Implications for Forestry Reform Processes:

Interviewees have very mixed views about the likely implications of the development and application of the Legality Standard for forestry reform in Indonesia. A strong view was expressed by the national environmental forum, WALHI, both in interviews and the workshop, that the whole campaign against 'illegal logging' and the corresponding demand for 'legal timber' is a diversion from the key challenge, which is to curb destructive logging. WALHI argues that given that the current forestry legal framework is flawed and part of the underlying problem of corrupt and destructive logging practice, efforts to enforce the current laws will only perpetuate this flawed forestry model. Far from being a step towards sustainability, the quest for legality is thus seen as, at best, a diversion or may even take forestry further away from sustainability by legitimising the HPH system.

A number of other interviewees expressed similar concerns, that an undue focus on shoring up the HPH system would only delay the major reforms in forestry law that are needed. The current forestry law, which anyway requires changing in accordance with National Assembly instructions, fails to take account of the rights of the millions of people who live in forests but instead favours the interests of big companies, economies of scale and big capital.

However, other interviewees think that insistence on legality could be a first step to forestry reform, could provoke a reassessment of the current laws and could lead to national and / or local solutions that will better accommodate local communities. Some argue that once it becomes clear that most HPH are illegal and most forests ungazetted, this will create greater space for reform and should lead the government to cancel or freeze the majority of concessions.

4.6 'Relevant' Laws: lowering the standards

Attempts to develop and impose a definition of legality in Indonesia confront the reality that full compliance with forest-related laws is improbable. It is extremely difficult for companies to comply with the jungle of laws relating to forests in Indonesia, because State compliance is lacking and because laws are contradictory, on the one hand, and because corporate culture in Indonesia has developed within a framework of impunity and an absence of the rule of law on the other. Laws relating to the rights and interests of local communities, especially those in forests, are among the least observed and most contradictory.

Officials crafting European procurement directives and laws on imports of 'illegal timber' recognise the difficulties of verifying the full legality of timber and only require compliance with 'relevant' forest-related laws. As yet, it is not clear what laws are considered 'relevant' and which may be ignored as 'irrelevant'.

A number of government interviewees and a spokesman for the timber trade at the workshop expressed the view that the draft Legality Standard is too high. The UK Timber Trade Federation actually favours a step-wise approach to legality, whereby companies would be encouraged to move by phases towards legality.³⁶ Some certifiers seem to share this view, arguing that companies need time to 'buy in' and are concerned that the draft Legality Standard requires companies to do 'too much, too fast'.

The risks for communities in such a step-wise approach are obvious, given that the aspects of the law that are most ambiguous or difficult to comply with are the social protections. Inevitably, step-wise legalisation will prioritise the interests of companies and leave the concerns and priorities of communities to be addressed later.

It would be extremely controversial for TNC, SGS/URS and DfID to accede to this approach, which would only confirm the sceptics in their view that the development and trial of a Legality Standard is designed to suit the interests of the timber trade and not to promote the sustainable development of rural Indonesians.

³⁶ TTF 2004a, 2004b..

5. Comparable Initiatives of legal verification and certification in Indonesia:

5.1 Other Legal Verification Processes in Indonesia:

Badan Revitalisasi Industri Kayu:

The Indonesian Institute for the Revitalisation of Forest Industry (BRIK) was established in 2002 as a parastatal agency charged with monitoring and verifying the legality of timber. To qualify for a legality certificate issued by BRIK (ETPIK certificate), mills must show: that all timbers coming into a mill were accompanied by transportation permits (SKSHH); how much timber the mill used; and how much processed timber it produced. Using these figures BRIK claims it is able to show that a mill is using only authorised timber and can issue a certificate accordingly.

According to interviewees, BRIK currently claims that Indonesian mills produce 50-60 million cubic metres of legal roundwood equivalent, even though the current Annual Allowable Cut from HPH is only 5.5 m³. BRIK explains the difference by stating that the other 45-55 m³ come from forest conversion, clearance of old oil palm plantations, rubber wood and from home gardens.

According to the government, ETPIK certificates can provide a full guarantee of the legality of all Indonesian processed timber exports. Personnel from research bureaux, development agencies and the European timber trade interviewed during this study have rather different opinions. BRIK is criticised by them, and in the grey literature of the international development agencies, as: ‘untransparent’, ‘questionable’ and ‘not credible’. It is notorious that the crucial SKSHH certificates, on which the whole BRIK system relies, are readily available on the black market. Doubts were expressed on whether the initiative will be sustained by the next government and it was pointed out that the scheme has no formal links with the MoU process.

Civil society groups note that BRIK was set up by the government without any consultation with NGOs and ORs and some consider the establishment of BRIK to be a ‘manoeuvre’ by the timber industry to reassure markets that Indonesia is tackling the problem of illegal logging. The main virtue of the BRIK system is said to be that it is fully computerised and, if it were made transparent, it could thus contribute to chain of custody verification. For the purposes of this study, BRIK is largely irrelevant, as it assesses legality after timber leaves concessions and thus has no bearing on issues of forest management and the legalities of extraction.

Lembaga Ekolabel Indonesia (LEI):

LEI already has its own system of ‘Legal Origin Verification’ (LOV), by which verifiers identify the sources of timber entering a mill and classify it according to whether it comes from forestry concessions, areas subject to clear-felling licences, district level clear felling licences or from unknown sources. The exercise has been piloted with APP and Indo-Kiap. LEI does not consider LOV to be a legal certification system, but merely a mechanism that provides partial information about wood origin. Thus, LEI leaves it to the companies to decide if timber from such sources is acceptable or not. The pilot exercises carried out under the LOV programme already show that there is a need for extensive multi-stakeholder involvement, if the real origins of timbers are to be known. However, according to LEI, these kinds of multi-stakeholder processes make companies ‘nervous’ and are ‘a

turn off' to those seeking verification. LEI notes that, up to now, it has not been promoting legal certification, as it expressly does not want to give credibility to disputed laws. However, the issue of whether in the future LEI should engage in this work is to be discussed by LEI at its upcoming general meeting in September 2004.

Tropical Forest Foundation:

The Tropical Forest Foundation is an international NGO with operations in Indonesia that promotes market based means of sustainable forest management. Having concluded that certification to FSC standards is beyond the reach of most concessionaires in Indonesia, it is developing 'step-wise certification', by which companies gradually improve step by step towards improved performance finally qualifying for full certificates over a period of several years. The first step in the process is for companies to adopt Reduced Impact Logging techniques.³⁷ Social considerations, such as community tenure and participation, do not form part of Reduced Impact Logging requirements except insofar as measures are taken to reduce direct impacts of livelihoods by routing skid trails around cultivated areas.³⁸ In the second stage, the companies submit to Chain of Custody (COC) audits, which check whether adequate measures are in place to ensure that timbers extracted from concessions can be identified through transportation, milling, processing and further transport to the point of export, without being mixed with other timbers.³⁹ In the third step, TFF assists companies to link to international markets and in the fourth stage full FSC certification is envisaged. TFF admits that it does not have social expertise among its staff as social considerations are not really their focus. According to TFF, community concerns are not introduced into their process of step-wise certification until the final stage of full FSC certification. TFF is now piloting legality audits between stage three and four with the help of the Dutch consultancy FORM.

