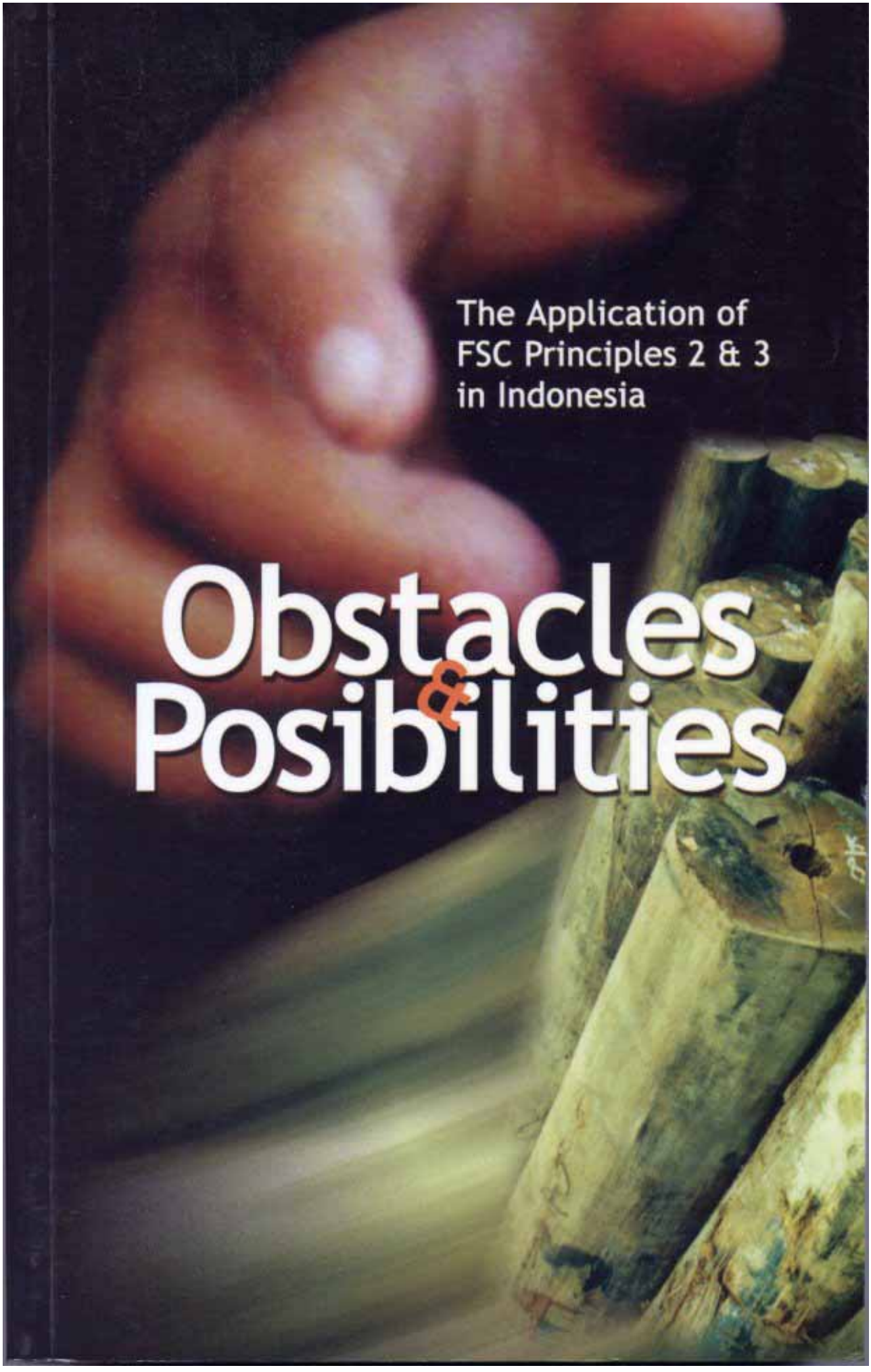

The Application of
FSC Principles 2 & 3
in Indonesia
Obstacles
&
Posibilities

The Aplication of FSC Principles 2 and 3 In Indonesia

Obstacles & Possibilities

2003

The Application of FSC Principles 2 and 3 In Indonesia: Obstacles and Possibilities

Study Commisioned by
AMAN (Aliansi Masyarakat Adat Nusantara)
WALHI (Wahana Lingkungan Hidup Indonesia)

Cooperation with
The Rainforest Foundation

Sponssored by
DFID-mfp
GTZ
NORAD
Ford Foundation

Researcher Team
Marcus Colchester
Martua Sirait
Boedhi Wijardjo

Contributor
Silvester Tomas Daliman
Herbert Pane

Design & Lay Out
Tjong

Table of Contents

1 Executive Summary with Conclusions and Recommendations

Ethical consumers want to be assured, when they buy forest products, that they are not buying timber sto len 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'.

FSC PRINCIPLES AND CRITERIA 2&3

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.

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 gazettement 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-

digenous 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.[1]
- 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.[2]
- 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 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.[3]
- 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.[4] 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.[5] 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.[6]

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.[7] 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.[8] 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.[9] 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'.[10] 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.[11] On 21st 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.[12] 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 fur 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.[13] 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.

WHAT IS THE FOREST STEWARDSHIP COUNCIL?[14]

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.

THE CERTIFICATION PROCESS

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.

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.

FSC PRINCIPLES AND CRITERIA 2&3

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.

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.[15] 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.[16] 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'.

THE JOINT CERTIFICATION PROTOCOL (JCP)

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.

Allthough 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.

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.'[17] 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'.[18]

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'.[19] 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.[20]

The International Covenant on Civil and Political Rights (ICCPR) is one of the central human rights instruments of the United Nations.[21] 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.[22]

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…[23]

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 1235th 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…[24]

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.[25]

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.[26]

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.[27]

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.[28]

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[29])

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 processs 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, were this 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.[30]

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,[31] 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.[32]

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.[33] 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.[34]

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.[35] 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.[36] 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.[37]

British Columbia

Unlike much of the rest of Canada, and with the exception of those in the North-East of the Province,[38] 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.[39] 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.'[40] 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.[41] 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.[42]

Aboriginal title is a legal doctrine dating back, at least, to the 15th and 16th 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.[43] 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'.[44]

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'.[45]

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.[46] 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 Crietria, 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.[47]

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.[48] 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-

propriate 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.[49]

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.[50]

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.[51]

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.[52]

As Rezende de Azevedo notes 'by and large, forest operations in Brazil are the object of conflicts between enterprises and local communities'.[53] This is because 'many forest operations cause adverse effects on the subsistence of local communities'.[54] 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.[55]

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'.[56] 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.[57]

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:[59]

- '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 [58]

FSC International	Brazilian Plantations	Brazilian Natural Forests
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.	3.1 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.	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.
3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.	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.	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.
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.	3.3 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.	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.
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.	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.	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.
	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. 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. 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.	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.

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 comportment 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.[60]

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.[61]

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 resettlement, 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. [62]

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.[63] 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)*.[64] 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.[65] (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.[66]

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.

3 Indigenous Peoples in Indonesian Context

FSC 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.[67]

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.[68]

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.[69]

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.[70]

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 Commisssion 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.[71] 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.[72]

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).[73] 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...'*[74] 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.[75]

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'.[76] 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'.[77] Furthermore, because DEPSOS had only a limited capacity to reach all these communities, the Ministry of Fo-

restry[78] 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.[79]

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.[80]

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 Affair's 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*'[81] 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.[82] Likewise the policy of the Ministry of Forestry and Plantations to resettle forest dwelling peoples, who were officially renamed *masyarakat adat* in 1993,[83] also continued.

During the latter years of the Suharto era, DEPSOS' programme changed somewhat.[84] 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.[85] 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 *masyrakat adat* lands were not affected.[86]

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*).[87] The government estimates their numbers at some 1.3 million, in total, of whom about 80% live in State forests.[88]

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.[89] 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'.[90]

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.[91]

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.[92] 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).[93] 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.[94] 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'.[95] 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.[96] 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.'[97] 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 Earh 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'.[98]

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'.[99] 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.

4 Land Tenure and Resource Rights: the Law and Its Application

FSC Principle 2 requires that long-term tenure and use rights be clearly defined, documented and legally es tablished. 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.[100] 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.[101]

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.[102] 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.[103]

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.[104] 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.[105]

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.[106] Likewise, the authority of the remaining sultanates, recognized by the Dutch through the policy of indirect rule, was abolished in 1965 - Yogyajakarta being the single exception. Legal theory about *adat* did not change drastically upon the establishment of independent Indonesia.[107] 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'.[108]

Since independence there has been much scholarly analysis and debate about the real intent and impact of Dutch recognition of *adat*.[109] 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'.[110] The reified *adat* of government and the law, is not the *adat* of the people.[111]

Forms of Customary Tenure

A key concept in the legal discussion of Indonesian tenure is the *adat* concept of *hak ulayat.*[112] The term was translated

by the Dutch legal scholars Van Vollenhoven as meaning the 'right of disposal'[113] and Ter Haar as 'sovereignty'[114]. It has also been translated as meaning the 'right of avail'[115], while Burns has translated it as meaning the 'right of allocation'.[116] 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.[117]

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.[118] 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.[119] *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.[120] As Wright notes: *'Hak ulayat* is the historical and philosophical cradle of *adat* land rights…'[121]

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.[122]

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.

CUSTOMARY RIGHTS OF HUNTERS AND GATHERERS[123]

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.

WHO 'OWNS' THE FOREST? KANTU' CONCEPTS OF LAND RIGHTS[124]

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.

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

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.[125] 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.[126] 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*.[127]

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 ralangan*) 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.[128]

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.[129]

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.[130] 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.[131]

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[132])

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.[133] 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*.[134] 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.[136]

TABLE 2: INDONESIAN LEGAL TENURES MADE SIMPLE [135]

Forms of Tenure	Rights implications	Main beneficiaries	Limitations
Hak milik	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
Hak guna usaha	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
Hak guna bangunan	Temporary right to use (and construct) buildings	Individuals and Indonesian corporations	Maximum term 50 years. Subject to regulations which do not exist.
Hak pakai	Right of use	Individuals on State lands	Granted for a definite term
Hak sewa	Right of lease	Individuals	Only available for structures, not available on State lands
Hak membuka tanah	Right to clear land	Individuals	Subject to regulations which do not exist
Hak memungut-hasil-hutan	Right to collect forest produce	Granted to individuals by Govt. 'based on adat'.	Subject to regulations which do not exist
Hak guna-air	Right to use water	Granted to individuals by Govt. 'based on adat'.	Subject to regulations which do not exist
Hak pemeliharaan dan penangkapan ikan	Right to raise and catch fish	Not clear	Subject to regulations which do not exist
Hak guna-ruang-angkasa	Right to use airspace	Energy companies	Subject to regulations which do not exist
Hak ulayat	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 kepunyaan	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.[137]

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.[138]

The intent of the BAL was thus to subordinate *adat* to the national interest and the State.[139]

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'.[140] 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.[141] 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)*.[142]

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

donesian 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'.[143] Indigenous communities standing in the way of government-sponsored Transmigration programmes have lost heavily as a result.[144]

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.[145]

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.[146]

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.[147]

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.[148]

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.[149]

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'.[150] 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.[151]

The process is positively endorsed by Article 4 of the Regulation of the Minister for Agrarian Affairs No 5 of 1999.[152] 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.[153]

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…'[154] (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'.[155]

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 kepunyaan* – 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 kepunyaan* – as this is not found elsewhere in the law. The actual rights conferred by the law are therefore unclear. According to Maria Ruwiastuti, these rights may only be registered for areas which do not overlap existing rights and concessions.[156] 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.[157]

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.[158]

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.[159]

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.[160]

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.[161]

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….[162]

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.[163]

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 it own legislature, district head *(bupati)* and executive.[164] 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[165])

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.[166]

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.[167]

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 are 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'.[168]

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'.[169]

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.[170] *De facto*, the Forest Department acts as if it were the owner of forests.[171]

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.[172]

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 give authority to investigate violations and prepare cases against offenders.[173]

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.[174] 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.[175] 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.[176]

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.'[177] 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.[178] 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.[179] (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 authomatically 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[180])

Under Article 1(4) of the 1967 BFL 'the determination of forestlands is to be controlled and defended by the Ministry of Forestry'.[181] 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.[182] 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: INDONESIAN FOREST GAZETTEMENT 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.[183]

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.[184]

Studies carried out for this review show that the hectarage 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.[185]

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.[186] **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.[187] 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.[188] 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.[189]

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 19th 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.[190]

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.[191] 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.[192]

Although a number of regulations have been passed since 1951 to try to ease these problems, they persist.[193] 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.[194]

The process of handing out concessions thus went ahead of the processes for designating forest zones, delineating boundaries and their official gazettement. 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 gazettement 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.[195]

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.[196] 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.[197]

