

A close-up photograph of a hand holding a piece of wood. The hand is in the foreground, slightly out of focus, and is holding a piece of wood that is in sharp focus. The wood has a natural, light brown color and a rough, textured surface. The background is dark and blurred.

The Application of  
FSC Principles 2 & 3  
in Indonesia

# Obstacles & Possibilities



# Executive Summary with Conclusions and Recommendations

Ethical consumers want to be assured, when they buy forest products, that they are not buying timber stolen from the lands and territories of local communities and indigenous peoples. The Forest Stewardship Council's (FSC) Principles 2 & 3 seek to provide that assurance. Anyone managing forests, who seeks to have the forests they manage 'certified' by independent certifiers according to FSC standards, must be able to demonstrate compliance with these (and all the other) FSC 'Principles and Criteria'.

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## FSC PRINCIPLES AND CRITERIA 2&3

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### PRINCIPLE #2: TENURE AND USE RIGHTS AND RESPONSIBILITIES

Long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established.

2.1 Clear evidence of long-term forest use rights to the land (e.g. land title, customary rights, or lease agreements) shall be demonstrated.

2.2 Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.

2.3 Appropriate mechanisms shall be employed to resolve disputes over tenure claims and use rights. The circumstances and status of any outstanding disputes will be explicitly considered in the certification evaluation. Disputes of substantial magnitude involving a significant number of interests will normally disqualify an operation from being certified.

### PRINCIPLE #3: INDIGENOUS PEOPLES' RIGHTS

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.

3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.

3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

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This study examines the obstacles and challenges to the application of these Principles and Criteria in Indonesia. A first part reviews the international experience with the application of these Principles and Criteria, while the main part of the report then examines the Indonesian situation.

### **International Experiences**

The study details how indigenous peoples' rights to their lands and territories and to free and informed consent are well established in existing and emerging norms of interna-

tional law. There has been considerable discussion about how these rights are applied in practice. Procedures for giving consent are greatly strengthened if land and resource rights are legally secure.

The study also reviews how Principles 2 & 3 have been applied in a number of other countries, which have been through lengthy participatory processes to agree how the FSC Principles and Criteria should be applied nationally and/or regionally. After reviewing the way Principles 2 & 3 have been adapted in Bolivia, Sweden, Canada's Maritimes and British Columbia, and Brazil, the study notes that:

- The agreement of national standards is a complicated process that requires detailed discussions with many local interest groups. Achieving consensus among these interest groups often takes many years.
- Criteria should be adopted which help clarify what constitute 'Major Failures' of compliance with each Principle.
- These national standard-setting exercises have given rise to the following interpretations of Principle 2 and its associated criteria.
- The aim of the principle is to ensure that there are no conflicting rights over the forest which is being assessed. It thus seeks to ensure that the rights of both the forest manager and local communities' are clearly established and that acceptable mechanisms are in place to resolve any conflicts in an agreed way.
- It applies to both indigenous peoples and other local communities and seeks to ensure that local communities' rights are legally secure and that the forest managers, if they are not the local communities, are not in conflict with these communities.
- Two interpretations of Principle 2 are possible. A 'strong' or 'legalistic' interpretation is that local communities customary rights must be legally established. A 'weak'

or ‘pragmatic’ interpretation is that only the forest manager’s tenure that needs to be legally established. Where this is not the local community, then local communities’ customary rights may be secured by other means.

- These rights should thus be secured through legal titles or else recognised in written agreements which are part of the management plan.
- The management plans likewise should incorporate agreed mechanisms for the resolution of conflicts.
- Conflict resolution mechanisms and negotiation processes should be participatory, transparent and, according to some national standards, should involve other civil society groups, such as NGOs and Trades Unions, to help ensure fair play.

With respect to Principle 3, the following guidance also emerges from these national experiences:

- The concept of ‘indigenous peoples’ needs to be applied in an inclusive way to embrace all socially marginalized groups with distinctive cultural identities and customary systems of forest management and use.
- Indigenous rights to land and resources should be legally recognized in a manner acceptable to the indigenous peoples. Without this clarity, conflicts or disputes are likely to arise.
- However, where legal recognition has not been achieved, national standard-setting bodies may accept other means for the recognition and respect of indigenous rights in order to allow certification to proceed, subject to indigenous consent and clearly agreed procedures.
- Where mutually accepted legal recognition of rights is not achieved, the extent of indigenous rights areas should be self-defined by the indigenous peoples concerned. They are not required to prove their rights over these areas in

court.

- Where indigenous peoples are not the forest managers, the extent of these rights should be formally recognized in written joint contracts ('agreements'/'protocols') agreed between the forest managers and the indigenous peoples. These areas should be mapped and the agreements documented and incorporated into management plans.
- One alternative is then to excise all these claimed areas from the forest management units.
- Alternatively, forest managers should then negotiate agreements with the indigenous peoples concerned, for the use of these areas.
- These agreements should also be included in the management plans.
- Mechanisms for negotiating these joint agreements should themselves explicitly recognize and respect indigenous rights and define clearly the roles of the various parties in future decision-making.
- These mutually agreed processes of achieving consent should be incorporated in the management plans.
- Likewise, management plans should also incorporate mutually agreed conflict resolution mechanisms, procedures for the documentation of sites of special value and mechanisms for agreeing and paying compensation for – loss or damage to livelihoods or natural resources or the use of indigenous knowledge.
- All such agreements should be without prejudice to any subsequent land claims negotiations with the government and should not imply any recognition by the indigenous peoples concerned of State ownership or rights to land or forests or imply the extinction of any indigenous rights.

## Indigenous Peoples in an Indonesian Context

Who are ‘indigenous peoples’ in Indonesia? International law, and notably the International Labour Organisation’s Convention No. 169, which has been endorsed by FSC, accepts the principle of self-identification as a fundamental criterion. In the past, the Indonesian government has rejected the term ‘indigenous peoples’ as applying in Indonesia. During the ‘New Order’, the government’s policy towards those it officially designated as *suku suku terasing* (isolated and alien tribes) sought their rapid assimilation into national mainstream society through forced resettlement and imposed economic and cultural change, while denying these peoples’ rights to lands and forests. An objective of the policy was to free up land and forests for logging and ‘national development’. The current policy towards *masyarakat terpencil* (remote communities) promotes their integration with less emphasis on forced change and more opportunities for participation but still does not address land and resource rights.

Recent years have seen the emergence of a national movement of self-identified *masyarakat adat* (peoples governed by custom), who are demanding recognition of their right to self-government, the exercise of their customary laws and the legitimacy of their customary institutions and rights to their lands and forests. The Indonesian government now accepts that these *masyarakat adat* are those referred to as ‘indigenous peoples’ in international discourse. Estimates of the numbers of these peoples in Indonesia’s forests are imprecise: it seems likely that between 30 and 65 million *masyarakat adat* have customary rights in Indonesia’s forest zone. The study concludes that it is these peoples whose rights are meant to be protected under Principle 3.

## Land Tenure and Resource Rights in Indonesia law

Indonesia has long given prominence to *adat* (custom) in the Constitution and other laws. Many peoples in Indonesia have customary systems of recognising collective rights in land, concepts which are commonly referred to as *hak ulayat*. The study examines in detail the extent to which these rights are recognised in national land and forestry laws. It seeks to answer the question, can indigenous peoples and local communities ‘legally establish’ long term tenure and use rights in forests (Principle 2) and have their rights ‘to own, use and manage their lands, territories and resources’ ‘recognized and respected’ (Principle 3). Even a short answer must be given in two parts depending on whether such security is being sought within or outside areas considered by the Ministry of Forestry to be ‘State forest lands’, even though the Basic Agrarian Law may apply in forests contrary to administrative tradition.

- Outside of State forests, the conclusion is that while the concept of collective land rights (*hak ulayat*) is recognized in Indonesian law, no **effective** procedures exist to secure these rights. Secure titles are only offered to individuals and even then the administrative procedures for securing land are deficient. All tenures in Indonesia are subordinate to State interests to a degree that far exceeds prevalent concepts of ‘eminent domain’.
- An unclear right of possession (*hak kempunyaan*) is recognized as applying to customary land but may not be registered in areas overlapping existing rights and concessions. The right has never been applied however.
- Inside ‘State forest lands’, legal recognition of proprietary rights is, by definition, impossible and customary rights are treated as weak forms of usufruct, which are subordinate to the interests of concessionaires. Legal recognition of communities’ land rights within forestry concessions

is not possible under current law.

- There are, however, a number of community forestry options which, while not recognizing the customary rights to 'own' lands, do offer a measure of management authority to communities. Although there are doubts whether these options are long-term enough to comply with Principle 2, some of these options may constitute a basis for the certification of community forestry.
- A more startling and unexpected conclusion has also emerged from this study. Perhaps the majority of forest concessions, including community forestry options, issued in Indonesia are of questionable legality owing to major deficiencies in the process of gazettment of forest lands. As a result of these procedural failures as much as 90% of 'forest lands' have never actually been properly transferred to the jurisdiction of the Department of Forestry. This implies that the great majority of State forests (and the concessions within them) are 'illegal' and therefore invalid in terms of Principle 2 and Criterion 2.1.

### **Customary Institutions and the Principle of Consent**

Free and informed consent is a central principle for FSC. Effective exercise of this right is a key safeguard that communities and indigenous peoples need to ensure that certified logging and plantation schemes do not violate their rights. Moreover, since in Indonesia legislative protections of land rights and customary rights are weak, absent or insufficiently enforced, then free and informed consent becomes the **central** safeguard for these communities. Can Indonesian communities exercise this right to protect their interests when dealing with forest industries seeking certification?

The following conclusions emerge from this section of the study:

- The extent to which local communities and indigenous peoples can exercise their rights to free and informed consent and to control forest management is limited in Indonesia, owing to both a legacy of repression and remaining institutional and legal obstacles.
- A uniform system of village administration was imposed in 1979, which disempowered customary institutions and disenfranchised community members. Although the Act was revoked in 1999, the majority of rural villages in Indonesia continue to be administered through the *desa* system.
- Under the *desa* system, communities are deprived of representative institutions with legal personality, which can sign contracts with forest management companies or pursue actions in the courts on behalf of community members.
- Concessionaires commonly retain, and pay for interventions by, elements of the State security services to resolve disputes and enforce their management regimes. A legacy of fear and distrust remains which discourages communities from exercising their right to free and informed consent.
- Recourse to the law is a difficult option for communities in Indonesia. Successive evaluations by international bodies concur that the courts system in Indonesia is in serious need of reform if the rule of law is to prevail.
- On the other hand, legislative and administrative reforms are underway to reform the system of village administration. Where these reforms have been carried through and the authority of customary institutions restored **to the satisfaction of communities**, then the basis for more equitable negotiations between communities and private sector companies may now exist.

- Participatory mapping by communities has proven to be a powerful tool that can provide the basis for negotiations between communities and government or private sector agencies over issues of land rights, resource access and boundary definition.

## **The Indonesian Experience with FSC Certification**

Based on detailed community-level workshops and a review of the publicly available literature, the study then looks at a number of case studies to get a clearer idea of the practical challenges for the application of Principles 2 & 3. It examines examples of local land claims and negotiation processes in KPH (Forestry Concessions in Java), HPH (Logging concessions on the Outer Islands) and HTI (Industrial Timber Plantations). The examples looked at include: Perum Perhutani in Java; PT Diamond Raya in Riau; PT Intracawood Manufacturing in East Kalimantan; and PT Finantara Intiga in West Kalimantan.

Six forest districts administered by Perum Perhutani for a time enjoyed FSC certification, issued by Rainforest Alliance Smartwood, though five of these districts have since lost their certification. Among the points for discussion, which emerge from this case, are the following (the relevant FSC Principles and Criteria are noted in brackets):

- Perum Perhutani has acquired long term use rights which have been clearly documented and legally established, however, no equivalent security is provided to the communities within these forests. (Principle 2)
- There is clear evidence that Perum Perhutani is authorized by government decree to hold long-term forest use rights thus apparently providing the company with legally secure tenure of their lands. However, this tenure is dis-

puted by affected villages on three grounds: that some State forests have annexed village lands; that customary use rights are not adequately recognized in other State forests; and PP is not sharing the benefits of these public forests with the people in line with the requirements of the Constitution. (P&C 2.1)

- The communities claim that some forests should be recognized as village lands and that they have ‘customary rights’ in other forests, but they are not being given the opportunity to ‘maintain control’ of these forests to the extent that they think is necessary nor have they delegated control to Perum Perhutani with their ‘free and informed consent’. (P&C 2.2)
- Major unresolved conflicts over tenure and use rights exist and no appropriate mechanisms are in place to resolve these disputes. (P&C 2.3). The fact that these disputes are of a very ‘substantial magnitude’ should by itself preclude certification under 2.3.
- Some of the communities in the area do claim to be *masyarakat adat*, suggesting that Principle 3 should apply in at least some community areas within the Perum Perhutani concession area. However, their rights to own, use and manage their lands, territories and resources are neither recognized nor respected by national or local laws nor by the company. (Principle 3)
- These communities are not being given the opportunity to ‘maintain control’ of the forests in which they claim rights nor have they delegated control to Perum Perhutani with their ‘free and informed consent’. (P&C 3.1)
- The communities do feel threatened and feel the operations have curtailed both their rights and their access to resources. (P&C 3.2)
- Routine recourse to the security services to resolve disputes has resulted in serious human rights violations including extrajudicial killings. This is inimical to ‘free and

informed consent’ and cannot be considered part of an ‘appropriate conflict resolution mechanism’. (P&C 2.2, 2.3, 3.1).

- Management plans have not clearly identified ‘sites of special cultural or religious significance’ in cooperation with the communities, nor are these area recognized or protected by PP staff responsible for forest management. (P&C 3.3)
- The communities point to the local regulation in Wonosobo (*Perda Kabupaten Wonosobo 22/2001*) as an example of a reformed legal and management regime compatible with their rights and aspirations.

PT Diamond Raya (PTDR) is the first HPH concession in natural forests to be FSC certified in Indonesia, in this case by SGS Qualifor. Six main issues for discussion emerge from the examination of this case:

- SGS Qualifor’s generic standards, notably the indicators, seem to be either ambiguous or weaker than the FSC Principles and Criteria 2 & 3.
- Given that PTDR’s concession is operating on a 35 year logging cycle, while the company concession only extends for 20 years, clarification is needed about what constitutes ‘long-term forest use rights’. (P&C 2.1)
- In the absence of secure and agreed legal rights to land, clear participatory mapping exercises are needed to help resolve land disputes to the satisfaction of all parties. (P&C 2.1, 2.2, 2.3)
- Clarification is needed about whether customary uses should be distinguished from customary use rights. (P&C 2.2)
- Prior agreement is needed through community fora to ascertain appropriate mechanisms for negotiation and the giving of consent. Agreements signed by *camat* (subdistrict administrators), in the name of the community, can

not be construed as consent. (P&C 2.2)

- Given the legacy of army violence and intimidation, dispute resolution mechanisms need to be very transparent and participatory. Long term capacity building of affected communities may be required to restore equitable relations between communities and forest managers. (P&C 2.3)

PT Intracawood Manufacturing (PTIM) has subcontracted part of a large concession from the para-statal company PT Inhutani I in East Kalimantan. The area so secured by PTIM entirely overlaps Dayak lands. PTIM has sought certification from two FSC accredited certifiers, SGS Qualifor and Rainforest Alliance Smartwood, but has not been successful. The case brings out the following issues for discussion:

- The absence of any legal process giving land security to indigenous peoples has contributed to serious confusions and disputes about tenure and access to forest resources. (Principle 2 and 3)
- Incomplete forest gazettement processes mean that concession rights are insecure and of uncertain duration. In this case, neither PT Inhutani I nor PTIM have fulfilled their obligations to delineate the boundaries of the concession. (P&C 2.1)
- There is a lack of clear evidence that the forest manager, PTIM, has long-term forest use rights to the land, owing to the fact that PTIM acquired rights from PT Inhutani I but, in the opinion of the regional forestry offices, PT Inhutani I's rights to the PTIM area have lapsed. (P&C 2.1)
- The conflicts of interest between the national, provincial and district forest offices further undermine the forest manager's security of tenure. (P&C 2.1)
- The entire concession area is claimed by indigenous

peoples but there is no evidence that PTIM's management plan 'recognizes and respects' these peoples' rights to 'own, use and manage' these areas.(P&C 3, 3.1)

- PTIM are alleged to have pressurized community leaders to repudiate their land claims. (P&C 3, 3.1)
- No agreements have been negotiated with the communities allowing PTIM to log the communities' areas with their 'free and informed consent' (P&C 2.2, 3.1)
- Appropriate mechanisms have not been established either to resolve disputes between PTIM and the communities or with the small-scale concessionaires.(P&C 2.3).

PT Finantara Intiga is a mainly foreign-owned plantation company seeking to develop softwood plantations on Dayak lands. The case illustrates many of the difficulties and contradictions in achieving a mutually acceptable application of the principles of respect for customary rights and free and informed consent in Indonesia.

- On the face of it, the land acquisition processes carried out for the PTFI development seems to have been respectful and consensual. Signed agreements were entered into, with benefits for both parties, and communities even celebrated customary land transfer ceremonies as a result. It is easy to imagine that a certification body shown this documentation and informed of the salient events could conclude that forest management is being carried out in accordance with the principles of recognition and respect for customary rights and free and informed consent. It is only when we look beneath the surface that it becomes plain that things are not so simple.
- The case shows how, even where a land acquisition process is undertaken with the aim of ensuring community participation, the lack of clearly defined land rights and the existence of imposed forest zoning processes substantially disadvantages communities in their dealings with

developers. Lacking strong and clearly recognized rights they accede to imposed plans against their inclinations.

- Cooptation of village leaders, through the imposed structures of the 1979 Land Administration Act and by paying prominent village members to negotiate on behalf of the company, means that decisions are taken and imposed without the possibility of consensus-building within the community first.
- Negotiations are made further one-sided by the fact that police and military personnel directly participate in land acquisition teams. Individuals rejecting land acquisition have suffered intimidation and discrimination. Community leaders feel isolated in such negotiations.

## **FSC Certification Procedures in Indonesia**

A major difficulty for FSC-accredited certification bodies operating in Indonesia is that there has not been, to date, any national standard-setting process nor has a national FSC initiative to develop such standards yet been set up. Indeed there are only 4 FSC members in Indonesia.

In the absence of national standard-setting processes, FSC requires certifiers to adjust their 'generic standards' to the country through a participatory discussion and due publication of the standards used. However, FSC accredited certifiers operating in Indonesia have not developed 'locally adapted generic standards' in accordance with FSC procedures and instead leave it to field assessors to use their own judgment to adjust the standards to the local situation in the field. Interviews with a number of these assessors reveal that they have diverse views of how specific criteria should be applied and they admit there are real difficulties applying FSC Principles and Criteria.

These findings pose a basic question for this study: where in the FSC system should these issues be resolved? Currently, they are being resolved in the field, during the actual implementation of certification by inspectors, and subsequent decision-making. This is the wrong place to solve such fundamental issues. The right place is to bring these discussions into the open, and to discuss them in the context of national standards development, not case by case in the context of the issue of individual certificates.

### **Prospects for Reform**

The study also examines current initiatives to reform the national legal and administrative framework regarding forests and forest based communities. The National Assembly has passed a decree (TAP MPR IX/2001) requiring a major change in natural resource management laws which would recognise customary rights in forests and to land in general. These reforms are now being resisted by the Ministry of Forests. New Autonomy Laws are now also changing the extent to which central or district level administrations will manage forests. Legal confusion currently prevails. Moves are being made to allow the registration of *hak ulayat* but the rights conferred by this recognition remain very weak and will not be strengthened unless the Basic Agrarian Law is changed. Forestry laws are also being reformed as a result of which more aperture now exists for a recognition of communities' rights in the spatial planning process, but the strength of these rights remains unclear. Meantime, as a result of decentralization, district legislatures are beginning to recognize the rights of local communities to land, to a measure of autonomy and to community forestry by passing local decrees. These may offer some security for communities during this period of political and legal uncertainty.

## Conclusions

FSC Principles 2&3 provide important provisions aimed at assuring the buyers of FSC certified forest products that they are produced in socially acceptable ways. The Principles provide four tiers of protection designed to ensure that the needs and rights of local communities and indigenous peoples are accommodated by forest management. The spirit of P2&3 is: first, to establish that customary rights of local communities and indigenous peoples are secure, preferably through formal, legal means; secondly, that there be locally acceptable mechanisms to ensure community control of forest management which may only be delegated through the principle of free and informed consent; thirdly, that acceptable dispute mechanisms are in place; and, fourthly, that the existence of serious unresolved disputes should 'normally' be grounds for refusing certification.

FSC national standards have been approved even in countries where the legal recognition of customary rights is unclear or uncertain. In these circumstances, the importance of the second line of protection, through exercise of the right to free and informed consent, becomes doubly important.

The general finding of this study is that the Indonesian State lacks effective measures for securing customary rights to land and forests. Moreover, it also lacks legal provisions that facilitate exercise of the right of free and informed consent. On the contrary, the prevalent development model, administrative system and legal framework deny customary rights, dis-empower customary institutions, and encourage top-down forestry, all in violation of internationally recognized norms. The current Indonesian forest policy environment is difficult for, even hostile to, certification to FSC standards.

However, the situation is not entirely bleak. Wide-reaching reforms are underway. Constitutional revisions and

National Assembly decisions are opening the way for a recognition of customary rights. Decentralization laws now provide for the possibility of a measure of self-governance by customary institutions. Local governments are beginning to pass local laws which recognize customary rights and promote community forestry options. Certification is increasingly favoured by the national government as a way for reforming forestry practice.

This final section first summarises the findings of this study with respect to the obstacles to the application of FSC Principles 2&3, reviews the reform options that may facilitate certification, and then makes recommendations about what should be done in the circumstances.

### **Current obstacles in law and practice**

This review has found a series of major obstacles to the application of FSC Principles and Criteria 2&3 in Indonesia. The most salient include the following:

- Current national land laws do not ‘clearly define, document and legally establish’ ‘long term tenure and use rights of local communities’.
- Nor do they provide the basis for such communities to ‘control to the extent necessary their rights and resources’.
- Customary (*hak ulayat*) rights are subordinated to State decisions and interests and do not confer the right of ‘free and informed consent’ on local communities. Communities are not entitled to reject the imposition of logging or other forms of state-sanctioned land use on their lands.
- The prevalent model of administration at the local level (the *desa* system) does not provide an appropriate mechanisms for the resolution of disputes. Coercive decision-making and intimidation by local administrators and security personnel is common. Legal processes are widely recognised as deficient and even unjust.

- Although the ‘customary rights’ of indigenous peoples to their lands and resources are nominally recognized in the revised Constitution, under the Basic Agrarian Law these are interpreted as weak rights of usufruct subordinate to State interests. Regulations for the definition of these areas are lacking.
- In State forest lands, under the Basic Forestry Law (No 41/1999), the customary rights of indigenous peoples and other local communities are further weakened.
- Proprietary rights in state forest lands are by definition excluded, meaning that long term tenure for local communities cannot be legally established, nor can the rights of indigenous peoples to own, manage and control their lands be legally asserted. Communities’ use rights are subordinated to logging.
- Likewise, under the Basic Forestry Law, the weak rights of usufruct of local communities do not secure their right to free and informed consent regarding logging or plantation operations on customary rights areas.
- Short-term community forestry concessions (HPHKM) can be leased on forest lands, but subject to strict government oversight and intervention.
- Logging and plantation concessions are routinely granted without consultation with local communities and indigenous peoples, much less their ‘free and informed consent’.
- On the other hand, application of the laws governing the zoning, delineation and gazettement of forest lands and forest concessions have often been incompletely adhered to. As a result as much as 90% of forest lands thought to be under the jurisdiction of the Forest Department are not legally so.
- Disputes between the central and local government administration over the legal status of forest lands and concessions is thus widespread.

### Prospects for legal and institutional reform

In recent years, there have been moves to reform laws and policies related to forestry and community rights. These reforms include the following:

- Constitutional provisions now endorse the international human rights regime and explicitly recognize the rights of indigenous peoples (*masyarakat adat*).
- The National Assembly has ordered the DPR and Executive to carry out far-reaching reforms of land tenure and natural resource management law to establish more equitable access to land and to recognize customary rights. The reform process has however been held up.
- The Regional Autonomy Act now paves the way for reforms of the local administration, which may allow the recognition of customary institutions. Where these reforms have been pushed through to the satisfaction of local communities, a more secure basis for the exercise of the right of free and informed consent may now exist.
- Participatory mapping techniques have proved their worth as effective mechanisms for documenting and recognizing the extent of customary rights areas.
- The decentralization laws may also give local government the authority to legislate on forest lands. Using this power some district level legislatures have begun to confer rights to community forestry (Wonosobo) or customary rights (Lebak) through local legislative acts (*Perda*).
- The reform process remains uncertain and a number of local government decisions regarding forests and rights in forests are now being contested by central government Ministries.
- The reform process, while encouraging, is not yet far advanced enough to provide a secure basis for certification except in some specific locales.

## Recommendations

### FSC certification in Indonesia

The social acceptability of FSC certification processes depends on the quality of the participation that leads to decisions. Where participation is weak or absent, national standard setting, forest management and certification assessments are all likely to fail to meet FSC's high standards.

The prevalent national policy and legal framework provides a very difficult context in which to carry out certification to FSC standards in Indonesia, especially with reference to FSC Principles 2 and 3. With a few local and disputed exceptions, current Indonesian laws do not provide the security that local communities need to establish clear rights to their lands and resources, to ensure that indigenous peoples' rights to own, use and manage their lands are recognised and respected, to exercise their right to free and informed consent and to control forest operations on their lands insofar as they affect their rights.

Reforms that are required include the following (the corresponding FSC P&C are indicated in brackets):

- Ambiguity about the boundaries of forest lands and concessions must be resolved through revised participatory land use planning, mapping, demarcation and gazettement processes (2.1).
- Enabling laws and corresponding regulations must be passed to allow the customary use rights of local communities to be defined, documented and legally established so that they can maintain control to the extent necessary to protect their rights in forests (2, 2.2, 3.1).
- Laws must be amended so that customary rights holders can represent themselves through their own representative institutions and so that these are assured legal personality and can thus enter into negotiated agreements with forest managers where they choose to delegate control

- with free and informed consent (2.2, 3.1).
- Forest and land tenure laws are amended to provide effective mechanisms for the recognition and respect of the rights of *masyarakat adat* to own, use and manage their lands, territories and resources in forests (3).
  - Current concessions established on indigenous peoples' and local communities' customary lands and rights areas, without their free and informed consent, should be revoked (2.2, 3.1).