In 2003, an earlier test of 3rd party legal verification was also piloted by TFF and WWF in West Kalimantan with the company PT Suaka Jaya Makmur (PT SJM). This initiative formed part of TFF/WWF's 'forest-market linking pilot project' and involved an experimental independent legal audit of the operation by Smartwood.⁴⁰ Some NGOs have criticised this, and similar schemes, for ignoring the underlying social conflicts in such concessions resulting from inadequate adherence to gazettment processes and others have condemned the scheme as 'greenwash'.⁴¹

Noting these concerns about the social implications of the pilot legal assessment of PT SJM and that a correct application of the forestry laws should exclude customary rights areas from State Forest Areas, the Indonesian Environment Forum, WALHI, wrote to the TFF and queried whether the communities near the PT SJM concession

³⁷ TFF 2003a.

³⁸ TFF 2004. cf Applegate, Putz and Snook 2004; *RIL and Certification Newsletter* 4 (1) July 2004.

³⁹ TFF uses FSC COC certification procedures, without using the FSC label. (FSC own documents note that 'Chain of Custody certification only guarantees that raw materials used in the manufacture of a product comes from certified forests'.)

⁴⁰ 'Rainforest Rescue', *Businessweek*, 27 October 2003; cf Poynton 2002.

⁴¹ 'Step Wise Approach to Certification Raises Questions', *Down to Earth Newsletter* No. 59, November 2003; Rainforest Action Network Press Release 18 August 2003, criticises a WWF/TFF 'certification' of reduced impact logging: www.ran.org/ran_campaigns/old_growth/indonesia/.

had been interviewed. Specifically, WALHI enquired whether the investigation had looked into points of legality relating to community rights.⁴²

In responding to these concerns, the Tropical Forest Foundation has noted that ‘the issue of legality was addressed at a general level’. The audit required that the company had a valid concession license and a valid cutting permit as approved by all three levels of Government. The assessment was ‘principally a ch[a]in of custody audit’ but also sought to assess that the company ‘was operating within the laws and regulations as mandated by the Ministry of Forestry and as pertaining to issues of planning, operations, reporting, and payment of royalties and taxes’. TFF explicitly noted that it ‘makes no claims with regards to community rights, adat rights, decentralization issues, or any related issues which are not universally accepted by all levels of government’.⁴³

Conclusion about alternative Legality Verification:

It can be concluded, from this rapid overview, that other efforts to legally verify timber in Indonesia do not seek to assess the legality of measures designed to protect the rights and livelihoods of communities in forests. In this sense, the draft Legality Standard developed under the MoU is far more consistent with the social development objectives of the Indonesian government and international development agencies, such as DfID.

5.2 Assessment of legality in existing certification:

Existing certification systems, such as those of FSC and LEI, do also examine legality issues but deal with them in different ways. FSC Principle 1 requires that:

Forest management shall respect all applicable laws of the country in which they occur, and international treaties and agreements to which the country is a signatory, and comply with all FSC Principles and Criteria.

However, Criterion 1.4 substantially qualifies this requirement, noting that:

Conflicts between laws, regulations and the FSC Principles and Criteria shall be evaluated for the purposes of certification, on a case by case basis, by the certifiers and the involved or affected parties.

Certification Bodies (CBs) interpret this as meaning that ‘the forest comes first’ and thus feel entitled to certify operations, even though they may lack certain legal approvals and permits, as long as the companies can show they have made repeated and good faith efforts to get them, which have been stymied by problems in the bureaucracy or the political apparatus. Given that FSC certificates are to encourage good forest management, not just good paperwork, in such circumstances CBs consider that certificates may be issued provided that the companies continue best efforts to secure the requisite permits. Members of the FSC secretariat confirm that

⁴² WALHI 2003.

⁴³ TFF 2003b (sic.).

Criterion 1.4 allows a measure of latitude in the interpretation of the legality requirement and that adherence to inappropriate laws can be waived. Ideally, agreements about which legal requirements can be overlooked is subject to agreement when national FSC standards are agreed. In the absence of such standards, waivers are decided on a 'case by case' basis. There is, as yet, no guidance on how this criterion should be applied.

LEI represents its own system as being more lenient than FSC noting that, under the Joint Certification Protocol, three companies which have passed LEI audits have failed FSC audits largely on legal grounds. LEI notes, for example, that it does not insist on full clarification of gazettement processes, **if** all the stakeholders in an area accept a forestry operation's presence. Likewise, LEI may not insist on full compliance with PMDH requirements, **as long as** the local communities are satisfied with alternative benefit-sharing provisions. LEI points out that, in any case, not all laws are conducive to sustainability. LEI's view is that it is *de facto* performance on the ground which is of overriding importance, as their objective is to promote a transition of forest management to sustainability and not just to legality.⁴⁴

LEI personnel interviewed emphasise the processual nature of LEI certification. LEI accepts that initial assessments may not be perfect but establishes consultation fora and review panels which can deal with difficulties and controversies that arise. LEI certification is thus seen as a mechanism for creating transparency and greater accountability, creating an arena in which disputes between concessionaires and local communities can be resolved. In this sense, LEI certificates have a lot in common with 'step-wise certification', being designed to incentivise progressive improvements in practice.

Indeed, LEI expresses concerns that 'legality certificates' could become a disincentive to companies to improve their forest management performance. If companies can secure access to markets as sources of 'legal timber', what incentives remain for them to become sustainable? LEI is concerned that legal verification will legitimise the current HPH system. In the view of LEI, if 'legal verification' is to go ahead it must be part of a phased approach which provides clear incentives to companies to move forward to sustainability or lose their certificates.

5.3 Comparison of draft Legality Standard with FSC requirements:

Currently there are no agreed FSC national standards for certification in Indonesia, nor has an initiative yet been agreed or set in motion to develop such.⁴⁵ As a result there is no national consensus about how FSC's Principles and Criteria should be applied in Indonesia, although it is agreed by FSC that developing such a consensus is desirable. Owing to the absence of such a consensus or procedure, there is neither a detailed guidance note nor any manual yet available, which set out which laws, regulations and permits are required of forestry operations in Indonesia for them to comply with FSC requirements. This makes comparison between the FSC system and the draft legality standard problematic.

⁴⁴ LEI is of the view that even though it does allow certain laws to be waived, its certificates should satisfy the requirements of the EU's procurement directive.