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
Aim of the company	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
Period	No time limit			
Forest Land Area	1,874 million hectares, Central Java and East java State Forest	2,567 million hectare, Central Java, East Java and West Java		
Exempted Area	Nature Reserve (CA) & National Parks (TN), Jakarta City forest land and Jogyakarta forest land			
Working Area Delineation	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)		
The alteration of KPH area	By the MoF through state forest land declasification and by the Director of Perhutani for other purpose such as public road, grave yard etc through Land for special purpose (LDTI) classification			
Procedure to get the concession	Appointed by the Government through Government Regulation			
Permit Holder	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)
Community Development	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)
Human Resources	Migrant contract workers (Pesanggem) & local communities from the nearby villages.			
Indigenous Community Rights	Tumpang sari (temporary farming between seedlings)			Tumpang sari and/or benefit- sharing
Forest Class and Harvesting Techniques	Planted Forest (Jati Class, Sengon Class, Pinus Class) with clear cutting harvesting techniques			
Cultural Conservation		LDTI for graveyard and other sacred places		
Control of the Company	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

Cultural Conservation	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.
Sanctions	Reprimand up to revocation of permit	Reprimand up to revocation of permit	Reprimand up to revocation of permit, especially in cases of illegal logging
Others	Authorised 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)
Timber Plantation Management: HTI	Based on Forest Management Act No. 5/1967 & GR 7/1990		Based on Basic Forest Law No. 41/1999 & GR 34/2002
Period	Right for 35 years + 1x cycle(42 years)		Max. permit 100 years
Size	Max 100.000 hectares in each province (Papua 200.000 ha) Max 400.000 ha. Nationally		Not yet regulated
Exempted Area	Private Property, village, farming and land already managed by a 3rd party		Only vacant land, bush land and prairies
Delineation of Work Area Boundaries	Implemented two years after the HTI Decree is issued		At least 3 months after the permit is issued.
The alteration of HTI area	Possible, accordingly to the prevailing law and regulation		20% of the working area may be reduced as administrative sanction
Procedure	Application		Auction & Application
Permit Holder	State owned company (BUMN) & Private company (BUMS)		Individual, BUMN, BUMD, BUMS, Cooperative
Community Supervision	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
Human Resources	Working opportunity for the local community		Provide employment opportunities for the local community through contracts for aspects of the company's operation.
Indigenous Community Rights	HTI should allow the indigenous community to collect non-timber forest resources		Allocation of rights to collect NTFP.
Forest Conservation	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.
Cultural Conservation	Accountable for & reporting historical sites and creating buffer zones around them.		Idem.
Sanctions	Reprimand up to revocation of permit		Reprimand up to revocation of permit, especially in cases of illegal logging
Others	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 Perhutanis (Unit I, II & III).[198] 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.[199]

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.[200]

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.[201]

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).[202]

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.[203] 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 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^3 for timber that had already been logged and Rp. 3500/m^3 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 profts 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-

trict 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/m3 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.[204]

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.[205]

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.[206] 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 the 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.[207] 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.[208] 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 kempunyaan*) 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 gazettement 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.[209]

5 Customary Institutions and the Principle of Consent

In line with international standards (see section 2.4.2 and 2.4.3) the effective expression of the right to free and informed consent, a key element of FSC Principles 2&3, requires that communities are able to confer amongst themselves, negotiate with other parties, and express their views, according to their customary systems of decision-making and through their own representative institutions.

Free and informed consent requires in addition:

- Adequate time to make decisions according customary procedures
- A full and open provision of information in forms and languages suitable to make them readily comprehensible to local parties
- The absence of duress, intimidation, threat or negative incentives.

Experience in other countries also teaches us that in order for the principle of free and informed consent to have any binding power and thus provide the basis for genuine and equitable decision-making, communities must have clear legal personality. In the absence of formal clarity about who may legitimately speak on behalf of a community, disputes proliferate, causing divisions in communities, frustration on the part of forestry operators and confusion among certifiers.

This section of the report thus reviews the extent to which forest-dwelling communities and indigenous peoples in Indonesia are currently in a position to exercise this right effectively.

Adat Institutions during the Period of Guided Democracy

Article 18 of the 1945 Constitution specifically recognized

the presence and status of local institutions within the newly independent Republic of Indonesia. The official explanation of this article notes:

> [T]here are roughly 250 types of self-governing villages (*Zelfbesturende landschappen*) and native communities (*volksgemeenschappen*)210 such as *desa* on Java and Bali, *negeri* in Minangkabau and *dusun* and *marga* in Palembang. These areas have their own indigenous organizational structures (*susunan asli*) and because of them can be construed as areas with special attributes (*daerah yang bersifat istimewa*). The State of the Republic of Indonesia respects the status of these special areas and all state regulations concerning them shall heed the original hereditary rights (*hak-hak asal-usul*) of these areas.[211]

These provisions were in line with the prevailing sentiments of the time, during which the founders of the nation favoured an open and decentralized Indonesian polity, which would respect custom and cultural diversity and provide scope for local and regional autonomy. However, following unsuccessful attempts by the US Government in the 1950s to dismember the Republic by fomenting regional rebellions,[212] President Sukarno felt obliged to centralize the administration and limit the scope for regional autonomy. Democratic freedoms were also limited and Indonesia entered the period known as 'Guided Democracy'.[213]

Accordingly, in 1965, the Law on Village Governance and Jurisdiction (UU 19/1965) was passed, which overrode both the constitution and the colonial laws that had acknowledged the plurality and relative autonomy of indigenous institutions. According to the law, a uniform administrative regime was to be imposed throughout Indonesia, with the village becoming an administrative body of central govern-

ment.[214] The Dutch policy of indirect rule and legal pluralism was replaced by a new policy of direct rule from the centre.

Suharto's 'New Order' and the Local Administration Law

Undang-Undang 19/1965 was clearly unconstitutional and was declared so by President Suharto soon after he took power.[215] However, ten years later, he imposed his own equally unconstitutional *Local Administration Law* (Act No. 5/1979), which put in place a uniform system of village administration throughout Indonesia, based on the Javanese model of rural organization. Accordingly, villages were regrouped and centralized, and referred to by the Javanese term *desa.*[216] The *desa* became the lowest unit of the administration, sometimes referred to as the 'administrative village', and the head of the village (*kepala desa*) became the direct agent of the administration, usually a government appointee. The imposition of this uniform administrative regime has had profound and lasting effects on community life throughout the archipelago.

Reviews of the application of these laws by Indonesian scholars have shown that the underlying motivation of these administrative reforms was to further a centrally directed model of national development which brooked no opposition. The reforms were charactarised by:

- A lack of confidence in customary institutions
- Belief that customary systems of law and decision-making were obstacles to development
- Conviction that political control of villages was needed to promote national security and national development.[217]

Problems that resulted from this imposed reform included the following:

- Some traditional villages were too small to fit the system and had to be regrouped
- Resettlement resulted (much of this promoted under the policy towards isolated peoples – see section 3.2)
- Customary systems for electing or choosing leaders were occluded
- Alternatively, customary leaders were incorporated into the village administration, but no longer spoke for the community
- Tribal chiefs even got 'Letters of Promotion' issued by district heads.

The result was that it was difficult for local village leaders to effectively represent the will of their communities.[218] According to Roedy, village autonomy was thus weakened in a number of crucial respects:

- Although villages were allowed to enact their own regulations, these were only given legal force after being ratified by the local administration.
- Land and resources were not under the control of the community
- Village revenues, which were customarily shared among community members, were no longer distributed according to custom.

The enduring consequence is that, in many places, community members now consider that the village administration belongs to the government and not to the community.[219]

As the Asian Development Bank has noted, the Local Administration Law 'led to the weakening and disappearance of *adat* institutions, together with its *adat* values and leadership…, the disappearance of potential, spirit of participation and creativity of the community, and caused dependence of those communities on the government'.[220]

Recent field research carried out as part of a national study coordinated by the NGO ELSAM (*Lembaga Studi dan Advokasi Masyarakat*), has corroborated these findings.

> The 1979 law on village administration ignored existing community-based forms and processes of village decision-making, many of which provided for open debate and participation... It created an official legislative body (*Lembaga Musyrawah Desa*),[221] and provided that decisions by the LMD were subject to approval by the *Bupati* [district head]… The pseudo-democratic nature of the institution was further corrupted by the requirement that all village officers and members of the LMD be members of the ruling party, GOLKAR.[222]

The occlusion of traditional village level decision-making mechanisms was reinforced by the military's policy of 'territorial management' which was part of a nation-wide policy of *'sishankamrata'* (*Sistem Pertahanan dan Keamanan Rakyat Semesta* – System for the Defence and Security of the Entire People). In accordance with the military's policy of 'dual function' *(dwi fungsi),* which implied equal vigilance against internal as well as external threats to the regime, the armed forces acted as an army of occupation throughout the archipelago, with military garrisons stationed in each district (*kodim*), sub-district (*koramil*) and in each village (*babinsa*).[223] The combination of the military and civilian administrations meant that local communities rarely dared speak out against oppression and injustice.

The CIEL study further notes:

> Traditional community-based village institutions were further undermined and even criminalized under the Ministry

> of the Interior Regulation on Villages No. 4/1981. It proscribed the inclusion of any *desa* within a state forest area or *hak guna usaha* (which means a concession). Traditional communities located inside "state-owned" forest areas were legally banned, and many residents were involuntarily relocated…[224]

Although the Local Administration Law was repealed in 1999, the legacy of 'New Order' impositions on forest dwellers is still felt today. After twenty years of highly centralized, state-directed, repressive interventions in their lives, the institutions of local communities and indigenous peoples have been severely affected. Customary forms of decision-making have been weakened and communities internally divided between those who continue to respect *adat* processes and those who rely on the imposed *desa* system. In these circumstances, securing 'prior and informed consent' from communities becomes highly problematic.

Changes in Village Administration

Stipulation No X/MPR/1998 of the People's Consultative Assembly concerning Development Reforms for the Protection and Stabilization of the National Condition recognized that the centralization of power under the New Order regime had not accommodated local realities, had hindered justice and freedoms, encouraged the transfer of wealth to the centre, and thus limited regional development. The Stipulation paved the way for the passing of the Regional Autonomy Act No. 22 of 1999 which recognizes that the promotion of regional autonomy is in conformity with the 1945 Constitution and is necessary for democracy, to provide an effective role to the community, justice and in order to respect regional diversity and potential.

The Regional Autonomy Act No. 22 of 1999, also repealed the 1979 Local Administration Law and has provoked major changes in Indonesia. The Act recognizes villages of 'origin'[225] and grants them authority to regulate and manage community interests in accordance with custom. Villages that may be so recognised must be natural resource- or agriculture-based and enjoy government services. The Act specifically mentions a number of regional terms for such customary socio-political units, such as *nagari, kampung, huta bori* and *marga*. However, authority to recognizes such villages is given to the district government and this discretionary power has been objected to by some lawyers, who fear it may pave the way for a repeat of the abuses perpetrated under` the 1979 Local Administration Act.

Indeed, Regulation No. 64/1999 of the Ministry of Home Affairs states in Article 3 that villages which cannot meet the criteria for recognition should be 'eradicated and integrated'. According to this regulation, to qualify for recognition a village must have: a total population of at least 1,500 people; a defined area; socio-culture; village capacity; government facilities and infrastructure. The integrationist intent behind these provisions is self-evident.

Major ambiguities also remain about the way Act 22 should be interpreted with regard to the recognition of village institutions although the act does recognize the role of customary village institutions to settle disputes **within** the village.

Notwithstanding its deficiencies and ambiguities, the Act represents an advance for customary communities. The spirit, if not the letter, of the law may provide the basis for a restoration of the authority of customary institutions and, if backed by appropriate regulations, could provide these institutions' with legal personality, thus providing a basis for negotiated and legally enforceable contracts with private

sector institutions such as logging and plantation companies. Indeed in some districts, the Act has already been interpreted to allow for the recognition of occluded customary institutions. In Toraja, where custom remains vigorous, the imposed *desa* system has already been dismantled and replaced through the restoration of the customary institution of the *lembang*.

The Act responds to widespread demands from both civil society and the regional administration for the decentralization of State authority. The devolution of a measure of authority over forests and land to the *kabupaten* level, may also potentially facilitate the engagement of local communities in decision-making. This process is more likely to favour customary forest dwellers and indigenous peoples in areas where they still form the majority and may thus more readily influence the policies and decisions of locally elected politicians and regents (*bupati*). On the other hand, the reforms have also stimulated the creation of a new political class of local politicians and administrators who have their own interests and priorities. Without adequate mechanisms for the genuine engagement of rural communities, the interests of this class may come to predominate.[226] Whether for this reason or because of a general failure of government regulatory power, there is already clear evidence that pressure on natural resources has increased greatly during the reform era.[227]

Dispute Resolution Mechanisms

One of the few national discussions about the principle of free and informed consent in Indonesia took place in the Workshop on Indigenous Peoples and Poverty Eradication held by the Asian Development Bank in cooperation with the Department of Justice and Human Rights in 2001. The

meeting noted that exercise of the right to 'Free, Prior and Informed Consent' requires:

- Absence of coercion
- Full provision of information
- Participation by other civil society organizations to ensure transparency

Government agencies attending this meeting expressed a commitment to put this right into effect, including in a proposed guiding Protocol on Gender to be issued by the Department of Women's Empowerment.