The investigation is therefore driven to conclude that, according to a strong reading of FSC Principles 2 & 3 and a literal application of these Principles, certification to FSC standards in Indonesia is currently not possible. It will not become possible until substantial national and local legal, institutional and policy reforms take place, such as those outlined above.

This conclusion may seem harsh, litigious, unhelpful or unrealistic.

Indeed, it is not clear to the authors that a legalistic and inflexible application of the FSC Principles to the Indonesian case is the best way forwards. Many of the problems in forests in Indonesia, indeed, derive from a top-down, prescriptive application of laws and standards, which do not give scope for local solutions. Indonesian civil society groups themselves stress the importance of a flexible recognition of customary law. Strict and legalistic requirements of documentary proof of tenure can be a problem for local communities seeking secure access to forests based on customary law and oral culture.

A more flexible and locally-adapted interpretation of FSC Principles 2 & 3, it can be argued, should allow FSC certification, even in the absence of unambiguous, legally defined rights, if forest managers, certification bodies, in-

indigenous peoples and local communities agree on how to interpret the P&C to suit local realities and if clear measures are taken to go beyond what the law currently allows or requires.

The question then arises: who should make these judgments and how?

The current situation is that there has been no national FSC initiative in Indonesia to develop national standards. There are only four FSC members in the entire country. Moreover, the certification bodies have not themselves adopted 'locally adapted generic standards' in accordance with FSC processes. Currently, judgments about how FSC P&C should be interpreted in Indonesia are being made by certification teams in the field. This is leading to certification decisions being contested by local communities and NGOs, a situation that is neither useful for forest managers, certification bodies nor the FSC and which risks discrediting the whole process of certification.

This situation is not satisfactory and is contrary to established FSC procedures. Local interpretation, of how FSC Principles 2 and 3 should be applied, require detailed local discussions, with the full and informed participation of affected communities and indigenous peoples.

A major conclusion of this investigation is therefore that an urgent and required next step must be to embark on a national dialogue to decide how and whether to promote voluntary certification in Indonesia using international standards such as those of the FSC. Until such a national dialogue has been held and a national consensus achieved on the way forward, FSC certification processes in Indonesia should be suspended.

At the multistakeholder dialogue held in Jakarta in January 2003 to discuss the first draft of this study, this recommendation was fully endorsed by the local community, indigenous peoples' and NGO representatives present. How-

ever, a number of spokespersons for certification bodies and the FSC spoke out against this recommendation, claiming that without certification Indonesia's forests would be trashed as there would be no incentive for improvement of forest management. This is to misunderstand the recommendation, which is that there be a pause in the certification process while the uncertainties about how to go ahead with certification, which this study has identified and which are causing such contention, are resolved.

It is our view that a temporary suspension would focus the minds of those committed to improvements in forest management in Indonesia to find solutions to the problems that have been identified. A pause would thus hasten not delay development of good guidance and a reformed certification process. Agreements must be found about how to:

- legally establish secure tenure for concessionaires;
- establish mechanisms for ensuring that local communities with customary rights control forest operations that affect their rights;
- ensure recognition and respect the rights of indigenous peoples to own, use, control and manage their lands, territories and resources
- and establish verifiable and meaningful procedures for ensuring free and informed consent of forestry operations on local communities and indigenous peoples' lands.

Until there is agreement about how these principles and criteria should be complied with in the Indonesian context, we consider that it is irresponsible to recommend that FSC certification should continue. A national dialogue is, in our view, absolutely necessary to address these issues, for to press ahead without this is to risk further problems with the interpretation of P 2&3 in Indonesia, provoke more conflict in concession areas, bring further discredit to certification among consumers, and generate growing doubts about

FSC's ability to respect the views of indigenous peoples, who are the primary rightsholders in forests. These are serious issues which cannot be brushed aside and must be agreed through a national dialogue.

We do not seek to pre-judge the outcome of such a national process. The following recommendations are thus offered as proposals for discussion by the national dialogue.

- An inclusive national level dialogue should be carried out to establish whether there is wide enough support for establishing a national FSC initiative. A successful dialogue will depend on indigenous peoples' and local communities' organizations, and other civil society groups having the time, capacity and resources to engage in it.
- If a national FSC initiative is decided on, a reasonable number of national organizations would need to become members of FSC for it to be credible.
- Consideration should then be given to the chamber structure of such a process. Should the process have the standard three chamber process (economic, social and environmental chambers) or (as in Canada) include a fourth chamber for 'indigenous peoples'?
- The term 'indigenous peoples' used in FSC Principle 3 should be understood as referring to *masyarakat adat* in Indonesia. Self-identification should be a fundamental criterion for establishing which groups are referred to as such.
- 'Customary rights' areas should be established through community-based mapping exercises.
- In the absence of effective national legal reforms that recognize the rights of local communities and indigenous peoples to their lands, recognition should be sought through the following steps:
  - Recognition of rights through a local decree (*perda*) and/or through the determination of the boundaries of rights areas through participatory mapping.

- Community rights areas should either be managed by the local communities themselves or excised from the concessions of other operators or else managed by these other operators according to agreements negotiated with the rights holders.
  - Where community rights areas are to be managed by other operators, the full extent of community rights areas should be formally recognized in negotiated agreements agreed between the forest managers and local communities and/or indigenous peoples. These areas and agreements should be incorporated into management plans.
- Serious thought needs to be given to how such negotiated agreements can be made binding in the Indonesian context. Signed agreements registered by a local notary have been suggested as one option in community consultations. Additional measures will be required to give the representative institutions of the local communities and/or indigenous peoples legal personality.
- ‘Appropriate’ dispute resolution mechanisms may include the submission of disputes to the adjudication of *adat* councils and customary decision-making fora. Agreement about such mechanisms must be part of negotiated agreements and made explicit in the management plans.
- All such agreements should be without prejudice to any subsequent land claims negotiations between the communities and government.
- Transparent mechanisms should be developed at the forest management level to ensure that civil society institutions are able to monitor certification processes and forest management agreements.<sup>1</sup>
- The experience of the Indonesian Ecolabelling Institute with standards development and with regional consultative for a should be taken into account.
- Appropriate national standards should be considered for

promoting the certification of community-based forest management.

### **Recommendations for the Government**

This investigation has concluded that internationally credible certification is unlikely to become widely established in Indonesia without substantial reforms to recognise and respect the customary rights of local communities and indigenous peoples (*masyarakat adat*) to their lands and forests and to give them legal standing so they can negotiate agreements with forest managers.

In line with the Constitutional commitment to recognizing the rights of indigenous peoples, the government should:

- Ratify ILO Convention 169/1989 on Indigenous and Tribal Peoples in Independent Countries.
- Ratify the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.
- Through a participatory process of legal reform, promulgate national laws in accordance with these international laws and constitutional provisions to:
  - Recognize the rights of local communities and indigenous peoples to own, manage and control their lands and forests
  - Recognize their rights to self-governance
  - Revoke current laws and executive decisions which violate these rights
  - Implement Agrarian and Natural Resource Management Reforms in line with TAP MPR IX/2001, including a revision of the Forestry law which currently classifies *adat* land as State forest lands.
  - Ensure the legal delineation and gazettement of State forest land in agreement with neighbouring communities

according to the correct procedures before handing out concessions to these areas.

- Conflict resolution and negotiation mechanisms should be adopted, which do not rely on security forces and/or violent actions.
- Human rights violations associated with land and natural resource conflicts should be addressed as a matter of priority.
- Procedures to excise customary rights areas from concession working areas should be implemented.
- In future, concessions should not be handed out without the free and informed consent of affected local communities and indigenous peoples.
- Programmes to develop national mandatory certification should take into account the conclusions and recommendations of this investigation and ensure that standards include respect and recognition of the rights of indigenous peoples and local communities, in particular their rights to their lands and to free and informed consent.

## **Recommendations for FSC**

### *Specific recommendations related to Indonesia*

- If the national dialogue decides to promote a national FSC process, then FSC should openly support and encourage the setting up of a national FSC initiative in Indonesia. It should ensure that this national initiative is developed strictly in accordance with FSC guidelines.<sup>2</sup>
- In the meantime, it should immediately call on accredited certification bodies to suspend certification in Indonesia until the national initiative reaches a consensus on the way forward.

### *General recommendations*

- The FSC should amend the definition of ‘indigenous peoples’ given in the glossary of its Principles and Criteria to reflect the advances in thinking made at the UN Working Group on Indigenous Populations and, in line with the FSC Board’s decision to operate in conformity with the ILO Conventions, should give due recognition of the right to self-identification.
- The FSC Board and Assembly should give careful consideration to the way it promotes certification processes in countries without existing national standards, especially in developing countries.
- Given the difficulties which this study has highlighted in applying international standards to local realities, the FSC Board should consider halting certification in developing countries in the absence of FSC-approved national standards agreed through national FSC initiatives.
- Alternatively or in addition, the FSC should take strong steps to prohibit accredited certification bodies from carrying out certification in such countries relying on their generic standards.
- If (which we do not recommend), the FSC decides to continue to allow certification in the absence of national standards, strict mechanisms must be applied to ensure that certification bodies develop ‘locally adapted generic standards’ as required.
- FSC Guidelines for the development and dissemination of such draft ‘locally adapted generic standards’ should be strengthened to ensure that there is genuine local consensus among key interested parties for the application of these standards. Strong local objections to the procedures or standards being used should normally be grounds for the suspension of certification processes.
- FSC Guidelines should make stronger requirements of

national working groups and certification bodies that their certification standards and procedures clarify what constitute ‘major failures’ in compliance, especially with respect to Principles 2&3.

- Through participatory dialogue among FSC members, make clear whether Principle 2 requires that the customary rights of local communities need be ‘legally established’ or this provision only applies to forest managers.<sup>3</sup>
- Complaints procedures should be made more accessible and agile, so local communities and indigenous peoples can raise concerns about certification decisions directly with the FSC.

### **Recommendations for Certifiers**

- Accredited certification bodies should suspend certification activities in Indonesia, pending a decision from a national FSC initiative on the appropriate way forward.
- No certifications should be made in developing countries without strict adherence to FSC requirements regarding the development of ‘locally adapted generic standards’.
- Generic standards should be revised to make clear what constitute ‘major failures’ in terms of compliance with Principles and Criteria 2 and 3.



Photo: Sawit Watch Doc.



## 2 Introduction

## Why this study?

When the Forest Stewardship Council (FSC) was first founded in 1993 at an international meeting held in Toronto, a number of non-governmental organisations (NGOs) and Indigenous Peoples Organisations (IPOs) from South East Asia expressed the view that certification could not be an effective tool for forestry reform in their countries. In their view, the lack of political space in national ‘democratic’ processes, the endemic corruption in the timber industry, the institutionalised denial of indigenous peoples’ rights and the prevalence of patrimonial political systems would undermine any efforts to apply internationally agreed standards effectively.<sup>4</sup> Some of these NGOs retain this view today.

Others, however, have been persuaded that independent third-party certification can, potentially, provide a useful means of improving forestry standards, even in the context of South East Asia. So long as there is vigilant adherence to FSC’s principles, criteria and procedures, they believe, the pressure from vested interests to distort certification processes can be held in check. Certification, as proposed by FSC, involves the genuine involvement of three ‘chambers’ of ‘stakeholder’ groups, representing ‘economic’, ‘social’ and ‘environmental’ interests and the ideal of FSC is that through dialogue these groups should find common ground on national certification standards which accommodate the interests of all parties. There is an expectation, therefore, that certification according to FSC standards can empower hitherto marginalized groups, offering them new political space to push for a recognition of their rights and concerns in both specific forestry operations and in national laws and administrative systems.

During the mid-1990s, in both Indonesia and Malaysia, national processes got underway to develop certification standards, initially independently of the FSC process. The

FSC secretariat has made a strong effort to marry these national processes with those of FSC. Progress has been uneven but, at least initially, indigenous peoples were involved in these national dialogues.<sup>5</sup> At the same time, there have been complaints about the certification of a number of forestry operations in Indonesia, some of which have been withdrawn as a result.<sup>6</sup>

In Indonesia, annual rates of deforestation have exceeded a million hectares a year for over a decade and are now believed to be well over 2 million hectares per year.<sup>7</sup> Forestry malpractice has made a major contribution to this loss both due to wasteful and destructive logging and lax compliance with the regulations on forest conversion.<sup>8</sup> It is now recognised that the almost annual fires, which destroy huge swathes of forests, are largely caused by poor forestry and corrupt plantation companies.<sup>9</sup> There have been persistent complaints that the rights of indigenous peoples are systematically denied and conflicts between forestry operations and local communities are reported from all over the archipelago.

Those with expectations that the 'reformist' administrations of President Habibie (1999-2000), President Wahid (2000-2001) and President Megawati (2001- present) would address head-on the crisis confronting Indonesia's forests have however been disappointed. Indeed, the economic crisis, coupled with precipitate moves to grant district level autonomy and decentralize the administration of forestry operations, has caused a startling increase in rates of forest loss and uncontrolled logging. It is now estimated that over 60% of timber extraction in Indonesia is 'illegal'.<sup>10</sup> On the other hand, the emergence of a new vigorous movement of indigenous peoples demanding effective recognition of their customary rights has not yet led to real change on the ground.

Faced with this worsening situation, in March 2001, Indonesian environmental and human rights organisations,

backed by international NGOs, called for a moratorium on logging in Indonesia, to give time for a proper reform of forestry policies in the country and for the elaboration of new laws and more effective administrative processes to apply them.<sup>11</sup> On 21<sup>st</sup> April 2001, many of the same NGOs, also called on FSC to suspend the processes leading to certification of industrial logging operations in Indonesia, until such a time as certifications could be carried out reliably. In discussions with the secretariat and board of FSC, the NGOs asked that an independent study be carried out of the obstacles and challenges to the application in Indonesia of FSC Principles 2 & 3, which relate to indigenous peoples and other local communities, the legal establishment of their customary rights to their lands and resources, and which assert the principle that logging should only go ahead on their lands subject to their free and informed consent. This study has been commissioned and carried out as a direct consequence.

In response to these demands and other appeals, FSC has called on its certifiers not to certify new logging operations in Indonesia, until this study is completed.<sup>12</sup> As well as recognising the importance of this study being independent of those with financial interests in certification, FSC has also lent its support to this study by: making recommendations for the terms of reference; helping raise funds for the research; advising on suitable consultants for the research.

The study has been jointly sponsored by WALHI, the Indonesian Environmental Forum, and AMAN, the Alliance of the Indigenous Peoples of Indonesia. It has been commissioned by WALHI and AMAN and carried out under a joint WALHI/ Rainforest Foundation project titled ‘Analysis of FSC Principles 2 and 3 Relative to Indonesian Laws and Reform Processes’. The study has been funded by the UK Department for International Development (DfID) and the

Ford Foundation. Additional support for the study was facilitated by FSC and came from the German Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH. Workshops associated with the study have been supported by DfID, Ford Foundation, GTZ and NORAD.

The research team comprises the following individuals:

- Marcus Colchester, Team Leader (Director, Forest Peoples Programme, UK)
- Martua Sirait, Researcher (Land Tenure Programme, International Centre for Research in Agroforestry, Bogor)
- Boedhi Wijardjo, Researcher (Executive Director, RACA, Jakarta)

Between January and November 2002, the team also included the certification consultant, Matthew Wenban-Smith, specifically to provide guidance on the application of certification procedures. Matthew later took up a position as Head of Policy & Standards Unit at FSC. In November 2002, he chose to withdraw from the project in recognition of a potential conflict of interest. His valuable influence and insights have nonetheless been critical to this study and the discerning reader may yet detect his contributions.

The research has comprised:

- a broad-ranging literature and legal review;
- carrying out interviews with a wide range of stakeholders, including government officials, forest managers and concessionaires, assessors and inspectors working for certification bodies, NGOs and community members;
- community workshops in four very different areas:
  - with the communities bordering the certified concession of PT Diamond Raya in Riau Province;
  - the communities in Blora district, Cepu KPH, where the forests are managed by Perum Perhutani;
  - communities in Sanggau in West Kalimantan, whose

lands have been incorporated into a plantation scheme by PT Finantara Intiga;

- communities whose customary lands overlap the the PT Intracawood concession in East Kalimantan.
- original research was also carried out of the forest classification and gazettement system and of Forestry Department regulations concerning the obligations of concession holders

The report has been designed as a tool to inform all those actively involved in certification processes about the obstacles and challenges to the application of FSC Principles 2 & 3 in Indonesia: it is targeted, equally, at Government officials and policy-makers, accreditation bodies, certifiers, concessionaires, NGOs and indigenous peoples. It is also hoped that the report will provide useful background for those who deal with timber certification processes in other parts of the world where indigenous peoples' and local communities' rights are imperfectly secured.

Ever since its inception, many FSC members had hoped that certification process would promote a greater respect for the rights and interests of people who make their livelihoods from forests. Many had also hoped that certification would stimulate community-based forest management. In the event, the FSC has had difficulty ensuring that social issues get full prominence. The social chamber of the FSC has relatively few members, especially from the South. The high costs of developing certifiable forest management plans, and of certification itself, have favoured large-scale operations. In addition the main demand for certified timbers is in Northern markets. As a result 86% of certified areas are located in developed countries and over 90% are managed by corporations.<sup>13</sup> The Board of the FSC has been making efforts to redress these imbalances. The FSC's support for this study

can be seen as part of this effort to give greater prominence to social issues in certification.

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### WHAT IS THE FOREST STEWARDSHIP COUNCIL?<sup>14</sup>

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The Forest Stewardship Council is an international non-profit organisation founded in 1993 to promote environmentally appropriate, socially beneficial, and economically viable management of the world's forests.

It is an association of Members consisting of a diverse group of representatives from environmental and social groups, the timber trade and the forestry profession, indigenous peoples' organisations, community forestry groups and forest product certification organisations from around the world. Membership is open to all who are involved in forestry or forest products and share its aims and objectives.

Members are the organizations highest authority and exercise their authority at 3-yearly General Assemblies where decisions are made by vote. Members are categorised into three Chambers made up members with social, environmental and economic interests. Each chamber has an equal proportion of the vote and votes are also shared equally between North and South. The FSC membership elects 9 members to form its Board of Directors, who are responsible for approving all FSC national or regional standards, approving all FSC certification bodies, and recognising any national FSC initiatives.

The Board of Directors appoints an Executive Director, who runs the day to day business of FSC together with a permanent staff of about 20 people. The permanent staff are currently based in Oaxaca, Mexico and Bonn, Germany.

FSC aims to provide a truly independent, international and credible labelling scheme on timber and timber products and provide the consumer with a guarantee that forest products bearing the FSC label have come from a forest which has been evaluated and certified as being managed according to agreed social, economic and environmental standards.

FSC has developed procedures and standards to evaluate whether organisations (certification bodies) can provide an independent and competent forest evaluation (certification) service. This process is known as 'accreditation'. FSC accredited certification bodies are required to evaluate all forests aiming for certification according to the FSC Principles and Criteria for Forest Stewardship. Accredited certification bodies may operate internationally and may carry out evaluations in any forest type. Certified forests are visited on a regular basis, to ensure they continue to comply with the Principles and Criteria. The performance of the certification bodies is monitored by FSC through periodic reviews. Products originating from forests certified by FSC-accredited certification bodies are eligible to carry the FSC-logo, if the chain-of-custody (tracking of the timber from the forest to the shop) has also been certified by an accredited certifier.

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## THE CERTIFICATION PROCESS

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FSC does not evaluate forest management or issue forest management certificates directly. This work is carried out by FSC approved ('FSC-accredited') certification bodies. The detailed procedures for each certification body are different. However, all FSC-accredited certification bodies have to comply with the requirements of the 'FSC Accreditation Manual', the

certifier's guidelines and the certifier's contract. The 'Accreditation Manual' is designed to incorporate the requirements of the international standards organisation, ISO, as well as the policies of FSC. Only the main features are described here.

Firstly, the certification body has to check whether there is already an approved FSC standard, or an approved 'FSC national initiative', in the country in which it is going to work. If there is, then the certification body works with the approved standard, and/or consults with the national initiative. In Indonesia there is currently no FSC national initiative or national standard. However, FSC has agreed to work closely with Lembaga Ekolabel Indonesia (LEI). All FSC-accredited certification bodies operating in Indonesia have agreed to carry out their evaluations together with a team of nationals approved by LEI and using the LEI forest management standards (see below for further details).

Before carrying out a full evaluation, the certification body usually carries out a 'pre-evaluation' or 'scoping' visit to the forest - to interview the forest managers, identify the main issues related to implementation of the FSC Principles and Criteria, identify potential stakeholders, and to consider logistics for a full evaluation. In the absence of an FSC approved national standard the certification body has to seek comments from national stakeholders on its own 'generic' standard, and has to demonstrate that it has considered these comments in order to develop a 'locally adapted' generic standard.

The certification body then puts together a team of professionals with expertise in forest auditing, environmental issues, social issues and traditional forest management requirements such as silviculture or harvesting. The size of the team depends on the size and complexity of the forest operation being evaluated, but the team must always include people with previous experience in the country, knowledge of the language of the country, the forest management

system being implemented, and the local forestry context.

The inspection team makes the arrangements for the inspection, including consultation with forest stakeholders. This might include interviews by telephone or in person, public meetings, informal ad hoc meetings during the evaluation, and comments being received by post or e-mail. The team may split up in order to carry out the evaluation itself, with different team members looking at different aspects of management. The team's objective is to determine whether the forest management complies with the 'locally adapted generic standard' - which itself is designed to ensure compliance with the FSC Principles and Criteria for Forest Stewardship.

After the evaluation the certification body prepares a detailed report for the forest manager, which presents its findings. The objective of the report is to demonstrate how the forest management complies with, or fails to comply with, the standard used for the evaluation. Different FSC-accredited certification bodies have developed different methodologies for coming to a final certification decision. Some certification bodies score the forest management unit's performance on each criterion, and then combine the scores to come to a final decision (e.g. SmartWood); others require substantial compliance on every criterion (e.g. SGS-Qualifor).

It should be noted that FSC does not require perfect compliance with FSC Principles and Criteria. While 'Major Failures' of compliance disqualify forestry operations from being certified, the FSC system permits 'minor failures'. The exact definition of a minor failure varies between certification bodies. The objective is that if a forest management unit complies with the standard in spirit and practice, despite occasional lapses or mistakes, or some areas in which improvements are agreed in advance, then a certificate can still be issued. In this case the certificate may be issued on the basis of agreed

conditions for improvement. The forest managers are contractually obliged to meet such conditions within a specified time frame. If the improvements are not implemented then the certificate should be suspended and subsequently withdrawn.

If a certificate is issued, then the certification body must make a public summary of the certification evaluation report, and the final version of the 'locally adapted generic standard' on which the certificate was based publicly available.

The public summary must show, at least, the basis for the certification decision in terms of each of the FSC Principles. It must also include any conditions on which certification was based. The public summary has to be updated annually to show how the forest management unit is progressing to comply with any conditions that were issued. The public summary must be made available in the national language of the country in which the certificate was issued. Procedures exist for any member of the public to raise concerns about the issue of the certificate, with the forest manager, the certification body, or, ultimately, with FSC itself.

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## **Terms of Reference for the Study**

The specific terms of reference for this study was to undertake an analysis of FSC's Principle 2 and 3 relative to relevant Indonesian laws and relevant ongoing reform processes - in order to determine under what circumstances these principles could be implemented in Indonesia. The study was to examine in particular the Forestry Act, the Basic Agrarian Law and the Local Administration Act as well as relevant ongoing reform processes such as processes for the recognition of Customary Forests (*Hutan Adat*) and the enactment of a new more encompassing "Natural Resources Act". Additional objectives set out in the Terms of Reference included:

- Inform the FSC and LEI of debates around the issues covered in FSC Principle 2 and 3 internationally, with reference also to relevant conventions such as ILO 169, and other international legal provisions.
- Provide insights into concepts such as “free and informed consent” (P 2.2 and P 3.1.) and how this concept relates to Indigenous Rights and implementation of the Principle 2 and 3 of the FSC... Provide guidance and identify the mechanisms by which free and informed consent and representativeness may be evaluated by certification bodies in relationship to the implementation of Principles 2 and 3.
- Inform the FSC of the status of land and resource rights under current legislation in Indonesia, by referring to the Basic Agrarian Law/Forestry Act and other relevant laws – and their application. The study should aim to explain relevant concepts such as “State land”, “Private Land” and “Tanah/Hutan Ulayat”, as well ongoing reform processes related to land tenure, and outline this relative to Indigenous Rights and the Indonesian Constitution.
- Discuss the relevance of the regional autonomy process in Indonesia, and what problems and possibilities this raises for certification efforts.
- Determine what requirements would be necessary to make it possible for logging concessions in Indonesia to comply with Principles 2 and 3, including possible legal and political reforms, and describe the status and relevance of relevant ongoing political and legal reform processes in Indonesia.

The study should provide specific recommendations concerning:

- Under what possible circumstances Principles 2 and 3 can be implemented in the current legal and political situa-

tion, and in what kind of operations that could be possible.

- What requirements would be needed in order to implement FSC Principles 2 and 3 in community forestry operations, as well as in concessions (KPH, HPH, HTI etc) in Indonesia (to be listed).
- At what level of decision-making these different requirements must be agreed and implemented, and what the current status is. Indicate which organisations or bodies would have responsibility for addressing these requirements, indicate what the current status of these is, and make recommendations for how they may be advanced.

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## FSC PRINCIPLES AND CRITERIA 2&3

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### PRINCIPLE #2: TENURE AND USE RIGHTS AND RESPONSIBILITIES

Long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established.

2.1 Clear evidence of long-term forest use rights to the land (e.g. land title, customary rights, or lease agreements) shall be demonstrated.

2.2 Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.

2.3 Appropriate mechanisms shall be employed to resolve disputes over tenure claims and use rights. The circumstances and status of any outstanding disputes will be explicitly considered in the certification evaluation. Disputes of substantial magnitude

involving a significant number of interests will normally disqualify an operation from being certified.

### PRINCIPLE #3: INDIGENOUS PEOPLES' RIGHTS

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.

3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.