⁴⁵ See Colchester, Sirait and Wijardjo 2003: 182-243 for a discussion.

In the absence of an FSC national standard, the most comprehensive ‘locally adapted generic standard’ used for FSC certifications in Indonesia is that developed by Smartwood,⁴⁶ which besides restating, as required by FSC, the full FSC Principles and Criteria, also lists specific indicators that assessors must look out for in making assessments. A number of these indicators are drawn verbatim from LEI Criteria and Indicators.

The Smartwood ‘interim guidelines’ specifically note that:

*the purpose of the certification process is not to assess actual legal compliance; that is the mandated task of government institutions. But Smartwood must check with government agencies and other stakeholders to verify that an operation is dealing with legal requirements in a responsible fashion, and in some cases the field assessment may be a valuable way for helping operations improve the quality of compliance.*⁴⁷

Nonetheless, Smartwood’s guidelines require compliance with relevant national laws and with applicable international laws ‘including CITES, Convention on Biological Diversity and ILO 87 and 98’. The guidelines also require that ‘Human Rights are guaranteed’. Full compliance with a number of other provisions of the ‘Guidelines’, such as Principles 2 and 3 on Tenure, Use Rights and Responsibilities and Indigenous Peoples, would also imply compliance with a number of pieces of Indonesian law relating to gazettment, land rights, customary rights, and free prior and informed consent, although, as made clear above, in practice CBs may waive some legal requirements, which are considered to contradict FSC Principles. As Table 2 on the following pages shows, the legal requirements of FSC certificates and those for legality verification according to the SGS legality definition appear to be very similar.

It is, however, important to note that there are significant differences between Certification and Legal Verification as summarised in Table 1 :

Table 1: Comparison of Certification and Legal Verification Processes

Certification: FSC and LEI	Legal Verification: MoU LS
<ul style="list-style-type: none"> • Evolved outside govt- govt agreements • Encourages ‘best practice’ in a few forestry operations • Evaluates forest management unit not government performance • Not black and white: does not seek full compliance 	<ul style="list-style-type: none"> • Being developed within govt- govt. agreement • Applies to all large-scale forestry operations & aims to weed out the worst • Assesses legal compliance of operator and government • More black and white: either laws have been complied with or not

⁴⁶ Smartwood 2003.

⁴⁷ Smartwood 2003:5 (emphasis added).

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Table 2: Comparison of Legal Requirements relevant to local communities of FSC standards and MoU LS for HPH⁴⁸

Legal Requirements	MoU LS	FSC
<i>International Laws</i>		
CERD	√	√ P 2 and 3 set higher standards than CERD requirements on land and consent
CBD (UU 5/94)	√	√ P3.4 covers requirements for benefit sharing and consent for the use of traditional knowledge as per CBD 8j, while P2&3 cover requirements for recognition of customary use and rights in land as per CBD 10c
ILO 169	X (Indonesia has not ratified)	√ FSC requires compliance with ILO 169, even where this is not national law. Requirements in P2,3&4 are equivalent to ILO requirements on land and resource rights. Other elements in 169 are not fully addressed by FSC: eg re forced resettlement, exercise of customary law and representation through customary institutions. Most certification bodies have not yet integrated these requirements into locally adapted standards.
<i>National Laws and Requirements</i>		
UU 39/99 - Human Rights Act	√	√
Forest Gazettement (BATB)	√	√ This can be waived under FSC 1.4
Concession Gazettement	√	√ This can be waived under FSC 1.4
Valid HPH License	√	√

⁴⁸ Note the Table does not review workers' rights, although it is recognised that some members of local communities are likely to be workers on HPH.

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UU 5/1960 - BAL (To check HPH don't overlap lands in BPN records)	√	X
Check no overlap with RTRWP (UU 24/1992)	√	√
Check consistency with Provincial Land Use Map (PKHPP) (UU 47/1997)	√	√
Check no overlap with Hutan Adat or Ijin Hutan Kemasyarakatan	√	X
UU 27/99: AMDAL, ANDAL, RPL, RKL, Monitoring reports.	√	√
Free, Prior and Informed Consent ⁴⁹	√	√
Benefit sharing (PP 34/2002 & SK 4795/2002)	√	√
Relevant <i>Perda</i>	X	√

It is not yet clear whether certification to FSC standards will or will not satisfy the requirements of the EU procurement directive. A study into this issue is currently being carried out by the ERM and ProForest for the UK Department for Environment and Rural Affairs but the results of this study are not yet available.

⁴⁹ FPIC is required under CERD, National Environmental Law, Vulnerable Families and Populations Law, UU 41/1999 and CBD (UU 5/1994).

6. Conclusions and **Preliminary** Recommendations:

The Spirit and the Letter of the Law:

As far as its social content is concerned, the draft Legality Standard is the result of a concerted effort to take into account the need to protect the rights and livelihoods of local communities in forests. The fact that these protections remain somewhat weak and ambiguous, reflects the state of formal law in Indonesia rather than a lack of commitment to social issues on the part of those drafting the Standard. The Standard should evolve as Indonesian law itself evolves.

Indonesian law regarding the recognition of customary rights is in a process of change, in which new Constitutional provisions and reiterated instructions from the National Assembly have yet to find their way into implementing laws and regulations. It is thus essential that the Legality Standard seeks to work within the spirit of these new, higher laws and not be limited to the letter of outdated laws and regulations, which are already slated for reform. What this means, in practice, is that audits must take great care to assess: the observation of due process in gazettelement, in consent procedures and participatory mapping of customary rights areas (and see notes in Annex 3)..

If it can be applied in this way, then the Legality Standard could become a motor for progressive change, rather than being a brake on the reform process, as some Indonesian NGOs fear. Such a ‘pro-poor’ reform agenda is entirely consistent with the MoU Action Plan.

Resist pressure to simplify the legality standard:

Foreign markets, Indonesian concessionaires, some certification bodies and even some NGOs, are already pressing for a simplified or ‘partial legality’ standard that, they hope, will allow Indonesian timber unimpeded access to discerning markets. Given that it is the (anyway weak) social protections in the Legality Standard which are the hardest to meet, acceding to this pressure is likely to result in further weakening these aspects of the Standard. Giving in to this pressure would be a grave mistake. It would confirm the suspicions of elements of civil society, who are already concerned that the Legality Standard is designed more to suit the interests of industry than communities and fear that the Standard will reinforce an outdated, exclusionary forestry regime that causes impoverishment, social conflicts and forest loss.

Conscious Pilot: test, assess and learn

The draft Legality Standard does not yet enjoy widespread acceptance in government, private sector, certifier or civil society circles. Steps need to be taken to improve engagement in the process of developing and testing it. Until this is achieved, it will be advisable to continue to treat the Legality Standard as a preliminary draft, to be carefully piloted and assessed before wider consultations can be undertaken on the standard itself and the findings from pilot audits. If the results of these pilots are encouraging, wider ‘buy in’ may result.