One of the most promising tools for conflict resolution that has gained increasing popularity in Indonesia is community mapping, which has proven to be a very useful in settling land-and-natural-resources-related disputes.

The value of this technique has also led to it being adopted by collaborative projects being carried out by the Indonesian government and foreign development and conservation agencies. For example, WWF projects to promote community empowerment within Conservation Areas in Indonesia have used community mapping exercises as a basis for determining the boundaries of protected areas and community lands.[228]

In the same way, the GTZ-SFDP project in Sanggau, West Kalimantan, introduced Community-Based Forest Management (PHOM) by transferring the management of Alas Ketue HPH area which covers 104,000 hectares to the community. The main tool used in the planning of the project was 'Village Agreement on Land Management', which is in essence a local scale form of the Agreement of Forest Management (TGHK) process, which has been used to zone forest lands. The process went through continuous evolution to the point where it was adopted as an umbrella policy by the government to be applied in each village to prepare its com-

munity map to be used in village planning (Domestic Affair Ministerial Decree no 46/1994 on village management pattern) as a bottom-up input into provincial Spatial Planning.[229]

Of course, the other mechanism technically available for the resolution of conflicts in Indonesia, as elsewhere, is appeal through the courts. Assuming that legally binding agreements can be negotiated between private companies and local communities or indigenous peoples with legal personality, enforcement could theoretically then be ensured through recourse to the law.

Legally enforceable contracts are, however, of little purpose if legal processes do not function well. Indeed, the lack of effective rule of law in Indonesia poses a major challenge to the reform of the forest sector, as the very small number of prosecutions of forestry businesses violating forestry regulations testifies.[230] The long years of dictatorship and one party rule have left a serious problem. By the end of the Suharto period, as political analyst Kevin O'Rourke notes:

> Indonesia was governed by what legal experts termed 'Ruler's Law', as opposed to rule-of-law. Over four decades of authoritarian rule, every component of the legal system had been crafted to defend the supremacy of the ruler, rather than the supremacy of the law…. By necessity, Indonesia's legal system was rife with corruption. Legal system actors – such as judges, prosecutors, police and lawyers – were not motivated by professionalism, principles or ideals of public service, as the system placed little value on these qualities. Instead, the regime recruited and promoted legal system actors on the basis of their loyalty – loyalty that was induced by financial incentives. Over time, the practice of rewarding loyalty with money conditioned legal system actors, who became highly susceptible to bribery while con-

> ducting routine tasks. Thus, with the exception of decisions that directly affected the regime, the legal system actors routinely sold their service to the highest bidders. Eventually, the legal system became a mechanism through which the wealthy and powerful were able to consistently exploit the poor and weak. The implications of Ruler's Law were profound: the government continued not to be unaccountable to the people and ordinary Indonesians faced considerable difficulty in their daily lives.[231]

Similar conclusions have been reached by many other analysts. For example, an exhaustive review carried out for the World Bank during the closing months of the Suharto era, revealed the very serious problems besetting the whole legal system, a legacy of patrimonial politics and the absence of democracy and civil and political rights and freedoms. Among the problems noted in the five volume report were: a lack of competence in the legal profession; low professional standards and ethics; lack of disciplining professionals for misconduct by their legal associations; and a conspicuous absence of good conduct by senior members of the professional legal associations. Moreover, 'court management… is inefficient and lacks transparency', leading to a backlog of cases and long court delays. 'At the present time, the business community and the public are very disappointed with court services', the report concluded after detailed surveys. The judiciary was likewise found to lack capacity and independence. A serious lack of a separation of powers has led to judges being chosen by the Ministry of Justice. 'The dominant role of the executive branch enables an unhealthy restraining influence over the judiciary', the report notes.[232]

Things do not seem to have improved much since the World Bank study. A United Nations mission to gauge the country's judiciary in 2002 has again found pervasive cor-

ruption in the courts.[233] The situation, says Prof. Dr. Mochtar Kusumaatmadja, 'is desperate but not hopeless'.[234]

SECURITY ISSUES[235]

A curious feature of security arrangements in Indonesia is that the budgets of the police and military are not fully funded by the government. Instead, ever since independence, the security services have been encouraged to supplement their incomes through business ventures. During the early years of the logging boom senior military figures were commonly rewarded with logging concessions. Security services also set up Foundations (*Yayasan*) to run businesses and generate revenue. Some of these military foundations and senior officers remain substantial shareholders in forestry industries, some of which have been implicated in illegal logging activities.

Another way that the security services generate revenue is through being contracted by large companies to police their concessions and industrial sites. Additional payments may also be made to mobilize security units to intervene in disputes. The military's Mobile Brigades (*BriMob*) are among the units most commonly contracted by plantation and logging companies to deal with the security issues. In some areas of Indonesia, very serious human rights violations by security units have been alleged and in some cases these have been substantiated in the courts.

Exercise of the right to free, prior and informed consent by local communities in their dealings with forestry industries is clearly compromised so long as military or police units are involved in negotiations or are retained by the companies to deal with disputes.

Conclusions

Free and informed consent is a central principle for FSC. Effective exercise of this right is a key safeguard that communities and indigenous peoples have to ensure that certified logging and plantation schemes do not violate their rights. Moreover, where - as in Indonesia (see section 4) - 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 this 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 since the late 1970s, 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 communi-

ties from exercising their right to free and informed consent.

- Recourse to the law is a difficult option for communities in Indonesia. Although field studies were not carried out to explore this issue in detail for this study, 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

Photo: *Sawit Watch Doc*.

6 The Indonesian Experience with FSC Certification

KPH

As noted in Section 4.8, on Java Forest Concessions are referred to as KPH and are all managed by the State-owned company Perum Perhutani (PP), which controls over 2 million hectares of land on Java as a result. Perum Perhutani has experienced major reorganisation in recent years. Through Government Regulation No. 14/2001, the status of Perhutani was changed from being a para-statal company (*Perusahaan Negara Umum/Perum*), ostensibly managed in the public interest, to a private company owned by shareholders.[236] Perum Perhutani was thus stripped of its social function and turned into a proft-making enterprise. However, on 7 March 2002, following a judicial review, through its Decision No. 07.P/HUM/2002, the Supreme Court abrogated Regulation No. 14/2001, as contrary to the Forestry Act No. 41. Perhutani, thus, got back its dual social and profit making function, in line with GR 53/1999, and became again Perum Perhutani instead of being PT Perhutani (Persero).

Certification

Perum Perhutani was first certified by the Rainforest Alliance's SmartWood programme in November 1990, three years before the FSC was founded. The certificate covered all PP managed land in Java. In 1995, when the FSC evaluated the Rainforest Alliance for accreditation, FSC had not finalized its plantation standards and all plantation certificates were thus excluded from the scope of accreditation.

In 1996, the FSC approved its certification principle on plantations (FSC Principle 10) and FSC then evaluated SmartWood's plantation programme. FSC at that time was not satisfied that SmartWood's evaluation of PP met FSC requirements and FSC issued a number of 'pre-conditions' for the extension of its accreditation to cover plantations.

As a result, in 1997, SmartWood suspended its certificate of PP and decided to evaluate each KPH separately with the aim of ascertaining that the FSC Principles and Criteria were being complied with adequately in each. Three KPH received SmartWood certification on this basis in 1998, supposedly in compliance with FSC procedures. A further three KPH were certified in 2000.

Concerns were raised about the situation in these KPH, especially with regard to the response of the company to growing civil unrest characterized by illegal cutting of timber, civil protests and hostage taking. A number of deaths at the hands of security forces were reported. Timber theft was reported to exceed 100% of the annual allowable cut. In 1999, SmartWood identified a number of problems with compliance, in particular, the worsening relations between PP and local communities. These had not been addressed sufficiently at the time of monitoring in 2000. Subsequently, after another monitoring visit in 2001 showed continuing compliance failures, certificates were suspended on three districts including the Cepu KPH in Blora District, which was revisited as part of this investigation. Among the main compliance failures noted by the investigation, the continuing problems of civil unrest, serious security issues, illegal logging and PP's 'lack of serious commitment to community involvement in forest management' were cited as reasons for suspension.[237] Smartwood emphasises that all PP certificates have now been suspended.

The PP management plan for the Cepu KPH, for example, includes details about the basis for land ownership within each subdistrict and refers to the colonial system by which private lands, village lands and state forests were registered, a process which commenced in 1917 and which was applied to the Cepu area in 1924 and then amended in 1925, 1934 and 1935. Under this system each village gained its

own 'Letter C', copies of which are meant to be deposited in the National Agrarian Agency. Some villages still have copies of corresponding maps made during the colonial period, which show the village areas and surrounding forests and the boundaries between the two. In some villages these boundaries were later marked by cement boundary markers or fenced off. Village administrative boundaries, which are not co-terminous with the boundaries on village lands or state forest lands, also exist.

This investigation notes that SmartWood's interpretation of Criterion 2.2 given in its generic standard and being used to evaluate compliance seems either to be ambiguous or to be weaker than FSC Criterion 2.2. Whereas FSC 2.2 expects local communities to 'maintain control' over forest operations 'to the extent necessary to protect their rights or resources', unless they choose to delegate this through 'free and informed consent', SmartWood instead checks to ensure that:

- Local communities' legal or customary/traditional rights to own, manage or use forest resources (timber and non-timber) have been formally recognised, documented in written agreements **if necessary**, and honored.
- **Controlled access** is given or offered to local communities for timber and non-timber forest products based on either legal agreements or longstanding local arrangements (emphasis added).[238]

This gives rise to two ambiguities: first it requires certifiers to decide for themselves if they think recognition of customary rights is 'necessary'; secondly the language seems to suggest that forest managers should control customary users' **access** to forests, rather than customary users having a measure of **control** of forest management. As noted below, it is exactly because the 'longstanding local arrange-

ments' do not provide communities with the control and access that they now demand, that disputes have arisen between Perum Perhutani and the local villagers.

Community Perspectives

As part of this investigation, a series of community workshops were undertaken in Cabak, Nglebur, Janjang and Bleboh villages – all of which fall in the Cepu KPH, in Jiken subdistrict - to better understand the communities' perspectives about Perum Perhutani and its forest management, with the aim of shedding light on the way Principles 2& 3 should be applied in the Indonesian context.

In all the villages visited, community members related stories which recount how their ancestors came to occupy these areas long before the Dutch colonial period, before which time, they claim, their access to forests was not controlled. In one village, the people noted they have a separate ethnic identity from other Javanese of the area, being known as *Kalang*, a group of woodworkers and carpenters with a long association with forests that is also mentioned in Dutch sources. In this sense the people do consider themselves to be '*masyarakat adat'*.

The community members note that many villages do have sites of special cultural or social significance, some of which are still revered through customary rites. These sites include ancestral graves of the original founders of their villages, old graveyards, with associated sacred springs and very old trees. These areas are not all accommodated in PP's management plans and in the case of the village of Janjang, ancient trees associated with one such site have even been cut and harvested by PP.

In line with the Dutch colonial land registers, the villagers note two main kinds of land in their area – village lands which they claim belong to them and state forest lands

which they accept now belong to the State but in which they still claim customary use rights. Some of the villages dispute the boundaries between these two kinds of lands noting that areas that they consider to have been village lands were taken over by the Dutch without their consent and reclassified as state forests. They point to old village sites and old graveyards within these state forests as evidence that village lands have been expropriated. According to the villagers interviewed, PP's management plans do not recognize the villagers' rights in these areas nor do any oral or written agreements exist transferring these rights to PP.[239]

In those forests lands, which the villagers agree now belong to the state, the villagers now claim use rights and they also note that in line with the Constitution these State forests are meant to be administered for the benefit of the people.[240] They note however that these areas were allocated to PP without their consent and they now dispute PP's rights in the area. They recognize that they did not feel able to contest these rights during the Dutch colonial era or under the dictatorship, but they now feel able to demand restitution of their rights in this era of reform.

The communities note that they do not have control of either the village lands, which have been annexed into state forests, nor of these customary use areas in State forests. In neither case have joint agreements been entered into about these areas. Indeed they note that PP has very little connection with the district authorities at all, as it feels authorized to regulate affairs in these public forests without reference to the local administration.

The communities do note that in the last three years, PP has talked about implementing the Cooperative Forest Management (PHBM) pilot project in their villages but this benefit-sharing programme is neither yet in operation in these villages nor has it been negotiated with the village authori-

ties. Indeed the villagers noted that they have very negative relations with PP and with the security services that PP relies on to punish those who offend its regulations. They feel they are still treated as robbers and forest destroyers. They admit, though, that timber theft is commonplace and that this behaviour has gotten out of control, being grounded in pervasive poverty, hostile relations with PP and resentment at the fines and punishments meted out by the security services. According to testimony collected in one village, the looting of the forests by the communities is their response to the denial of their rights.