3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

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## **FSC and the Lembaga Ekolabel Indonesia**

An analysis of FSC-based forest certification in Indonesia would be incomplete without consideration of FSC's relationship with Lembaga Ekolabel Indonesia (LEI) a non-governmental organisation set up in 1996, as an Indonesian response to growing international demand for certified timber from Indonesia. The relationship between FSC and LEI is relevant because the two systems aim to achieve similar ob-

jectives, and make use of similar standards. Furthermore the two systems are formally linked through the 'Joint Certification Protocol' signed by LEI and FSC in 2000, and subsequently updated in October 2001.

Like FSC, LEI has developed standards for the evaluation of forest management (see 2.3.1 below). LEI also approves inspection bodies to carry out forest evaluation, and in doing so acts like an accreditation body. Certification inspections and initial decisions are carried out by the LEI-approved inspection bodies (referred to by LEI as 'certification institutions').

LEI decisions are made in a two-stage process. The decision is initially made by an 'Expert Panel' made up of individuals appointed by the inspection body. The Expert Panel follows guidance provided in LEI's 'Intensity Scale' which distinguishes between 'excellent', 'good', 'fair', 'poor' and 'bad' performance by the forest management unit compared with each LEI Indicator. By combining performance on all criteria, a decision is made resulting in the award of 'gold', 'silver', 'bronze', 'copper', or 'zinc' certifications. A certificate is only awarded to companies that achieve the bronze level or higher.<sup>15</sup> Certificates may be awarded to operations failing to comply with some criteria so long as the overall score is considered adequate.

LEI differs from FSC in reserving to itself direct involvement in certification decision making through its 'Certification Advisory Board'. This Board takes on the role of 'confirming' the certification decision and acting as an 'appeals' mechanism for certification decisions. If the LEI Certification Advisory Board concludes that the Expert Panel's decision was incorrect, the Board has the power to revoke the certificate.<sup>16</sup> LEI developed its standards between 1996 and 2001. Standards were developed in consultation with, and subsequently approved by, a broad range of forest stakeholders.

LEI standards are similar to FSC's in that both cover economic and social, as well as environmental considerations. The LEI standards were developed with input from Indonesian forest stakeholders and provide a greater level of 'Indonesia-specific' detail than the FSC Principles and Criteria. The FSC Principles and Criteria and LEI Criteria, Indicators and Verifiers are quite similar with regard to content. However, *both* standards include a number of words which require close consideration to understand how they should be implemented in practice. For example, both standards refer to 'control' by local 'communities'.

The FSC Principles and Criteria refers to 'free and informed consent', whereas the LEI Criteria, Indicators and Verifiers refer to boundaries being 'approved by' interested parties. FSC refers to 'appropriate mechanisms' to resolve disputes, and LEI refers to 'appropriate solution procedures'.

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## THE JOINT CERTIFICATION PROTOCOL (JCP)

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FSC and LEI have maintained close contact during the development of their respective systems. In 2000 this cooperation was formalised by the signing of a 'Joint Certification Protocol' (JCP), subsequently updated in October 2001. Under the Joint Certification Protocol, LEI-inspection institutions and FSC-accredited certification bodies agreed that they would not issue certificates in Indonesia unless the requirements of *both* schemes are met.

As the name indicates certifications are carried out jointly under the JCP. Applicants for certification are assessed by two teams of inspectors, separately representing an FSC-accredited certification body, and a LEI approved certification institution. During the assessment both teams collaborate closely and

exchange information. This joint assessment is intended to facilitate the understanding of each others systems. Certification decisions are under the independent authority and responsibility of the respective certification body participating in the joint assessment. Each certification body has to ensure compliance with the requirements of its own accredited system.

By this mechanism all natural forest management units which receive an FSC-endorsed certificate should also (separately) meet LEI requirements. Conversely, any natural forest management unit which receives an LEI certificate, should also (separately) meet FSC requirements.

Although forest management operations may receive certificates under both schemes (LEI and FSC), FSC notes that this does not imply substantial equivalence of the LEI and FSC systems nor *'Mutual Recognition'* between the systems. Indeed, the JCP is specifically necessary only in the absence of Mutual Recognition.

## LEI Standards

LEI forest management standards are based on a hierarchical evaluation of three principle 'functions' of forests: ecological, social and production functions. Within each function criteria and indicators are specified. Criteria are in the form of general areas for evaluation – for example Social Criterion 1 (S.1) is “Secured Community-based Forest Tenure System”. Each criterion is then sub-divided into indicators for evaluation. These are generally statements that could in principle be verified by inspection (e.g. S1.1, below), though occasionally are in the form of issues to evaluated (e.g. S1.4, below).

For example, under Criterion S.1 there are four indicators:

### **Social Indicator S1.1**

Boundaries between forest concession areas and local community areas are clearly delineated and approved by interested parties.

### **Social Indicator S1.2**

Communities' inter-generational full access and control towards traditional forest areas is guaranteed.

### **Social Indicator S1.3**

Communities' inter-generational full access on the forest product utilization in concession areas is guaranteed.

### **Social Indicator S1.4:**

The use of appropriate solution procedures for every claim over the same forest area.

The full list of LEI criteria and indicators is available on the LEI website at: [www.lei.or.id](http://www.lei.or.id).

The LEI system does not stop at the level of indicators. LEI has also developed detailed guidance for assessors. This guidance provides a 'definition' of each indicator, and associated 'verifiers'. For each verifier the guidance specifies 'verification/sampling methods', and both 'primary' and 'secondary' sources of data and information. Thus, for example, for the evaluation of Social Sustainability indicator S1.1 the following guidance is provided:

### **Definition**

In this context, delineation is not only a technical matter of 'drawing a line' between one concession area and another. In situations where a concession area is side-by-side with an area belonging to the traditional community, delineation can also come to signify 'drawing the line' between areas that abide by the rules of the law, and those

that abide by the rules of the local traditional community. The absence of delineation process, or delineation done only by one party without consultation with the local community, can lead to future claim/ disputes on the same area between the management unit and the local community. Reversely, a collaborative delineation process on equal terms, will ensure tenurial security from both sides.

## **Verifiers**

### **S1.1.1**

Boundary delineation process is collaboratively conducted by the relevant parties

### **S1.1.2**

Informed concern principle of the existence of the management unit

### **S1.1.3**

Certainty of the boundaries of the concession area.

With respect to Verifier S1.1.1 the following sources of data and information are specified:

### **Primary**

Facts from the field on: Tenurial disputes

### **Secondary**

Documents/Reports on: Tenurial disputes

Finally, LEI also provides an ‘intensity scale’ designed to allow the LEI Expert Panels to come to a decision as to whether or not a forest management unit complies with the LEI standard. For example, with respect to compliance with indicator S1.1 the following guidance is provided:

### **Excellent**

The management unit provides the facilities to produce a map of traditional communities done in collaboration with the local communities, specially along the areas that share a common border with a concession area.

### **Good**

Collaborative process on equal terms in determining and ensuring security of the boundary lines between the management unit and the local community area.

### **Fair**

The delineation process is done by oneparty without claims from the local community for the concession area. The process started from disagreements concerning the setting of boundaries between the concession area and the local community area.

### **Poor**

The delineation process is done by the management unit, which resulted in the inclusion of the local community area within the concession area, which in turn resulted in area disputes/claims on parts of the concession area.

### **Bad**

The delineation process is done by the management unit in collaboration with repressive administrators that resulted in the inclusion of the local community area within the concession area, which in turn led to a breadown of further discussions with the local community regarding a review of the concession area.

This intensity scale is broadly equivalent to the ‘scoring’ or ‘decision support’ systems implemented by some FSC-accredited certification bodies.

The degree of difference between the LEI and FSC systems should however not be underestimated. A notable illustration of this difference concerns the PT Intracawood Manufacturing's concession in East Kalimantan (see section 6.2), which has been passed by a LEI assessment but has twice failed to receive a certificate under FSC standards, substantially because of problems related to Principles 2 & 3. The inference that may be drawn from this case is that LEI's system appears to offer less protection of local communities and indigenous peoples' rights than FSC. Because of these differences between the LEI and FSC systems, this investigation did not look more exhaustively into the LEI certification process as this fell outside the Terms of Reference of the Study.

### **FSC Principles and Criteria 2&3 from An International Legal Perspective**

FSC Principles and Criteria have been developed taking into account existing and emerging standards of international law. FSC also requires that certification accommodates the standards of the International Labour Organisation. Specifically, according to an FSC Board Decision made in March 2002, the Board accepted an interpretation that *'FSC Principles 2 & 3 require that the legal and customary rights of indigenous peoples be legally established and respected'* and endorsed a new Indicator regarding compliance with Criterion 2.1: *'2.1.1 Communities have clear, credible and officially recognised evidence, endorsed by the communities themselves, of collective ownership and control of the lands they customarily own or otherwise occupy or use.'*<sup>17</sup> This section summarises relevant international law and jurisprudence relating to key elements of FSC Principles 2&3, with respect to 'indigenous peoples', 'lands and territories' and 'free and informed consent'. Many of these elements of in-

ternational law have become so commonly referred to that they are sometimes considered to have become ‘international customary law’.<sup>18</sup>

### **Land and Territorial Rights**

International law recognises that indigenous peoples enjoy inherent rights because of their distinctive identities and their connections to their ancestral lands, based on customary law, which precede the creation of nation states or the extension of effective government administration over their areas. Among the most important for the purpose of this study is the recognition of the rights of indigenous peoples to the ownership, control and management of their traditional territories, lands and resources.

These rights were first set out in the International Labour Organisation’s Convention No. 107 on ‘Indigenous and Tribal Populations’, of 1957, and were later expanded on, in 1989, in a revised Convention No.169 on ‘Indigenous and Tribal Peoples’.<sup>19</sup> Articles 14 and 15(1) of Convention No. 169 state:

#### ***Article 14***

- (1)The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
- (2)Governments shall take steps as necessary to identify the lands, which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

- (3) Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

***Article 15***

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

The ILO's Conventions broke new ground in international law in that they confirmed the principle that 'aboriginal title' derives from immemorial possession and does not depend on any act of the State. The term 'land' is generic and includes the woods and waters upon it.<sup>20</sup>

The International Covenant on Civil and Political Rights (ICCPR) is one of the central human rights instruments of the United Nations.<sup>21</sup> It was adopted in 1966. The Covenant does not make specific reference to indigenous peoples but it applies equally to them as to other human beings. Articles 1 and 27 of the Covenant are of particular importance to indigenous peoples. They note:

***Article 1***

- (1) All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue the economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.

***Article 27***

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other mem-

bers of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Concerns about the treatment of indigenous peoples have been frequently brought to the attention of the UN Human Rights Committee, which monitors compliance with the Covenant by States which are party to the Covenant's Optional Protocol, designed to encourage its application. In 1994, the Human Rights Committee issued a note clarifying the obligations of State parties under Article 27 of the ICCPR:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>22</sup>

In 2000, the UN Human Rights Committee offered additional guidance about State party obligations under the Covenant:

...in many areas native title rights and interests remain unresolved [and] in order to secure the rights of its indigenous population under article 27... the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands... securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and pro-

tection of sites of religious or cultural significance for such minorities, [are rights] that must be protected under article 27...<sup>23</sup>

The Convention on the Elimination of Racial Discrimination forms another key international human rights instrument with importance for Indigenous Peoples. In interpreting the application of the Convention to indigenous peoples the United Nations Committee on the Elimination of Racial Discrimination, at its 1235<sup>th</sup> meeting on 18 August 1997, noted:

The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned and otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories...<sup>24</sup>

These rights of indigenous peoples, already implicit in existing human rights instruments and whose interpretation has been clarified in international jurisprudence, have been consolidated in the UN's Draft Declaration on the Rights of Indigenous Peoples, which provides a clear statement of indigenous peoples' territorial rights. Article 26 states:

Indigenous Peoples have the right to own, develop, control and use the lands and territories, including the total environment of their land, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of the laws, traditions and customs, land tenure systems and institutions for the devel-

opment and management of resources, and the right to effective measures by States to prevent any interference with, alienation or encroachment on these rights.

### **Free and Informed Consent**

Article 7(1) of ILO Convention 169 provides that:

The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

This article is one of the general principles of the Convention and provides a framework within which other articles can be interpreted. Although qualified and weakened by the phrase, “to the extent possible,” it recognizes that indigenous peoples have the right to some measure of self-government with regard to their social and political institutions and in determining the direction and nature of their economic, social and cultural development. Other general principles of the Convention require participation, consultation and good faith negotiation.<sup>25</sup>

In its 1997 General Recommendation, the Committee on the Elimination of Racial Discrimination elaborated on state obligations and indigenous rights under the Convention. The Committee called upon states-parties to:

... ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.<sup>26</sup>

In its Concluding Observations on Australia's report, the Committee reiterated in 2000:

its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the "informed consent" of indigenous peoples.<sup>27</sup>

Building upon these principles, Article 30 of the UN's Draft Declaration on the Rights of Indigenous Peoples acknowledges that:

Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require the State to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources particularly in connection with the development, utilization or exploitation of mineral, water or other resources....

International agencies working in specific sectors such as hydropower, forestry and conservation have also begun to recognise indigenous peoples' rights to free and informed consent and to the use, ownership and control of their lands and territories. The International Tropical Timber Organisation's Guidelines for Natural Forest Management accept ILO and World Bank standards towards Indigenous Peoples. The World Conservation Union's (IUCN) new protected area categories accept Indigenous Peoples as owners and managers of Protected Areas. New IUCN and WWF policies endorse the UN Draft Declaration on the Rights of

Indigenous Peoples, recognise their rights to own, control and manage their territories, and accept the principle that conservation initiatives should only go ahead in indigenous areas with the free and informed consent of the traditional owners. The World Commission on Protected Areas has also adopted guidelines for implementing these principles. Since the 1992 United Nations Conference on Environment and Development (UNCED), there has been an intergovernmental consensus that Indigenous Peoples should be involved in policy making and they have been accepted as a ‘Major Group’ that should be involved in implementation of Agenda 21. The European Community has adopted a Resolution on Indigenous Peoples and Development which endorses the principle that initiatives on their lands should be subject to their agreement and Guidelines for the implementation of this resolution likewise require the recognition of indigenous rights to land. The Inter-American Development Bank accepts that indigenous peoples should not be forcibly relocated without their consent and the same principle was recently adopted by the World Commission on Dams.<sup>28</sup>

### **Mechanisms for Consultation and Engagement in Decision-making**

International law regarding indigenous people is unique in a number of respects, perhaps the most important being that it recognises **collective** rights. It thus asserts the authority of the indigenous **group** to own land and other resources, enter into negotiations and regulate the affairs of its members in line with customary laws which may be quite different to national laws. External agencies should thus accept not only that indigenous peoples rightfully have a say in their own futures but that they should be permitted and encouraged to express their views and make their decisions according to

their own processes and through their own institutions.

These issues have been further clarified in ILO Convention No. 169, which recognises the right of indigenous peoples to exercise their customary law. This right is more fully affirmed in the UN's Draft Declaration.

ILO Convention No. 169 also makes clear how states and other institutions should interact with Indigenous Peoples. Article 6 (1) of the Convention notes:

In applying the provisions of this Convention, governments shall:

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
- (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

These principles have been elaborated on in the United Nations Draft Declaration on the Rights of Indigenous Peoples. Article 19 of the Declaration notes:

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as maintain and develop their own indigenous decision-making institutions.

Article 32 also affirms:

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

In December 2001, the UN Office of the High Commissioner for Human Rights, in collaboration with UNCTAD, ILO and WTO, hosted a workshop on *'Indigenous peoples, private sector natural resource, energy and mining companies and human rights'*, which included a discussion of forest industries. The workshop, which was attended by the High Commissioner, representatives of the extractive industries, NGOs, Indigenous Peoples' organisations, governments and the international agencies including the World Bank, recognised that:

the issue of extractive resource development and human rights involves a (tripartite) relationship between indigenous peoples, governments and the private sector. The Workshop also acknowledged that a precondition for the construction of equitable relationship between indigenous peoples, States and the private sector is the full recognition of indigenous peoples' rights to their lands, territories and natural resources.

The workshop also recognised:

the link between indigenous peoples' exercise of their right to self-determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognised land and resource rights and peoples with treaties, agreements or other constructive ar-

rangements, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior and informed consent than peoples without such recognised rights. The Workshop recalled the Vienna Declaration and Programme of Action (paragraph 20 of the Declaration and paragraph 30 of the Programme) in which States recognise the importance of the free and informed participation of indigenous peoples in matters affecting them as a means of contributing to their rights and well-being. The Workshop affirmed the importance of economic and sustainable development for the survival and future of Indigenous Peoples. It also considered, in particular, that the right to development means that Indigenous Peoples have the right to determine their own pace of change, consistent with their own vision of development, and that this right should be respected, including the right to say “No”.

This conclusion is important for this study. Effective exercise of the right to free, prior and informed consent requires also the effective recognition of indigenous peoples’ land and resource rights. The two are interrelated and flow from the right of peoples to self-determination.

### **Experiences with Principles 2 & 3 in Other Countries**

There is much confusion over the practice of certification at the national level. Certification requires an adequate policy context and certain incentives to be in place for it to be effective. (Upton and Bass 1995<sup>29</sup>)

The FSC is conceived as an international scheme with standards that are compatible throughout the world. Accord-

ingly, all FSC standards, anywhere in the world, must comply with the '*FSC Principles and Criteria for Forest Stewardship*'. These Principles and Criteria are designed to provide the framework for all other FSC forestry standards and they incorporate social as well as other requirements, including environmental ones. They are designed to ensure that the needs of local people are addressed, as well as protection for the environment.

However, the Principles and Criteria are **not** designed to be used directly, in the forest. Because social and other conditions are different in every country, the FSC expects forest stakeholders at the national or regional level to interpret just how the generic FSC Principles and Criteria are to be applied in these national or regional circumstances. It is therefore FSC's objective that the Principles and Criteria be discussed and debated in every country in which they are to be used, with the aim of agreeing national or regional standards to be applied in that country or region. Once these standards have been agreed by a nationally accepted process they are sent to the international Board of the FSC for approval. Once approved by the FSC Board, these standards then become the standards that must be applied by all forest managers seeking FSC certification and all certification bodies are then required to assess forest management using these national standards.

None of this has yet happened in Indonesia, but FSC's expectation is that Indonesian stakeholders including environmental and social NGOs, representatives of indigenous peoples' organisations and also forest managers, technicians and forest product traders should form a national working group for them to participate in on an equitable basis to discuss the best way to interpret and implement the FSC Principles and Criteria in the diverse conditions that are present in Indonesia. If agreement was achieved, the result would

be 'National FSC standard for Indonesia'. This would then be used as a minimum requirement for all FSC-approved evaluations in the country. This kind of process has now taken place in many countries around the world, including Bolivia, Sweden, parts of Canada and Brazil, as well as several regions of the USA. Processes are also ongoing in a number of other countries. The sections which follow summarize how some of these other countries and regions have interpreted Principles 2 & 3 in accordance with local circumstances and seek to draw out certain lessons relevant to the Indonesian case.

### **Bolivia**

Bolivia was the first developing country to develop national certification standards for the FSC. The initiative was taken by the government in October 1994 and led to a national Organising Committee being established which in turn appointed a Standards Committee. In 1996, these Committees were brought under the auspices of a specially created Bolivian Council for Voluntary Forest Certification. After a long process of drafting and redrafting, a set of standards, developed by the Standards Committee and accepted by the three-chamber Council, was passed to the FSC international Board for approval. Final approval for the standards was given in 1998. Although no indigenous peoples organizations were represented in the Social Chamber of the Council, local community concerns were represented by two NGOs and a community-based organization representing peasant groups (APCOB), which has had a long history of working in solidarity with indigenous groups.

As required, the Bolivian standards adopt without modification the Principles and Criteria 2&3 of the FSC. Additional Indicators are included to guide compliance. For Principle 2 these include:

- 2.2.1 There exists agreement in the community for long-term forest management and the latter controls the processes related to such management.
- 2.2.2 In case the utilisation were to be delegated to third parties, there are clear agreements or contracts in which local and community standards for the control of forest activities are respected.
- 2.2.3 The plans for forest management are agreed upon in common, and are based on practices of participative planning, execution and local control.
- 2.3.1 There are no serious conflicts regarding land tenure and / or possession which may put forest operations at a risk.
- 2.3.2 If a potential for conflicts exists, there are written mechanisms to prevent them. If conflicts arise, there are written mechanisms and actions for their resolution, wherein the strategies for negotiation of the local population are recognised, and the participation of a mediator accepted by mutual agreement within the legal framework in force. Such mechanisms are included in the Management Plan.
- 2.3.3 There exists a policy of public relations between the person responsible for management and the neighbouring communities or those affected by the aforesaid management.

For Principle 3, the additional indicators adopted are:

- 3.1.1 There exists agreement among the indigenous community to carry out long-term forest management, and it has control over the procedures related to such management.
- 3.1.2 In case utilisation were to be delegated to third parties, there are clear agreements or contracts in which local and community standards are respected with regard to the control of forest activities.
- 3.1.3 The plans for forest management are agreed upon in common, and are based on practices of participative planning, execution and local control.

- 3.2.1 Legal or traditional rights or customs of indigenous peoples, the management or use of their forest resources (timber-yielding and non-timber), have been formally recognised and documented in written agreements and, where necessary, will be reflected in maps showing the areas concerned.
- 3.2.2 Indigenous lands have been excluded from the forest concession or property, with well defined limits, or written agreements.
- 3.2.3 If potential conflicts exist, there are written mechanisms to prevent them. If conflicts arise, there are written mechanisms and actions for the resolution of same, in which the strategies for negotiation of the indigenous population are recognised as well as the participation of a mediator accepted by mutual agreement within the legal framework in force. Such mechanisms are included in the Management Plan.
- 3.3.1 The management plan identifies places of special cultural, ecological, economic or religious significance for the indigenous peoples and proposes actions for their protection, with the existence of a written agreement among the parties.
- 3.4.1 If the persons responsible for forest management use knowledge privative of the indigenous peoples, they (the indigenous peoples) are recompensed and acknowledged.
- 3.4.2 If the indigenous peoples participate in different phases of the management plan, they are adequately recompensed. Such compensation is agreed upon with the consent of the aforesaid peoples.<sup>30</sup>

## **Sweden**

National standards for the application of FSC Principles and Criteria in Sweden were negotiated between 1994 and 1998

within a standard three-chamber national working group, which included workers' organisations and institutions representing the Sami reindeer herders in the social chamber, conservation NGOs in the environment chamber and private sector companies in the economic chamber. A full consensus on the standards was not achieved owing to strong opposition to some of the social and environmental safeguards by institutions representing small forest owners. In the event, the small forest owners agreed to withdraw from the negotiations rather than veto the process and they allowed an agreement to be achieved among the other players interested in promoting FSC certifications.

The final standards agreed by the large forest owners and social and environmental chambers include special provisions for the maintenance of the rights and activities of Sami reindeer herders - indigenous transhumant pastoralists - even though these rights had never been adequately recognised in Swedish law. Most of the Sami, who continue to graze reindeer, graze their herds during the summer months in upland areas that are classified as public lands. Logging is not permitted in these areas but Sami reindeer herding, fishing and hunting is permitted subject to a complex set of rules. The Swedish FSC-agreed standards do not relate to these uplands although a dispute exists about whether the Sami's land rights are adequately recognized by the Swedish State in these areas.

The reindeer (*Rangifer tarandus*) is native to the boreal forests of Eurasia. In its undomesticated condition it naturally migrates between summer and winter areas, moving North and up into the mountains during the summer and South and down into the lowlands in winter. In summer and autumn its diet consists of grass, leaf browse, wild fruits and especially lichen. In winter, lichen forms an even greater proportion of its diet.

About five centuries ago the Sami in Sweden began to domesticate their reindeer herds,<sup>31</sup> and, following the natural pattern, they became accustomed to bringing their herds down into the lowland forests for the winter months. The Sami do not claim full ownership rights to these lowland areas but, in accordance with Article 14 and 15 of ILO Convention 169, do claim rights to winter-grazing in lowland forests and on certain intermediate pastures that they have been accustomed to use both for grazing and calving while moving between their upland and lowland pastures. Broadly speaking, government legislation recognizes the Sami's customary rights to winter-grazing in lowland forests on State land. However, these legal provisions do not extend clearly to privately owned forests, which comprise the majority of Sweden's lowland forests.

The Swedish FSC working group agreed an interpretation of FSC Principles 3 and 4, which allows for winter-grazing by reindeer herds both in State forests and in privately owned forests. The standards also accommodate the fact that in harsh winters, when the deer cannot break through thick snow crusts, the reindeer require access to old growth forests with pendent lichens in order to survive. The industrial-scale logging companies and the government have thus agreed to allow Sami access to forests in winter and to set aside 10% of forest concession areas for old-growth to provide areas for reindeer survival in harsh winters.<sup>32</sup>

The FSC process in Sweden has not been an unblemished success story. Small-scale private land-owners, who own up to 50% of Sweden's forests and up to 75% of Sami winter-grazing areas, do not accept these standards and have adopted an aggressive approach to the Sami, suing them in the courts for continuing their 'illegal' access to forests. Sami communities, unable to provide the documentary evidence of their customary practices that the courts demand, now face bankruptcy as punitive court costs are exhausting their

financial resources.

Other Sami are also in dispute with FSC-certified companies about the exact interpretation of the new standards.<sup>33</sup> Part of the problem seems to result from the lack of *procedural* clarity about how the newly agreed principles should be applied. As one of the certifiers, SGS, notes:

Social aspects of forest management are not well defined in the procedures. However, in general these are considered to be of low importance in Sweden [because the legal framework is assumed to be comprehensive]... Accordingly, social appraisal is not a top priority for forest companies.<sup>34</sup>

The problem for the Sami is that their rights have **not** been legally secured.

The Swedish experience with certification is generally considered to be a positive one. Certainly Sami spokespersons have made clear that the process of developing national standards did provide them with useful political space to clarify their relations with the timber industry. However, it is also clear that there is considerable room for improvement of their situation, including:

- legal recognition of Sami land and grazing rights, especially on lands privately owned by third parties
- open and participatory negotiation between the government and Sami to determine where they enjoy these rights
- clear delimitation of these areas
- strengthened criteria for community consultations in FSC procedures.