Improve civil society participation:

Meantime, to counter the widespread perception among NGOs and ORs that the draft Legality Standard is a foreign imposition, developed only to suit the interests of overseas markets, a concerted effort needs to be made to ‘socialise’ the process. This is likely to be worth it in the longer term, even if it incurs some delays in the ‘finalisation’ of the standard and its deployment. The following are some suggestions for building greater engagement and consensus, which can be explored with local NGOs and ORs:

- Hold a series of informal mini-workshops on key issues of concern such as:
 - making the legality pilot tests contribute to the legal reform process
 - treating the lack of Gazettement as an opportunity for change instead of as an obstacle to progress
 - promoting local solutions through *Perda*
 - making FPIC work
 - developing a legality standard for community forestry
 - building transparency
- Conduct a Workshop with key Trades Unions to get their opinions on the draft Legality Standard’s protections of Workers’ Rights (see Annex 6).
- Hold a national workshop with a wider set of stakeholders following the pilot audit and social assessment.
- Strengthen links between the MoU team and MFP process.

A more participatory pilot:

To date, TNC and SGS/URS appear to perceive concessionaires as their principal partners in the pilot scheme and preparatory meetings have been held (and more are planned) to help the companies reach the standards required by the audit. However, compliance with the draft Legality Standard actually requires the effective engagement of local communities and government officials, if it is to be successful.

- Training workshops should be held with the communities in pilot audit areas, within and neighbouring the concessions, to inform them about the draft Standards and the audit.
- Indonesian NGOs specialised in dealing with communities could be sub-contracted to carry out these workshops in local languages.
- MoF partners from the MoU team, supported by TNC and SGS/URS specialists, should also carry out workshops with local officials who have relevant responsibilities to explain the draft Legality Standard and explain how it requires an assessment of compliance by government officials, not just the companies.⁵⁰

⁵⁰ These workshops with local officials should be aimed at improving compliance and local government support for the draft Legality Standard. However, the workshops could also be used to explain how the exercise is part of a gov’t-gov’t agreement including the MoF. Knowing they will also be subject to scrutiny might encourage local officials not to use companies’ preparations for audits as opportunities for ‘rent-seeking’.

Resolve tenurial disputes: explore local solutions

Unresolved tenurial disputes between concessionaires and local communities should be used as opportunities to develop consensus-based decisions, in line with progressive elements in the laws, as part of a process of legalising both community rights and concessions.

- Where gazettement procedures have not yet been carried out, carry out participatory workshops with local officials and communities to explain due process, before gazettement procedures are undertaken. This should result in forests and concessions being delineated, demarcated, decided and gazetted to exclude areas where communities have rights.
- On the other hand, in cases where faulty gazettements have already taken place, and which have failed to exclude areas of community rights, workshops should be held to prepare communities to negotiate with companies and local officials to establish the areas in which they have rights. Such negotiated settlements could then be submitted to *kabupaten* officials and DPRD for recognition of rights through *Perda*.

Socially sensitive audit procedures:

Resources should be provided to ensure that audit teams are well-qualified and prepared to carry out socially sensitive audits. Audit teams should:

- Include one or two persons with social science training and skills
- Spend several days in concession areas interviewing local communities and company personnel
- Ensure that the visit all the communities within a concession.

To avoid a conflict of interest, audit teams should not be the same company or persons who have been involved in providing management training or technical and legal advice to concessionaires.

Accreditation of Auditors:

A credible independent third party verification process will require accreditation of auditors by a fourth party (ie not by first and second parties, who by definition have a vested interest in the results).

Reinforcing Free, Prior and Informed Consent

The MFP should support the initiatives of international NGOs and Indonesian ORs to develop awareness within Indonesia, especially among *masyarakat adat* of the requirements and best practice procedures of Free, Prior and Informed Consent as an essential part of environmental governance.

Further research:

National NGOs and international research agencies like CIFOR and ICRAF should be encouraged to carry out research to document the numbers of people living in designated forest areas, including natural forests, degraded forests, agroforests, lands outside forest but classified as forests, and within concessions. This is a vital requirement if appropriate policy responses are to be developed to meet the needs of these tens of millions of people.

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Annex 1:

**Terms of Reference
Strengthening the Social Component of a Definition of Legal Wood Origin and
Production for Indonesia**

Prepared by The Nature Conservancy

Background and Purpose

The majority of wood cut in Indonesia is considered to be in various ways illegal by the Government and specialists. At the same time international markets, especially in Europe and North America, are making commitments to stop imports of illegal wood products. Forest products companies and other stakeholders need a practical, auditable, and meaningful (in the context of environmental sustainability and social justice) definition of “legal wood” to address these challenges.

Perhaps the most complex component of any definition for legal wood in Indonesia is dealing with social issues, including the rights of local and traditional peoples to ownership and/or control of their customary lands, proper consultation, prior informed consent, and a proper share of the benefits from logging operations in the vicinity of their homes. Indonesian law does address these issues to varying degrees, and the country is also a signatory to various international laws of relevance. Given longstanding and often violent conflict between communities, companies and the Government there are many deeply held beliefs in Indonesia about social justice and human rights as well as continuing flagrant disregard for them by some businesses and officials.

The purpose of this contract is to review work that the Nature Conservancy has recently completed in Indonesia in consultation with experts on social aspects of defining legality, to observe the application of this work in the field, and to recommend further changes to the definition and associated procedures for verification of legality. In addition, a workshop will be held in Bogor with Indonesian NGOs, legal specialists and others committed to reform of the forest products industry and to the recognition of community rights and social justice, to debate the new definition, its application and further improvements. The consultant will help to lead this workshop.

Specific Tasks

1. Review documentation including the draft definition, material that has been used to develop it, and the procedures to be used in its application.
2. Interview experts and stakeholders who have been involved in preparation of the definition or have a special interest in its content, including from AMAN, WALHI, DFID, ICRAF, Telapak and CIFOR to gather their perspectives.
3. Accompany field trials of the definition with auditors in East Kalimantan to independently observe its application.
4. Independently visit and interview local communities and NGOs in East Kalimantan to ascertain their views about company operations, legality and auditing procedures.
5. Based on 1-3 above provide a detailed critique of the definition and associated audit procedures, and recommend changes in the definition, guidance to auditors and related procedures. The critique should place the perspectives of local peoples and recognition of their rights within the context of the

constraints and priorities of other stakeholders (forest products companies, their markets, and the incipient regulatory and voluntary verification processes).

6. Help to plan and lead a 2-day workshop to be held at in Bogor to gain wider awareness of the definition of legal wood and further strengthen its content. This will include advising TNC on the agenda, participants, and style for the meeting, as well as making presentations and assisting with facilitation.