The villagers recounted a number of incidents of the shooting of villagers for alleged timber poaching, resulting in injuries and some deaths. Resentment against one such killing in August 2001, led to the PP regional office being burned to the ground by angry villagers. A further incident occurred in early October 2002, when a 40 year old villager, Wiji, from the Jepon subdistrict, Blora district was caught by a PP official, allegedly in possession of illegally felled timber. Reportedly, Wiji was then arrested and tortured by PP officials for three hours. He suffered a number of injuries to his head and body, as a result of which he fell into a coma. Covered in blood, he was taken to hospital where he died, apparently from brain contusions suffered while being beaten up. Although villagers have loudly protested about this action and vehemently assert that he was wrongly arrested, no investigation appears to have followed, nor has there been any legal action regarding the case. One of the villagers said, "I am surprised that the case has never been brought to court. Instead the officials involved have been moved to another area. Killing people seems to be nothing serious. The perpetrators should have been brought to court."

As such cases illustrate, it is clear that no adequate dispute resolution mechanisms exist to deal with these kinds

of conflicts between the company and villagers, much less to resolve the underlying land, access, use rights and benefit sharing problems. Indeed the lack of a dispute resolution mechanism is itself noted to be part of the problem. The villages note that fines and punishments seem to be imposed by PP in an arbitrary manner, without coordination with district authorities and without clear reference to an agreed legal framework. Resentment – some villagers spoke of 'hatred' - of PP officials is widespread.

Villagers note that PP personnel and other local officials routinely carry weapons when they visit communities. 'Why do they always have guns and hold weapons then they talk with us?' asks one community member. 'It is intimidating. They don't respect us… They feel they are kings'.

The villagers also note that a number of factors have contributed to the breakdown in relations and good forest management. These allegations include: arrogant and arbitrary behaviour by PP officials; unjust and brutal activities of the security personnel; lack of benefit sharing from the sale of timbers; no, or inadequate, provision of timber to villagers for house construction; general political instability during the reform era.

The villagers also recommend ways of overcoming these problems and re-establishing working relations with PP. Proposed measures include the following:

- Definition by the district authorities of the extent of village autonomy
- Restitution of village lands on the basis of agreed maps
- Community forest management of customary rights areas in State forests
- Greater benefit sharing
- *Tumpang sari* modified to increase the space for subsistence crops.

The villages have set up a village Forest Area Community Solidarity Forum (FSMKH) to provide the basis for negotiated agreements between the villages and PP. We found that the villagers' knowledge of the standards, procedures and purposes of forest certification to be very limited. We address this problem in the final section of the report.

Implications for the Application of Principles 2 and 3

This case study has many implications for the way Principles 2 & 3 of the FSC should be applied in Java. Among the emerging points for discussion are the following:

- 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 disputed 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 *masyrakat 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)
- Management plans have not clearly identify '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.

HPH

PT Diamond Raya

PT Diamond Raya Timber (DRT) is a company belonging to the UNISERAYA group, based in Pekan Baru-Riau, which owns concessions covering 870,000 ha. of forests on the is-

land of Sumatra (see Table 5). DRT was registered as a company (PT) in Jakarta in 1978 and was awarded a concession on 27 June the following year, through Ministerial Decree SK 403/Kpts/UM/6/1979. Logging operations commenced that year. The contract was extended on 8 May 1998 under SK 443/Kpts-II/1998 giving DRT a concession of 90,956 hectares. The renewed licence included significant changes to the concession boundaries, with some 35,000 ha. of degraded forest being excised of which 25,000 ha. were allocated to local communities and the local government, while 10,000 ha. were re-allocated to an oil palm plantation company PT Sindora Seraya, which is also a member of the Uniseraya Group. The current licence to DRT, which is due to expire in 2019, covers 90,000 ha. of peat swamp forest, most of which is no more than a few metres above sea level at any point and which merges into mangrove forest in the north east. The forest is known as the habitat of rare species, including the threatened Sumatran tiger.[241]

TABLE 5: UNISERAYA GROUP [242]

No	Company	(ha)
1	Diamond Raya Timber Co.	115.000
2	Uniseraya Co.	112.300
3	Essa Indah Timber Co.	100.000
4	Perkasa Baru Co.	106.250
5	Rimba Mutiara Permai Co.	107.800
6	Peranap Timber Co.	77.500
7	Rokan Permai Timber Co.	153.800
8	Triomas PDI Co.	97.500
	Total	**870.150**

Disputes with Local Communities

Disputes over the boundaries of the concession and the way the company was dealing with the local communities surfaced in the 1990s. Salient incidents in this history of disputes are summarised in the following paragraphs. In the 1990s, the DRT logging operation was one of several involved in a project funded by the ODA243 to develop improved forest management (KPHP and see section 7.4). A first effort to settle contested boundaries was made through a spatial planning exercise, which resulted in a zoning map on 6 December 1994 (552.11/Bappeda/3759). This zoning was however later contested by the local communities. In 1996, as part of the KPHP project, an agreement was negotiated between the local sub-districts administrators, forestry department officials and the company, with the presence of ODA staff. At the time, ODA staff explicitly noted that this was meant to be a **first step** in making an agreement about the boundary between village lands and the concession. Village leaders today also repudiate this agreement arguing that it was negotiated over their heads and was not even signed by them but by the sub-district *camat* (senior government administrative official for the sub-district, *kecamatan*). The agreement contributed to the redrawing of the DRT concession boundaries in 1998, with the excision of degraded forest. However, the local communities interviewed in this study say that they still claim lands in both the DRT area and the area allocated to PT Sindora Seraya (the sister company with a HTI concession).

In 1999, the village leader of Lenggadai Hulu village raised a number of concerns about DRT operations and he claims that he recommended to LEI and SGS that certification be refused to the company. At the same time, according to representatives of community of Sungai Sialang, they also noted that:

- The boundary 'agreed' in 1996 was not realistic and the village lands were not adequate to meet the villagers' needs
- Even so logging was being carried out on agreed village lands
- There was no participation in planning
- No information was shared with the community about operations
- Promised payments of compensation were not paid
- No compensation had been paid for expropriated chainsaws.

At about the same date, the village of Bantaian also claimed that the boundaries of the concession had been agreed by officials without the participation of villagers.

In a further effort to resolve this dispute on 22 May 2001, a negotiation took place between DRT and community leaders, with the mediation of government officials from the *bupati*'s office. The agreement noted *inter alia*:

- The company would implement its community development plan (PMDH) before logging in the communities' areas.
- Social services would be provided
- Information would be provided about the percentage of profits that would be furnished to the communities
- There was a need for a participatory discussion about the boumdary
- Reports on these discussions should be provided to the local government, village teams and village heads
- Local people would be involved in drawing up the annual cutting plan
- Meetings would take place through a forum agreed to by the community.

At that time the community of Labuhan Tangga Kecil claimed that 5 km^2 of their lands had been logged by the company without their consent. According to the villagers, it was understood on 22 May 2001 that the agreed actions should be undertaken by the end of that year. However, they note, none of these issues had in fact been addressed by the time of the community workshop arranged as part of this study in August 2002.

Certification

SGS Qualifor undertook pre-assessment visits to DRT in November 1998 and June 1999. The main assessment then took place in December 1999. This was the first evaluation in Indonesia to take place in cooperation with LEI. The SGS team of four inspectors was accompanied throughout the evaluation by an LEI team of five, and the teams completed their evaluations against both SGS standards and LEI standards in parallel. The SGS evaluation resulted in the issue of a number of 'major Correct Action Requests', none of which related to FSC Principles 2&3. In the SGS system such major CARs must be 'closed out', i.e. corrected, prior to the issue of a certificate. SGS re-visited the concession in August 2000, and as a result of that visit the major CARs were all 'closed out'. A certificate was subsequently issued on the 27th March 2001.[244]

With respect to the observation of FSC Principles 2&3, the SGS Qualifor assessment, published in 2000, notes *inter alia* that apart from NTFP collection the communities 'have not traditionally been very dependent on the swamp forest'. Although the assessment team heard claims relating to community rights within the concession, these were found to be outside the revised concession boundaries. The assessments notes that 'Since the December (1999) visit the (DRT) management has been proactive in contacting local commu-

nities and ensuring there is an agreed Memorandum of Understanding between each community and the company'.[245] Judging by the public assessment report, no consideration was explicitly given to Criterion 2.3 to assess whether an 'appropriate' dispute resolution mechanism was in place. This is itself contentious given that FSC rules that 'disputes of substantial magnitude involving a significant number of interests will normally disqualify an operation from being certified.' The assessment did however demand a 'minor corrective action' of DRT with respect to FSC Criterion 4.5, noting that 'There are no appropriate mechanisms for resolving grievances in cases affecting legal and customary rights' and 'DRT makes no specific reference to hutan adat'.[246] The absence of a mechanism for ensuring compliance with Criterion 4.5 suggests there was also an absence for ensuring compliance with Criterion 2.3.

The assessment also took into account Principle 3. However the team concluded that:

- There was no *hutan adat* (customary forest areas) in the concession, while the people enjoyed free access to gather NTFP.
- 'In 1996 DRT negotiated the concession boundaries in consultation with the neighbouring communities and the local government'. Consequently the concession area 'does not have future claims on it'.[247]

In 2001, a complaint about the SGS Qualifor/LEI certification of DRT was filed by a consortium of Indonesian and European NGOs with SGS and FSC. This complaint deals with a large number of FSC Principles and, with respect to Principles 2 and 4, it highlighted the existence of disputes between DRT and the local communities about benefit sharing, access to forest resources and community boundaries.[248]

Some of these concerns were investigated by SGS Qualifor when it carried out a routine surveillance mission in November 2001. A visit was made to one of the communities in dispute with DRT about the boundaries but 'found no clear evidence of a disputed boundary with PT Diamond Raya. However, boundary disputes with the oil palm plantation of PT Sindora Seraya are possible.'[249]

As noted below (section 6.5.1), SGS Qualifor does not have a locally adapted generic standard for Indonesia. Guidance for the application of Principles 2 & 3 are given in certain indicators in the SGS generic standard. With respect to Criterion 2.2, the current generic standard notes:

> 2.2.1 access to local communities or other stakeholders, who have recognised legal or customary tenure or use rights is granted **where it does not threaten the integrity of the resource or management objectives**
>
> Guidance: Where legal or customary tenure or use rights threaten the integrity of the resource or management objectives, criterion 2.3 must be invoked
>
> 2.2.2 there is evidence that free and informed consent to current and proposed management activities affecting use rights has been given by affected parties

The exact meaning of these indicators is ambiguous but seem to imply that customary rights and usages should be subordinated to management objectives, subject to free and informed consent. If this is the case then this is seriously weaker than the FSC criterion. The indicators would give the primary right to maintaining the 'integrity of the resource or management objectives'. This is the exact opposite of the FSC criterion which gives the primary right to

local communities with legal or customary rights.

With respect to Criterion 2.3, the current SGS generic standard provides the following indicators:

2.3.1 all interested parties have access to relevant information and have the opportunity to influence decision making.

2.3.2 every reasonable effort is made to resolve disputes through fair consultation aimed at achieving agreement and consent

2.3.3 large scale operations begin only once conflicts have been resolved or every reasonable effort has been made to resolved them

2.3.4 dispute resolution mechanisms (including legal requirements and internal procedures) are documented (guidance: applies to organisations with over 5000 ha only).

2.3.5 records of previous and on-going disputes over tenure and use rights are maintained

The public summary of the assessment report does not provide an explicit assessment of how the criterion and associated indicators have been complied with, although it does note that 'it was felt that the management could put in place a more transparent system for dealing with claims and disputes.'[250]

Community Perspectives

As part of this investigation, interviews and a community workshop were carried out in four villages in Rokan Hilir District – Bantaian, Sungai Sialang, Labuhan Tangga Besar and Labuhan Tangga Kecil in August 2002. These discus-

sions made clear that the local communities still insist that the DRT concession **does** overlap forests that have long been used by these villages. Indeed, they claim that their lands extend right across the concession to Bukit Kapur sub-district. They also note that the official village (*desa*) boundaries reach far inside the concession. The villagers identify themselves as Malay belonging to various regional groups referred to as *Melayu Riau, Melayu Kuala Rokan, Melayu Rokan Hilir* etc. The communities recognize that as a result of the process of modernization and the imposition of new administrative systems, they no longer govern themselves fully according to custom, they are unsure of whether they should be classified as *masyarakat adat* and their customary system of land occupation is attenuated. On the other hand, only a small proportion of their lands are formally recognized in law and most lands are still allocated and used according to custom. Forests are used quite extensively as part of their livelihoods, particularly for non-timber forest products, notably rattan, but also though bark collection and timber sales.

As noted, DRT and SGS Qualifor hold that there are no customary forests within the DRT concession although they do agree that customary use is made of the forests by neighbouring communities to access rattan and other non-timber forest products. However, community members dispute this claiming that the concession **does overlap** their customary lands (and see map).

They also claim that they:

- Have participated in only a limited way in decision-making about concession management
- Gain very little benefit from DRT's operations
- Feel intimidated in meetings as the company relies on the military's mobile brigades (BriMob) to ensure security
- Are unsure what procedures there are to secure their rights
- Are unclear how their customary rights system is relevant

to the evolution of a concession management plan
- Do not really understand in any detail the certification process nor the Principles and Criteria that are meant to be applied.