## Canada

A Canadian national FSC working group was established in 1996 but relatively quickly resolved to develop regional stan-

dards because of the diversity of forest types across the country.<sup>35</sup> Given the unresolved nature of indigenous peoples' land claims in Canada and the importance of finding a solution, it was agreed to include a fourth chamber in the process for negotiating standards, such that an indigenous peoples' chamber would be added to the social, environmental and economic chambers. One standard-setting process was completed in 2000 for the eastern maritime provinces of New Brunswick, Prince Edward Island and Nova Scotia, while three further processes, for the Ontario, Boreal Forests and for British Columbia, are still underway. Standards for the Great Lakes region developed before the FSC Working Group got underway have also been developed but were agreed without the participation of indigenous peoples.

### *Maritimes*

Adopted in 2000, the Maritime standards, as required, include P&C 2 and 3 unchanged from the originals. They are supplemented by sub-Criteria and Indicators, which provide forest managers with guidance on how the Principles and Criteria should be adapted to the context in the Maritimes.

Notable Indicators for Principles 2 include:

- 'There is documentation showing the legal status of all land and forest that demonstrates legal, long-term (or renewable) rights to manage the land and/or utilize forest resources. The extent of any First Nations' claims or other claims to forest lands (mining, trapline, water permits, easements etc.) are documented. There is evidence of due diligence in establishing clear title.(2.1)
- 'First Nations (see Principle 3), local communities, or other stakeholders, who have recognized legal or customary tenure, or traditional use rights, have been identified (e.g treaty lands, municipal boundaries, water licences, and permits, community watersheds, traplines, traditional

hunting or gathering etc.)..... There is evidence that free and informed consent to forest management activities affecting legal, customary or traditional use rights has been given by affected groups and individuals and their interests have been accommodated.’(2.2)

- ‘There are records of all previous and on-going disputes over aboriginal title (see Principle 3), land use, or tenure and use rights. There is documented evidence of commitment to resolution of on-going disputes.’ (2.3)

Principle 3 is given more detailed treatment. Criterion 3.1 restates the need for indigenous peoples to control forest management on their lands and territories unless they delegate control with free and informed consent. Sub-Criterion 3.1.1 then notes the special relationship that First Nations have with Canada and requires that the ‘Rights of First Nations shall be formally recognized and given fair accommodation.’ Indicators related to this Criterion include:

- ‘There is documented evidence that efforts have been made to get First Nations participation in forest management decision-making process. The owner/manager has a program/procedure for consulting with local First Nations. Decision-making incorporates and respects the traditional knowledge of First Nations. Local First Nations have not challenged the management plan in court.’(3.1)

With respect to Criterion 3.3, an additional sub-Criterion 3.3.1 requires that ‘Areas of cultural sensitivity must be identified and incorporated in forest management/operational plans.’ An Indicator associated with this Criterion requires:

- ‘Local First Nations have participated in the identification of Native values and in the production of native background information reports.’(3.3)

To date, there has been only one FSC certification of a timber operation in the Canadian Maritimes that has affected indigenous peoples. The Pictou Landing First Nation in Nova Scotia has had its community-run forestry operation certified and the certifier did not question the government's 'grant' of 'tribal land' as a basis for tenurial security under Principles 2 & 3.<sup>36</sup> An independent assessment of this operation carried out for the Taiga Rescue Network has concluded that the operation seems likely to provide real benefit to the community due to its having a clear land title and tenure agreement, and to developmental support provided by the First Nations Forestry Association, a professional association of foresters who support First Nations' rights.<sup>37</sup>

### **British Columbia**

Unlike much of the rest of Canada, and with the exception of those in the North-East of the Province,<sup>38</sup> the indigenous peoples of British Columbia have never signed treaties with the colonial powers or with Canada. Nor have land settlements been negotiated or imposed by other means.<sup>39</sup> The extent of indigenous peoples' lands and territories in the Province is thus legally disputed. Under the Canadian Constitution, a province may not legislate in relation to 'Indians' or 'Indian lands' as these are matters for the Federal government. However, the numerous indigenous peoples of British Columbia have unsettled land claims, which extend over a very large but undefined part of the province. Although a Federally administered Comprehensive Land Claims Settlement procedure exists, the process is extremely tardy and costly. It is generally thought that it may take years or even decades before all outstanding claims are settled in the Province. The logical corollary is that, in the meantime, the Provincial Government of British Columbia cannot legislate on matters relating directly to the lands and forests

covering the majority of the Province. The Provincial Government disputes this interpretation and takes the position that ‘no Aboriginal interests will be acknowledged until proven except where a treaty is signed.’<sup>40</sup> This disagreement poses a fundamental challenge to forest industries seeking FSC certification in the Province in terms of compliance with Principles 2 & 3.

A provincial working group with the task of developing mutually acceptable FSC standards for British Columbia was established in 1996.<sup>41</sup> Early in the proceedings of this working group, indigenous representatives made clear that they understand the terms of Principle 3 (recognition of the legal and customary rights of indigenous peoples to own, use and manage their lands and territories and resources) to mean legal recognition of their right of ‘Aboriginal title’. This is a principle that the government of British Columbia has been reluctant to accept. The controversy about the interpretation of Principle 3 has contributed to delays in the development of FSC standards in the Province.<sup>42</sup>

Aboriginal title is a legal doctrine dating back, at least, to the 15<sup>th</sup> and 16<sup>th</sup> centuries, which recognizes the rights of indigenous peoples as owners of their lands. These rights are conceived as deriving from traditional occupation and use, and the management of the lands according to custom, prior to the acquisition of sovereignty by a colonial power. The doctrine accepts that the consent of the peoples’ concerned is required before colonists can obtain lands from them. In North America, the doctrine was upheld by the Royal Proclamation of 1763, which reserved all lands west of the Allegheny Mountains for the use of Indian nations. The convention in Canada is that Aboriginal title must be surrendered to the Crown before indigenous lands can be acquired by third parties.<sup>43</sup> The ostensible purpose of this arrangement has been to provide additional protection against the alienation of indigenous land.

Aboriginal title implies a proprietary right in the land and the resources pertaining to it, but the exact extent and nature of these rights is determined by the practices, customs and laws of the indigenous people that maintains its connection with the land. According to the Canadian Supreme Court, aboriginal title confers more than a right to engage in site-specific activities, but a right to the land itself, including the right to exclusive use and occupation, and the right to exclude others from the land. In US and Canadian courts aboriginal title has been upheld as including mineral rights, rights to commercially exploit timber, fish, game and water rights. Extinguishment of Aboriginal title has been interpreted by the Privy Council as providing a basis for compensation **equivalent** to the deprivation of ‘full ownership’.<sup>44</sup>

A legal review carried out for the British Columbia working group on the interpretation and application of Principle 3 included the following conclusions and recommendations:

- Use of an inclusive definition of ‘lands and territories’ that conforms to the definitions in ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples
- The existence of a treaty process and set of consultation guidelines is not an acceptable substitute for settlement of land claims
- Require that indigenous control of their lands and territories be through formal co-management agreements that are not merely elaborate consultation guidelines
- Vigilance to ensure adherence to ‘informed consent’.<sup>45</sup>

Regional Standards for British Columbia were agreed in early 2002 and endorsed by FSC Canada in June 2002. They were then sent to the FSC for the consideration and adoption by the FSC’s international Board. They have since

been critically commented on by FSC Secretariat and sent back to FSC Canada for review. Final approval is still pending. These revised standards have been designed to allow certification ‘independent of any evolution or changes in case law, legislation, or policy,’ with respect to aboriginal rights and title.<sup>46</sup> They thus allow certification in advance of, and independently of, any legal resolution of claims made by indigenous peoples to their lands and resources.

The British Columbia standards, which use the term ‘First Nations’ to refer to the indigenous peoples referred to in FSC Principles and Criteria, interpret the term ‘legal and customary rights’ in Principle 3 to mean:

Aboriginal Rights and Title, which are largely self-defined by non-treaty First Nations, or Treaty Rights, which are mutually defined by First Nation and Federal Government at the time the treaty is settled. Principle 3 and its four Criteria identify rights which specifically relate to FSC certification and which are protected at the Principle and Criterion levels. These rights, which may be modified by existing or future treaties, are:

- the right to “own, use and manage their **lands, territories and resources**”;
- the right to “control **forest management** on their lands and territories”;
- the right to identify their own “**lands, territories and resources**”;
- the right to freely and knowledgeably grant, withhold or withdraw consent for **forest management** within their lands and territories;
- the right to **delegate control** for **forest management** and revoke that delegation; and
- the right to protection or accommodation of resource and **tenure** rights, sites of special significance, and use of intellectual property.<sup>47</sup>

The standards also note that there is no requirement that First Nations must prove their rights or title in court before they need to be consulted by forest managers.<sup>48</sup> The standards also provide a number of ‘Indicators’ that need to be satisfied to assure compliance with Principle 3 and associated Criteria. These are given as follows:

- 3.1.1 The manager recognizes and respects the legal and customary rights of the First Nation(s) over their lands, territories and resources.
- 3.1.1(i) First Nation(s) formally indicate, clearly, unambiguously and normally in writing, that their legal and customary rights over their lands, territories and resources have been recognized and respected.
- 3.1.1(ii) First Nation(s) interests or concerns are clearly incorporated in the management plan.
- 3.1.2 At the request of the affected First Nation(s), the agreements outlined in 3.1.3 and 3.1.5 below are written so they:
  - a) are without prejudice to treaty, land claims settlements, or agreements the First Nation(s) may reach with government;
  - b) cannot be construed that the First Nation(s) accept Provincial Crown title or extinguish their own Aboriginal title, and,
  - c) do not derogate from their Aboriginal rights.
- 3.1.3 The Manager has negotiated a protocol agreement(s) with relevant First Nation(s) that provides for the nature of the relationship between the parties, including:
  - a) how the parties will establish and conduct their relationship;
  - b) the roles and responsibilities of the parties;
  - c) the interests of the parties;
  - d) a description of appropriate decision-making authorities for all parties; and,
  - e) provides the framework for subsequent agreements necessary to give effect to the protocol.
- 3.1.5 The manager has obtained free and informed consent, normally in writing, for the management plan from the ap-

appropriate First Nation(s) by either: a) jointly developing the plan according to the process set out in a joint management agreement, or, b) consulting with the First Nation(s) on the plan.

- 3.1.5(i) The First Nation has the financial, technical and logistical capacity to enable them to participate on an informed basis in planning and decision-making.
- 3.1.6 Conditions under which consent has been given and under which it might be withdrawn, if any, are recorded in the management plan.
- 3.1.7 Where more than one First Nation is affected by the area being proposed for forestry activities, consent from each is ordinarily required.
- 3.2.1 Forest management activities within the management unit are planned and implemented in such a way as to maintain the resources and tenure rights of the First Nation(s), except in the following circumstances: a) the First Nation(s) are satisfied with measures to offset the loss or diminishment (e.g., restoration, replacement, monetary compensation, or other consideration); or, b) the First Nation(s) agree to accept the loss or diminishment.
- 3.3.1 Forest management activities within the management unit are planned and implemented in such a way as to protect sites of special cultural, ecological, economic, or religious significance to the First Nation(s) except in the following circumstances: a) the First Nation(s) are satisfied with measures to offset the loss or diminishment (e.g., restoration, replacement, monetary compensation, or other consideration); or, b) the First Nation(s) agree to accept the loss or diminishment.
- 3.4.1 Where mutually agreed, the manager incorporates First Nation(s) traditional knowledge into the management plan and supporting operational plans and practices.
- 3.4.2 The First Nation(s) maintain control of their traditional

knowledge, and are satisfied that the manager provided fair compensation for any traditional knowledge used.<sup>49</sup>

The standards also set out clearly what is considered to be an acceptable form of consultation for the purposes of securing free and informed consent for forestry operations carried out by third parties on lands claimed by First Nations.

The consultation process is designed with First Nations' and is agreed to by both forest manager and First Nation.

- The management plan is developed with the First Nation(s) communities.
- The First Nation(s) are satisfied the schedule of consultation is sufficient to provide them with effective involvement in the development and monitoring of the plan.
- The First Nation(s) are satisfied their concerns have been appropriately recorded (e.g., in writing, maps, videos) and have been incorporated in the management plan as required.
- First Nation(s) identify the resources and tenure rights and the sites of special cultural, ecological, economic, or religious significance they require to be protected and indicate their locations on maps where appropriate.
- The extent to which proposed management activities may threaten or diminish the resources and tenure rights, or impact sites of special significance of the First Nation(s) is assessed to the satisfaction of the First Nation(s).
- Strategies are developed and implemented to maintain the resources and tenure rights and to protect sites of special significance of the First Nation(s).
- The First Nation(s) are satisfied the strategies are sufficient to avoid threatening or diminishing their resources and tenure rights and to protect their sites of special significance.

- In the case of an unanticipated threat or diminishment to resources or tenure rights or sites of special significance due to management activities, the First Nation(s) are satisfied appropriate measures are taken to maintain those resources or tenure rights (e.g., stop work, notification, assessment, mapping).
- Financial, technical or logistical capacity-building support, in proportion to the scale and intensity of operations, is available to the First Nation(s) where required to assist with consultation.<sup>50</sup>

According to these standards, failure either to recognize and respect the rights of First Nations or to negotiate a protocol agreement with the First Nations constitute ‘Major Failures’ that prohibits the awarding of a certificate to the forest management operation.<sup>51</sup>

## **Brazil**

Brazilian civil society engagement with the FSC began with the founding conference in 1993 but an FSC-approved three chamber national working group only began concerted efforts to develop national standards in 1997. Three series of consultations and workshops were then undertaken to develop national standards. These drafts were subsequently subjected to field trials and debated in open public consultations. Revised nationally approved standards for certifying plantations were sent to the FSC for approval in 2001 and for natural forests in 2002. The natural forest standards are not yet approved by FSC. The plantation standards constitute the first FSC-approved certification standards for plantations adopted by a developing country. In the meantime, FSC accredited certifiers have already certified 15 operations in Brazil, 10 of which are for plantations.<sup>52</sup>

As Rezende de Azevedo notes ‘by and large, forest operations in Brazil are the object of conflicts between enterprises and local communities’.<sup>53</sup> This is because ‘many forest operations cause adverse effects on the subsistence of local communities’.<sup>54</sup> FSC Principles and Criteria 2, 3 and 4 thus, potentially, provide important tools to address these conflicts and resolve them in favour of impoverished and marginalized groups, in those operations prepared to subject themselves to certification.

The Brazilian national standards have opted for an inclusive approach to the term ‘indigenous peoples’, recognized under Principle 3, to include not only Brazilian ‘Indians’ but also rural communities engaged in extractivist enterprises such as rubber tapping and Brazil nut collecting and *quilombos*, Afro-Americans who fled slavery to recreate forest-based societies in the Brazilian interior.<sup>55</sup>

Principle 3 is thus adopted verbatim in the Brazilian standards except that the term ‘indigenous peoples’ has been substituted with the phrase ‘indigenous and traditional communities’.<sup>56</sup> The criteria have not only been adjusted to suit the national context but different forms of the criteria have been developed for plantations and natural forests. These differences are shown in the following table.<sup>57</sup>

The Brazilian standards also include a series of Indicators, which certifiers will look out for in evaluating compliance with the principles and criteria. These include such measures as:<sup>59</sup>

- ‘Negotiations related to forest management with indigenous or traditional communities will be done through their representatives, preferably, assisted by governmental and non-governmental agencies, that defend the rights of indigenous or traditional communities, that they appoint.’ (natural forests 3.2.1 and plantations 3.2.2)
- ‘Negotiations related to management activities shall be

**TABLE 1: COMPARING FSC CRITERIA 3** <sup>58</sup>

<b>FSC International</b>	<b>Brazilian Plantations</b>	<b>Brazilian Natural Forests</b>
<p>3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.</p>	<p>3.1 Indigenous and / or traditional communities must control forest management activities in their territories and lands, unless they delegate this control to third parties in a free and aware manner.</p>	<p>3.1 Indigenous and traditional communities must directly control the use of their goods and natural resources in their territories, but may establish contracts or the like to develop and implement management plans.</p>
<p>3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.</p>	<p>3.2 Forest management activities shall not threaten or diminish, directly or indirectly, the resources or rights of possession of the indigenous and traditional communities.</p>	<p>3.2 Forest management activities shall not threaten or diminish, directly or indirectly, the resources or rights of possession of the indigenous and traditional communities.</p>
<p>3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.</p>	<p>3.3 Sites of special cultural, economic, religious, historical or archaeological significance to the indigenous and traditional communities must be identified clearly (in cooperation with these communities), recognised and protected by those responsible for the forest management unit.</p>	<p>3.3 Sites of special cultural, economic, religious, historical or archaeological significance to the indigenous and traditional communities must be identified clearly (in cooperation with these communities), recognised and protected by those responsible for the forest management unit.</p>
<p>3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.</p>	<p>3.4 The indigenous and/or traditional communities must be justly compensated for the use of the traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation must be formally and freely accepted or used subject to the understanding and agreement of these communities before the initiation of commercial use of this knowledge.</p>	<p>3.4 The indigenous and traditional communities must be compensated for the use of the traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation must be formally and freely accepted or used subject to the understanding and agreement of these communities before the initiation of commercial use of this knowledge.</p>
	<p>3.5 Measures must be taken as necessary to avoid [any] negative social impacts from forest management and to promote the value of the cultural diversity of the indigenous and traditional communities.</p>	<p>3.5 Measures must be taken as necessary to avoid [any] negative social impacts from forest management and to promote the value of the cultural diversity of the indigenous and traditional communities.</p>
	<p>3.6 Those responsible for the forest management unit must provide information about the identity, locale and population of all those indigenous and/or traditional communities who live in the forest management unit or neighbouring areas, and/or are reclaiming customary rights in the area that is the object of certification.</p>	
	<p>3.7 The indigenous and/or traditional communities who live in the forest management unit or neighbouring areas, must directly control the use of their own natural resources but may establish contracts or the like to develop and implement management plans in their territories.</p>	

documented in writing and / or audiovisual form'. (natural forests 3.2.3 and plantations 3.2.4)

- 'The communities will be called to discuss the social and environmental impacts of the forest management. In which case, the one responsible for the forest management unit takes necessary measures to minimize the negative social and environmental impacts.' (natural forests 3.2.5 similar to plantations 3.3.5)
- 'Workers involved in the forest management should have certificates of good health and up to date immunization.' (natural forests 3.5.1) '...Those workers who are carriers of infectious or contagious diseases will not establish contact with these communities.' (plantations 3.5.1)
- 'Evidence if mitigatory measures to address negative impacts from the residence or compartment of personnel...' (natural forests 3.5.2 cf. plantations 3.5.2)
- 'The engagement of members of the community in management activities will not cause negative impacts on the social organization and institutions of the community.' (natural forests 3.5.3, plantations 3.5.3)
- 'Existence of documentary proof of the delegation of control of forestry activities' (plantations 3.1.1)
- 'Existence of a map or sketch map, or written document that identifies the areas possessed and/or areas customarily used and such neighbouring areas' (plantations 3.1.2)
- 'Agreements and negotiations will consider the economic and social sustainability of the indigenous and/or traditional communities with the participation of their representatives.' (plantations 3.2.1)
- 'Forest management contracts involving the lands of indigenous or traditional communities will take account of the long term activities, in conformity with the duration of the management plan.' (plantations 3.2.3)
- 'Forest management activities preferably of native species use indigenous knowledge' (plantations 3.7.2)

The Brazilian Constitution and laws notionally provide strong protections of indigenous rights. The law does however maintain State ownership of indigenous territories, granting the indigenous inhabitants rights of possession to these areas. These rights are ‘permanent’ (subject to Congressional decisions to the contrary). Current Brazilian law does not permit logging by outside operators on indigenous lands but does permit plantations in non-forested areas. These legal realities explain the main discrepancies between the FSC International P&C and the Brazilian standards and explain the main differences between the Brazilian standards for plantations and natural forests. Natural forest operations in Brazil have been required to excise indigenous areas from their properties in order to qualify for FSC certifications and unresolved disputes have led to major operations such as *Aracruz Florestal* being refused certificates.<sup>60</sup>

Brazil has a long and tragic history of unresolved land disputes and these issues pose a great challenge to the application of FSC Principle 2 in the country. Rezende de Azevedo notes one case where the logging company Mil Madeira that was seeking FSC certification and in order to accommodate resident local communities, which did not recognize the company’s title, first carried out a survey of all communities and settlements within the company property, suspended all logging in cutting lots adjacent to the communities and then worked with the local government and the communities to survey and title their lands and have them excised from company property.<sup>61</sup>

As well as adopting a number of additional indicators related to Criteria 2.1, 2.2, and 2.3, designed to ensure clarification of forest tenure and community land rights and to guarantee their right of free and informed consent to operations on their lands, an additional Criteria has been added which states:

The land tenure situation of local communities with direct customary rights of possession or use of the land must be regularized through documented agreements which secure their presence in harmony with the forest management activities, or that promote their planned and participatory re-settlement, or that provide them with just compensation.(natural forests 2.4, plantations 2.4)

Additional Indicators related to this criterion or also require:

- ‘Conflicts, when they exist, shall be resolved justly, and the agreements shall be satisfactory to both parties’ (natural forests 2.4.3, plantations 2.4.2)
- ‘In the case of conflicts involving local communities, their resolution shall include the participation of representative social organizations (NGO, Trades Union and others)’ (natural forests 2.4.4, plantations 2.4.3)

It should be noted that a number of problems have been identified with the application of these standards in forests certified to FSC approved standards suggesting that the safeguards and procedures in Brazil require refinement if they are to be effective.<sup>62</sup>

## Conclusions

These precedents provide a number of lessons and suggestions for those now seeking to apply FSC standards to the Indonesian situation. These include the following:

- The agreement of national standards is a complicated process that requires detailed discussions with many local interest groups. Achieving consensus among these interest groups often takes many years.
- Criteria should be adopted which help clarify what con-

stitute ‘Major Failures’ of compliance with each Principle.

These national standard-setting exercises have given rise to the following interpretations of Principle 2 and its associated criteria.

- The aim of the principle is to ensure that there are no conflicting rights over the forest which is being assessed. It thus seeks to ensure that the rights of both the forest manager and local communities’ are clearly established and that acceptable mechanisms are in place to resolve any conflicts in an agreed way.
- It applies to both indigenous peoples and other local communities and seeks to ensure that local communities’ rights are legally secure and that the forest managers, if they are not the local communities, are not in conflict with these communities.
- Two interpretations of Principle 2 are possible. A ‘strong’ or ‘legalistic’ interpretation is that local communities customary rights must be legally established. A ‘weak’ or ‘pragmatic’ interpretation is that only the forest manager’s tenure that needs to be legally established. Where this is not the local community, then local communities’ customary rights may be secured by other means.
- These rights should thus be secured through legal titles or else recognised in written agreements which are part of the management plan.
- The management plans likewise should incorporate agreed mechanisms for the resolution of conflicts.
- Conflict resolution mechanisms and negotiation processes should be participatory, transparent and, according to some national standards, should involve other civil society groups, such as NGOs and Trades Unions, to help ensure fair play.

With respect to Principle 3, the following guidance also emerges from these national experiences:

- The concept of ‘indigenous peoples’ needs to be applied in an inclusive way to embrace all socially marginalized groups with distinctive cultural identities and customary systems of forest management and use.
- Indigenous rights to land and resources should be legally recognized in a manner acceptable to the indigenous peoples. Without this clarity, conflicts or disputes are likely to arise.
- However, where legal recognition has not been achieved, national standard-setting bodies may accept other means for the recognition and respect of indigenous rights in order to allow certification to proceed, subject to indigenous consent and clearly agreed procedures.
- Where mutually accepted legal recognition of rights is not achieved, the extent of indigenous rights areas should be self-defined by the indigenous peoples concerned. They are not required to prove their rights over these areas in court.
- Where indigenous peoples are not the forest managers, the extent of these rights should be formally recognized in written joint contracts (‘agreements’/‘protocols’) agreed between the forest managers and the indigenous peoples. These areas should be mapped and the agreements documented and incorporated into management plans.
- One alternative is then to excise all these claimed areas from the forest management units.
- Alternatively, forest managers should then negotiate agreements with the indigenous people(s) concerned, for the use of these areas.
- These agreements should also be included in the management plans.
- Mechanisms for negotiating these joint agreements should

themselves explicitly recognize and respect indigenous rights and define clearly the roles of the various parties in future decision-making.

- These mutually agreed processes of achieving consent should be incorporated in the management plans.
- Likewise, management plans should also incorporate mutually agreed conflict resolution mechanisms, procedures for the documentation of sites of special value and mechanisms for agreeing - and paying compensation for – loss or damage to livelihoods or natural resources or the use of indigenous knowledge.
- All such agreements should be without prejudice to any subsequent land claims negotiations with the government and should not imply any recognition by the indigenous peoples concerned of State ownership or rights to land or forests or imply the extinction of any indigenous rights.

### **Key Issues for Application of Principles and Criteria 2&3 in Indonesia**

To date, there has been no comparable FSC-endorsed national or regional standard-setting process in Indonesia to agree how FSC Principles should be applied in Indonesia. Moreover, the Indonesian Government has ratified relatively few pieces of international law relevant to indigenous peoples' rights. It has not ratified ILO Convention 169 nor has it ratified either the UN Covenant on Civil and Political Rights or UN Covenant on Economic, Social and Cultural Rights.<sup>63</sup> It has however endorsed the UN Declaration of Human Rights, which can be interpreted as placing an obligation on the Government to recognize indigenous peoples' property rights. Indonesia has also ratified the Convention on the Elimination of Racial Discrimination, thereby accept-

ing the principle of prior and informed consent for indigenous peoples and recognizing their rights to the ownership, control, use and management of their communal lands, territories and resources (*vide supra*).<sup>64</sup> In 1999, the DPR passed the Human Rights Act which, *inter alia*, provides for the protection and recognition of customary (*adat*) communities including collectively owned (*ulayat*) land.<sup>65</sup> (The concept of *ulayat* land is explored below and section 4.3 examines the current obstacles to giving practical effect to this decision.)

