



Forest Peoples Programme

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20th April 2015

Dear Ravin and Complaints Panel members,

Thank you for your question sent by email (see annex 1 for copy).

In my view, the question from the Complaints Panel should be: what does GAR need to show in order to demonstrate compliance with RSPO P&C related to legality?

I have consulted three Indonesian lawyers and below I seek to compile their opinions into one as a reply for you to share with the Complaints Panel. The Panel may of course choose to get further legal counsel bearing in mind that although I have sought legal advice I am not a lawyer myself.

1. First, let us remind ourselves of the P&C (highlighting in red, the key elements for answering your question).

2.1

There is compliance with all applicable local, national and ratified international laws and regulations.

2.1.1 Evidence of compliance with relevant legal requirements shall be available.

2.1.2 A documented system, which includes written information on legal requirements, shall be maintained.

2.1.3 A mechanism for ensuring compliance shall be implemented.

2.1.4 A system for tracking any changes in the law shall be implemented.

2.2

The right to use the land is demonstrated, and is not legitimately contested by local people who can demonstrate that they have legal, customary or user rights.

2.2.1 Documents showing legal ownership or lease, history of land tenure and the actual legal use of the land shall be available.

2.2.2 Legal boundaries shall be clearly demarcated and visibly maintained.

2.2.3 Where there are or have been disputes, additional proof of legal acquisition of title and evidence that fair compensation has been made to previous owners and occupants shall be available, and that these have been accepted with free, prior and informed consent (FPIC).

2.2.4 There shall be an absence of significant land conflict, unless requirements for acceptable conflict resolution processes (see Criteria 6.3 and 6.4) are implemented and accepted by the parties involved.

2.2.5 For any conflict or dispute over the land, the extent of the disputed area shall be mapped out in a participatory way with involvement of affected parties (including neighbouring communities where applicable).

2.2.6 To avoid escalation of conflict, there shall be no evidence that palm oil operations have instigated violence in maintaining peace and order in their current and planned operations.

Thus to comply with RSPO requirements under 2.2 and especially 2.2.1, the company should be able to produce documents which show that:

- i. it has a valid lease (ownership not being an option in Indonesia) and
- ii. it has a legal right to use the land (as well as providing some account of the history of land tenure).

Valid lease: In Indonesia under the Basic Agrarian Law (5/1960) the main land tenure available for operations like plantations is a leasehold known as *Hak Guna Usaha* (Business Use Right). Prior to acquiring a HGU, and while it carries out the other actions required to secure a HGU (acquire land, carry out EIA and demonstrate its capitalisation etc.), companies need to acquire interim permits, which are valid for 3 years. These are known as *ijin lokasi*.

In the case of the 18 GAR operations named in the FPP complaint, (and based on the documents the company itself submitted as part of its NPP notifications), it seems that at the time of NPP submission GAR lacked HGU to 16 of the 18 operations for which it was planning new plantings. To our (admittedly partial) knowledge, most of the operations, including PT KPC, have expired *ijin lokasi* (which as noted has a term of 3 years). In some cases, including PT KPC, where GAR has secured an extension of its *ijin lokasi* (usually one year), these have also expired.

Legal right to use land: Under the Plantations Law and associated regulations, companies also need an *Ijin Usaha Perkebunan* (Business Plantation Permit). (For a detailed but dated explanation of what is required for a company to secure an IUP see FPP/ SW / ICRAF publication of 2006 *Promised Land*)

Some of the 18 GAR operations may have IUP but this is not made clear in the NPP submissions. This should be clarified.

2. What do some of the key laws in Indonesia require and allow? According to my legal colleagues:

An IUP does provide a company the right to open up land which has been legally acquired while the company had a valid *ijin lokasi* but it does not provide the right to acquire and open up lands without an *ijin lokasi* (BPN Regulation No.2/1999 see especially Article 5 Para 3).

Based on the Basic Agrarian Law (No 5/1960) and Ministerial Regulation No.40/1996 on HGU, and also the statement of BPN officials, a company should not do anything in its concession without HGU. Under Ministry of Agriculture Regulation No 98/2013 concerning IUP a company must acquire a HGU if they either have an IUP or have an active plantation and mill. If they don't have an IUP, a warning letter will be sent to them by *Dinas Perkebunan Kabupaten/Provinsi* (District or Provincial Plantations Unit).

This latter regulation operates in parallel with the regulation regarding the appraisal of plantation businesses that have already got IUP (Permentan 7/2009). One of the appraisal components is land rights. The outcome of the appraisal will classify the company in two groups of categories. First those that are still developing the plantation will be defined in category A, B, C, D and E. Second, those that are already operational will be categorised in rank I, II, III, IV and V. Companies in categories D and IV will be given a warning within 4 and 6 months respectively. Category E and V will get three warnings within 4 and 6 months respectively. If the company does not follow up the warning in a given timeframe, the IUP shall be revoked.

Since the matter is being contested by GAR, I feel obliged to point out that there are some other problems with the legality of GAR's land bank. Based on a conjoint reading of Law No. 18 of 2004 on Plantations, Regulation of the Minister for Agrarian Affairs and the Head of Land National Agency No. 2/1999 on Location Permit, Regulation of the Minister of Agriculture No.

26/2007 and Regulation No. 98/2013 on Guidelines for Licensing of Plantation Businesses, the maximum plantation area that a company or group of companies can hold is 100,000 hectares.

Under Regulation 98/2013, any company applying for an *IUP* is required to submit a declaratory letter confirming that the company or its group of companies has not exceeded the maximum plantation area as stipulated in Regulation 98/2013.

To our knowledge, at end of 2014 GAR already held 301,000 hectares under HGU. GAR held well in excess of the 100,000 ha ceiling when this law came into effect, yet GAR has been expanding year on year. GAR continues to seek rights to further areas of land.

We look forwards to being informed of the Complaints Panel's further determination on this case. A further meeting between FPP and GAR is now confirmed for 4th May 2015 and it would greatly help assure progress in resolving this complaint if the Panel could make a further (interim if necessary) determination prior to that meeting.

Yours sincerely



Dr. Marcus Colchester
Senior Policy Advisor

Annex 1:

From: Ravin Krishnan [mailto:ravin.krishnan@rspo.org]
Sent: 17 April 2015 10:27
To: Marcus Colchester
Cc: Patrick Anderson; Amalia Falah Alam; Sanath Kumaran; Darrel Webber; Salahudin Yaacob
Subject: Re: GAR response to RSPO CP letter of 4 March 2015

Dear Marcus,

I was just looking through Article 42 of Law No 39 of 2014 on Plantations :

Pasal 42 Article 42 Kegiatan usaha budi daya Tanaman Perkebunan dan/atau usaha Pengolahan Hasil Perkebunan sebagaimana dimaksud dalam Pasal 41 ayat (1) hanya dapat dilakukan oleh Perusahaan Perkebunan apabila telah mendapatkan hak atas tanah dan/atau izin Usaha Perkebunan.

The business activities of cultivation Plantations and / or business Processing Crops referred to in Article 41 paragraph (1) may only be made by the Company Plantation once it had obtained rights to land and / or license Plantation Business.

my understanding is that a company needs only an Izin Usaha Perkebunan to begin land development and not a Hak Guna Usaha(HGU) together at the same time ; *as the law says 'and/or' ,meaning either one will suffice to begin land development.*

Please do enlighten me on this.

ravin