Outputs

1. A report detailing comments on the review of the documentation, relevant observations from the field and from interactions with stakeholders that would be relevant to efforts to improve the definition and associated auditing and timber tracking procedures.
2. Comments on the quality of the work of the third-party auditors and suggestions for improvement, as well as any other relevant observations
3. Comments on the definition, auditor guidance notes and related procedures documented in materials prepared by SGS/URS. This should include detailed suggestions, if any, for changes in the wording of the definition and the technical descriptions of the associated procedures.

Annex 2:

Revised TORs

Activity	Refer to / work with	Days	Start date
Review documentation including the draft definition, material that has been used to develop it, and the procedures to be used in its application.	Meet with some of the experts involved e.g David Brown, ICRAF, Jeff Hayward	3	26 Aug
Interview experts and stakeholders who have been involved in preparation of the definition in Jakarta and Bogor, and perhaps elsewhere by phone, or have a special interest in its content, including from AMAN, WALHI, DFID, ICRAF, other certifiers/verifiers, Telapak and CIFOR to gather their perspectives.		5	30 Aug
Comparison/mapping of FSC legality requirements with the 7 principles of MoU standard – if you met all of our 7 principles, would you automatically satisfy FSC requirements, and vice versa?	ISHA listing of all laws pertaining to timber legality in Indonesia, meetings with verifiers etc	4	4 Sept
Propose how AMAN, WALHI etc can engage constructively as the standard evolves. Advise TNC on how to proceed.			
Speak to SGS/URS re auditing procedures for social elements within the standard, advise TNC on improvements, review their proposed social auditing systems.		2	8 Sept
Based on above provide a detailed critique of the definition and associated audit procedures, and recommend changes in the definition, guidance to auditors and related procedures. The critique should place the perspectives of local peoples and recognition of their rights within the context of the constraints and priorities of other stakeholders (forest products companies, their markets, and the incipient regulatory and voluntary verification processes).		3	
Assist in detailed objective setting, planning and running of a workshop on 9 Sept., help get people to come and engage in the process, help design the agenda and process etc		3	9 Sept
Wrapping up after workshop with any follow up meetings		1	10 Sept
Writing up and discussion with TNC, DFID etc		1	
TOTAL		22	

Annex 3:

Trip time use report:

Two days of preparation, research and reading. Prepare draft outline of study.

- 26 August : Study documents (This continues throughout)
- 27 August : Set up meetings by email
- 28 August : Taxi to Oxford; Bus to Heathrow; Fly to Abu Dhabi.
- 29 August : Fly to Jakarta; Taxi to Hotel.
- 30 August : Visit TNC; Assemble documentation at TNC. Clarify TORs with TNC. Schedule Interviews. Prepare list of workshop invitees and recommend agenda changes.
- 31 August : Interviews with DfID MoU and MFP; Interviews with Smartwood; Interview with Institut Titian Perdamaian; Telephone interview with DK; Email to schedule interviews.
- 1 September : Interviews with WALHI; Interviews with Smartwood; Email to schedule interviews; Drive to Bogor.
- 2 September : Interviews with CIFOR; Interviews with ICRAF; Interview with LATIN; Emails to schedule interviews.
- 3 September : Interviews with LEI; Interviews with Telapak; Emails to schedule interviews.
- 4 September : Meeting with Rudy Lumuru and Norman Sawitwatch; Meetings with Nigel Sizer TNC; Chip Fay, ICRAF and Antoinette Royo, DfID; Write up.
- 5 September : Write up.
- 6 September : Write up; Schedule more interviews; Informal meetings with Forest Watch Indonesia, Greenpeace, FSC, AMAN, ICRAF.
- 7 September : Get lift with Yudi to Jakarta; Interview with TFF; Meeting in TNC; Interview with SGS/URS; Interview with Sandra Moniaga, HuMA; Meeting with Avi and Patrick; Taxi to Bogor.
- 8 September : Lunch meeting with Doris Capistrano, CIFOR; Interview with Moira Moeliono, CIFOR; Meeting with ICRAF.
- 9 September : Workshop in Bogor; Post Mortem with TNC.
- 10 September : Write up and analysis; Dinner with Chris and Patricia.
- 11 September : Write up. Meeting with AMAN.
- 12 September : Write up. Dinner with Luca and Lini.
- 13 September : Taxi to Jakarta. Meeting with WALHI. Taxi to airport; Flight to Abu Dhabi.
- 14 September : Flight to UK; Bus to Oxford; Taxi to Chadlington.
- 23 September : Telephone interviews with Hugh Speechly, Sofia Ryder and Alistair Monument.

On return: more days writing up.

Annex 4:

**Legality Standard for Timber Products from Indonesia
Draft Number 1.0: 26 May 2004**

**Principles, Criteria and Indicators of Legality for Forestry Operations
and Timber Processing in Indonesia⁵¹**

“Timber is legal when the validity of its origin, logging permit, logging system and procedures, administration and transport documentation, processing, and trade or transfer are verified as meeting all applicable legal requirements”⁵²

Principle 1. Land Tenure and Use Rights

The legal status of, and tenure rights to the Forest Management Unit⁵³ are clearly defined and its boundaries have been properly gazetted. The Company⁵⁴ has documented, legally established rights to harvest timber within those boundaries, and harvests timber only within those boundaries.

Criterion 1.1: Areas covered by HPH, IUPHHK or HPHTI or land managed by Perum Perhutani must be located in the permanent state forest zone. Land clearing associated with non-forestry activities that are nationally approved or authorized by district governments may only be located outside the permanent state forest zone.

- 1.1.1 If the Forest Management Unit is covered by a natural forest selective felling permit [HPH (IUPHHK pada HA)], an industrial timber plantation permit [HPHTI (IUPHHK pada HT)], or is licensed to the state-owned enterprise Perum Perhutani, it must be located within the permanent state forest zone.
- 1.1.2 Land clearing associated with nationally approved non-forestry activities or authorized by district governments may only be located outside the permanent state forest zone. Any declassification of land from forest to non-forest (such as agricultural plantations) must have taken place with the free and prior informed consent of local and adat communities, and be gazetted in a manner consistent with applicable regulations.

Criterion 1.2: The Company holds a license to harvest timber on the Forest Management Unit that has been formally approved by the appropriate government authority.