However, as explained above, the FSC Principles themselves imply the need for FSC certifications to adhere to internationally agreed standards, such as those summarized in section 2.4 (above), which may be above those required by national law. Specifically, the FSC has already agreed that certified forest management units should operate in conformity with the standards set out in the relevant ILO Conventions regarding the rights and welfare of workers and indigenous peoples regardless of whether the State has ratified these conventions or not.<sup>66</sup>

The following sections of this report thus attempt to unpick the key concepts and principles implied by Principles and Criteria 2&3 in further detail in the Indonesian context. **Section 3** seeks to clarify who ‘indigenous peoples’ are in Indonesia and summarises how government agencies have dealt with them. **Section 4** summarises what is meant by ‘customary rights’ in Indonesia and explains in detail how indigenous peoples’ and other forest-dwelling communities’ land and resource rights are dealt with under existing laws and regulations. **Section 5** explores the existing procedures by which local communities are able to express their views and concerns and assesses them against the FSC Principle of ‘free and informed consent’. **Section 6** reviews the experience to date in Indonesia with certifications and explores

the procedures that certifiers have adopted in assessing whether Principles 2 & 3 have been applied. Given the difficulties indigenous peoples and other local communities currently experience in Indonesia in securing their rights and expressing the will, **Section 7** then explores current proposals for legal and institutional reform, which may fundamentally reshape the relationship between the Indonesian State and indigenous peoples and local communities. Finally, **Section 8** concludes the study with a review of the obstacles and challenges in the way of proper application of Principles 2 & 3 and makes targeted recommendations about how they may be applied in future.



## **Indigenous Peoples in Indonesian Context**

**F**SC Principle 3 refers to ‘indigenous peoples’, a term that has achieved widespread currency in international discourse. But to whom does this term refer in the Indonesian context? This section of the report thus attempts to clarify – as far as the data allow:

- who are indigenous peoples in an Indonesian context?
- how many are they?
- how has the Indonesian government dealt with these peoples?
- What implications does this have for the ability of these peoples to articulate ‘free and informed consent’?

### **Definitions and Numbers: Problems of Lack of Data**

In 1986, the United Nations’ Working Group on Indigenous Populations adopted the following working definition to guide its work:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity; as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>67</sup>

Since 1983 the Working Group, which has met annually, has heard presentations from thousands of indigenous spokespersons from all over the world. Many of these spokes-

persons are from countries in Asia and Africa that were either never colonised by European powers (such as China, Thailand and Japan) or from which colonial settlers mainly withdrew following decolonisation (such as India and Malaysia). Nevertheless the ‘aboriginal’ or ‘tribal’ peoples in these countries, whose territories have been administratively annexed by emerging independent nation states, experience discrimination and a denial of their rights. They thus equate their situation with that of other Indigenous Peoples in settler states and demand the same rights and consideration.<sup>68</sup>

Summing up the deliberations of years of work, the Chairperson of the UN’s Working Group has concluded:

In summary, the factors which modern international organisations and legal experts (including indigenous legal experts and members of the academic family) have considered relevant to understanding the concept of “indigenous” include:

- a) priority in time with respect the occupation and use of a specific territory;
- b) the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
- c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;
- d) and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist.<sup>69</sup>

The International Labour Organization’s Convention No.169 applies to both Indigenous and Tribal Peoples and thus includes many such peoples from Asia and Africa. It ascribes both the same rights without discrimination. Article 1(2) of ILO Convention No. 169 notes:

Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

The principle of self-identification has been strongly endorsed by Indigenous Peoples themselves and has been adopted in Article 8 of the United Nation's Draft Declaration on the Rights of Indigenous Peoples. The Draft Declaration is now being reviewed by another special working group of the UN's Human Rights Commission, with the objective of it being adopted during this current 'International Decade of Indigenous People'. Although disputes between governments about definitions have absorbed a disproportionate amount of time at this Working Group, many international lawyers agree with Indigenous Peoples that there is no need for an external definition of the term 'Indigenous Peoples'. Indeed they note that this is hardly possible as the component term 'peoples', which is fundamental to the constitution of the United Nations, is itself undefined.<sup>70</sup>

Meanwhile there has been growing acceptance that the term 'indigenous peoples' applies in Asia and Africa. The newly established United Nations Permanent Forum on Indigenous Issues, for example, includes representatives of indigenous peoples from Africa and Asia on its panel. Likewise, the African Commission on Human Rights has established a working group on indigenous peoples. A number of Asian governments, such as the Philippines, Nepal and Cambodia have accepted that the term 'indigenous peoples' applies to marginalized ethnic groups in their countries.

## **Indonesian Government Policy Towards 'Indigenous Peoples': the Suharto years**

Indonesia is a country of some 215 million people belonging

to perhaps 500 ethnic groups speaking as many as 600 different languages.<sup>71</sup> Ever since the 1928 Youth Congress, when the demand for national independence was first clearly articulated, the project of nation building has aimed at uniting these diverse peoples into a single cultural identity. Although a national policy of cultural tolerance was explicit in the national slogan ‘Unity in Diversity’, during the era of ‘Guided Democracy’ (1956-1965) and especially during the ‘New Order’ era (1966-1999), a centralized programme of cultural assimilation got underway.

National policies promoted the gradual development of rural communities through three stages of social evolution from ‘traditional’ (*swadaya*) communities, through a second phase of ‘transitional’ (*swakarya*) communities, with the goal of creating ‘developed’ (*swasembada*) villages of the third category. Membership of a mainstream monotheist religion was a requirement of citizenship and conformity to the doctrines of *pancasila* (the five principles) obligatory.<sup>72</sup>

The diverse customary communities of the ‘tribal’ peoples of the archipelago were perceived as posing a serious challenge to this programme of national integration. Living as they did as ‘tribes’ (*suku suku*) outside the purview of the administration, they were conceived as dwelling in ‘pre-villages’ outside the official classification of village types. Accordingly, under Basic Stipulation on Social Welfare (No. 6/1974), the State expressed an obligation to handle the ‘national problem’ of these ‘isolated and alien peoples’ (*masyarakat terasing*) and under Presidential Decree No. 45 of 1974, this task was entrusted to the Department of Social Affairs (DEPSOS).<sup>73</sup> DEPSOS officially described these communities as being comprised of ‘*people who are isolated and have a limited capacity to communicate with other more advanced groups, resulting in their having backward attitudes...*’<sup>74</sup> DEPSOS set out its integrationist

programme in startlingly ethnocentric terms:

The Indonesian Government has been and is of the resolve to transform the societal status of said isolated communities, so that these communities will become normal communities, as well developed as, and on a par with, the rest of Indonesian society.<sup>75</sup>

To this end DEPSOS implanted community development programmes aimed at: promoting monotheistic religions; building ‘awareness and understanding of the State and Government’; ensuring participation in national development, ‘raising their capacity for rational thinking’; increasing economic productivity; ‘developing and nurturing their aesthetic concepts and values... in tune with the values of Indonesian society’; ‘guiding and inducing [them]... to settle in an area with government administration’.<sup>76</sup> In line with this programme of social engineering, traditional religions were proscribed, customary religious paraphernalia burned, traditions of tattooing and ritual practices prohibited, longhouses torched, and shifting cultivation banned.

A central plank of the national programme of cultural integration was the obligatory resettlement of dispersed and isolated communities into large centralised villages under close government supervision. Some of these villages were resettled and then targeted for development by DEPSOS itself, while others were inserted into larger settlements made up of landless settlers resettled from Java and Madura onto the customary lands of the peoples of the ‘Outer Islands’ in the government’s Transmigration programme. Still others were incorporated as members of the labour force of palm oil and rubber plantations established in ‘conversion forests’.<sup>77</sup> Furthermore, because DEPSOS had only a limited capacity to reach all these communities, the Ministry of Fo-

restry<sup>78</sup> itself carried out an extensive programme of resettlement of forest dwellers, targeting the 6 million people it estimated were engaged in shifting cultivation, in order to give unimpeded access to forests to large-scale logging operations. The explicit aim of this programme was to prevent shifting cultivation, prevent the loss of valuable timber through non-commercial logging and provide unskilled labour to the logging industry.<sup>79</sup>

Minister of Home Affairs Regulation 11/1984 and Instruction 17/1989 concerning Development and Assistance to Customary Law Communities in the Regions (*Pembinaan Masyarakat Hukum Adat di Daerah*), instructed Provincial governors and district heads (*bupati*) to make inventories of the customary institutions in need of restructuring and to provide the resources to so change them. Field studies by Indonesian scholars show that the consequences of these interventions were to undermine the authority of traditional leaders and ‘emasculate’ customary institutions.<sup>80</sup>

Despite criticism of the programme both inside and outside Indonesia, these policies continued to be applied right through 1980s and 1990s. The policy of DEPSOS was restated in little changed terms in the Minister of Social Affairs Decree No 5/1994 at which time the government was estimating that 1.5 million, or 300,000 households, fell into its category of ‘*masyarakat terasing*’<sup>81</sup> Of these, some 160,000 had already been resettled by DEPSOS, while a further 1 million were still thought to require the agency’s attention.<sup>82</sup> Likewise the policy of the Ministry of Forestry and Plantations to resettle forest dwelling peoples, who were officially renamed *masyarakat adat* in 1993,<sup>83</sup> also continued.

During the latter years of the Suharto era, DEPSOS’ programme changed somewhat.<sup>84</sup> In its ideal application, which was rarely realised due to budgetary and personnel limitations, the communities were to be studied for 2 years,

while an inventory of persons and resources, ethnographic information and livelihood data were collected. The idea was to ascertain basic social conditions, needs, potentials, the environmental situation and the presence and capacity of supportive institutions. Communities would then be classified as either very backward or more advanced. In the latter case the communities were not resettled and instead a 'stimulus model' of community development was imposed aimed at accelerated social change over a couple of years. The 'very backward' groups, on the other hand, would usually be resettled and then subjected to a gradual process of integration into the national society over a period of five years, which aimed at providing them with social services and basic infrastructure such as roads, housing and electricity.

The current administration today admits that the old approach was unduly uniform, with the same methods being applied to communities from West Sumatra to West Papua. The highly centralised budget and lack of scope for participatory methods meant that the role of local government in this programme was restricted to implementation, which was in reality severely limited. The 'site manager', 'social worker' and 'community representative' who were assigned to each resettlement community had no control of budgets and were only given their own houses and a single motorcycle as means towards implementing their assistance programmes.

In his last term, President Suharto also established a Department of Transmigration and Resettlement of Forest Encroachers, which aimed to speed up the removal of forest dwellers and others residents from forest areas and resettle them in Transmigration villages. We have not been able to identify a study of the impacts of this scheme.

## A New Policy for Dealing with 'Indigenous Peoples'

In the revised Constitution of 1999, in Article 18 b(2), the State 'recognizes and respects the unities of *adat* law communities and their traditional rights'. However, in Article 28.1 (3), the Constitution stipulates that the 'cultural identity and rights of traditional communities are to be respected, in line with their evolution in time and civilization', a phrase that has been interpreted as still having an assimilationist or integrationist intent.

A careful reading of article 18 of the 1945 constitution refutes the argument that the rights of indigenous peoples (*masyarakat adat*) over their lands and resources were thereby extinguished and became state 'property' as a consequence. In the first place, the state never claimed to 'own' the land and resources, but only to administer them.<sup>85</sup> Secondly, the *Zelfbesturende Landchappen*, the Kingdoms that recognized Dutch sovereignty (recognized in the constitutional explanation of article 18 wherein around 250 units of self-rule were identified [*Swapraja*]) are different from the '*Volksgemeenschappen*' (recognized as *Desa, Marga, Nagari etc* identified as *masyarakat adat*). Thus whereas the self-governing *Swapraja* were merged into the government administrative system through the Laws No. 18 & 19/1965, the status of the *masyarakat adat* lands were not affected.<sup>86</sup>

Nevertheless, during the era of *reformasi*, a gradual rethink of national policy towards indigenous peoples has become apparent, although the process has been severely disrupted both by political decentralization and by institutional reshuffling in the capital. In 1999, DEPSOS was dissolved and most of the staff retrenched.

Just prior to the dissolution of DEPSOS, a new Presidential Decree was passed on *Establishing the Social Welfare of Remote Communities governed by Custom*

(Keputusan Menteri Sosial 97/HUK/1999) which articulated a revised policy towards, and a new name for, the target group (*Komunitas Adat Terpencil*).<sup>87</sup> The government estimates their numbers at some 1.3 million, in total, of whom about 80% live in State forests.<sup>88</sup>

According to the Decree, these ‘remote’ communities are those with ‘a local and dispersed character that have not been involved in social, economic or political networks or services’. They live in small, homogenous secluded communities, have kinship based social rules, are geographically isolated and hard to reach, generally have a subsistence economy, a simple technology, with a high dependence on the environment and natural resources (Article 1). The main aim of the policy is to ‘empower the remote communities governed by custom in all aspects of life and living so that they can live normally – physically, mentally and socially – and so that they can play an active role in development, in which activities are carried out with very deep concern for local traditions’ (Article 2).

However, the subsequent dissolution of DEPSOS severely limited the government’s capacity to implement the new policy. Retrenched staff sought employment in other government departments or in the newly established provincial and district administrations. Equipment, offices and local funds were likewise appropriated by these decentralized agencies, which however, in most cases have not re-established any local bureaux charged with indigenous affairs. Social programmes have often got low priority in the newly established regional administrations, which are preoccupied with revenue generation and economic development.

DEPSOS was restored in 2001 and a renamed ‘Directorate for the Empowerment of Remote Communities Governed by Custom’ (DPKAT) was re-established within it. A flurry of new publications and handbooks set out the new

vision of the Directorate.<sup>89</sup> In early 2002, a new Ministerial Decree was passed setting out *Operational Guidelines for the Empowerment of Remote Communities governed by Custom*. The guidelines note the importance of respecting human rights and responsibilities in line with the five principles of the nation (*pancasila*). Empowerment is interpreted as ‘meaning giving a mandate and trust to the local community to determine its own destiny and select the form of development according to its own needs, and through the provision of sanctuary, capacity-building, advancement, consultation and advocacy’. In DEPSOS’ view, however, ‘the low quality of religious life and understanding, and their orientation towards the past, traditions, customs and systems of belief can be an obstacle to the process of change in remote communities governed by custom’. A further obstacle is that sometimes ‘the social-cultural values of the communities contradict those of society in general and the development process itself’.<sup>90</sup>

Neither the decrees nor the accompanying handbooks make any mention of land rights but a draft set of *Technical Guidelines for Efforts to Protect Remote Communities Governed by Custom* does note the importance of respecting these peoples’ rights to security meaning that ‘in their dwellings, nobody can be disturbed by anyone trespassing on their inhabited place or home without the consent of the inhabitant’. The Technical Guidelines also highlight as problems the takeover of customary lands as protection forest, national parks, conservation areas and logging concessions and the fact that collective land rights (*hak ulayat* – see section 4.1.1) have not been regularized.<sup>91</sup>

The Directorate finds its human resources severely depleted by the institutional changes, despite ongoing support for its infrastructural development programme through an OECF project funded by ‘soft’ loans. Many experienced

staff secured other jobs during the period when DEPSOS was dissolved and a mechanism for effective implementation has yet to be established, given that, according to Article 10 and 11 of the Ministerial Decree, implementation is to be realized by the provincial and district administrations.

Personnel note that the new orientation of the Directorate is to enhance self-reliance, with local programmes being determined through participatory rural appraisal techniques. Officials admit, however, that although the implementation is now meant to be guided by participatory methods and devolved to local government initiative, the budget is still very centralized.

Resettlement is still contemplated as part of the programme but only where this is required by local circumstances – such as those living in ‘vulnerable zones, protection forest and border areas’. The Directorate claims that it is tailoring its new programme as far as possible to the requirements of ILO Convention 169 (although the lack of attention to land rights leads one to question this) but notes that ratification of the Convention is unlikely in the short term as it is the Ministry of Labour which deals with the ILO. Directorate officials complain that, although the new decrees are designed to be as progressive as possible, local government officials have not been retrained to accept these new ideas. PRA methods, it is hoped, will not only help ensure that assistance programme are locally adapted but will also help re-orientate local officials.

Questioned during this investigation, the Directorate agrees that new mechanisms are needed to secure communities’ land rights. Noting that it is impossible to secure communities’ lands so long as they remain within State forests, the Directorate states that it is necessary to excise community lands from the Forest Estate before tenure can be regularized because, notwithstanding the new Constitution re-

specting indigenous rights, land tenure laws have yet to be changed. ‘They need to change the [land tenure and forestry] policy and the law if they are to recognize the rights of communities in the forests’ notes the head of the Directorate.<sup>92</sup> Section 4 of this report details the reasons behind such views.

### **Self-definition of Indonesian ‘Indigenous Peoples’**

As noted above, Indonesian government policy as developed in the late 1970s and 1980s had already recognized a class of peoples, officially referred to as ‘*suku suku terasing*’ or ‘*masyarakat terasing*’ (‘isolated and alien tribes/peoples’), who required special attention in development (see section 3.2).<sup>93</sup> By the 1990s, this policy was modified and addressed to ‘remote communities governed by custom’ (see section 3.3). However both the policy and terminology of the government was repudiated by these peoples themselves. The policies had been developed without taking into account the aspirations of the communities and the communities were classified using imposed and pejorative terms. The opportunity for self-identification, that is an accepted principle of international human rights law (section 3.1), was not part of this ‘top-down’ process.

A process of self-definition of Indonesian ‘indigenous peoples’ began in the 1980s, when representatives of discriminated communities within Indonesia, claiming to be ‘indigenous peoples’, began to bring their concerns to the attention of international organizations such as the United Nations and began demanding recognition of their rights. In response to these claims, the Indonesian government delegation at the UN made a number of interventions at the UN Working Group on Indigenous Populations denying that the concept of ‘indigenous peoples’ applied to Indonesia.

However during the 1990s, through dialogue with the World Bank, the Government began to accept that the concept did apply to some of the more remote and marginalized groups on the 'Outer Islands'. A working group was established, jointly with World Bank regional staff in Jakarta, to develop a methodology for the identification of those groups to which the World Bank's policy on 'Indigenous Peoples' should apply.<sup>94</sup> Although a methodology was never agreed on (and the draft definition was contrary to the principle of self-identification accepted in international law and the World Bank's own policy), the process did encourage the Indonesian authorities to accept that Indonesia does have its own 'Indigenous Peoples' as understood internationally.

With the gradual restoration of democracy in the late 1990s, a strong and much broader social movement of self-identified 'Indigenous Peoples' has emerged questioning previous government policy and calling for respect for their rights. These peoples, who refer to themselves collectively in *Bahasa Indonesia* as '*masyarakat adat*' (a term that can be glossed as 'peoples governed by custom'), are far more numerous and widespread than the set of peoples who had been pejoratively referred to by the government as 'isolated and alien tribes'.<sup>95</sup> Activists in the movement 'guesstimate' that as many 60 or even 120 million Indonesians class themselves as '*masyarakat adat*'. The authors consider this figure rather high. However, no official or methodical NGO effort has been made to substantiate these figures.

Nor are there any sound statistics regarding the numbers of forest residents in Indonesia. Using projections based on isolated studies of populations in specific areas and the extent of Indonesia's forests, rough estimates have been made of the numbers of long-term forest residents that range between 30 and 95 millions.<sup>96</sup> Of these, it has been suggested, as many as '40 – 65 millions are indigenous peoples living

on land classified as public forest and managing their resources through customary law.<sup>97</sup> The absence of reliable census data about who lives in Indonesia's forests is a strong indicator of their political marginalization. Forest peoples are, literally, off the map.

In its contribution to the World Summit on Sustainable Development, the Indonesian Minister for the Environment submitted a progress report explicitly setting out the measures both the government and civil society organizations have undertaken in conformity with agreements made at the Earth Summit in 1992 to recognize and strengthen the role of indigenous peoples. This document refers to *adat* communities as co-terminous with indigenous peoples and may be interpreted as an official recognition that the term 'indigenous peoples' does indeed apply to Indonesia's 'customary communities'.<sup>98</sup>

In sum, the reform era government apparently accepts that there are 'indigenous peoples' in Indonesia. These peoples are becoming well-organised as a self-defined social movement and refer to themselves as 'indigenous peoples' in international discourse and as '*masyarakat adat*' in Bahasa Indonesia.

## Conclusions

FSC has endorsed the ILO Conventions and accepts the principle that self-identification should be a fundamental criterion for defining 'indigenous peoples'.<sup>99</sup> In Indonesia this term is increasingly used by a self-defined social movement of *masyarakat adat* – communities governed by custom – that includes a very wide number of peoples in Indonesia. These peoples have increasingly begun to refer to themselves as 'indigenous peoples' in international discourse and elements in the reform era government now seem to accept that

*masyarakat adat* and indigenous peoples are co-terminous. It seems fair to conclude therefore that, in the absence of a national FSC consensus-building process, FSC Principle 3 should be interpreted as applying to *masyarakat adat*. This conclusion also takes into account the lesson from the review of other national FSC standards (section 2), which showed that in other countries, FSC national initiatives have chosen to apply the term ‘indigenous peoples’ in an inclusive way.



## **Land Tenure and Resource Rights: the Law and Its Application**

**F**SC Principle 2 requires that long-term tenure and use rights be clearly defined, documented and legally established. As the associated Criteria make clear, clear evidence of these rights is required (2.1) not only to ensure that a forest manager has legal security to manage forests for the long term but also to ensure there are no unresolved conflicts between resident communities, other forest users and concessionaires (2.3). Criterion 2.2 further requires that local communities with such rights should maintain control of their lands “to the extent necessary to protect their rights or resources”. Adherence to Principle 2 thus requires not only clarification of the rights of the forest manager but also those of any other resident communities or users. Specifically with respect to indigenous peoples, Principle 3 in addition requires the recognition and respect for the legal and customary rights of indigenous peoples to own, use and manage their lands, territories and resources.

This section of the report thus attempts to answer the following questions:

- What does the term ‘customary rights’ mean in the Indonesian context?
- How can local communities define, document and legally establish long-term tenure and use rights in Indonesia?
- How can indigenous peoples in Indonesia gain recognition of, and respect for, their legal and customary rights to own, use and manage their lands, territories and resources?
- Do these tenures provide them with control of their lands?

## **Adat and Land:**

### **Basic concepts and administrative interpretation**

**Custom:** a traditional or widely accepted way of behav-

ing or doing something that is specific to a particular, society, place or time.

**Customary law:** law established or based on custom rather than common law or statute. (New Oxford Dictionary of English).

Adat... can mean any of the following: law, rule, precept, morality, usage, custom, agreements, conventions, principles, the act of conforming to the usages of society, decent behaviour, ceremonial, the practice of magic, sorcery, ritual. The precise meaning of the term depends upon context, but an important underlying sense seems to be the idea of proper behaviour in one's relations both with other people and with natural phenomena. (Hooker 1978:50)

A cornerstone concept in Indonesian law, identity and culture is *adat*, a word that can be glossed as 'custom' but which embraces far more than the English term usually does.<sup>100</sup> In Indonesia, the term *adat* has come to convey much that is 'essential' to the Indonesian identity, the cultural inheritance that Indonesians have from their pre-colonial past. A community that observes *adat* is, moreover, not just one that observes traditional ways of behaving, but one that is governed by customary law, according to customary institutions, and which allocates rights, responsibilities and resources and orders relations in line with customary values and beliefs. For customary communities, *masyarakat adat*, custom implies a way of life.

The Dutch realized the importance of *adat* to the peoples of the Indonesian archipelago early in their imposed rule and, in common with many colonial regimes since the Romans, accepted *adat* as a more acceptable and practical way of ordering the lives of their subjects than imposing

their own laws and beliefs. They thus adopted a dualistic legal system, with one law for Europeans and another based on *adat* for their subject peoples. Yet as the colonial embrace tightened and administrative interventions intensified, the Dutch also sought to formalize the relations between these two legal regimes.<sup>101</sup>

Attempts by Dutch legal scholars to document, formalize and then codify *adat*, led them to realize the huge variety of social systems that they were dealing with and yet discern what they felt were underlying commonalities of usage and belief. By the 1930s, they had identified 19 *adat* areas which, in particular, they distinguished according to perceived commonalities and differences in customary laws relating to marriage and the allocation of land and natural resources.<sup>102</sup> The colonially perceived boundaries between customary rights regions substantially determined the administrative boundaries of the Netherlands East Indies and thus the provincial boundaries of modern Indonesia.<sup>103</sup>

The Dutch also formalized customary law in codes, and instituted courts and appellate courts to administer *adat* and adjudicate disputes. Indirect rule through *adat* continued during the short period of Japanese rule, although in theory a unified judiciary was introduced.<sup>104</sup> With the rise of an independence movement, beginning in the 1920s, a debate began on the extent to which *adat* should be retained once Indonesia was free. Modernists saw *adat* as a symbol of their backward past in which the Dutch had tried to trap them, but the majority view which prevailed was that *adat* represented the authentic spirit of free Indonesia (and anyway underpinned the status of many of the Indonesian elite at the forefront of the Independence movement). The majority of Indonesian lawyers also strongly favoured the maintenance of the *adat* legal framework established by the Dutch. Moreover, those nationalists advocating a unified modern

state of Indonesia feared that any abolition of *adat* might provoke religious rivalry and conflict between religious and secular authorities.<sup>105</sup>

*Adat* was thus formally recognized in the Indonesia constitution of 1945 and the old legal forms of the Dutch were substantially retained. The plural legal system continued to function for a further 15 years, but the government gradually dismantled native courts, in North Sumatra in 1946, South Sumatra in the 1960s and Kalimantan, Sulawesi and Nusatenggara in the 1970s.<sup>106</sup> Likewise, the authority of the remaining sultanates, recognized by the Dutch through the policy of indirect rule, was abolished in 1965 - Yogyakarta being the single exception. Legal theory about *adat* did not change drastically upon the establishment of independent Indonesia.<sup>107</sup> The basic principle that was retained was that *adat* should be maintained **where it does not conflict with state law and policy**. However, as World Bank/UNDP lawyers Barber and Churchill point out, 'the vastly increased capacity of the government to penetrate and order village life, has meant that the role of *adat* has shrunk accordingly'.<sup>108</sup>

Since independence there has been much scholarly analysis and debate about the real intent and impact of Dutch recognition of *adat*.<sup>109</sup> An important point which emerges from this polemic is that 'the external, scholarly analysis of *adat* upon which much national policy towards *adat* is based does not in many cases reflect an accurate picture of *adat* as it functions in the life of the rural communities'.<sup>110</sup> The reified *adat* of government and the law, is not the *adat* of the people.<sup>111</sup>

### Forms of Customary Tenure

A key concept in the legal discussion of Indonesian tenure is the *adat* concept of *hak ulayat*.<sup>112</sup> The term was translated

by the Dutch legal scholars Van Vollenhoven as meaning the ‘right of disposal’<sup>113</sup> and Ter Haar as ‘sovereignty’<sup>114</sup>. It has also been translated as meaning the ‘right of avail’<sup>115</sup>, while Burns has translated it as meaning the ‘right of allocation’.<sup>116</sup> The truth is that *adat* regimes generically known as *hak ulayat* probably imply all these things in different contexts and the difficulties in translation of the term reflect the difference there is between indigenous customary law concepts and western law. Like ‘Aboriginal Title’, *hak ulayat* derives from custom and precedes any act of the State.<sup>117</sup>

Under very many of the customary regimes prevalent throughout the Indonesian archipelago, land is considered to ‘belong’ to the community as a collective, though it may not be ‘owned’ by it in accordance with western ideas of land as an alienable, private property. The community enjoys the right, subject to its customary rules, commonly referred to as *hak ulayat*, to ‘allocate’ land within the collective territory to members of the group for their long-term stewardship, or to outsiders for their temporary use. Lands allocated to community members are, in many societies, heritable and even alienable **within** the group but may not be alienated to outsiders.<sup>118</sup> When such lands are abandoned, remain unclaimed, or have no heirs, they revert to the collective. *Hak ulayat* can also be seen as a bundle of rights and, besides implying rights of access to and to use natural resources, also confers rights to regulate land for use and conservation, supervise the relationships between persons and the land, regulate transfers and the inheritance of land and other resources, as well as the right of representation of the community in relations with outsiders.<sup>119</sup> *Hak ulayat* thus implies a much **greater** proprietary relationship with the land than the western concept of ‘ownership’, but in modern international law usage corresponds to a substantial degree with such concepts as ‘Aboriginal title’, or an inalienable,

freehold, collective right to territory.<sup>120</sup> As Wright notes: '*Hak ulayat* is the historical and philosophical cradle of *adat* land rights...' <sup>121</sup>

Summarising existing knowledge of *adat* rights, Barber, Johnson and Hafild have noted:

Under *adat*:

- Land has socio-religious significance, and it is closely connected to the identity of the group. Matters concerning land cannot easily be separated from matters of kinship, authority and leadership, modes of subsistence, ritual, and the supernatural.
- In many areas, land and its resources support a broad array of seasonally staggered activities. Rotational and shifting cultivation (*swidden*), hunting, fishing, and the collection of forest products generally predominate over sedentary, intensive agriculture or the intensive exploitation of a few species for the market.
- Individual, heritable rights in land exist, but most individual 'rights in land' are either rights of use subsidiary to a superior group right, or rights to particular resources, such as rubber or other trees, or to harvest a particular cultivated plot. Thus land tenure and resource tenure aren't necessarily the same thing, and one parcel of land is often encumbered with a variety of rights held by different persons and groups.
- Unworked lands are, for the most part, as encumbered by rights as individual garden plots. Land is rarely considered 'empty'.
- Rights in land and its resources are rarely recorded in maps or written records, with the exception of ownership marks placed on trees and other discrete, individually owned resources. Borders are determined on the basis of natural features, such as rivers, and by mutual understanding.<sup>122</sup>

The following sections explore the extent to which these customary law concepts of land and territorial rights are accommodated by current Indonesian Agrarian and Forestry Laws.