The sense of grievance among the community members was very obvious, with some workshop participants talking about DRT as an 'enemy' that has 'looted' their lands.

Conflicts between the community and DRT also stem from the fact that many of the community members carry out small-scale timber cutting, today using chainsaws. Interviewees note that this trade, notably of the species *milas,* a small tree favoured by coastal communities, not only provides a vital source of cash income but has been carried out on a moderate scale for generations.[251] The *milas* wood resists sea water rot and is used by the coastal communities in Bagan Siapi-api as part of their fishing gear and is indeed vital to the customary use of one of Indonesia's major fisheries. Another interviewee did also note that the scale of cutting was stepped up by the communities to get 'revenge' on DRT for what they felt was the unfair exploitation of their resources. One village leader noted that he feels disappointed at the accusation that his people steal timber. 'The truth is DRT Co. has seized the people's land.'

In 1998, the company cracked down on this 'illegal logging' and hired *Brimob* (military Mobile Brigade and see box 'Security Issues' in section 5.4) to stop it. *Brimob* took away the people's chainsaws and prohibited them from felling more timber, even in their own areas. Testimony to this effect was collected in Labuhan Tangga Kecil and also in Sungai Sialang village.

Noted the village leader from one community:[252]

> I would tell you the truth – how they (DRT Co.) treated us. People here are about to be made destitute and they would

do anything to save their life.

A villager from another community explained:

> Honestly, I don't want to share any information of what has happened relating to DRT Company anymore because there was not any follow-up. Many people from outside come and ask for information but then they go to the company. What is their purpose in then going to the company ? Do they sell the information and get money? …[253] Here, in Sialang, 60% of the community work in timber. We have done so for generations. We did it traditionally and later we took the waste timber (kayu buangan) from DRT Co. The government says this is illegal and that we damage the forest. But we are very sure that DRT Co. is responsible for the damage to the environment and forest degradation that has been happening for years. They never re-planted the land.

Another village head agrees:

> I know that DRT Co. never plant ramin log in line with the reforestation requirement. I can prove and be the witness of it. They just took the seed of ramin, then they put in the poly bag but the ramin seeds are never planted. It is just a formality to show to the team from forestry department.

On 24-25 August 2002, a community meeting was held to consider progress in dealing with DRT, in particular the company's failure to meet its obligations under its PMDH programme. The minuted meeting, which included representatives from 7 villages and 32 other village members, concluded that:

- DRT HPH should be revoked
- LEI should revoke its certificate of DRT
- DRT should discharge its outstanding obligations and

agreements with the communities
- The Ministries of Forests and Agriculture should recognise the region of the DRT concession as the customary collective lands of seven Malay villages and return it to them.

Implications for the Application of FSC Principles 2&3 in Indonesia

Six main issues for discussion emerge from this case study.
- 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 DRT 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*, in the name of the community, cannot be construed as consent. (P&C 2.2)
- The deployment of company-hired military forces cannot be considered any part of an 'appropriate dispute resolution mechanism'.
- 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 rela-

tions between communities and forest managers. (P&C 2.3)

PT Intracawood Manufacturing

Another company that has been seeking certification under the FSC process is PT Intracawood Manufacturing (PTIM), which is a joint venture of PT Inhutani I (30%), PT Altrack (35%) and PT Berca Indonesia (35%). PT Altrack and PT Berca Indonesia are companies owned by the Central Cipta Murdaya Group. PTIM commenced timber harvesting in East Kalimantan in Malinau and Bulungan districts in 1990. In accordance with a joint agreement signed with PT Inhutani I, PTIM also established a large wood processing plant in Tarakan Island, just off the coast, from which it developed a lucrative trade with the US 'Do-It-Yourself' retailer, Home Depot. In 2000, Home Depot announced that, as from 2003, it would only retail FSC-certified timbers,[254] so in 2000 PTIM approached FSC-accredited certifying bodies SGS Qualifor and then SmartWood for certification. Smartwood carried out an assessment of the operation but declined to certify the operation pending the resolution of a number of major difficulties.

This study has included a detailed but not exhaustive investigation into this concession area, with the aim of elucidating the practical difficulties with application of Principles 2 & 3 in Indonesia. The study reveals that major disputes exist about: the legal status of the area; the status of the rights of the indigenous peoples who claim rights over the whole concession area; and the legality or not of small-scale logging licences which have been handed out in the same area by local government.

The following sections of the report set out these issues in some detail. However, given the enormous complex-

ity of the issues uncovered, it is not claimed that these findings are either definitive or constitute a comprehensive evaluation of the concession or its legal status. The case study does however provide some clear insights into the challenges in the way of an unambiguous application of FSC Principles 2&3 in Indonesia.

Legal status of the Concession

In 1988 PTIM was established as a joint venture company through three Notary Acts, which included agreements about who should manage the timber concession, who should run several management activities and have access to the timber, and a joint agreement (*Perjanjian Kerjasama)* with PT Inhutani I to promote industrial processing.[255] Key elements of the agreement are:

- Inhutani I subcontracted 250.000 hectares of its timber concessions in East Kalimantan, over 75 years, to PT Intraca Manufacturing, based on the **assumption** that the government would extend PT Inhutani I's own underlying HPH.
- Exclude the timber plantation concession area (HTI, PT Intraca Hutani Lestari) over 42, 050 hectares which lie within the PTIM concession area. However the logs from the land clearance of the HTI would be utilised by PTIM (See the Map # 3).[256]
- PT Inhutani I devolved the concession management activities include planning (areal concession deliniation, remote sensing uasing areal photo, mapping, etc.) harvesting , timber transporting, etc. to PTIM.
- PTIM would sell the logs to PT Inhutani I at the rate of 5000 m^3 per year, while a further 5000 m^3/year would be supplied to the PTIM processing plant. If the factory had not been set in operation yet, then PT Inhutani I would purchase all the logs from PTIM. If production from the

area was insufficient, PT Inhutani I would have to sell PTIM logs from its other logging concessions which covered some 2.2 million hectares of East Kalimantan.

The concession area transferred to PTIM by PT Inhutani I lies on the boundary between Malinau and Bulungan districts and covers 226,326 hectares of Natural Forest and Rehabilitated Forest. A further 42,050 hectares are classified as HTI (industrial timber concession) (see map 3) but this area was not considered for certification by Smartwood. Before its transfer to PTIM, the area had been logged for 15 years by PT Inhutani I under a Ministerial Decree of the Agriculture Ministry, SK #352/1976. This 20-year concession made retroactive to start in 1973, gave PT Inhutani I rights over a total 2,465,000 ha. until 1993.[257]

By means of a letter from the Director of PT Inhutani I, reference number #1694/IC/10/Inh/89 dated 30 November 1989, PT Inhutani I transferred the rights and responsibilities for managing this concession to PTIM. This gave PTIM responsibility for all forest management operations including forest concession planning, concession area delineation, mapping, remote sensing using areal photo surveys, forest inventory, forest rehabilitation, and training for sustainable forest management. This also included transfer of the right to all published documents and permit arrangements related to the concession.[258]

However, on 4th July 1992, the Director of PT Inhutani I through a further letter, reference number #949/IVC/10/Inh/92, issued new stipulations about the Concession Management Plan (*Rencana Karya).* According to this letter, owing to the continuing absence of forest and concession border delineation, any process of annual Proposed Management Plan (*Usulan Rencana Karya Tahunan* /URKT) submitted by PTIM should be subject to the approval of PT Inhutani I.

TABLE 6: THE ARRANGEMENT OF PTIM CONCESSION AREA

Forest Function	(Hectares)
Production Forest	146,386
Limited Production Forest	66,972
Excluded from the concession area:	
1) Conservation Area	30,310
2) Community Lands	13,853
Remaining Concession Area	169,195

The Forestry Department claims all these areas as State forest land, which consist of production forest, limited production forest, and which include all the forests on the crests of Bengalun and Sondong mountains. However, these claims by the Forestry Department were not followed up by forest delineation either by the Department of Forestry or by the concessionaires. In fact, to date, only the southern part of the concession has yet been delineated (around Bengalun and Sondong mountains) along the boundary of the protected forest (*hutan lindung*). The northern part of PTIM was delinaated by PT Inhutani 1 in 1998 but overlapped with almost all the villages of Mangkuasar, Sesua, Sempayang, Batu Lindung, Seputuk, Rian, Sendulum, Tidung Pala and Tembalu along the Sesayap River and was rejected by the local government of Sesayap Sub-District, Bulungan District due to lack of data on the village territory.[259]

Further investigation, shows that the status of the PTIM concession is even more confused. On February 1988, the Director of PT Inhutani I sent a letter, reference number 362/IVC/10/1988, enquiring about the forest gazettement for PTIM in the concession area (HPH) of Inhutani I. On 11th March 1998, the Ministry of Forestry issued a letter, reference number 219/Menhut-IV/1988, announcing that such

areas were to be the long term stock supply for the joint concession of PTIM with an area of 250.000 hectares (although in fact they only claim 226.045 hectares, which, once the HTI area is excluded, is really less than 180.000 hectares.)

On October 1991, the general director of the forest concessions in the Department of Forestry issued a letter, # 2355/IV/BPHH/1991 dated on 9 October 1991, approving PT Inhutani I's authorization of PTIM as concessionaire. This was restated in a letter of the Department of Forestry, # 2931/IV-RPS/1991 dated on 20 November 1991, concerning PTIM's status, authorizing PTIM to propose the Annual Planning Program (RKT).

Since the PTIM area falls inside the HPH of PT Inhutani I , it is the terms of the PT Inhutani I's concession which apply to PTIM as a sub-contractee. PT Inhutani I's, 2.2 million hectare concession expired in 1993. In 1995, the evaluation report on PT Inhutani I (#656/Menhut-IV/1995) by the Department of Forestry noted that:

1. After 20 years of forest exploitation – only 24.5% of the original forest remained unlogged, while there should have been 42.9%, given that the operation was being cut on a 35 year rotation. The implication is that PT Inhutani I and any subcontractees had been mismanaging the concession.[260]
2. Migrants and people from local communities were occupying the forest area, opening it up and cultivating it, which implies that Inhutani I was unable to secure the areas.

Notwithstanding, PT Inhutani I did secure a temporary extension of its contract – commencing on 8th December 1993 and lasting until 7 December 2013. The concession area was however reduced by 257.300 hectares (from

the requested area for 2.207.700 hectares) to allow for the establishment of conservation areas and for other purposes. PT Inhutani I's extension was made conditional on the following requirements:

1. The areas have to be delineated and officially designated following the forest gazettement procedure and rearranged as forest blocks. Without any of this tenure security there would not be any sustainable production and there would be a repeat of the the bad experience of forest management of the past 20 years.
2. The remaining old growth forest within the logged-over areas would have to be rehabilitated to maintain the second cycle of rotation.
3. Areas which had already occupied by the migrant needed to be sorted out:

- Those areas on the boundaries of the concessions should be excised from State forest lands in the delineation process
- Those areas occupied by migrants within the concession area were to be 'enclaved' with permanent boundaries established, and subject to government approval.

4. On the second round of rotation (2008), further logging of standing stock would be prohibited unless there was data on forest increment.
5. Fulfill the HTI and other obligations as required in law & regulation.

Contradictorily, PT Inhutani I is one of the 116 companies listed by the Department of Forestry as those which did not get their contracts extended. Many of these companies are still waiting for the result of performance asessments done by Forestry Departement of their sustainable management of production forest (*Pengelolaan Hutan Alam Produksi lestari)* in accordance with Ministerial Decree

#4796/Kpts-II/2002 on the performance appraisal of sustainanble production forest management (*Tata Cara Penilaian Kinerja Pengelolaan Hutan Alam Produksi Lestari- (PHAPL).* The validity of PTIM's concession is thus in doubt.

Customary rights claims

We want community title to the ownership of our village territory, but this land is not for sale: that would be like selling ourselves. The land should not even be given out as a loan. It belongs to future generations. If we sell the land, we are selling our future generations.[261]

The area now covered by the PTIM concession includes a large portion of the ancestral lands of the Lun Dayeuh, Tidung and Berusu peoples, which they shared for many years, possibly centuries, with the hunting and gathering Punan Bulungan. Historically the Punan and many of the other Dayaks inhabited the headwaters of the Sesayup, Bengalun and Sekatak rivers that drain the area, scattered in small settlements and longhouses through the forests.[262]

Customary rights zones were, and still are, allocated to longhouses in a manner broadly similar to that summarized for the Punan and Kantu' in section 4.1. However, in the first half of the last century, during the Dutch colonial period, communities were encouraged to congregate at the mouths of some of the upriver tributaries in larger settlements, so that the Dutch administration could reach the villages. This process intensified sharply in the late 1960s and 1970s as the New Order government began to apply its programme of obliging shifting cultivators and nomads, 'isolated and alien tribes' (*suku suku terasing* – see section 3.2), to move out of the forests and settle down as permanent farmers on the forest margins, thereby, in theory, freeing up forests for the exclusive use of the timber industries. The re-

sult was that, by the mid 1970s, the majority of the Dayaks in the PTIM concession area had been removed from their forest settlements and longhouses and settled along the major rivers. In the 1980s, the government progressively imposed the uniform *desa* administrative regime on the settlements, subjecting the communities to even more direct rule from Jakarta. Map 4 illustrates this process of resettlement schematically.[263]

Today the Dayaks interviewed have very mixed views about the resettlement. On the one hand, they note, they have not in fact fully abandoned the upriver areas. A small number of upriver settlements remain, while many community members from the downstream resettlements still maintain fields in the upriver areas, although not being resident nearby they find the crops ravaged by pests more than in the past. At the same time, *adat* continues to govern a great part of village affairs, is applied to visitors to the communities, and also governs the allocation of hunting rights in the headwaters: community members are still expected to limit their hunting activities to the forest zones where their ancestral longhouses were located prior to the resettlement and can expect to be penalized according to custom when they violate these norms. The advantages of resettlement are that they now live in larger villages and enjoy more friendships and improved access to health, education and transport. On the other hand, they now have to buy many of their subsistence requirements – fish, meat and sometimes even vegetables – 'we need cash for everything'. Drinking alcohol has become a social problem, they note.