- 1.2.1 In the case of land in the permanent forest zone, the Company holds a valid HPH, HPHTI or IUPHHK that has been approved by the Ministry of Forestry and that has been issued only with the free and prior informed consent of all affected communities.
- 1.2.2 In the case of land that is not in the permanent forest zone and is subject to clearing for a non-forest use, or land in the permanent forest zone that is subject to clearing

⁵¹ This draft Standard is the outcome of stakeholder consultations carried out in Berau District, East Kalimantan and in Pelalawan District, Riau between April and June 2003. In addition, provincial workshops were held in Samarinda and Pekanbaru, and a national workshop was hosted in Jakarta in June 2003. Several individuals and organizations have contributed further to the Standard and guidance that accompanies it in preparation for field-testing of the system in Berau, starting mid 2004. Development of the standard was carried out under the auspices of the Indonesian Ministry of Forestry in close partnership with The Nature Conservancy (TNC) under the Indonesia-UK Memorandum of Understanding on Illegal Logging, with contractors SGS and URS Forestry. Financial support was provided by the UK Department for International Development (DFID), the US Agency for International Development (USAID) and The Home Depot. For comments or questions, contact Moray McLeish (TNC) [mmcleish@cbn.net.id] or Achmad Pribadi [adhi@dfid.or.id]

⁵² Final summary by participants at Stakeholder Consultation in Jakarta, June 2003

⁵³ “Forest Area” refers to the defined area of land from which the Company claims to have right to harvest timber and is subject to evaluation.

⁵⁴ “Company” refers the legally established body that claims authority to perform the forest, transport or processing operations under evaluation.

for HTI, the Company holds a (ILS) IPK for the area that has been approved by national and provincial, or provincial and district, forestry authorities, as required by national forestry law, and that has been issued only with the free and prior informed consent of the affected communities.

- 1.2.3 In no cases do the gazetted boundaries of a license area conflict with any land use classification in which the activities allowed under that license are prohibited.

Criterion 1.3: There are plans for the Forest Management Unit that meet all applicable government regulations.

- 1.3.1 Areas covered by HPH, HPHTI or IUPHHK have long term (20 year), medium term (5 year) and annual management plans approved by the appropriate government authority.
- 1.3.2 (ILS) IPK licensed areas have approved work plans (*Bagan Kerja*) to harvest trees from Conversion Forest for non-forestry purposes, or from Production Forest for industrial tree plantations.

Principle 2. Physical and Social Environmental Impact

The Company has an Environmental Impact Assessment (AMDAL) covering the Forest Management Unit that was prepared in the prescribed manner, and can demonstrate that it complies with all legal, physical, social and environmental requirements stated in the AMDAL, as well as all legal requirements for monitoring and associated reporting on implementation of the AMDAL.

Criterion 2.1: The Company has conducted a physical, social and environmental assessment of the forest operations and/or processing facility using the AMDAL Process as specified by Governmental Regulation No.27 of 1999.

- 2.1.1 The Company has a current government-approved AMDAL that was prepared in accordance with applicable regulations and covers the entire area of the licensed operations and includes an Impact Identification and Evaluation Report (ANDAL), an Environmental Management Planning Report (RKL) and an Environmental Monitoring Plan (RPL).
- 2.1.2 The Company has prepared all required Monitoring Reports based on the RPL of the AMDAL that demonstrate actions it is taking to mitigate environmental impacts and to provide social benefits.

Criterion 2.2: The Company provides for protection of endangered species, as listed in Indonesian Government Regulations 7 and 8 /1999⁵, whose range or habitat form part of the Forest Management Unit

- 2.2.1 The Company implements procedures to identify endangered species whose range or habitat occur in the Forest Management Unit and to protect those species and their habitats.
- 2.2.2 The Company implements procedures that demonstrate its compliance with Government Regulation 7 and 8 /1999.

⁵ Regulation to implement the requirements of CITES and the Convention on Biological Diversity

Principle 3. Community Relations and Workers Rights

The Company complies with all its legal responsibilities in ensuring the well-being of communities affected by its activities in the Forest Management Unit, its provision of services to local communities, and the well-being and safety of its workers and contractors employed in the Forest Management Unit.

Criterion 3.1: The Company has identified all communities affected by its activities in the Forest Management Unit and has obtained their free and prior informed consent to carry out those activities⁵⁵.

3.1.1 The Company has identified all communities affected by its activities in the Forest Management Unit and taken reasonable steps, including announcements in local media, to inform them about its planned activities.

3.1.2 The Company has held and documented the proceedings of public consultations with each community affected by its planned activities in the Forest Management Unit.

3.1.3 The Company has made good faith efforts to reach a consensus concerning implementation of its planned activities in the Forest Management Unit with each community affected by those activities.

Criterion 3.2: The Company has identified and documented the traditional rights of communities affected by its activities in the Forest Management Unit and can demonstrate that it respects those rights.

3.2.1 The Company has documented the traditional rights claimed by each community affected by its activities in the Forest Management Unit.

3.2.2 The Company has developed plans in association with affected communities that describe how areas and/or resources covered by traditional rights within the Forest Management Unit are to be managed, detailing use, access and any compensation arrangements.

Criterion 3.3: The Company has entered into and honors agreements with local communities (as distinct from affected communities) that clearly specify social benefits (such as health and community development) it will provide to them.

3.3.1 The Company has documented agreements with local communities that clearly describe social welfare and community development projects it will undertake for them.

3.3.2 The Company can demonstrate that it is implementing those agreements.

Criterion 3.4: The Company respects its employees' rights to organize and voluntarily negotiate their employment conditions in accordance with International Labour Organization (ILO) conventions 87 and 98, enacted through Law no 13/ 2003 on Employment.

3.4.1 The Company permits its employees to join recognized labor unions and can demonstrate that it does not discriminate against labor union members when making employment decisions.

⁵⁵ The concept of free and prior informed consent is part of the Indonesian legal framework and can be found *inter alia* within the following laws: National Environmental Law, Vulnerable Families and Populations Law, UU 41, 1999, Official Indonesian Ratification of the Convention on Biodiversity (CBD), Indonesian ratification of the International Human Rights Law.

- 3.4.2 When requested by a recognized labor union that represents its employees, the Company willingly enters into negotiations with that union and honors all agreements reached as a result of those negotiations.

Criterion 3.5: The Company complies with manpower regulations regarding worker safety and health, benefits in kind, minimum salary, termination and contractors' conditions, as specified in the TPTI or TPTJ, as applicable.

- 3.5.1 The Company pays its employees' salaries and provides them with benefits in kind in a manner that meets the minimum legal requirements as prescribed in Law 13/2003 (commencing with Article 88)
- 3.5.2 The Company implements clearly defined safety procedures as prescribed in Act 1/1970.
- 3.5.3 The Company ensures that all required safety equipment (APD) and emergency first aid equipment (P3K) are available and readily accessible for use at each work site within the Forest Management Unit and that they are used in an appropriate manner.
- 3.5.4 The Company ensures that all its employees are 15 years old or above, as prescribed in Law 13/2003, Article 68.
- 3.5.5 The Company does not require any of its employees to work more than 40 hours plus 14 hours overtime per week, and allows each employee to take 12 paid days off per year in addition to statutory holidays (Law 13/2003, Articles 78 and 79).

Principle 4. Timber Harvesting Laws and Regulations

The Company conducts all forest planning, harvesting and other activities within the Forest Management Unit in compliance with relevant government regulations.