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### **CUSTOMARY RIGHTS OF HUNTERS AND GATHERERS<sup>123</sup>**

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Like other Dayak peoples (see box on Kantu' below), the Punan groups of Borneo may not have a concept of territorial 'ownership', in the western sense of proprietary rights to buy and sell land, but they nevertheless have a clear sense of identifying with a particular landscape, in which they have prior rights, which they will defend against intruders. Unlike the farming peoples of Borneo, who tend to conceive territories as extending from the river towards the watersheds, many Punan conceive their territory as a mountain massif bounded by the main rivers into which the waters drain, the downriver limits of such territories being marked by river mouths. In the past, these territories were also extended by conquest. Within the ethnic territory, bands are also associated with particular areas to which they have rights based on their prior occupation of the area. Historically, these territories were not only defended against other mobile groups but also against encroachment by farmers.

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### **WHO 'OWNS' THE FOREST? KANTU' CONCEPTS OF LAND RIGHTS<sup>124</sup>**

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The Kantu' are a 'Dayak' people of West Kalimantan who live along the banks of the northern affluents of

the Kapuas River bordering Sarawak. They live in longhouses which are comprised of a row of independent household units, referred to as 'rooms' or 'doors' and which nonetheless share a roof and a common verandah, with shared steps from the raised floor leading down to the ground. Although each individual household is substantially independent one from the other in terms of daily chores, commerce and subsistence, the longhouse itself is a corporate body - 'a unit of appropriation' - in which substantial rights are vested. The longhouse thus has clear rights over a communal territory, with usually well defined and widely known boundaries. Within this territory, the longhouse likewise shares all the footpaths and most of the primary forest within the territory. Farmlands and secondary forest, which are unencumbered with household claims, revert to the longhouse.

Based on this territorial right, the longhouse will prohibit anyone from outside the community clearing land within this territory and may also expel any members of the longhouse who broach *adat* rules of sharing in the labour of opening new farms, ritual proscriptions, who do not participate in long-house moots and who do not join with others in clearing longhouse trails. Householders' shared rights in the collective territory thus come with shared responsibilities.

Exclusive household rights in forest land are established by the clearance of primary forest. These rights in land are retained by the household for as long as the area can be distinguished from primary forest. The result is that the shared longhouse territory is overlaid by a chequerboard of farms and secondary forests belonging to households. These rights in land are heritable and shared by household members equally between men and women. Such household lands may be lent, permanently exchanged, rented out or sold to other households in the longhouse (and also, though rarely, alienated to households of other longhouses where there are relatives).

Clearance of primary forest is also subject to well known rules. In the first place, primary forest may not be cleared in the territory of a neighbouring longhouse. In addition, primary forest of the dimensions of a normal swidden abutting secondary forest and farms is considered to belong to those who hold rights to those secondary forests and farms. These 'rights of adjacency' do not pass to those renting or borrowing another's land. Where two households claim 'rights of adjacency' to the same piece of primary forest, the household which owns a swidden nearest to or downslope of the disputed area has the superior claim. If two households have swiddens downslope, the rights of adjacency are deemed to be held by the household which first cleared a swidden downslope. Households may agree not to exercise their rights to adjacent primary forest and thus permit others to clear the area instead. In such cases priority is given to those whose swiddens are nearest. Rights of adjacency then pass to that household. The logic of this system is that it encourages the sharing of the most fertile riverbank lands among the households, because a household's rights extend by further clearance upslope from the first swidden rather than along the riverbank.

Because rights to already cleared lands are stronger, such plots may be sold as well as rented, or lent. However, 'rights of adjacency' in uncleared primary forest can only be passed to others and not sold, lent or rented. Disputes over rights to old swiddens are resolved by adjudication of the longhouse headman or other person of rank. Disputed lands may not be cleared until the dispute is resolved. Disputes between longhouses over forest lands are adjudicated by supra-longhouse authorities.

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## CONFLICT OVER LAND TENURE AND OTHER NATURAL RESOURCES IN THE MANAGEMENT OF *REPONG DAMAR*, IN KRUI LAMPUNG

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### Introduction

The systems of land tenure and other natural resources control practised by coastal indigenous peoples grouped in 16 *marga* (traditional territories) in the District of West Lampung, the Province of Lampung are broadly similar. These systems are underpinned by a concept of *adat* territory and by the management system known as *repong damar*, a system of land cultivation that started with dry land agriculture, was then followed by planting pepper, coffee, fruit trees, and *petai* as well as other timbers, and which eventually evolved into an agroforestry system dominated by *damar* (*Shorea javanica*). *Damar* cultivation has gradually developed since 150 years ago when there was lack of resin from natural *damar* trees. Alongside their system of *repong damar*, as a method of *damar* cultivation, the coastal indigenous peoples also cultivate rice paddies (*sawah*), have small gardens, and also manage river and marine resources. Some of policies of Ministry of Forestry in 1980s and in 1990s were developed with so little understanding and knowledge, and even with a deliberate denial, of these peoples' (indigenous and other local people's) systems of land tenure and natural resources management that these policies have endangered the sustainability of *repong damar*.

### The Land Tenure System

There are various stories about the origins of the coastal indigenous peoples in West Lampung, but it is generally agreed that they were there long before the Dutch came to Indonesia. Indigenous peoples in this area speak a language that is different from that

spoken by indigenous peoples living inland but similar to that of indigenous peoples in Bengkulu and the coastal indigenous peoples in the eastern coastal area of Lampung. Kinship among *marga* members is not based on lineages but comes through belonging to the territorial units known as *marga*. Each *marga* has its own chief who is responsible for the various villages within the *marga*. In turn each village has a *kepala adat* (head of *adat*).

Each *marga* has clear boundaries with neighbouring *marga* and these territorial units were recognised in colonial documents from the British and Dutch colonial periods.<sup>125</sup> The *marga* are also acknowledged by other neighbouring peoples in the area. Participatory mapping carried out in 1994 in Kampung Malaya (northern coastal area) and later with NGO & Local Government assistance among the others of the 16 *marga* further south has helped make this system of land management more intelligible to outsiders.<sup>126</sup> Although the *repong damar*, is a relatively new system, it is underpinned by a system of land tenure that has functioned since time immemorial. Within each *marga* rights of ownership are acquired in four ways:

- By opening land for cultivation, a job that is done collectively, after getting the permission from the chief of *marga*. A person must be a member of one of the sixteen *marga* to acquire land rights in this way.
- By inheritance, in which case land is passed to the eldest son or, if there is no son, the eldest daughter. Sale of such land is not allowed and the one who inherits is expected to look after his extended family.
- Younger sons and daughters may also inherit smaller *repong damar*. Sale of such land is likewise prohibited.
- Rarely, land rights acquired through clearance (not through inheritance) may also be sold, with land being valued according to its productivity in *damar*.<sup>127</sup>

### Benefit Sharing

Customary rules also set out how the benefits from *repong damar* must be shared out among members of the extended family, between the sexes and with non-family members. Generally, the resin which drips to the ground is for the children, the resin from the first three notches near the ground is for the women, while the resin from the upper notches is for the owner. The *damar* is also shared between the owner and workers according to agreed ratios varying from 5:5 to 6:4. There is also a rule, known as a pawning system, according to which, when the owner of a *repong damar* cannot repay his debts, the resin has to be paid to the lender.

### Conflict resolution within the community

Within the community, the most common conflicts relate to inheritance, the cultivation of plants within *repong damar*, theft and control over *marga* lands. Most of these conflicts are settled without the need for government intervention by bringing the conflict to the head of *adat* and then to the chief of the *marga*. In case of conflict between *marga*, the conflict will be brought to the meeting of the chiefs with the presence of neighbouring *marga* leaders. Another kind of conflict is related to the clearance of forest water reservoirs (*tanah rancangan*) without the permission of the chief of the *marga* for establishing *repong damar*. Such conflicts are usually brought directly to the chief to be settled.

### Division of Labor in the Economy of Repong Damar

In addition to *sawah* (wet rice paddy), *repong damar* is very important in the economies of the indigenous peoples in the western coastal area of West Lampung. The agroforests not only yield *damar* resin but also other products such as *dukuh*, *petai*, coffee, and durian, etc. The resin is important as it provides a

steady cash income. The cash income is also shared out, according to customary rules, for the various different tasks involved :

- *Pengunduh*: harvesting resin from the notches by climbing and putting it into a basket. Yields can reach 40 kgs a day.
- *Mepat*: the work of making notches in the trunk of young-age *damar* (20 -25 years). This must be done carefully to avoid making too deep a notch which can endanger the tree. In a day a worker can make up to 250 notches.
- *Ngambica*: carriers who bring the resin from the garden to the village. This work is done by both men and women, once they have finished their household work, and besides bringing in the resin they also collect firewood. Every man or woman can bring 15 - 45 kgs of resin per day.
- *Penghadang*: the collector waits on the boundary between the gardens and the village to collect the resin brought in by carriers. There are more than one in each village and their house is also used as the storehouse for the *damar* resin.
- *Pemilah Damar*: sorting the resin, usually done in the village or in the warehouse. This is done by sifting the resin and separating it out piece by piece based on its quality. The women usually carry out this work and each of them can sort up to 100 kgs per day.
- *Cecingkau*: is the person who buys the resin and other products from villages. Generally *cecingkau* is a trader who sells the everyday goods needed by the villagers. Thus resin and other products can be directly exchanged for soap, sugar, pails, etc.
- *Operator Chainshaw* or chainshawman is the person who cuts down the unproductive *damar* trees to make into planks or beams and to provide light and

space in order to enhance the growth, and thus yield, of productive trees.

### **Conflict over control of land between communities and Ministry of Forestry**

A part of *adat* territory of the 16 *marga* has been consolidated as a Conservation Area (now Bukit Barisan Selatan National Park) following long negotiations between Department of Forestry of Dutch Colonial Government and the indigenous peoples. In 1939, the area was consolidated by official forest designation, forest delineation and official forest decision. The indigenous peoples still respect the result of that negotiation, accepting that part of their customary land was given to be a State forest area. The boundaries of the delineated area are likewise respected.<sup>128</sup>

In 1984, Department of Forestry of the Republic of Indonesia reclassified 29,000 ha. of customary land as a State Forest. However, the local communities strongly protested against this designation, when the delineation process was being carried out in 1988. Consequently, as for many forest areas in Indonesia (see section 4.6) the legal status of the area was never consolidated. Notwithstanding, in 1987, the Ministry of Forestry issued a Ministerial Decree granting a logging concession over the area to the parastatal company PT Inhutani V. The company however has accepted that almost the entire area of the concession is cultivated as *repong damar* agroforest and has declined to log the area.<sup>129</sup>

Many NGOs, local government officials, university researchers and research institutions have studied the Krui system and recommended that the government recognize the west coast indigenous peoples agroforestry system and provide them the security they seek to maintain their the land as *repong damar* agroforest. They note that the agroforestry system is economically, socially and environmentally viable.

In 1998, the Ministry of Forestry issued SK No. 47/1998 denoting 29,000 ha. of Krui as an Area with Special Purposes (KDTI). The policy gives an opportunity for the indigenous peoples to continue cultivating *repong damar* in the area for an unlimited time as long as they can demonstrate that they are indigenous people and manage the area sustainably. The decision also annuls the logging concession granted to PT Inhutani V.<sup>130</sup> However, it does not provide them the long-term land security that they seek, nor offer a guarantee that no other concessions will be granted in the area. There are other problems too resulting from the lack of local control of land, such as illegal logging, and the threat that the KDTI permit might be annulled by the MoF. The villagers are also concerned that there is nowhere for them to expand the *repong damar*. In 2001 a further 600 ha. of forest land was reclassified and became the object for the communities to own as private lands. This process is still being adjudicated by the district land office in West Lampung.

### The Future of Repong Damar

The current *repong damar* system does provide a measure of economic security to the *Pesisir* communities of West Lampung. It sustains a vigorous business community and enjoys fairly stable prices and good relations between traders and farmers. The *adat* land tenure system is still used and respected by the local people, who thereby maintain control over their lands and other natural resources, including through inheritance and customary conflict resolution mechanisms. There is, however, outmigration from the area for those deprived of inheritance or who lack the skills for managing *repong damar*. The main threat facing the *repong damar* cultivation system is the uncertainty resulting from its status as State forest, which means that the Department of Forestry can still allocate the area to a third party whenever it wants.<sup>131</sup>

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## The Basic Agrarian Law

[T]he general conclusion is that, from a legal perspective, [Indonesian] tenures are complex, use-related and are not at all secure. This is so because they remain continually liable to forfeiture to the State, usually without just compensation... The result is that rather than there being a developed system of private land law, there is constant intervention in and control of land tenures by the State. Furthermore, this insecurity is compounded by an astonishing degree of uncertainty in the Indonesian land law, which is generated by the basic provisions of the Basic Agrarian Law and maintained by successive governments since the law was enacted... there is little or no protection of the rights of indigenous peoples. (World Bank 1999<sup>132</sup>)

In 1960, the Indonesian Government enacted *Undang-Undang Pokok Agraria No. 5/1960*, commonly referred to in English as the Basic Agrarian Law or simply BAL. This was the first national law enacted after independence in 1945.<sup>133</sup> The law sought to overturn the legal dualism which had been applied by the Dutch, whereby Indonesians and other ‘orientals’ were governed by customary law, while westerners and commercial transactions were governed by ‘positive’ laws, based on Roman-Dutch legal precedents. In place of this dualism, which was seen as paternalistic and colonial, the BAL attempted to affirm a single system of law based on *adat*.<sup>134</sup> The law thus annulled **some** of the previous land laws inherited from the Dutch, including the 1870 Agrarian Act, the regulations establishing State land rights (*domeinverklaring*), the agrarian property rights contained in the Royal Decree of 1872 and Book II of the Civil Code. The law also implicitly revoked the colonial proscription on the alienation of *adat* lands.<sup>136</sup>

**TABLE 2: INDONESIAN LEGAL TENURES MADE SIMPLE** <sup>135</sup>

Forms of Tenure	Rights implications	Main beneficiaries	Limitations
<i>Hak milik</i>	Transferable, right of ownership, may be used as collateral for loans	Individuals - not available to corporations or collectives	Land reverts to State if abandoned or is used 'not in accordance' with BAL
<i>Hak guna usaha</i>	Temporary (up to 35 years) transferable, right of exploitation/ cultivation	Companies	Only for areas over 5 hectares. Can only be extended for a maximum of a further 25 years
<i>Hak guna bangunan</i>	Temporary right to use (and construct) buildings	Individuals and Indonesian corporations	Maximum term 50 years. Subject to regulations which do not exist.
<i>Hak pakai</i>	Right of use	Individuals on State lands	Granted for a definite term
<i>Hak sewa</i>	Right of lease	Individuals	Only available for structures, not available on State lands
<i>Hak membuka tanah</i>	Right to clear land	Individuals	Subject to regulations which do not exist
<i>Hak memungut-hasil-hutan</i>	Right to collect forest produce	Granted to individuals by Govt. 'based on adat'.	Subject to regulations which do not exist
<i>Hak guna-air</i>	Right to use water	Granted to individuals by Govt. 'based on adat'.	Subject to regulations which do not exist
<i>Hak pemeliharaan dan penangkapan ikan</i>	Right to raise and catch fish	Not clear	Subject to regulations which do not exist
<i>Hak guna-ruang-angkasa</i>	Right to use airspace	Energy companies	Subject to regulations which do not exist
<i>Hak ulayat</i>	Right of usufruct	Adat communities on State land	Cannot be recognized on lands overlapping concessions. Unclear procedures exist for recognition. Subject to regulations which do not exist. No compensation payable when land expropriated in national interest.
Hak kepemuaan	Right of 'possession' (legal meaning is unclear)	Adat communities on unencumbered land	Subject to regulations which do not exist. Not implemented.

The extent to which the BAL recognizes customary tenures is extremely ambiguous. Article 5 of BAL specifically states that:

*Adat* law applies to the earth/land, water and the air as long as it does not contradict national and State interests, based on national unity and Indonesian socialism, and also the other related regulations within this Law and others, all in respect to the religious laws.<sup>137</sup>

Land tenure specialist Roger Plant summarizes the

BAL thus:

The fundamental principles of the BAL can be summarized as follows. Agrarian law is to be based on *adat*, but only to the extent that *adat* laws and procedures do not conflict with the national interest. All land rights have to have a social function, with legal relationships over land and resources regulated for the maximum prosperity of the people.<sup>138</sup>

The intent of the BAL was thus to subordinate *adat* to the national interest and the State.<sup>139</sup>

Tenures recognized under the BAL differ substantially from western concepts of private property but also depart noticeably from *adat* concepts in that they emphasise individual rights and provide the basis for alienable, individually owned land. A series of rights were also invented to promote the interests of private companies. As Indonesian legal authority Gautama notes, the BAL thus ‘creates its own hybrid system which is perhaps as different from traditional *adat* law as it is from Western law’.<sup>140</sup> Table 1 (previous page) summarises Indonesian tenures provided under the BAL and subsequent laws.

Article 5 of the BAL also makes clear that ‘other legislation’ may override *adat* law. Notably, Government Regulation No 24 of 1997 sets out rules, which are contrary to *adat*, on how lands should be certified and registered. This regulation can be interpreted as having frozen the allocation of *adat* rights ever since the enactment of the BAL on 24 September 1960.<sup>141</sup> The BAL in effect, while professing to uphold customary law (*hukum adat*) in defiance of colonial legal impositions, in fact entrenched the authority of a new body of imposed laws, known in Indonesia as ‘positive law’ (*hukum positif*).<sup>142</sup>

The weakness of customary land rights under the BAL has been exposed by the very severe problems faced by In-

Indonesian villagers forcibly resettled by national development projects. For example, the tens of thousands of Javanese villagers forced off their lands by the World Bank-funded Kedung Ombo dam in the late 1980s, received nugatory compensation. Many were intimidated into participating in the Transmigration programme. After national and international protests, development agency investigations into the legality of this process of dispossession revealed that the government felt entitled to extinguish customary land rights whenever it wanted to. Whereas, in most countries, the State's power of 'eminent domain' (the right to expropriate private property in the national interest), is heavily conditioned by protections of the rights of property holders to fair compensation, in Indonesia the mere fact that a development programme is mentioned in a government 'five year plan' (*pelita*) is interpreted by government functionaries as sufficient evidence of the 'national interest'.<sup>143</sup> Indigenous communities standing in the way of government-sponsored Transmigration programmes have lost heavily as a result.<sup>144</sup>

As World Bank consultant Warren Wright observes:

The subjection of adat land law to the national interest based on the unity of the nation meant that adat authority must crumble whenever it came into conflict with the exercise of authority by the central State because the State cannot tolerate any other source of authority other than its own.<sup>145</sup>

Even greater obstacles confront those seeking land security under other forms of tenures aside from *hak milik*. Many of these tenures, are meant to be applied by regulations setting out how they should be applied and registered. As Wright again notes:

40 years after the enactment of the Basic Agrarian Law, these

critically important implementing regulations still do not exist. The continuing failure to enact implementing regulations mandated by the BAL concerning the creation and transfer of *adat* land means that a second major source of legal uncertainty prevails. How and, indeed, whether new rights on land can come into existence in accordance with *adat* law and, if they can come into existence according to local *adat*, how they may be transferred remain unclear questions.<sup>146</sup>

### ***Hak Ulayat***

The main form of tenure found among forest-dwelling indigenous peoples in Indonesia is that referred to by the catch-all term *hak ulayat* (see 4.1.1 above). Contrary to indigenous views, this right has been interpreted as a right pertaining to State lands an interpretation reaffirmed in Government Regulation No 24 of 1997 Re. Land Registration. This is based on a highly restrictive understanding of Article 33 (3) of the Constitution which gives the State the right to control natural resources. As Asian Development Bank consultants Safitri and Bosko note this has been:

Interpreted and implemented as to enable the state (the government), for the purpose of national development, to grant rights over uncultivated *adat/ulayat* land or forest without the need of obtaining consent of the relevant *adat* community and without triggering the legal obligation to pay ‘adequate’ compensation to the *adat* community which holds the *ulayat* right over that land and forest. This policy has been applied most notably in relation to the granting of timber concessions to the logging companies, granting of mining concessions to mining companies, the declaration and demarcation of protected forests, and the allocation of land for transmigration projects. This resulted in the processes

of displacement, dispossession and marginalization of indigenous peoples, together with the loss of their cultural integrity.<sup>147</sup>

Article 3 of the BAL states:

In view of the provisions contained in paragraphs (1) and (2) of Article 2, the implementation of *ulayat* rights and other similar rights of *adat*-law communities – as long as such communities in reality exist – shall be such that it is consistent with the nation’s interests and the interests of the State based on national unity and shall not contradict the laws and regulation of higher levels.

The General Elucidation of the BAL further notes:

It would not be justifiable for an *adat* community... to reject a plan of large-scale clearing of forests on an on-going basis, which is required for the implementation of projects for food production or relocation of people. Experience shows that regional development is impeded by problems related to *hak ulayat*. The interests of the *adat* community should be subordinated to the broader interests of the nation and of the State and the implementation of *hak ulayat* should also be consistent with the broader interests.<sup>148</sup>

The Indonesian Government has thus been extremely reluctant to tolerate, let alone effectively ‘recognize and respect’ *hak ulayat*. Instead, the emphasis of the BAL is on the provision of individual ownership and recognition of collective rights is ‘tokenistic and superficial’. *Hak ulayat* is not recognized in juridical terms.<sup>149</sup>

An additional problem for those who hold land under *adat*, is that the collective lands may be gradually broken

up as individuals acquire private land ownership rights (*hak milik*) within customary lands. Contrary to *adat* traditions, under the BAL, such lands do not revert to the collective when abandoned but instead revert to the State. Moreover, the determination of abandonment or misuse of land may be made by a simple decision of the executive. As Wright explains ‘through such processes, the original territory of the *adat* community will be diminished until eventually it disappears’.<sup>150</sup> Barber and Churchill observe, moreover, that such a procedure is rarely invoked by the *adat* holder of land of his own initiative, but only when another party wants to acquire *adat* land. Land titling is thus really a procedure for the transfer rather than for the recognition of land rights.<sup>151</sup>

The process is positively endorsed by Article 4 of the Regulation of the Minister for Agrarian Affairs No 5 of 1999.<sup>152</sup> Indeed Budi Harsono, an acknowledged expert on the BAL, argues that the BAL is instrumental in restructuring *adat* communities, obliging them to abandon collective land use patterns and adopt individualized land entitlements.<sup>153</sup>

The same Regulation, titled *Concerning Guidelines for the Settlement of Hak Ulayat Issues of the Adat Community*, does however recommend a mechanism for the registration of *hak ulayat*. Article 5(1) provides for the Regional Government to investigate and determine whether *ulayat* exists with the participation of *adat* law experts, the *adat* law community, NGOs and other institutions involved in the management of natural resources. Under Article 2(1) the Guidelines recommend that such lands shall be drawn cartographically on the land registration base map ‘if possible by drawing the boundaries and recording them in the land register.’ Implementation of these Guidelines apparently now require the enactment of Regional Government regulations

before they can be applied in practice, however the Regulation does not provide legal security of any rights. Wright notes ‘the regulation is neither adequate in itself to deal with the problems of *hak ulayat* nor does it apply to forest areas which are outside the jurisdiction of the National Land Agency...’<sup>154</sup> (and see section 4.3).