In the past, the Berusu relied on village wise men, *orang tua adat*, to apply *adat* and adjudicate disputes. During the Dutch colonial period they adopted the institutions of *kepala adat* (customary chief) and *kepala adat besar* (customary big chief), to provide longhouse leadership and help

adjudicate disputes between settlements. These institutions retain their vigour and now function alongside the administrative regime imposed through the *desa* system. Both the Berusu and the Punan have now set up their own organizations to deal with outsiders and press for a recognition of their rights. The Berusu organization, established in 1993, is called the Customary Consultative Body of the Berusu (*Badan Musyawarah Adat Berusu*) and is overseen by the senior customary leader for the area (*kepala adat besar*), who lives in Sesua, and the customary leaders of the seven villages of the surrounding area – Sesua, Batu Lindung, Seputuk, Rian, Sedukun, Sebidai, Sebawang. For their part the Punan have established a regional organization uniting all the Punan of East Kalimantan, the Customary Punan Association (*Lembaga Adat Punan*). The Punan characterize themselves as people who live close to nature. The relation between Punan, their lands and forests they describe as being like 'forest milk' (*telang otah urun lunang*).[264]

Interviews carried out during this study reveal that at least eight customary rights areas overlap the PTIM concession and the associated HTI area (see table 7).[265] The extent of these areas are shown on Map 4. Map 6 shows how these areas overlap the PTIM logging concession. None of these customary areas have been legally secured.[266]

TABLE 7 : CUSTOMARY RIGHTS AREAS OVERLAPPING THE PTIM CONCESSION AREA

Customary rights area	Ethnic groups	Map # (and colour)
Gong Solok	Kenyah	1 (Light brown)
Sesua and Punan Mangkuasar	Berusu and Punan	2 (Light Blue)
Seputuk	Berusu	4 (Dark Blue)
Rian	Berusu	5 (Red)
Sendulum	Berusu	6 (Green)
Sesayat	Tidung	7 (Grey)
Sekatak	Tidung, Berusu and Punan	8 (Dark Brown)
Pungit and Bengara	Berusu	9 (Blue)

Disputes with the company

When PT Intracawood first came here, we were not brave enough to say anything, because it was during the New Order regime. Since *reformasi* we have spoken out.[267]

Disputes between the PTIM and the local Dayak communities have a long history. In the community workshop held as part of this investigation, village members noted the following issues which they have brought up with the company and the local government.

- Logging has soiled drinking and bathing waters, rendering it undrinkable
- Fish stocks in turbid rivers have declined
- Hunting has been disrupted
- Machinery has destroyed forests
- Burial grounds have been destroyed
- Land rights have been denied
- Access to forests for shifting cultivation and hunting has been denied
- Forests were cleared for HTI, exacerbating local flooding
- Trees have been felled along river banks
- Few employment opportunities have been offered to local people
- Outside workers have molested local women.[268]
- Sacred trees have been felled
- Agreed compensation has not been paid.
- Adequate information has not been provided and dialogues have not been sustained.

Some of these complaints have been dealt with by the company. For example, compensation payments have been paid in some cases. A piped-water system was installed in one village, although it was not completed. The company has implemented a PMDH programme, although not in a very participatory manner. When Dayak women complained about

a brothel which had been established on community land just north of Sesua, local officials had it closed.

In Sekatak, on the eastern side of the concession, disputes between the company and villagers have become more bitter. In early 2002, after a long history of disputes about compensation payments, the community decided collectively to take matters into their own hands and impounded company machinery while destroying buildings in the logging camp. The company responded by calling in the police, which resulted in arrests and, after lengthy court hearings, three month imprisonment for those found guilty. Community members evidently still feel angry with PTIM over this incident. '*If PTI carries on using the New Order rules, we will react.'* This conflict was identified as a problem during the certification assessment and Smartwood and DfID promoted a workshop in Tarakan between some of the Sekatak village leaders and PTIM to try to resolve the dispute.

The community of Rian has also been involved in a serious dispute with the company. According to the testimony of villager members, during the July and September 2002, members of the community sought to open discussions with the company to settle their differences. On 10 October 2002, members of the community filed a complaint about PTIM's operations and asked local officials to check whether the company was operating correctly. When they got no response to these efforts either, on 21 October 2002 the community decided to set up a blockade on the road through the village in order to freeze PTIM's timber harvesting operations. The response was immediate. A large force of *Brimob* accompanied by 20 members of another (unidentified) military unit came fully armed to the village and demanded that the blockade be lifted. Three members of the community were arrested. Summons were served on these three on 21 November to appear at the Tanjung Selor police station where

they were charged and jailed. Bail was set at Rp. 3 million each (US$ 350) a sum too high for the three to pay.[269] While in jail the community leaders were approached by company personnel and persuaded that if they wanted the charges to be dropped they should first sign letters withdrawing their complaints against the company. Under duress they signed but the charges were not dropped. 'I feel very frustrated' noted one community member 'I am a notable figure in my community and for me this is harassment'.[270]

The community workshop also discussed what would constitute acceptable alternative negotiation mechanisms to establish agreements with companies. The following suggestions were made:

1. Regularise community land claims through good maps.
2. Provide clear information about the company's intentions to the community.
3. Hold community discussions to decide on an appropriate response
4. Delegate the *kepala desa* and *kepala adat* to jointly negotiate with the company
5. Hold further community discussions to assess the draft agreement
6. Sign the agreement between the company and the *kepala desa* and *kepala adat*.
7. Register the agreement with a notary .

One community member stressed the bilateral nature of such negotiations:

> We don't need the government to mediate our business. We can settle our disputes without the government. We have the right to determine our own fate. If outsiders come in they need to respect our law.

Another emphasized:

> The kepala adat cannot speak for the community without involving us all first.

As for the content of such negotiations and agreements, the following elements were suggested:

- Fees payable for each cubic meter of timber extracted
- Community development programmes
- Agreement to negotiate each annual cutting plan
- Community monitoring of operations
- Agreement to resolve all disputes through *adat*.

Local Government claims and rights allocations

Before the implementation of the 1999 Regional Autonomy Act, the Department of Forestry's regional offices *(kantor wilayah)* and *BipHut*[271] had considerable authority over concession areas, and over the delineation of concession boundaries and the boundaries of state forests. Decisions were made from the top-down, without much authority being conferred on regional forestry offices **(***Dinas Kehutanan*) or the regional forestry branch offices (*Cabang Dinas Kehutanan**)***.

However, with the implementation of the Regional Autonomy Act, many changes were made to the institutional framework of government. The regional forestry offices gained more independence and began to operate under the control of Provincial Governors and District regents (*bupati*).

In Bulungan and Malinau, a new kabupaten carved out of Bulungan in 2000, the regional forestry bureaux did not recognize the extension of the contract of PT Inhutani I by the Ministry of Forestry #656/1995. Under the East Kalimantan Spatial Plan,[272] carried out in 2000, PT Inhutani I's concession area was near halved to cover an area of

1.137.388 hectares, about 1.070.312 hectares smaller than the 1973 concession. A result of this is that local forestry bureaux officials do not recognise PTIM's concession rights.

Based on the Government Regulation # 6/1999 on the Utilisation of Production Forest, the local governments of Bulungan, Malinau and other districts (generally in Kalimantan) have passed District Government Regulations (*PerDa*) on 'Timber Harvesting from Private Forest, Community Forest and Adat Forest'.[273] These regulations allows the *bupati* to give out 100 hectare annual timber harvesting permits to private land owners, communities and customary forest owners. This has opened the way for outside investors to fund small-scale concession activities, in the name of the community, in areas claimed by local communities.[274]

To gain these concessions and before approaching the *bupati* in the name of the communities, outside investors have first sought local consent by signing deals with village headmen (*kepala desa*), and other prominent community members, and by offering to pay compensation to the communities around Rp. 20.000 (US$2) per m^3 for all timber extracted. Considerable controversy within the communities and between different villages has been generated by these deals, due to lack of transparency in the negotiations, disagreements about who has authority under customary law to allocate rights in these areas, and lack of clarity about to whom the money should be paid. Nevertheless, despite these problems and even though the payments seem very small compared to the value of the timbers on the international market, these deals are seen as highly advantageous by many community members, used as they are to seeing timber extracted from their lands without receiving **anything** in return.

Within the PTIM area there are at least 12 different **sets** of such permits given out by the local governments.

The result is that the PTIM concession area is now partially covered with a chequerboard of dozens of small-cutting licences (see Map 5).[275] PTIM has made strong efforts to have these small permits cancelled, although this has exacerbated relations with some of those community members currently gaining financially from these short term arrangements.

The status of all these small concessions is now in doubt, however. In March 2002, Government Regulation (PP) # 34/2002 was passed, replacing the previous regulation (PP 6/1999), thereby restoring the authority of the Forestry Minister to issue new forestry concessions and denying this right to local government.

Ongoing conflicts between provincial forest department and the district forestry offices over who has authority over forest delineation processes further complicates the picture. This confusion and competition between the forestry bureaux is one of the major constraints impeding forest delineation and concession delineation.

Experience with certification

PT Intracawood has interacted with three FSC accredited certification bodies. It first contacted SGS Qualifor, but after field visits, the certification company indicated that it felt conditions were not far enough advanced to merit a full assessment. PTIM then brought in Smartwood, which carried out a number of scoping visits and then a full assessment of the concession in March 2000, which established that a number of problems needed to be dealt with before a certificate could be issued. Smartwood has also carried out a number of subsequent audits in the concession.

After carrying out its assessment of the Intracawood concession in 2001, Smartwood made three key Preconditions which relate to Principles 2 and 3:

Precondition 1

Prior to certification, Intraca shall reach an agreement with the district governments of Bulungan and Malinau Districts that will result in:

1) Respect for the concession's nationally recognized boundary; and

2) Stop the issuance of IPPK licenses, or extensions of current IPPK licenses, within concession.

Precondition 3

Prior to certification, Intraca shall conduct a community survey to document and map community land claims, resources use and sites of special community interest within concession, including existing and potential areas of conflict. The community survey will :

1) establish social baseline data;
2) assess social impacts from Intraca logging operations;
3) make recommendations about actions to be taken to compensate for and/or mitigate impacts;
4) make recommendations for social impact monitoring procedures; and
5) recommend ground rules for community relations, including the steps required to establish the community forum described in Pre-Condition 4.

Precondition 4

Prior to certification, Intraca shall establish a consultative community forum composed of legitimate representatives of communities whose lands are fully or partially within the concession and including representatives from company management and local government. Community members of the forum should be transparently selected by community. The purpose of the forum is to set guidelines and policy relations between Intraca and villages, to resolve specific

land and resources-related disputes, and to help the company select the villages to be assisted under the PMDH program. Intraca will support the forum financially and administratively.[276]

Since these findings, PTIM has also being in contact with a third certification body, SCS from which it secured a Chain of Custody certificate. The certificate will permit PTIM to label as 'FSC certified' plywood it is manufacturing in its plant in Tarakan. PTIM is importing pine from Fletcher-Chalenge FSC-certified plantations in New Zealand and processing this into plywood with *meranti* veneer sourced from the disputed concession. In this way, PTIM is able to supply the North American market with FSC certified plywood even though its own concession in not certified.

Implications for the implementation of Principles 2 & 3 in Indonesia

The following issues for discussion are brought out by this case study:

- The absence of any legal process giving land security to indigenous peoples has contributed to serous 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.(Principle 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.(Principle 2.1)

- The conflicts of interest between the national, provincial and district forest offices further undermine the forest manager's security of tenure.(Principle 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.(Principle 3, 3.1)
- No agreements have been negotiated with the communities allowing PTIM to log the communities' areas with their prior and informed consent.(Principle 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.(Principle 2.3).