Criterion 4.1: Harvest plans for the Forest Management Unit have been approved by the appropriate government authority and have clearly defined boundaries that show areas where harvesting is allowed and areas that must be protected.

- 4.1.1 Harvest plans (RKT and IPK – *Bagan Kerja*) have been formally approved by the appropriate government authority.
- 4.1.2 Harvest plans have clearly delineated boundaries that show areas excluded from harvesting such as buffer zones, steep slopes, critical habitats and areas of cultural significance such as adat areas and religious areas, or those of cultural significance identified in the planning phase.

Criterion 4.2: The Company implements harvest operations in accordance with the legally prescribed silvicultural system or the conditions for harvesting for land clearing as applicable.

- 4.2.1 Harvesting operations comply with the requirements listed in TPTI, TPTJ, PUHH (2003) documents for RKT licensed areas, or the applicable land clearing regulations for (ILS) IPK licensed areas.
- 4.2.2 All boundaries of licensed harvesting areas are clearly demarcated on maps of an appropriate scale and on the ground.
- 4.2.3 All equipment used in forestry operations complies with BPK requirements as specified in Ministry of Forestry Decree No. 428/KPTS-II/2003.
- 4.2.4 Data for all trees harvested as listed in the cruising report (LHC) are recorded in the (BU) as per PUHH (2003) requirements.
- 4.2.5 No harvesting operations have been carried out in any Exclusion Areas as shown in the approved Harvest Plan.

Principle 5. Forest Taxes

The Company pays all relevant legally prescribed fees, royalties, taxes and other legal charges related to its use of the Forest Management Unit and the timber extracted from it.

Criterion 5.1: The Company demonstrates that it has paid all applicable concession fees and taxes for its license covering the Forest Management Unit and the timber extracted from it. These include:

- IIUPH – Iuran Izin Usaha Pemanfaatan Hutan (Forest Utilization Business Permit Fees)
- DR – Dana Reboisasi (Reforestation Fund)
- PSDH – Provisi Sumber Daya Hutan (Forest Resource Royalty)
- PBB – Pajak Bumi dan Bangunan (Land and Building Tax)
- PPH 21 – Monthly Employee Withholding Tax
- PPH 22, 25
- Fees agreed upon with local communities

5.1.1 The Company demonstrates that payments for concession fees (HPH, HTI, IUPHHK), reforestation fees (DR), and resource taxes (PSDH) are current.

5.1.2 The Company demonstrates that payments for community taxes based on extracted volume of timber harvested and annual building tax (PBB) and other legal charges are current.

Principle 6. Log Identification, Transfer and Delivery

The Company ensures that all logs transported from the Forest Management Unit are properly identified, have correct associated documentation and are transported in accordance with government regulations.

Criterion 6.1: The Company ensures that all logs transported from the Forest Management Unit have the required physical identification.

6.1.1 All logs transported from HPH, IPK (ILS), IUPHHK areas are marked using the prescribed tags and paint and chisel marks that contain sufficient information to trace each log back to the compartment (petak) and to the RKT harvest tree.

6.1.2 All logs transported from HPH areas have a valid MoF hammer mark to verify government clearance at the log pond.

Criterion 6.2: The Company ensures that all logs transported from the Forest Management Unit are properly documented.

6.2.1 The Company records the transport of logs from log landings (TPn) to the [primary] log pond (TPk) using document DP.

6.2.2 The Company records the transport of logs through all further log ponds en route to the processing facility using SKSHH with attached log list (DHH) that is issued before those logs leave the Forest Management Unit.

6.2.3 All exemptions from use of documents listed in 6.1.1 and 6.1.2 must be documented with a valid government approval form.

6.2.4 Where the Company is a (ILS) IPK license holder it records the transport of logs from the Forest Management Unit to the processing facility using the Faktur, or SKSHH with attached log list (DHH) as appropriate.

Criterion 6.3: All organisations transporting timber products have valid licenses.

6.3.1 Organisations operating vessels or trucks for transporting forest products outside the Forest Management Unit have licenses issued by Ministry of Transportation for the Company and for each vessel or truck it operates.

6.3.2 Organisations operating trucks and loaders within the Forest Management Unit have licenses issued by the Ministry of Forestry for that equipment.

6.3.3 ORGANISATIONS TRANSPORTING WOOD PRODUCTS OUT OF A PROVINCE HAVE A PKAPT (REGISTERED INTER-ISLAND WOOD TRADER REGISTRATION NUMBER) ISSUED BY THE MINISTRY OF INDUSTRY AND TRADE.

Principle 7. Timber Processing and Shipping

Timber processing facilities and shipping companies have valid licenses and operate in accordance with relevant government regulations.

Criterion 7.1: Timber processing facilities, and companies engaged in trading or export of forest products comply with all legal requirements for their activities.

7.1.1 The timber processing facility has a legal license to operate based on its current capacity and legal BKPM that approves the investment.

7.1.2 The timber processing facility has an approved Industrial Raw Material Requirement Plan (RPBBI).

7.1.3 All organizations engaged in trading of forest products are registered with the Ministry of Industry and Trade and, if exporting processed wood products, have a registration number issued by the Ministry confirming its status as a Registered Exporter for Forest Products (ETPIK).

7.1.4 All raw material received by the wood processing facility must originate from one of the following sources: natural forest selective felling permit [HPH (IUPHHK pada HA)]; industrial timber plantation [HTI (IUPHHK pada HT)]; Perum Perhutani licenced area; land clearing associated with nationally approved non-forestry activities or authorized by district governments located outside the permanent state forest zone.

7.1.5 All logs in the log yard or log pond are accompanied by valid log transportation documents, and the information within these documents corresponds to the physical characteristics of each log.

Criterion 7.2: Organisations engaged in shipping of forest products for export can demonstrate their compliance with government regulations.