A further critical problem relates to the lack of legal personality of customary law communities. Under existing laws, no corporate entities or collectives may own land rights save for those specifically designated by Government Regulation No 38 of 1963. ‘An *adat* community enjoys no legal status under existing law let alone being recognized as a corporate entity capable of owning land rights’.<sup>155</sup>

Following the AMAN Congress of March 1999, at which the Minister for Agrarian Affairs, Hasan Basri Durin, promised to issue a policy to recognize *adat* land rights, Ministerial Regulation No 5/1999 was passed. The regulation creates a new category of land rights – *hak kepemayaan* – which has been translated as meaning a ‘right of possession’. Under the regulation, an *adat* community may be recognized by the local legislature at the *kabupaten* level and given a register number and recorded in the land book of the BPN (see section 7.5 for examples).

Land tenure scholars now dispute the legal implications of this regulation and the meaning of the term – *hak kepemayaan* – as this is not found elsewhere in the law. The actual rights conferred by the law are therefore unclear. According to Maria Ruwiasuti, these rights may only be registered for areas which do not overlap existing rights and concessions.<sup>156</sup> The ADB defines it merely as ‘a right to reap the benefits of the natural resources, including land, in the said area for survival and livelihood’ – in other words a weak right of usufruct.<sup>157</sup>

World Bank land tenure expert Warren Wright concludes:

What is required is an Act of the Indonesian Parliament to deal comprehensively with *hak ulayat*. Until that occurs, the difficult issues associated with *hak ulayat* will continue.<sup>158</sup>

Maria Sumardjono, Professor of Law at Gajah Madah University and Vice Director of the National Land Administration Agency (BPN), likewise asserts:

Some explicit clarification is...required about what is meant by recognition of *ulayat* rights and such clarification needs to be stated in a piece of legislation that can serve as a fair basis for settling the existing cases of *ulayat* land and for managing *ulayat* rights. If neglected, the *ulayat* rights issue will be a time bomb that is ready to explode anytime.<sup>159</sup>

## Land Agency

Article 19 of the BAL says that land registration is to be carried out throughout the whole of Indonesia to provide legal certainty. This process is to be implemented according to the provisions of Government Regulation No 10 of 1961 *Concerning Land Registration*. Land registration is to proceed in two main steps, first, the surveying and registration of the land itself in the land registry and, second, the registration of rights to land in the form of titles. The emphasis of the latter stage is on the provision a titles (*sertifikat*) to those claiming *hak milik*. The BAL and the Regulation passed the responsibility for administering this process to the BPN (*Badan Pertanahan Nasional*) and its subsidiary bodies, with the overall policy being the preserve of the national planning agency BAPPENAS. However, the capacity of these agencies to actually implement the law has been deficient.<sup>160</sup>

According to the World Bank, which is just embarking on a second long-term project to strengthen the capacity of the land administration in Indonesia:

Only about 14 million of the nation's estimated 70 million land parcels (20 percent) have been registered in the 40 years since land registration began. If the current pace of registration continues, land registration would never catch up with the total number of parcels, since this total is estimated to be growing by more than 1 million parcels per year. The main reasons for such a low coverage are the weak institutional capacity of the [District Land Offices], complex and overlapping patterns of land tenure, absence of documentation, long-term disputes and unclear procedures for adjudication, large number of parcels, and rapid increase in the number of parcels. Even where titling has been substantially completed, the number of registrations of transactions subsequent to the titling are low and threaten the integrity of the land records as does poor records management.<sup>161</sup>

Further:

...the land administration institutions are, generally, poorly focused and commonly resented. Until 1999, non-forest land matters were administered by the National Land Administration Agency (BPN), a central agency reporting directly to the President and controlling a network of some 300 District Land Offices. BPN has been characterized as over-centralized, unresponsive to landholders, secretive, and used in ways incompatible with good governance. Overall land policy was the responsibility of BAPPENAS whose role was marginal at best because of the weak policy position....<sup>162</sup>

Registration and certification of collective rights has been even more deficient. Again according to the World

## Bank:

While the [BAL] established that Indonesian land law would be based on highly diverse *adat* laws, most of the implementing laws, decrees, and regulations needed to clearly define the land rights specified in the [BAL] have not been enacted, at least partly, because there is no clear policy for the legal framework to support. This gives administrators a wide amount of discretion in interpreting the law and in allocation of land rights with little basis for fair resolution of tenure disputes... communal rights of traditional societies (*hak ulayat*) were ignored by formal policy. Contrary to the requirement of Law No. 20 of 1961 on Revocation of Rights on Land, formal land expropriation procedures are not used and unfair bargaining mechanisms are used to force out landholders. Appeals to the courts are rarely successful and confidence in the court's impartiality in enforcing the laws and their intent has been eroded. Legal and regulatory reform is needed but must be preceded by an inclusive consensus on the policies and objectives that they will support.<sup>163</sup>

In 1999, as part of a country-wide process of decentralization, far greater powers for the allocation of land rights, land registration, and dispute resolution were conferred on the 268 District (*kabupaten*) governments, each of which has its own legislature, district head (*bupati*) and executive.<sup>164</sup> The process of land titling is thus in a phase of transition (see also section 7.3).

## The Forestry Act

One of the most difficult issues for consensus is the policy for land under control of the Ministry of Forestry. This land

amounts to about 70% of the total land in Indonesia. Much of this land is not forested, and the Ministry effectively maintains a parallel land administration system for urban and farm land within the forest boundary that is even less transparent than that of BPN. The boundary itself is unclear and registration of private land rights in these areas is difficult. Even more difficult, is establishing customary land rights within the forest estate. Probably most forest land has been used by ethnic communities for many generations and the land rights are recognized within and among communities. (World Bank 2000<sup>165</sup>)

In 1967, the Indonesian Government promulgated Act No 5, *Undang-Undang Pokok tentang Kehutanan*, which is referred to in English as the Basic Forestry Law (BFL). The BFL radically redefined the property rights of the tens of millions of Indonesians living in areas that were to be classified as ‘State Forest’. BFL had the aim of promoting a rapid process of national development based on the exploitation of natural resources by facilitating the access of large companies to forests.<sup>166</sup>

During the 1970s, an administrative convention developed by which all lands classified as forests would be administered by the Ministry of Forestry according to the BFL, while all other lands would be subject to the BAL to be administered by BPN. The Ministry of Forestry thus assumes that the BAL does not apply in forests, an interpretation that appears to have no legal basis.<sup>167</sup>

Under BFL forests are divided into two categories: ‘proprietary forests’ (*hutan milik*), being those areas of forests where land titles have already been secured, and ‘State forest’ (*hutan negara*), where property rights are not recognised. Forest dwellers claiming *adat* rights, such as *hak ulayat*, find their lands subsumed into the latter areas. The degree to which *adat* communities may continue to ex-

ercise their rights varies with the classification of the forest. Rights in ‘Conversion Forests’ are effectively extinguished through the clearance of natural forests in the national interest and the land is transferred to the jurisdiction of BPN under the BAL. In ‘Production Forests’ traditional rights to hunt and gather may be exercised relatively freely, but only the minor and incidental usages are permitted in ‘Protection Forests’.<sup>168</sup>

However, while recognising the existence of *adat* rights, following the interpretation in the BAL, the BFL treats these as weak rights of usufruct, and explicitly subordinates them to the national interest: logging. Article 7 of the BFL thus notes: ‘Implementation of *ulayat* rights should not hinder the fulfilment of the aims of this Act’, a point reiterated in Article 17. This charge is further clarified in Implementing Regulation No 21 of 1971, *Concerning the Right of Forest Exploitation and the Right to Harvest Forest Products* which stipulates in Article 6(1): ‘the rights of *adat* law communities and their members to extract forest products... shall be arranged in a proper manner so as not to interfere with the implementation of forest utilization’.<sup>169</sup>

Under the BFL, forests, that is both State and proprietary forests, which have not yet been defined and which together are claimed to include 70% of the national territory (but see sections 4.5 and 4.6), come under the direct jurisdiction of the Forestry Department and are considered, by administrative convention but not by law, to be excluded from the jurisdiction of the BPN and the Department of Agriculture.<sup>170</sup> *De facto*, the Forest Department acts as if it were the owner of forests.<sup>171</sup>

Both the BFL itself and the way it has been interpreted have been roundly condemned by legal analysts. FAO Forestry Law Consultant Charles Zerner has characterised the classification of State forests as lands unencumbered by property rights as:

a potent legal fiction that is factually inaccurate and socially problematic. The vast expanses of Indonesia's designated state forest lands are in fact inhabited or directly used by approximately 30 million people.<sup>172</sup>

Under Government Regulation No 28 of 1985 on Forest Protection further restrictions on the exercise of customary rights were subsequently applied. Shifting cultivation, cutting, harvesting, unauthorized occupation or working of forests were all criminalized and the forest police were given authority to investigate violations and prepare cases against offenders.<sup>173</sup>

The BFL laid the basis for the intensive exploitation of Indonesia's forests, which were first zoned as protection, production or conversion forests and then handed out to logging companies and land developers. Production forests were opened up to concessionaires as KPH (*Kersatuan Pemangkuan Hutan*) on Java and as HPH (*Hak Pengusahaan Hutan*) on the Outer Islands. Production forests could also be developed as tree plantations under PIR (Nucleus Estates) schemes, mainly oil palm plantations, which were often supplied with labour through the Transmigration Programme, whereby the 'surplus people', mainly from Java and Madura, were transported and resettled in outlying provinces.<sup>174</sup> In 1990, the Forestry Department also initiated a fourth form of concession, HTI (*Hutan Tanamuan Industri*), under which concessionaires could clearfell degraded natural forests and replant with fast-growing softwoods suitable for use in the pulp and paper industry.<sup>175</sup> Currently there are 57 KPH concessions, 420 HPH concessions and 183 HTI concessions in Indonesia.

The problem remained, however, that the simple assertion by the state of control of natural resources and the subordination of *adat* to state decisions and interests, did not cause *adat* rights-holders to vanish. The 30 years of in-

tensive forest exploitation that followed the promulgation of the BFL have thus been characterised by continuous land disputes and local resistance. An attempt to resolve these conflicts was made by the Government in 1976 through Presidential Instruction No 1 *Concerning the Synchronisation of Implementation of Agrarian Affairs with the Forestry, Mining, Transmigration and Public Works Sectors*. With respect to *adat* the instruction notes:

Where a piece of land (intended as part of a HPH) is controlled by the local *adat* community under a valid right (*hak yang sah*), that land must be cleared (of those rights) at the outset with the payment of compensation... Where the holder of a HPH needs to close off an area with the result that the local community cannot enjoy *adat* rights, the HPH holder must give compensation to the community.

As Barber and Churchill point out, the trouble is that it remains unclear what a ‘valid right’ is.<sup>176</sup>

In 1999, after intense advocacy by civil society groups demanding a more just process of allocating rights in forests, the 1967 BFL was revoked and replaced by a new Basic Forestry Act No 41. However, the new law retains the same provisions as the 1967 BFL regarding the recognition of *hak ulayat*. Article 1(4) of the 1999 BFL notes that ‘State forest is forest situated on a piece of land not covered by any proprietary rights’. The same is reiterated in the Explanatory Memorandum accompanying the new law, which notes that ‘included in this category (State forest) are forests formerly controlled by *adat* communities known as *ulayat* forest, *marga* forest, or another name.... *Adat* forest is state forests in the territory of an *adat* community.’<sup>177</sup> The result is that although *adat* forests are a new category of forest, this is still within the State Forest Zone and no clear rights are conferred on *adat* communities.<sup>178</sup> At the same time, ar-

ticle 1(4) of the new Basic Forestry Act rejects the concept of *adat* rights as some kind of ownership right regulated in the BAL, PP 24/1997 re Land Registration and Permen 5/1999.

The Ministry of Forestry also imposes the use of the new Forestry Act No 41/1999 on the whole area that has been designated as State Forest Land, currently 120 million hectares of the land base of Indonesia, in place of the Basic Agrarian Law that allows, albeit weak, recognition of the rights of *masyarakat adat* to their lands. The administrative agreement between the Ministry of Forestry and the National Land Bureau to segregate the areas under their jurisdictions, applying the BAL in one and the BFL in the other, seriously disadvantages those communities whose lands fall inside areas designated as State forest lands. According to administrative convention, in these areas, the communities cannot own their land but can only get management rights to it, through long procedures which are not yet regulated nor clarified through implementation guidelines.<sup>179</sup> (see section 4.9 for further details).

## The Forest Gazettement Process

In what could be considered one of the largest land grabs in history, the government implemented a forest zonation system that classified most of the Outer Islands as forestlands. Seventy-eight percent of Indonesia, or more than 140 million hectares were placed under the responsibility of the Department of Forestry and Estate Crops. This included over 90% of the outer islands. Estimates place as many as 65 million people living within these areas. According to the Department of Forestry, the creation of the State forest zone automatically nullified local *adat* rights, making thousands

of communities invisible to the forest management planning process and squatters on their ancestral lands. As a result, logging concessions, timber plantations, protected areas, and government-sponsored migration schemes have been directly overlaid on millions of hectares of community lands, causing widespread conflict. Yet, in fact for many local people, traditional law, or *hukum adat*, still governs natural resource management practices. (International Centre for Research in Agroforestry<sup>180</sup>)

Under Article 1(4) of the 1967 BFL ‘the determination of forestlands is to be controlled and defended by the Ministry of Forestry’.<sup>181</sup> Government Regulation No. 33/1970 on Forest Planning required the Ministry to reserve land as forest areas. Official Decision 85/1974 then set out the general procedures for forest gazettement.<sup>182</sup> Basically, these pieces of legislation reaffirmed the procedures laid down by the Ministry of Forestry in Dutch colonial era, whereby the State determines the State’s forest area through a three stage process of **designating** an area according to its land use function, **delineating** the boundaries and then finally gazetting this area as ‘forest’ with a certain classified use through an **official decision**. The policy also set out procedures to determine whether an area is public land or not. (See table 3).

**TABLE 3: INDONESIAIAN FOREST GAZETEMENT MADE SIMPLE**

Era	Designation	Boundary definition	Official decision
Colonial era	Ministry of Forestry	Local forestry team and adat community	Provincial Resident
New Order era (1970s and 1980s)	Ministry of Forestry	Bip. Hut.	Ministry of Agriculture
New Order era (1990s)	Ministry of Forestry	PTB headed by bupati	BATB and KHT
Current era	Ministry of Forestry by considering Province Spatial Plan	District government with PTB and adat community	BATB and Ministry of Forestry

The main difference between the various procedures lies in the location of the authority to carry out the various steps of forest gazettement. In the Dutch colonial era, the Ministry of Forestry (*Bosswessen*) only designated forests and arranged forest boundaries technically, while final official decisions lay with the provincial colonial government. In the New Order era, the Ministry of Forestry had responsibility for both the designation and border arrangement, while the Ministry of Agriculture made the final decisions. Since decentralization, the designation of forests is carried out by the Ministry of Forestry, taking into account provincial spatial planning, the boundaries are defined by local government (kabupaten/City government), with the aim of ensuring that communities can participate in boundary definition arrangement. The final decision is then made by the Ministry of Forestry.<sup>183</sup>

### **The Implementation of State's Forest Gazettement Policy**

Not only has the forest gazettement policy changed several times, the implementation of these procedures has been very deficient. The administrative process is long and complicated and much of the work of implementation is leased to other parties, with the result that many of the legally required procedures are often omitted. When in 1978 the task for deciding forest boundaries was passed from the Provincial Forestry Office (Bip. Hut.) to a boundary definition committee (*Panitia Tata Batas* (PTB)), which was headed by the *bupati* from 1990 onwards, further misunderstandings arose.<sup>184</sup>

Studies carried out for this review show that the hectareage of State forest land increased progressively until 1984 (see figure 1). At that time the Ministry of Forestry designated 143 million hectares of land as 'forests'. How-

ever, between 1999 and 2001, Provincial Spatial Planning exercises were carried out to determine more precisely the boundaries of these forest zones. This resulted in some 20 million hectares being re-classified as outside official ‘forests’. The current total of ‘State forest land’ is estimated to be some 120 million hectares.<sup>185</sup>

But beside this, there have also been serious deficiencies in the process of boundary definition. Because of widespread resistance by local communities to the designation of their lands as State forest land, the legal document of forest delineation (*Berita Acara Tata Batas/BATB*) cannot be finalised (and see section 7.4). Additional complications arise from the fact when concessions are handed out, concessionaires are contractually obligated to delineate their own concession boundaries (see also section 4.8). Where these concession boundaries follow the boundary of State forest lands, the concessionaires are expected to pay for and carry out **joint** delineation along with personnel from the Ministry of Forestry. These processes are very often delayed or incompletely carried out. The result is that no legally binding decision on these areas has ever been made officially. In fact, our research shows that only 10% (12 million hectares) of the approximately 120 million hectares designated as State forest land has yet been officially delineated and decided.<sup>186</sup> **Therefore, 90% of all State forest lands have uncertain legality** and the status of the 10%, on which final decisions have been made, is still disputed by many communities.

Since the promotion of decentralization in 1999, *bupati* have become increasingly critical of the forest gazettement process. There are loud calls for a rigorous review of the status of State forest lands, while at the same time many long submerged conflicts have surfaced as local communities seek to reclaim rights to their lands, which they feel were unjustly classified as state forest land.<sup>187</sup> A study con-

ducted by the International Center for Research in Agroforestry in 2000 showed that about half of all State Forests, that is half of the total 143 million hectares then classified as ‘forest’ by the Ministry of Forestry, are actually dominated by agro-forests, agricultural lands and settlements. ICRAF has recommended that these areas be excised from the State’s forest area in order to dampen land conflicts in the forest area, while priority then be given to deciding which of the remaining areas should be maintained as forests.<sup>188</sup> Likewise a World Bank study of 2002, based on the latest data from landsat satellites, has recommended that 30 million hectares out of the current 120 hectares of State forest land, which are not categorized as protected forest, should be excised from the State’s forest lands.<sup>189</sup>

### **The KPH, HPH and HTI system**

This report examines in turn the three main types of forestry concessions in Indonesia being forest concessions on Java (KPH), forest concessions on the Outer Islands (HPH) and timber plantation concessions on the Outer Islands (HTI).

#### **Forest Concession on Java(KPH)**

Whereas most forest lands on the outer islands were arrogated to the State and then allocated to forest concessionaires following independence, on Java this system of asserting centralised control over forests was instigated by the Dutch colonial State at the beginning of the 19<sup>th</sup> century. Forest lands were arrogated to the colonial State, assigned to the jurisdiction of an emergent forestry department, while the rights of local communities were overridden or limited to small areas of permanent cultivation. Disputes were defused, in part, by introducing the *taungya* system, pioneered by the British in Burma, under which local villagers were

permitted to cultivate crops between rows of teak saplings for a few years. In Java this system is now known as *tumpang sari*. However disputes between the local communities and foresters - over land rights, access and use rights, employment conditions and the system of penalties – have been very widespread and long-standing.<sup>190</sup>

In 1972, control over 1.8 million hectares of production forest and protected forest on Java was given to a parastatal timber company, Perum Perhutani, for an unlimited period. The area was later extended expanded in 1978 (GR 2/1978) to include forest lands in West Java and Banten Province. The company now has control over more than 2.5 million hectares of land, 23% of the land base in Java.<sup>191</sup> These concessions have given Perum Perhutani a virtual monopoly of control over Java's forests, with the exception of conservation forests, and the forests within the Jakarta region and the Sultanate of Yogyakarta.

In recent years, land conflicts, between villagers and Perum Perhutani (PP) have steadily worsened, although large parts of the areas administered by PP are in fact no longer forested but are now irrigated fields, village settlements and areas of dry-land farming, and include some of the poorest villages of Java.

The reasons for these disputes have been summarized by Perum Perhutani as follows:

- Villagers have occupied forest lands without State authorization because of their need for land.
- Forest gazettement is disputed, in part because the gazettement procedures were not complied with properly.
- Development projects have been given the go ahead even in areas where unresolved land disputes exist.
- Villagers facing relocation have refused to move.
- Disputes arise from overlapping land rights or claims – land ownership, concession areas, use rights, and customary or *adat* rights in the forest area.<sup>192</sup>

Although a number of regulations have been passed since 1951 to try to ease these problems, they persist.<sup>193</sup> In the 1980s, Perum Perhutani began experimenting with social forestry and later developed a pilot ‘Cooperatives Forest Management’ system (PHBM) to try to accommodate the demands and needs of local communities. The system included a profit sharing arrangement by which communities received 20% of the profits from timber sales, while PP retained the other 80%. The profit sharing has, however, been considered unjust by both local communities and some local governments. In one district, Wonosobo, a district regulation has been passed, No. 22/2001 on Community-based Forest Management, which gives the community the opportunity to manage forest without any intervention by Perum Perhutani. The regulation can be seen as a response to a rising tide of complaints from local communities about the way Perum Perhutani relates to them.

### **Forest Concession on the Outer Islands (HPH)**

Shortly after the 1967 BFL was passed, Act No. 1/1967 on Foreign Capital Investment was also passed in order to facilitate foreign investment in logging in Indonesia. Act No. 6/1968 on Domestic Capital Investment opened the way for national investment in logging the following year. Government Regulation No. 21/1970 on Forest Concession Rights (HPH - *Hak Pengusahaan Hutan*), then set out the mechanism for actually handing out these concessions.<sup>194</sup>

The process of handing out concessions thus went ahead of the processes for designating forest zones, delineating boundaries and their official gazettelement. Indeed some 600 concessions had already been allocated by 1968, a number that has actually decreased, although many have increased in size, since. Forest zoning outside Java was not seriously implemented until 1984, when a national

programme of forest designation was carried out according to a Consensus Forest Land-use Plan (*Tata Guna Hutan Kesepakatan* (TGHK)). Many of the conflicts between communities and concessionaires result from this back-to-front process, whereby concessions were handed out long before areas were designated as State forest lands, boundaries were properly delineated or official gazettelement had taken place. The later concentration of forest concessions in the hands of a relatively small number of timber industrialists has exacerbated these difficulties, pitting local communities against politically protected tycoons with massive resources and power.<sup>195</sup>

### **Industrial Planted Forest (HTI)**

When HTI was initiated in 1984, the programme was conceived as a way of promoting the rejuvenation and rehabilitation of unproductive production forest, as stated clearly in the Forestry Ministerial Decree No.20/Kpts-II/1983: “The development of HTI is an activity to rejuvenate and revitalize in order to increase the potential of production forest to guarantee the availability of industrial material and is an effort to rehabilitate unproductive production forest.” Accordingly, funds were taken from Reforestation Fund and the Forest Rehabilitation Fund to this end. In 1986, based on the Forestry Ministerial Decree No. 320/Kpts-II/1986, the government deemed HTI to be a National Programme, aimed at increasing the productivity of unproductive production forest, whether inside or outside HPH. HTI development was prioritized on “vacant lands, pastures, bushes and other unproductive forests”. As the ministerial decree makes clear there was prioritization in which lands should be used for the development of HTI. This condition was maintained until 1989, such as in the Forestry Ministerial Decree No. 471/Kpts-II/1989, where the prioritization of land for HTI de-

velopment is apparent.

Ironically, in the Government Regulation No.7/1990 on HPHTI (Right to Utilize Forest for Industrial Plantation) this prioritization was not stated explicitly. It merely stipulated that HTI should be sited in “regular production forest area that is unproductive.” The lack of reference to land prioritization poses a significant set back to this policy, as an effort to keep the natural forest from being destroyed by HTI development. It propelled the implementation of HTI into timber rich natural forests.

HTI development is closely related to the effort of the forestry department to supply demand for wood from a decreasing natural forest base, while at the same time maintaining its jurisdiction over forest lands. However, society as a whole has had to pay the cost in terms of lost access to natural forests and degraded areas, and severe disruption of their social, economic, legal and environmental conditions.

The common pattern of HTI management goes through several stages:

- Residual timber is first harvested under a Logging Concession Permit
- The residual forest is then cleared usually by slash and burn.
- Skidders or tractors then clear out the remnants of the burning
- In the early rainy season fast-growing, light-tolerant tree species are planted such as *Acacia*, *Gmelina*, *Leda*, etc.)

In practice rates of regrowth have often been disappointing meaning a net loss of biomass of around 70%.

To overcome the shortage of labour in HTI areas, many HTI have been supplied with migrant workers under the Transmigration programme. These ‘HTI-Trans’ projects have been negotiated through Inter-Regional Work Agreements (AKAD) and have resulted in a large influx of urban-

ized workers into the forest area with no guarantee of the land titles which are meant to be issued to migrants under the standard Transmigration project. Under HTI-Trans, which is a national programme that HTI companies are obliged to join, the company is responsible for preparing facilities for the workforce while the government supplies the manpower through Transmigration. Currently there are 67 concessions under the 'HTI Trans' programme, covering an area of 985,430 hectares of forest land.

PT Finantara Intiga (see Section 6.3) and some other outgrower schemes companies are among the few HTI pulp companies that are still expanding their plantations following the economic crisis and the reform era.