The certification body has obviously identified that there are serious problems for PTIM meeting Criteria 2.1, 2.2, 2.3, 3.1, and 3.3. The question is, though, has it made clear that compliance with Principles 2 and 3 should require the concessionaire to 'recognize and respect' the customary rights of the indigenous peoples to **own and control** their lands. As the owners of the area, it can be argued that the communities' long-term tenure and use rights should also be 'clearly defined, documented and legally established' in accordance with Principle 2. The problem arises when the Criteria and Indicators are attended to, one by one, without being framed by the overall intent of the Principles.(Principles 2&3)

HTI

To date there has not been an FSC certification of a timber plantation in Indonesia. The final case study carried out for

this investigation instead examines a new HTI operation being developed in West Kalimantan. The concession was selected as a case study because land acquisition processes were more developed in this area than in most HTI operations.

PT Finantara Intiga

> It is really upsetting to see our own lands fragmented for oil palm plantations & HTI without having any chance to understand more about its consequences. It should have been us that decided the future of our adat land and villages. (Tumenggung Udjon)

PT Finantara Intiga (PTFI) received an Industrial Timber Plantation permit (HTI) through Ministerial Decree in 1996. The joint venture company secured a total concession area of 299,700 hectares, located in Sanggau and Sintang districts of West Kalimantan Province. The HTI is divided into five management units, three in Sanggau and two in Sintang. PTFI aims to produce pulpwood from plantations on these units in order to supply a pulp and paper factory with a capacity of 500,000 metric tons per year. (Exactly when and where the projected factory is to be installed in West Kalimantan is not yet clear). To supply the factory, the HTI is expected to produce pulpwood at a rate of 1,000,000 cubic meters per year from plantations of *Acacia mangium*, *Acacia crassicarpa* and *Eucalyptus* spp.

Since its establishment in 1996, the management of the company has undergone three changes in the shareholding. Initially the proportions were 40% for PT Inhutani III, 30% for Gudang Garam (a private cigarette company) and 30% for Nordic Forest Development Holding Pty Limited. The latest position for the shareholdings of PTFI is PT Inhutani

III 20% and Nordic 80%. PT Inhutani III has had to gradually reduce its shares in the company due to its own financial problems, resulting from it losing an allocation from the Reforestation Fund.

Of the total concession area of 299,700 hectares, about 80,056 hectares cannot be utilized because they overlap areas used for oil palm plantations, densely-populated residential areas and primary forests. Apart from demonstration plots, *Acacia* plantations are to be developed in partnership with local communities. Community members are expected to collaborate with the plantation scheme in exchange for opportunities of paid employment and compensation payments for lands used for plantations. The villages also benefit from the provision of various services.

By 2000, the *Acacia* plantations covered 20,000 hectares. As a result of the lengthy processes of land acquisition, the company had had to lower its target for plantation establishment for 2003, from 100,000 hectares to 50,000 hectares. The company hopes to return the unusable areas of its concession to the Ministry of Forestry in exchange for an additional 104,958 hectares as a substitute.[277] However, much of this replacement land being sought by PTFI actually falls outside State forests and include Dayak lands in areas classified as agricultural land. The company, however, expects to be able to appropriate this land as if it were in State forests. Although the company expected approval of this request in 2001, no information on the additional permit has been made public. Nor are data available on the status of the boundary delineation of the HTI area.

Land Acquisition Criteria for PT FI Plantations

To establish its plantations, PT FI needs compact blocks of land preferably of a minimum 100 hectares each. It seeks areas that are not fragmented, contain no enclaves of other

lands such as farms, rubber plantations or customary agroforestry plots. According to the company's guidebook, the kinds of land considered suitable for the development of the HTI are:

1. *Imperata* grassland
2. Scrubland
3. Mixed *Imperata* grass land and scrub
4. *Rawang* forests (low volume secondary forests).

The company explicitly excludes from conversion the following land types:

1. Primary Forests
2. Secondary Forests
3. River banks
4. Community Conservation Areas (forest preserves)
5. Agroforests (mixed timber and fruit trees) (*tembawang*)
6. Rubber Plantations
7. Steep land, swamps and tidal forests

Lands included in the plantations are to be leased to the company by the community, implying recognition of the fact that the lands are owned and under the possession of the community and not actually controlled by the State. However, there is concern that using these criteria, the company may consider converting a number of village lands to plantations, such as swiddens, fallow lands, old and new rubber plantations (where rubber trees do not grow as monocultures), fruit gardens, young *tembawang*, rice paddies, uplands (commonly without big trees) and sacred lands, based on the fact that the Department of Forestry claims control over these areas.[278] Whereas communities practise multiple use forestry and rotational farming, the company's criteria and government officials see mixed species agroforests and fallow lands as unused areas suitable for conversion. Dis-

agreements about where plantations are best established have arisen as a result (See Maps 7,8,9).

Land Acquisition

To take over land for its plantations, the company formed a district-level task force (*Tim Pelaksanaan Satuan Tugas Kecamatan* [TP3K]), consisting of TRIPIKA (three Sub-district Heads), including the *camat* (Sub-district Administrative Head), the Sector Police Chief and the *Koramil*.[279] The villagers note that since the Village Heads (*Lurah/ Kepala Desa*) are direct subordinates of the *camat* in the administrative hierarchy, they were obliged to accede to this take-over programme, having lost their authority to manage their own village lands, with the enactment of Law No. 5/ 1979 on Local Administration, which was followed by a Village Regrouping Programme.[280] Since customary land was not recognized as such through legal documentation (ownership certificates), there were few obstacles to its acquisition. The take-over teams, along with community figures stressed the advantages of the HTI scheme in providing job opportunities, economic benefits, species enrichment to river catchment ecosystems, cooperative groups (*Bina Desa*), training opportunities, agroforestry, and agricultural intensification on areas surrounding the HTI.

Villagers allege that any individual or household opposed to the program was intimidated, stigmatized as anti-development, socially excluded and encountered subsequent difficulties dealing with the administration. To try to ensure the smooth take-over of land and prevent possible conflicts, the company appointed a prominent figure in each village to be the head of an Executing Task Force. This village member received payment of Rp. 24,000 per month as an incentive, with additional lumpsum payments being given for each village meeting that they help convene.

The land accquisition process was carried out either household by household, or in relation to groups of households. Alternatively blocks of land of up to 100 hectares could be handed over by a village or by clusters of villages. All that was needed to ensure the hand-over was the submission of 'a statement of hand-over' signed by the company and household heads, village administrators, village heads, and prominent figures. In some cases land acquisition agreements were signed by household heads, in other cases just by the village administrators.

Villagers complain that the land acquisition process has also been accelerated by the manipulative application of customary law procedures relating to land transfers. Under a custom called *bera,* where a community member has not used an area for some years, villager elders may reallocate such land to another villager following community discussion. Villagers allege that in their dealings with PTFI, the *bera* procedure is being invoked by village leaders to alienate lands to the company against the will of the villagers involved.

Under the agreements the company leased the lands for a period of forty-five years, in accordance with Government Regulation No. 7/1990 on the HTI-Pulp management period, which grants concessions for 35 years with an extension of ± 8 years for the planting rotation. According to the villagers, mechanisms for transparent control and re-negotiation were not part of the company's formal procedures. However, some informal re-negotiations were carried out on a case-by-case basis in response to specific demands by the participating villagers.

Customary rights claims

Kampung Upe, Kolompu, Lanong, Entiop, Engkayu, and Kotup are Mayao Dayak villages, in the sub-district of Bonti,

Sanggau District. The villages are all affliated to the Mayao Indigenous Peoples Council (*Lembaga Ketemenggungan Benua Mayao* - LKBM) (See Map 7).

The Bidoih Mayao Dayak trace their origins back to Sungkung, in Sambas District, but they have been inhabiting the Sanggau area since the 19th century. At first, they called their village 'Mayou' but then they separated into several groups: one led by Macan Balok moved and his descendants inhabited Kampung Entiop and Engkayu; another led by Macan Batu formed Kampung Kelompu, Lanong and Upe; and the others led by Macan Labokng and Macan Trusi formed Kampung Sedua and Kotup (the latter, the last new settlement, was formed around 1940). The Mayou Kotup community lives across the Sekayam River and is usually referred to as "the outcast Mayao".[281] The 1997 census estimated the number of Bidoih Mayou at 422 households, comprising 1,939 people.

Communities in Sanggau still practise swidden agriculture quite extensively, although some people have adopted more intensive land-use systems also. Despite their involvement in the HTI Pulp development and some oil palm plantations surrounding their villages, the community still depends on rice cultivation in their swiddens, complemented by rubber tapping and fishing. The average household income per month is estimated at Rp. 477,894 (US$52). The community has had some bad experiences with a reforestation project coordinated by PT Inhutani III and funded by the Asian Development Bank, and from an oil palm plantation scheme.[282]

Compensation

Because the lands acquired by the company were on customary land, the signing of the hand-over agreements were marked by a customary ceremony '*Ngudas*'. PT FI paid com-

pensation ranging from Rp. 10,000 to Rp. 30,000 per hectare, according to the following details: Rp. 20,000 for the rubber and the fruit plantations, but only Rp. 10,000 for scrub and coarse grass land. An additional Rp. 10,000 per hectare was payable as a fee for the ceremony..[283]

The company also provided 'infrastructure compensation' to the village for the use of the land:

a. 0.5 hectares of the HTI-Pulp plantation was given for each 10-hectare handed-over land to the land givers under a soft credit scheme.
b. 0.5 hectares of non-timber plantation was also given for each 10-hectare handed-over land to the land givers. These non-timber areas were established outside the HTI area, as part of the Village Development Program (*Program Bina Desa*).
c. Rp 10,000,- per hectare of the net size of landclearing was given for building a social facility as part of the Village Development Program (*Program Bina Desa*)

Forest Department Claims

The Department of Forestry asserts its jurisdiction over the areas based on the 1984 Forest Land Use Consensus (TGHK). In 2001 a re-designation of forest and coastal areas was made, resulting in significant changes in the size of areas. The new forest zoning is rather like the Provincial Spatial Plan (RTRWP) carried out in 1997, but it excludes some areas and includes others as forest land. (See Map 8). Whereas, these zoning processes should be transparent and participatory so the public can input their opinions on how lands and forests should be classified and the extent of their rights, such data have not been provided to the communities. The same should now apply to the additional area now being sought by the company (and see section 5.4). Map 9

shows how the additional area does exclude some of the villages that have rejected the HTI scheme, but also includes some areas which are not State forest lands.

The Provincial Spatial Plan (RTRWP) and the District Spatial Plan (RTRWK) need to be carefully scrutinized, because in the past these zoning processes were often manipulated to fulfill investors' wishes. The monitoring is important because the Plan is used as the base for the revision of Forest Designation, according to the Decree of the Minister of Forestry No. 31/2001 and the Decree of the Minister of Forestry No. 70/2001, and it has already been used for the new designation of state forest land of West Kalimantan Province (2001).

Research findings

LBBT, the Dayak-run legal assistance NGO which carried out the field study, drew the following conclusions from their investigation and the community workshop that was part of it.

- The principle of prior and informed consent was not applied in the land acquisition process.
- Inadequate information is being given to the villagers about company plans and processes of land acquisition meaning that consent, where given, is often not 'informed'.
- The legality of the land transfer process is in doubt as the company's process of leasing land from the communities while in line with the local administration's view that the land is privately owned land conflicts with the view of MoF, which considers the land to be State forest land.
- The livelihoods of community members have been negatively affected.
- The process of negotiating land deals with individual households has had the effect of transforming the land ownership system from a customary notion of collective

tenure to one of individualized land entitlements.
- Given the history of government interventions in village administration, communities need far more information and capacity building to be able to exercise their right to free and informed consent.
- Coopting prominent villagers into each Executing Task Force created village divisions and was contrary to customary norms of decision-making, which would not allow village representatives to receive and incentives from outside companies.

Implications for the application of Principles 2 and 3

This 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 develop-

ers. Rights of free and informed consent are overridden from the beginning because the company is granted a HTI concession before any consultation takes place. 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.

As one workshop participant remarked:

> It is true there were written agreements but the company always makes excuses to avoid detailed discussion.. What we need is to change the system of land acquisition which currently involves the camat, police and military. This is not prior and informed consent. We need to have our own negotiator, who will be accountable to us with a clear mandate and schedule. Negotiations should be carried out in the village with the participation of as many people as possible. Just like we do in making decisions through our *adat* system. This is what we mean by prior and informed consent, without the presence of the police and military. Negotiation should just be between the community and the stakeholders who need our natural resources, witnessed by local government. Once again, what we want is for the land acquisition task force and the task force of the oil palm plantation to be dismissed.