7.2.1 Each shipping company and its vessels are registered with the Ministry of Transportation (MoT)

Glossary of Terms and Abbreviations

AAC	Annual Allowable Cut
AMDAL	<i>Analisa Mengenai Dampak Lingkungan</i> Environmental Impact Document
Adat	Customary or Traditional law
ANDAL	<i>Analisa Dampak Lingkungan</i> Environmental Impact Assessment
APD	Safety Equipment
BK	<i>Bagian Kerja</i> Work Plan
BKPM	<i>Badan Koordinasi Penanaman Modal</i> Department of Coordination of Investment
BPK	<i>Dit Jen Bina Produksi Kehutanan/</i> Directorate General of Forestry Production Management
BSPHH	<i>Balai Sertifikasi dan Pengujian Hasil Hutan/</i> Forest Product Certification Agency
BU	<i>Buku Ukar</i> Daily Log measurement Report
Bupati	Head of Government at the District Level
CBD	Convention on Biodiversity
CITES	Convention on International Trade in Endangered Wild fauna and Flora
DBH	Diameter at Breast Height
DFID	Department for International Development
DHH	Product list that accompanies SKSHH
Dinas Kehutanan	Government Forestry Authority at the Provincial (<i>Propinsi</i>) or District (<i>Kabupaten</i>) level
DP	Log transportation document from log landing to log pond
DR	<i>Dana Reboisasi</i> Reforestation Fund
EIA	Environmental Impact Assessment
ETPIK	Registered Exporter for Forest Products
FMU	Forest Management Unit
HP	<i>Hutan Produksi</i> Permanent Production Forest

HPH	<i>Hak Pengusahaan Hutan/</i> Forest Timber Concession Permit
HTI	<i>Hutan Tanaman Industri/</i> Industrial Plantation Forest
IIUPH	<i>Iuran Izin Usaha Pemanfaatan Hutan/</i> Forest Concession Fee
ILO	International Labour Organisation
ILS	<i>Izin Lainnya Yang Sah</i> Permits permitted under PP No 34 , 2000
IPHH	<i>Izin Pemungutan Hasil Hutan/</i> Forest Product Collection Permit
IPK	<i>Izin Pemanfaatan Kayu</i> Land Conversion Permit
IUPHHK	<i>Izin Usaha Pemanfaatan Hasil Hutan Kayu/</i> Forest Timber Product Exploitation Permit
Kab.	<i>Kabupaten</i> District
Kec.	<i>Kecamatan</i> Sub-district
kawasan	State Forest Zone
LHC	<i>Laporan Hasil Cruising/</i> Cruising Report
LHP	<i>Laporan Hasil Penebangan/</i> Felling Report
LMHHO	<i>Laporan Mutasi Hasil Hutan Olahan/</i> Processed Forest Production Transportation Report
LMKB	<i>Laporan Mutasi Kayu Bulat/</i> Logs Transportation Report
MoF	Ministry of Forestry
MoT	Ministry of Transport
P2SKSHH	<i>Pejabat Penerbit SKSHH</i> Forestry Official for Issuance of Legal Forest Product Transportation Permit
P3K	Emergency First Aid
PBB	<i>Pajak Bumi dan Bangunan</i>

	Land and Building Tax
PCT	Potential Crop Trees
Petak	Block (usually 100 ha) used for inventory, planning, and operational control
PKAPT	<i>Pedagang Kayu Antarpulau Terdaftar</i> Registered Inter-Island Wood Trader
PMDH	<i>Pembinaan Masyarakat Desa Hutan</i> Forest Village Development Program
PPH	<i>Personal Withholding Tax</i>
PPN	<i>Value Added Tax</i>
PSDH	<i>Provisi Sumber Daya Hutan/</i> Forest Resource Royalties
PUHH	<i>Penatausahaan Hasil Hutan</i> Forest Use Plan
PUP	<i>Petak Ukur Permanen</i> Permanent sample plots
RKL	<i>Rencana Kerja Lima Tahunan/</i> Five-year Work Plan
RKAP	<i>Rencana Kerja dan Anggaran Pembelanjaan</i> Annual working plan and budget
RKL	<i>Rencana Pengalolahan Lingkungan</i> Environmental Management Plan
RKPH	<i>Rencana Kerja Perusahaan Tahunan</i> 20 Year Working Plan
RKPHTI	<i>Rencana Karya Perusahaan Hutan Tanaman Industri</i> Long term Forest and Industrial Plantation Management Plan
RKT	<i>Rencana Kerja Tahunan/</i> Annual Work Plan
RKUPHHK	<i>Rencana Kerja Usaha Pemanfaatan Hasil Hutan Kayu/</i> Overall Work Plan
RPBBI	<i>Rencanan Pemenuhan Bahan Baku Industri/</i> Industrial Raw Material Requirement Plan
RPL	<i>Rencana Pemantauan Lingkungan</i> Environmental Monitoring Plan
RTRWP	<i>Rencana Tata Ruang Wilayah Propinsi</i>

	Provincial spatial/land use plans
SAKB	<i>Surat Angkutan Kayu Bulat</i> Logs Transportation Permit
SAKO	<i>Surat Angkutan Kayu Olahan</i> Processed Timber Transportation Permit
SGS	Societe Generale de Surveilliance
SKAU	<i>Surat Keterangan Asal Usul</i> Certificate of Origin
SKSHH	<i>Surat Keterangan Sahnya Hasil Hutan/</i> Legal Forest Product Transportation Permit
SPP	<i>Surat Perintah Pembayaran/</i> Payment Order
SPSI	<i>Serikat Pekerja Seluruh Indonesia</i> Indonesian Laborers Union
TGHK	<i>Tata Guna Hutan Kesepakatan</i> Agreement on Forest Use Plan
TN	<i>Taman Nasional</i> National Park
TNC	The Nature Conservancy
TPk	Log Pond
TPn	Log landing in forest
TPTI	<i>Tebang Pilih Tanam Indonesia</i> Indonesian Silvicultural Tree Planting Scheme (selective cutting and planting system)
TPTJ	<i>Tebang Pilih Tanam</i> Silvicultural and Tree Planting Scheme (Selective cutting and line planting system)

Annex 6: Key Labour Standards to consider in reviewing labour protections.

Principles	International Standards
<i>Just Land Acquisition</i>	ILO Convention 169 (1989) on Indigenous and Tribal Peoples
	ILO Convention 117 (1962) Social Policy (Basic Aims and Standards)
	UN Convention on Biological Diversity (1992)
<i>Fair Representation and Participation of Indigenous and Tribal Peoples</i>	ILO Convention 169 (1989) on Indigenous and Tribal Peoples
	UN Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights.
<i>No Forced Labour</i>	ILO Convention 29 (1930) Forced Labour
	ILO Convention 105 (1957) Abolition of Forced Labour
<i>Protection of Children</i>	ILO Convention 138 (1973) Minimum Age
	ILO Convention 182 (1999) Worst Forms of Child Labour
<i>Freedom of Association and Collective Bargaining</i>	ILO Convention 87 (1948) Freedom of Association and Protection of Right to Organise
	ILO Convention 98 (1949) Right to Organise and Collective Bargaining
	ILO Convention 141 (1975) Rural Workers' Organisations
<i>Non-Discrimination and Equal Remuneration</i>	ILO Convention 100 (1951) Equal Remuneration
	ILO Convention 111 (1958) Discrimination (Employment and Occupation)
<i>Just Employment of Migrants</i>	ILO Convention 97 (1949) Migration for Employment
	ILO Convention 143 (1975) Migrant Workers (Supplementary Provisions)
<i>Protection of Plantation Workers</i>	ILO Convention 110 (1958) Plantations
<i>Health and Safety</i>	ILO Convention 184 (2001) Safety and Health in Agriculture