The majority of HTI schemes have slowed down, partly for financial reasons - the subsidy from the Reforestation Fund has been stopped – and partly owing to pervasive land conflicts with local communities who in fact occupy much of the land. Other HTI companies are currently either maintaining their current planting levels or are not continuing activities, another common reason for a slow expansion of HTI development is because local people occupy much of the land.<sup>196</sup> In October 2002, the Ministry of Forestry revoked dozens of HTI concessions due to their financial and technical problems but in November 2002, several HTI concession holders brought their cases to court. It seems likely that final decisions on whether these concessions can continue to operate will then be made by the MoF following mandatory certification.<sup>197</sup>

### **The Obligations of Concession Holders**

As part of this study, original research was carried out in order to gain a comprehensive understanding of the legal obligations of concessionaires towards local communities and

**TABLE 4: THE OBLIGATIONS OF CONCESSION HOLDERS**

Forest Management in Java: KPH	GR No. 15/ 1972	GR No. 36/ 1986	GR No. 14/ 2002	Supreme Court Decision No. 07.P/HUM/2002 & GR 53/1999
<b>Aim of the company</b>	Economic Profit, Maintain Sustainable Forest Product and its social function	Economic profit by providing forests product and services, and support to the government development program	Economic Profit by provide forest product and services	Economic profit by providing forests product and services, and manage the forest ecosystem participative for the benefit of the company and the community
<b>Period</b>	No time limit			
<b>Forest Land Area</b>	1,874 million hectares, Central Java and East java State Forest	2,567 million hectare, Central Java, East Java and West Java		
<b>Exempted Area</b>	Nature Reserve (CA) & National Parks (TN), Jakarta City forest land and Jogjakarta forest land			
<b>Working Area Delineation</b>	Unfinished process left over by the Dutch, should be done by the concession holder	Unfinished, should be done by the concession holder according to its own regulation (Perhutani Director Decree no17/1987)		
<b>The alteration of KPH area</b>	By the MoF through state forest land declassification and by the Director of Perhutani for other purpose such as public road, grave yard etc through Land for special purpose (LDTI) classification			
<b>Procedure to get the concession</b>	Appointed by the Government through Government Regulation			
<b>Permit Holder</b>	Perhutani as a State Owned Company (BUMN-State Enterprise)	Perhutani as a State Owned Company (BUMN-State Enterprise)	Perhutani as Private Company	Perhutani as a State Owned Company (BUMN-State Enterprise)
<b>Community Development</b>	Taungnya system (Tumpang sari)	Community Development by the Concession Holder (PMDH) Charity	Community Development by the Concession Holder (PMDH) Charity	Community Development by the Concession Holder (PMDH) Charity & Sharing Benefit (PHBM)
<b>Human Resources Indigenous Community Rights</b>	Migrant contract workers (Pesanggem) & local communities from the nearby villages. Tumpang sari and/or benefit- sharing			
<b>Forest Class and Harvesting Techniques Cultural Conservation Control of the Company</b>	Planted Forest (Jati Class, Sengon Class, Pinus Class) with clear cutting harvesting techniques			
		LDTI for graveyard and other sacred places		
	Controlled by Ministry of Forestry, but Company Regulation issued by the Director of Perhutani	Controlled by Ministry of Forestry and Ministry of Finance but Company Regulation issued by the Director of Perhutani	Controlled by Ministry of Forestry, Ministry of Finance & Ministry of State Owned Company but Company Regulation issued by the Director of Perhutani	

Natural Forest Management (HPH)	Enactment of Forestry Basic Forestry Act 5/1967 & GR 21/1974	Enactment of Basic Forestry Act UUPK 5/1967 & GR 6/1999	Enactment of Forestry Act 41/1999 & GR 34/2002
Period	20 year right	75 year right	55 year permit
Size	No limit	Max 100.000 hectares in each province (Papua 200.000 hectares) Max 400.000 ha nationally.	Not yet regulated
Exempted Area	Protected Forest (HL), Nature Reserve (CA), land owned by other party & land with other right attached to it includes lands converted into farming etc.	Protected Forest (HL)	Logging can only be done in production forest with certain cubic meter potentials and limited by set criteria
Delineation of the Work Area	Should be completed within 3 years after the permit is issued, and the concession will take the risk for any effect of HPH activities because boundaries are not yet set.	Delineation should take place in 3 years after the permit is issued, and is accountable for any impacts of HPH activities because boundaries not yet set	Delineation should take place within 3 months after the permit is issued
The revision of the Work Area	The right of the Ministry of Forestry	Alteration of HPH area as the result of the limitation of HPH holders within one company group (HPH restructuring)	Removal of 20% of the working area as administrative sanction
Procedure to get the concession	Application	Auction & Application	Auction, Application & Mandatory certification
Permit Holder	State Owned Company (BUMN) & Private Company (BUMS)	BUMN, BUMS, Village Owned Company (BUMD), Cooperative.	Individuals, BUMN, BUMD, BUMS, Cooperative.
Community Development	HPH Assisting Local Government in CD	HPH supervising the community and Cooperative.	HPH is obligated to supervise the community and local Cooperative
Human Resources	Not involved in the G30S/PKI (alleged communist sympathisers)	Working opportunity for the local community	Working opportunity for the local community through contracts with the company's on certain aspect of HPH operation.
Indigenous Community Rights	Not limited by Forest Agreement (FA), the company should acknowledge and with the government try to identify suitable solutions	HPH should allow the indigenous community to collect non-timber forest resources	The HPH will help ensure that the Adat community secures their Right to Collect Forest Products legally through an annual permit from MoF.
Forest Conservation	No poaching protected species, no using poison or explosives	No poaching protected and unprotected species, & preventing illegal poaching Prevention of land clearance.	Idem. No mining

<b>Cultural Conservation</b>	Steps to protect objects with historical and scientific value from damage. Any cultural or historical site should be reported to the government. The company is accountable to the government for any of its employees' or its visitors' actions or neglect in the working area.	Accountable for & reporting historical sites and creating buffer zones around them.	Idem.
<b>Sanctions</b>	Reprimand up to revocation of permit	Reprimand up to revocation of permit	Reprimand up to revocation of permit, especially in cases of illegal logging
<b>Others</b>	Authorized to use Force Majeur for regulating riots, blockades, natural disasters	Increasing the value of the forest by planting trees in critical areas bordering with the land of the community	The implementation of the precondition of the mandatory certification of Sustainable Forest Management (Forestry Ministerial Decree No. 4795/2002)
<b>Timber Plantation Management: HTI</b>	Based on Forest Management Act No. 5/1967 & GR 7/1990		Based on Basic Forest Law No. 41/1999 & GR 34/2002
<b>Period</b>	Right for 35 years + 1x cycle(42 years)		Max. permit 100 years
<b>Size</b>	Max 100.000 hectares in each province (Papua 200.000 ha)		Not yet regulated
<b>Exempted Area</b>	Max 400.000 ha. Nationally Private Property, village, farming and land already managed by a 3 <sup>rd</sup> party		Only vacant land, bush land and prairies
<b>Delineation of Work Area Boundaries</b>	Implemented two years after the HTI Decree is issued		At least 3 months after the permit is issued.
<b>The alteration of HTI area</b>	Possible, accordingly to the prevailing law and regulation		20% of the working area may be reduced as administrative sanction
<b>Procedure</b>	Application		Auction & Application
<b>Permit Holder</b>	State owned company (BUMN) & Private company (BUMS)		Individual, BUMN, BUMD, BUMS, Cooperative
<b>Community Supervision</b>	HTI supervises the community and & koperasi and lets the community use the health facility of the HTI		HTI is obligated to supervise the community and & Cooperative
<b>Human Resources</b>	Working opportunity for the local community		Provide employment opportunities for the local community through contracts for aspects of the company's operation.
<b>Indigenous Community Rights</b>	HTI should allow the indigenous community to collect non-timber forest resources		Allocation of rights to collect NTFP.
<b>Forest Conservation</b>	No poaching protected and unprotected species, & preventing illegal poaching, Preventing land clearance, No using fire in land clearing, Preventing nomadic farming, Erecting signs.		Idem. No mining Should have finished planting 50% of the area within 5 years after the permit.
<b>Cultural Conservation</b>	Accountable for & reporting historical sites and creating buffer zones around them.		Idem.
<b>Sanctions</b>	Reprimand up to revocation of permit		Reprimand up to revocation of permit, especially in cases of illegal logging
<b>Others</b>	Government would assess once every 5 years		The implementation of the precondition of the mandatory certification of Sustainable Forest Management (Forestry Ministerial Decree no 4795/2002)

the forests they depend on. This research suggests that these obligations have gradually diminished over time, through a series of legislative reforms which have been based on the (false) assumption that the official programmes of Forest Designation, Delineation and Gazettement, Spatial Planning, Transmigration and Resettlement have resolved land rights and resource access problems and secured community development.

### **Obligations of KPH Holders**

All KPH in Java are held as a monopoly of the state forest management company Perum Perhutani. As a KPH holder, Perum Perhutani accepts two major obligations with respect to local communities. The first is to clarify concession boundaries through delineation exercises, with the aim of ensuring that there are no misunderstandings between local communities and the company about the boundaries between village lands and concession boundaries. However, even by 2002, the forest delineation commenced by the Dutch forest administration is still uncompleted in three units of Perhutani (Unit I, II & III).<sup>198</sup> The rights of local communities have only been recognized as Land for Special Purpose (LDTI) to secure their sacred graveyards. In addition, the company provides opportunities for *tumpang sari* (interplanting of food crops between seedlings, in young plantations. Recent regulations require KPH holders to promote benefit-sharing with the communities.

### **Obligations of HPH Holders**

The HPH system of rights and responsibilities has varied over time. Three periods can be discerned: a first period between 1968-1997; a second between 1999- 2001; and a third which commenced in 2002. The obligations of current HPH holders are determined by the date when the HPH was last issued or renewed.

During the first period, Forest Delineation was supposed to be completed within three years of a concession being granted. However, in the second period, this important requirement for sustainable forest management was weakened by saying that forest delineation should be undertaken within 3 years, while the risk of not having the forest delineation completed is the company's. During the third period, forest delineation was to be undertaken within 3 months of a concession being granted. In practice, the term 'undertaken' has been interpreted as meaning that delineation should have started and not been completed by the stipulated date.

The three periods of regulation also evince different notions of how communities should be dealt with. In the first period, a patronising approach was adopted whereby the state and the concessionaire were to identify the best solution for the indigenous communities. In the second period, the Ministry of Forestry required the concessionaire to provide access to local communities for the collection of non-timber forest products, while the concessionaire was also to encourage community development as a charitable exercise. In the third period, access to forest resources by the indigenous community is no longer limited to non-timber forest products, but the communities are required to formalise their access by securing permits from the Ministry of Forestry, an approach which has not yet been implemented in practice. The details of these obligations are summarised in Table 4 and elaborated in Annex 1.

### **Obligations of HTI Holders**

Responding to the increasing damage upon the forest as well as the demand for timber, in 1990 GR No.7 on Industrial Timber Plantation Utilization Rights (HPHTI) was enacted and implemented almost simultaneously in all production

forest in Indonesia, supported by the Reforestation Fund in the form of low-interest loans and was conducted by the holders of HPH in form of BUMS, BUMN or Joint Venture. The right and obligations of HTI companies relating to community rights and land security are set out in this regulation and shown in Table 4 and in more detail in Annex 2. However, with the enactment of GR No. 34/2002 which replaced the term, HTI with Natural Forest Utilization Venture, there have been some additions and reduction of rights and obligations. These modifications are also shown in Table 4 and Annex 2.<sup>199</sup>

### **Compliance with Obligations**

As noted in Section 4.6, there has been a massive failure by companies to delineate their concession boundaries in accordance with these obligations. The result is that most concessions have resident communities within their concession areas but they have failed to identify the boundaries of the communities lands. This has created the basis for conflicts between concessionaires and communities and has become a nationwide problem.

There was not time during this investigation to assess the extent to which companies actually comply with their other obligations, although community complaints about companies' failures to deal fairly with the communities were recorded in all four areas studied (see section 6). A study carried out by P3PK of Gadjah Mada University found that 69% of villagers living within a heavily logged area in East Kalimantan suffered malnutrition as a result of reduced or lost access to forest products. Starvation owing to loss of livelihoods has also been reported from other communities forced off their lands by concessionaires in Kalimantan.<sup>200</sup>

Recognising the failure of the Ministry of Forestry's resettlement programme, whereby forest villages were re-

moved from concessions and encouraged to abandon shifting cultivation, and taking account of the growing evidence that logging was having a severe impact on local livelihoods, Ministerial Decree No. 691/Kpts-II/1991 was passed which placed obligations on concession holders to implement development programmes in the communities within or immediately bordering their concessions. The development programmes were supposed to improve the community's welfare and assure them some access to forest resources. Under the Decree, each concession holder was obliged to conduct a diagnostic survey of the villages in and around the concession in preparation for the implementation of the HPH Bina Desa programme. One case study carried out for the Ministry in 1996 revealed that these Bina Desa programmes were unpopular and were imposed in a top-down manner. Assessments carried out for DfID, USAID and GTZ concur with these findings. The studies found:

- Endemic prejudice against traditional agricultural practices among project staff
- Poorly trained project staff
- Lack of evaluation of alternative development strategies based on traditional systems
- No collaboration between concessionaires and local administration
- Inadequate or absent participation
- Imposed patron-client relations with villagers
- Forced pace of implementation due to direct linkage with 5 year harvesting plans.<sup>201</sup>

In 1995, in accordance with Ministerial Decree No. 69/ Kpts-II/1995, the HPH Bina Desa programme was replaced by an alternative programme for the 'Community Development of Forest Villages' (PMDH).<sup>202</sup>

## Community Forestry Options

Alongside its national programme for promoting the development of the economy of the Indonesian people in all areas of life, the ‘reform era’ government has adopted a policy of forest development with the aim of securing community welfare.<sup>203</sup> In line with TAP MPR Decree No. IX/2002, reform-minded policy advocates argue that this now requires a revision of the current forest development paradigm away from ‘state forest management’ towards ‘community based forest management’, so that communities within and neighbouring forests become the main actors in managing forests. This section briefly summarises the options currently available to promote increasing community involvement in forestry ranging from benefit-sharing options to the direct management and control of forests by communities.

### Charity, Fees and Benefit Sharing

The most conventional option for involving communities in forest management systems is one exercised in many HPH, by which members of local communities are employed by forest managers to carry out tasks such as timber cruising, planting, and de-barking as paid workers. In addition many companies assist forest villages by providing infrastructural improvements such as roads, water supplies, bridges, schools and places of worship, as required of each company in order to get approval of its Annual Work Plan (RKT), which includes approval of the Annual Allowable Cut.

Under PP6/1999, communities may also take a more direct role in forest management by incorporating as Cooperatives and acquiring a 10% share in the concession holding company. However, in practice the scheme has brought uncertain benefits to local communities as the cooperatives formed to acquire these concessions often have no connection with local communities more often being incorporated

by other groups, such as forest company employees, members of distant communities and religious institutions.

Another type of participation was initiated by APHI (*Asosiasi Pengusaha Hutan Indonesia* - the concession holders' association) and the regional governments of East Kalimantan and Papua in year 2000. Under this policy, HPH concessionaires were required to pay a royalty or fee to local communities for every cubic meter of timber extracted from community lands. The Governors' Decrees in these two provinces set a fee of Rp. 2500/m<sup>3</sup> for timber that had already been logged and Rp. 3500/m<sup>3</sup> for wood yet to be logged from the village area, which was to be paid to the village community. The policy, which acknowledges the people's ownership of the timber, has begun to be implemented slowly owing to lack of clarity about how the funds should be paid to the community and who should then manage them.

In Java, Perum Perhutani has also been under pressure to develop a profit sharing system similar to Joint Forest Management in India. A trial scheme regulated by a Decree of Perhutani's Board of Directors has been initiated but not all villages have accepted the system, which would allocate 20% of profits to communities and 80% to the corporation. Several villages in Kuningan District (in West Java) have been willing to give the system a try but the community of Sumedang District has rejected it, proposing instead a three-way profit sharing system between the Province, a District Owned Corporation and a Village Owned Corporation (33:33:33). The majority of inhabitants in the Wonosobo District (East Java) have rejected such ideas entirely opting instead for community-based forest management (see section 7.5).

### **Small Concessions**

Government Regulation No.6/1999 gives the head of a dis-

strict the authority to issue an annual permit for logging covering 100 ha.. The cost of each permit is approximately Rp. 3 million. While the regulation does not provide a sound basis for sustainable forest management, since it does not elaborate any management requirements and is very short term, it has proved popular as a means of rewarding communities and people with connections to local government. These IPHH/IPPK are very similar to the IPK (clear-cutting permit) which existed previously, the authority to issue which used to be held by the parastatal timber company PT Inhutani.

Almost all IPHH/IPPK have nominally been given out to village Cooperatives, incorporated using copies of the ID cards of one or several members of a community. However, the fact is that felling involves the use of heavy machinery and is carried out by contractor companies. Through this process, contractor companies have been able to secure access to thousands of hectares of forest lands. As commonly applied, profits are shared between the contractor and the village Cooperative, typically by payment of a fee of Rp. 25,000/m<sup>3</sup> to the village in whose name the permit has been issued. Lack of transparency in these deals is one of their main problems (add see section 6.2.2.4).

In March 2002, Government Regulation No. 34/2002 was issued, which replaces Government Regulation No. 6/1999 and shifts the authority to issue IPHH/IPPK from the district level to the national (ministerial) level. The future of the IPHH/IPPK system is thus in doubt.

### **Community Forests (Hutan Kemasyarakatan)**

In 1995, the Ministry of Forestry formed its own Directorate of Community Forestry (DPHKM), located within the Directorate General of Land Rehabilitation and Social Forestry and began to offer communities permits for the extrac-

tion of non-timber forest products. The DPHKM remains, however, a relatively small bureau with little power or influence compared to the offices that promote and regulate large-scale commercial logging. The DPHKM currently employs some 50 staff out of total of some 3000 in the Ministry. According to DPHK statistics, some 92,351 hectares of the various kinds of community forestry permits had been granted by 1999, of which well over 80% by area were in the heavily degraded dry forest zones of Nusatenggara and West Timor.<sup>204</sup>

The legal provisions developed to promote this community forestry programme, (Ministerial Decree 677/Kpts-11/1998, Ministerial Decree 865/Kpts-11/1999) were recognised as incompatible with the new Basic Forestry Law No 41/1999 and efforts were simulatenously made to extend the scope of the programme to include timber harvesting by communities. Accordingly, Ministerial Decree No 31/Kpts-11/2001 *On Administration of Community Forestry* was passed to bring community forestry into line with the revised BFL. Under the Decree, a Community Forestry permit (HPHKM – *Hutan Kemasyarakatan*) is a strictly limited usufruct lease of 25 years, which entrusts forests to a local community for it to be managed, according to its own internal regulations, in close coordination with the Ministry which maintains control of the area. The decree is explicit that a HPHKM does not confer an ‘ownership right on the working area and cannot be mortgaged nor transferred’ (Article 18.2). Permit holders gain a provisional licence after developing a draft management plan for the area, ‘facilitated by the District/Municipal Government’ (Article 29), and which has to be approved by the regional administration. The management plan must include ‘internal regulations’ which make provisions for: managing the area; decision-making; conflict resolution; forest land use planning; preparation of a management plan; forest utilization; forest rehabilitation; forest

protection; as well as set out community members' rights and obligations. Explicit provisions are included in the decree requiring the zoning of the area into protection and cultivation blocks, with progressively stronger restrictions being placed on cutting within 50-500 metres of small streams, the coast, springs and rivers, lakes and dams. No cutting of trees leading to exposure of the forest canopy is allowed in the protection blocks. These 'internal' regulations are to be developed in a 'participatory manner by the District/Municipal Government with the local community' (Article 12.3).

A signed agreement between the local government and the community represented by the village head (*kepala desa*) endorses the regulations. Regular reporting to the government is required and the management is re-evaluated every five years. To gain a definitive licence the village has to incorporate as a cooperative. In the case of non-compliance, licence owners are first given a warning to take corrective action. If disagreements cannot be resolved through dialogue, a permit can be annulled 'at any time' at the discretion of the District Head/Mayor, whose decision is 'final and binding on all parties' (Article 57.2(c)). Traded forest products are subject to the same taxes and royalties as apply to other forestry operators.<sup>205</sup>

HPHKM can only be given on State Forest Lands (*hutan negara*), by definition areas unencumbered by proprietary rights. The law does not clarify whether such utilization rights can be issued in areas subject to *adat* claims such as *hak ulayat*. Moreover it is not clear to the authors that the limited use rights, subject to State control, conferred by the Decree provide enough land security and local control for the certification of community forestry in line with FSC Principle 2.

Since the Ministerial Decree was passed, a further 25 HPHKM have been handed out by local government and reported to the Ministry, with a total area of 66,214 hect-

ares, the majority in the western parts of the archipelago.<sup>206</sup> It is likely that other areas have been handed out which have yet to be recorded in central government statistics.

However in June this year the whole community forestry system was again placed in doubt subsequent to the passing of GR 34/2002, which revokes the authority of district level administrators, district heads (*bupati*) and provincial governors to allocate timber cutting rights. A revised Ministerial Decree is now required to provide a system for the allocation of community forestry permits.

The DPHKM admits that the HPHKM system is only a first step towards the devolution of forest management to the community level but argues it is a process that requires support. In general, the DPHKM notes, the Ministry of Forestry is doubtful of even the existence of *masyarakat adat* and unsure whether *adat* systems of forest management are strong or rigorous enough to deal with the current pressures on forests from the market and competing interests. It notes that the Ministry of Forestry currently does not have a system for recognizing *adat* rights, nor has it passed any regulations to make this possible. The subject is still under discussion within the Ministry.<sup>207</sup> Temporary permits that last for 5 years have also been given out by the district head to many groups, under Bupati decrees.

The main limitations on the HPHKM programme result from the fact that there is only a limited amount of land that is not already under HPH and HTI and because of the serious difficulties that exists in locating areas that have been legally defined as 'forest' (see sections 4.5 and 4.6).

### **Village Forests**

'Village Forests' are provided for both under Act No.22/1999 on Regional Government and Forestry Act No.41/1999 but the concept remains unexpressed in the lesser laws, cre-

ating confusion among the various parties who are supposed to implement it. The law stipulates that a local community whose lands overlap State forest land may have them classified as ‘Village Forest’, over which they have management rights. Such land will continue to be classed as State forest land (ie land in which there is no proprietary rights). To date this option has not been applied in practice due to the lack of implementation regulations. The option may however be suitable for those villages bordering State forest lands that seek to regain responsibility for managing natural resources, whether for crops, natural forest or other types of resources, while not seeking a proprietary interest in land.

### Customary Forests

As noted, the revised BFL (No. 41/1999) on Forestry states that the management of state’s forest lying within the jurisdiction of customary law communities *Masyarakat Adat Territory (wilayah adat)* may be classified as *Hutan Adat* (Article 1.5). *Hutan Adat* is still considered as State forest land (Formal Explanation of Law 41/1999, at line 10). A community with a *Hutan Adat* may be issued a *Hutan Adat* Management Right, only after it has been officially recognised by the local legislature (Article 65). Under Articles 8 and 34 of the revised BFL, State forest land may be classified as an Area with Special Purpose (*Kawasan Dengan Tujuan Khusus-KDTK*) and entrusted to a customary law community, a religious group or a research institution for cultural and research purpose. However, no regulations have yet been passed to implement these provisions.

Apart from the lack of implementing regulations, there are a number of procedural obstacles in the way of bequeathing authority to manage a forest to an indigenous people according to this procedure. First, as noted, the procedures must be preceded by the recognition of the community’s exist-

ence through a decree of the district legislature (*Perda*), which is a very long process. Secondly, the legal process of deciding that the area is indeed legally State forest land would have to have been complied with (something true for only 10% of State forests – see sections 4.5 and 4.6). This is itself unlikely as local communities do not want their lands classified as State forest lands as this denies their rights in land (see section 4.4).

Further legal ambiguity surrounding the notion of *Hutan Adat* derives from the argument that the revised BFL itself is in contradiction with the way the BAL has been interpreted. For example, GR 24/1997 provides for the recognition as individual title (*hak milik*) of ‘old rights’ in land, including lands originally held as customary land (*tanah adat*) that have since been allotted to individuals by village heads.<sup>208</sup> Likewise the revised BFL also contradicts Permen BPN 5/1999, which provides for the recognition of the ‘possessory’ rights of communities (see section 4.2.1). Insofar as these pieces of law recognise that customary land rights confer proprietary rights in land, such areas should more logically be classed as ‘Private Forests’ (*Hutan Milik*) under the BFL and not State forests (*Hutan Negara*), which is where *Hutan Adat* may be recognised.

### **People’s Forest (Hutan Rakyat)**

The concept of ‘People’s Forests’ has been implemented for quite a long time in Java where market conditions favour the local production and consumption of timber by individual farmers. In ‘People’s Forest’, management rights to forest may be issues as individualised rights to forest by the Forestry Department through the Directorate of People’s Forestry, itself under the Director General of Social Land and Forestry Rehabilitation (RLPS). RLPS offers credits for ‘People’s Forests’ to be used to restore and rehabilitate for-

est on individually claimed lands. ‘People’s Forests’ can only be developed on lands where farmers have already acquired either an SKT (a letter recognising individual land ownership rights issued by the village head - *kepala desa*) or a *sertifikat* issued by the BPN (land title). Potentially, the concept of People’s Forest may also be applied to indigenous people’s lands under the Decree No5/1999 of the Agricultural Minister, on the indigenous peoples’ territory (*tanah ulayat*). However, as for ‘Village Forest’, the legal category remains unimplemented in indigenous areas and cannot be readily applied unless the indigenous community first gains recognition by the district legislature and is registered in the land book by the BPN. The ministerial decree is considered to be imperfect because the process is long and does not adequately acknowledge indigenous peoples’ proprietary rights in land.

## Conclusions

This long chapter has attempted to answer the question, can indigenous peoples and local communities ‘legally establish’ long term tenure and use rights in forests (Principle 2) and have their rights ‘to own, use and manage their lands, territories and resources’ ‘recognized and respected’ (Principle 3). Even a short answer must be given in two parts depending on whether such security is being sought within or outside areas considered by the Department of Forestry to be ‘State forest lands’, even though the BAL may apply in forests contrary to administrative tradition.

- Outside of state forests, the conclusion is that while the concept of collective land rights (*hak ulayat*) is recognised in Indonesian law, no effective procedures exist to secure these rights. Secure titles are only offered to individuals and even then the administrative procedures for securing land are deficient. All tenures in Indonesia are subordi-

nate to State interests.

- An unclear right of possession (*hak kepemunyaan*) is recognised as applying to customary land but may not be registered in areas overlapping existing rights and concessions.
- Inside ‘State forests lands’, proprietary rights are by definition impossible and customary rights are treated as weak forms of usufruct, which are subordinate to the interests of concessionaires. **Legal** recognition of communities’ land rights within forestry concessions is not possible under current law.
- There are, however, a number of community forestry options which, while not recognising the customary rights to ‘own’ lands, do offer a measure of management authority to communities. Although there are doubts whether these options are long-term enough to comply with Principle 2, some of these options may constitute a basis for the certification of community forestry.
- A more startling and unexpected conclusion has also emerged from this study. Perhaps the majority of forest concessions, including community forestry options, issued in Indonesia are of questionable legality owing to major deficiencies in the process of gazettment of forest lands. As a result of these procedural failures as much as 90% of ‘forest lands’ have never actually been properly transferred to the jurisdiction of the Department of Forestry. This implies that the great majority of State forests (and the concessions within them) are ‘illegal’ and therefore invalid in terms of Principle 2 and Criterion 2.1.<sup>209</sup>