Community Forestry

Certification of Community-Based Forest Management (CCBFM) has been promoted in Indonesia as an effective, economically viable, environmentally sustainable, socially just and resilient forestry alternative. [284] However, these claims are yet to be tested, as CCBFM is still in its earliest phases of development in Indonesia. There are a number of challenges facing CCBFM which are noted by its proponents. These include:

- CCBFM products have to compete in the open marketplace with products from industrial-scale companies.
- Connections between small-scale producers and consumers interested in certified forest products are hard to maintain for obvious logistical, cultural, linguistic and financial reasons.
- The costs of certification itself are proportionately higher for small-scale producers. (Experiments with group certification have yet to be attempted).[285]

To date there have not been any certifications of CBFM in Indonesia by FSC-accredited certification bodies. A partial exception is the group certification given to small-scale producers supplying PT Xylo Indah Pratama a company producing pencil slats made from a fast-growing hardwood – *pulai* (*Alstonia scholaris*). Most of these plantations are cultivated by transmigrants and long-term resident smallholders on non-forest lands in South Sumatra. The operations received FSC certification from Rainforest Alliance SmartWood in 2000.[286] Regrettably, owing to time and budgetary limitations, a field visit to these settlements and their woodlots was not carried out as part of this study. According to the Public Summary Report, the company accepts the participant small-holders as 'land-owners'. According to the report, these transmigrants enjoy 'village land entitlements'

and 'the land tenure is clear and legally secure'. Specifically, although the land-owners lack land title (*sertifikat*), in order to participate in the scheme they are obliged to show that they have a 'village land letter', *surat tanah desa,* signed by village heads (*kepala desa*).[287] In addition, signed agreements between the company and the 1,500 land-owners who are part of the scheme, secure the flow of wood products to the company. These agreements establish the mutual obligations of the company and the landowners on diverse issues such as environmental protection, forest management, harvesting, wood supply, planting, personnel relations and benefit sharing. *Prima facie,* the case suggests itself as a model for other situations whereby private companies can explicitly accept local people as rightful land-owners, even in the absence of legal title, and sign binding agreements with such land-owners in order to meet FSC Principles. The case merits further study.

A pilot CCBFM project is currently being tested in three locations in Indonesia under a collaborative engagement funded by GTZ in Gunung Kidul (Yogyakarta), Wonosobo (East Java) and Sanggau (West Kalimantan). Tests certifications are presently using modified LEI Criteria and Indicators and are apparently not being done under the Joint Certification Protocol, as this only applies to HPH.[288] A further pilot scheme is now being planned jointly by a consortium of 6 NGOs, comprising WWF-Indonesia, KpSHK, SHK Kal-Tim, AruPA, AMAN, and PERSEPSI, in collaboration with LEI.

Certification Procedures

Adapting the International Standards to Indonesian Realities

In such circumstances, FSC has a clear position set out in

the FSC Accreditation Manual Part 3.2, Section 2. As summarized in '*FSC Guidelines of Certification Bodies'*

Until a regional Forest Stewardship Standard has been formally endorsed by the FSC Board, certification bodies are required by the FSC to carry out certification according to their own 'generic' standard, which has been evaluated and approved by the FSC Board…. Certification bodies are **required** to encourage local input to and comment on their 'generic' standard and to take into account any inputs on their generic standard. Identified stakeholders **must** be informed at least one month prior to the main assessment evaluation taking place of procedures for developing the 'locally adapted generic standard'. This 'locally adapted generic standard' **must** be finalized through meaningful accommodation of stakeholder concerns prior to certification assessment audit commencing in High Conservation Value Forests. For all other forest certifications, the 'locally adapted generic standard' **must** be finalized and circulated at least one month prior to the certification decision.[289]

According to the *'FSC Accreditation Manual'*290 all approved certification bodies **must** have:

- a 'generic' standard which specifies appropriate indicators and verification techniques, to serve as the basis for evaluating compliance with the FSC Principles and Criteria for Forest Stewardship at the forest management unit level;
- a document which provides explicit cross references between such a 'generic' standard and the FSC Principles and Criteria for Forest Stewardship;
- procedures for ensuring that the locally adapted generic standard conforms with relevant national and local laws and administrative requirements;
- procedures for encouraging effective local input to and comment on the 'generic' standard, before the evaluation takes place;

In addition, FSC approved certification bodies *must* ensure that the locally adapted standard developed as a result of these procedures is publicly available.

Interviews carried out for this investigation reveal that, in fact, in none of the cases studied did development of a 'locally adapted generic standard' take place. Rainforest Alliance has explained that they were careful to indicate that they were using their international generic standard and explicitly did **not** attempt to develop a local standard as they perceived this to be the role of LEI. In the case of subsequent evaluations, Rainforest Alliance has stated that it considered the Memorandum of Understanding between LEI and FSC as providing the equivalent of a national consultation on the standards used in Indonesia. Similarly, an SGS inspector suggested that parallel work to develop a local version of an FSC standard would have been "counterproductive to relations with LEI". SGS inspectors have worked closely with LEI inspectors, and have compared checklists, but have never developed a specific local adaptation of their generic standard for use in Indonesia.

In the context of the Joint Certification Protocol (see section 2.3), Smartwood did, however, make efforts to reconcile its generic standards with the Criteria and Indicators of the LEI system.

Smartwood notes that *'we were sensitive not to affront the importance of the LEI C&I by seeming to be overly aggressive in coming forth with an adapted standard that either by perception or design would come across as something diverging, rather than collaborating with LEI'*

Smartwood thus noted in its assessment report of PTIM:

> The Intraca assessment was conducted using the Forest Stewardship Council-approved SmartWood Guidelines for Assessing Forest Management, March 2000 as related to the LEI Criteria and Indicators. At present there are no en-

dorsed FSC regional guidelines for Indonesia. Within the context of the joint certification protocol, the LEI standard was incorporated within the field guidelines used by assessors. As per SmartWood's FSC accredited certification system, the findings, scores, preconditions, conditions, and recommendations are presented according to the FSC P&C.

FSC accredited certification bodies appear to have concluded that the existence of the LEI process and implementation of the 'Joint Certification Protocol' meant that it was unnecessary to carry out additional consultations on the adaptation of their generic standards, although, in the case of Smartwood, their experience in Indonesia has nevertheless led to refinements of their generic standards which have been issued in Bahasa Indonesia.

The great amount of work done by Indonesian inspectors and NGOs associated with the LEI process has thus resulted in less, not more, discussion of the implementation FSC Principles and Criteria in Indonesia with Indonesian stakeholders. The result is that although two different certification bodies have implemented the FSC Principles and Criteria in Indonesia, there has been little public debate specifically about the standards to be used.

Interpretation of FSC Standards by Certification Bodies

In the absence of either national standard-setting processes or due procedures for adapting certifiers' generic standards to local circumstances, certification bodies have developed their own means of adapting the standards during certification. Inevitably, the result is that different certification bodies have ended up making different interpretations of the standards. For example, with respect to FSC Criterion 3.2 SGS Qualifor evaluated implementation of the Criterion with two indicators:

3.2.1 "adverse impacts of forest management on indigenous communities' resources or tenure rights are identified", and

3.2.2 "documented actions are taken to address adverse impacts".[291]

Rainforest Alliance Smartwood evaluated the same Criterion with the following two indicators:

3.2.1 "Indigenous groups do not perceive Forest Management Operation operations as a major threat to their resources or tenure"

3.2.2 "The Forest Management Operation takes explicit actions to ameliorate threats or diminishments to indigenous resources or tenure".[292]

These kinds of differences between different FSC-accredited certification bodies operating in the same country are inevitable in the absence of a national standard-setting process.

Another generic finding of the study is that some of the phrases that are difficult to interpret within the FSC Criteria are used verbatim within the certification bodies' own generic indicators.

Thus FSC Criterion 3.1 requires that "Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies". The expression 'free and informed consent' was identified in this study as being difficult to interpret. But the SGS standard used for evaluation of this criterion requires its inspectors (amongst other requirements) to evaluate whether "there is evidence that free and informed consent to management activities affecting use rights has been

given by affected peoples". In the absence of a national FSC process, or comment on the generic standard, the difficult question of interpretation is passed directly on to the inspector in the field.

This can be viewed either a necessary area of flexibility in the standard in which the auditor's professional skill is to interpret the standard in the field. Or it can be viewed as putting the auditor in the uncomfortable position of having to interpret the standard, rather than simply implement it. This study found signs that some auditors would welcome additional guidance. One inspector said "What I would like for this process… [is] more clarity on how the Principles and Criteria should be applied". A local manager of a certification body commented that "Certification in Indonesia has suffered from a lack of guidance from the FSC Secretariat". However another certification body manager emphasised the role of the auditors interpreting the standards to suit the local context.

As part of this study interviews were carried out with consultants and inspectors used by certification bodies to ascertain in more detail how they currently interpret and apply FSC Principles and Criteria 2&3. Many of those interviewed were refreshingly candid and open about the difficulties they face adapting these P&C to the local situation. The relatively small number of certifications that have been granted in Indonesia may reflect the certification bodies' caution. However, the interviews also revealed that there is considerable confusion and an apparent lack of procedural rigour in the way standards are interpreted in current certifications. The following key issues emerged from the interviews:

1) Definition of Indigenous Peoples and local communities (2., 3.) : Partly because the LEI process does not seek to identify 'indigenous peoples', no locally adapted defini-

tion of indigenous peoples applicable to the Indonesian context has been agreed by any of the certification bodies operating in Indonesia beyond the general definition given by FSC generic standards. One inspector suggested that an assumption should be made that all communities be considered indigenous unless proved otherwise but in practice, in the Perum Perhutani certification, assessors assumed that the communities were not 'indigenous peoples' and so Principle 3 was apparently not applied. Our own community workshops, however, showed that at least one of these communities does self-identify as *masyarakat adat*.

More consensus emerged among assessors on the definition of 'local communities' as including all those living within and in areas neighbouring concessions, although no formal definitions have been adopted. One inspector noted in this context: 'There is not time during an assessment to visit all the villages in a concession, let alone all those outside, so we have to consult a sample.'

2) The Extent of Customary Rights (2., 2.1., 2.2., 3., 3.2.): Assessors interviewed did not have clear expectations of what forest managers are expected to have done to establish the extent of customary rights areas within their concessions. One noted that 'this is a very foggy area'. Another explained that ideally there should be participatory mapping carried out jointly by the communities and the company but that in practice this is not done. However, as noted above, Smartwood has required such a mapping for the PTIM concession in East Kalimantan.
3) Local Community Control (2.2): Criterion 2.2 requires that local communities retain control 'to the extent necessary' to protect their rights and resources, unless they delegate this authority with their consent. Assessors were asked what kinds of rights triggered the need to apply

this principle. There was no clarity in the responses. In the Perum Perhutani case, the assessors had decided not to apply Criterion 2.2 but only Criterion 2.3. In the Diamond Raya case the assessors had not looked for evidence of local control of , or consent to, the logging operations.

4) Rights legally established or recognised and respected (2, 2.1, 3, 3.1) : Assessors agreed that the current legal framework in Indonesia makes it very hard to legally establish or provide clear evidence of long-term use rights to land, with the possible exception of *perda* (see above). In general, the best that can be achieved is to have indigenous or customary rights areas noted in spatial planning maps. Most certifiers did not make clear what kind of documentation of these rights they require to satisfy them that compliance with these criteria has been achieved. The optimum arrangement that could be expected in the current legal situation would be to have a tripartite agreement between Local Government, the concessionaire and the local communities, which sets out the extent of community rights areas. However, such agreements have not been drawn up for the areas so far certified. On the other hand, most certifiers assume that holding a HPH/KPH is adequate proof of the legal establishment of a concessionaire's long-term use rights. Our own studies show that most concessions are issued on shakey legal grounds.
5) Not diminishing the resources or tenure rights (3.2): Criterion 3.2 requires that forest management shall not threaten or diminish the resources or tenure rights of indigenous peoples. As noted, however, the very extension of State forest lands and concessions over customary rights areas has the legal effect of denying proprietary rights and limiting recognition of customary rights to very weak forms of usufruct that must give way to concessionaires'

rights. Doubts were expressed by assessors about whether a strict application of Criterion 3.2 is ever possible. One assessor noted: 'I agree that if this is taken literally it is impossible to log.' Likewise another noted: 'There is no way you can have a HPH without disputes. It is impossible that a HPH operates without doing damage so the solution is to pay compensation.' In general it seems that certifiers are interpreting 3.2 to mean that measures must be taken to ensure that people can go on with their lives – farming, hunting and gathering etc. – while any accidental damage to their properties and crops is paid for. One assessor noted that national standards are needed to give guidance on this issue. Another noted that guidance was also needed as there is a potential conflict between the need to protect hunting rights in accordance with Principles 2&3 but to limit such activities to ensure compliance with Principle 6.

6) Procedures to establish free and informed consent (2.2., 3.1, 3.4.): Given the centrality of the principal of consent for Principles 2&3, the degree of uncertainty we found among assessors about what they should look for to ascertain whether or not local communities or indigenous peoples had consented to logging operations in their customary rights areas is surprising. Interviewees repeatedly used phrases like this is a 'grey area', this is 'not rocket science', 'this is a very foggy area', 'our verification is weak on that to be perfectly honest', when explaining their assessment procedures.

On the other hand, candid statements were made about the lack of consultation and consent in the way concessions have been handed out historically in Indonesia and the implications this has for certification. Noted one assessor: 'Formally none of the HPH are valid: none of them were granted with consent'. Another assessor vol-

unteered the opinion that: 'It is true that the concessions were all established without consent and (communities') ownership rights were abrogated. It is true that the rights should go back to the people and, given what happened, certification should not happen.' But at the same time most assessors believed such a literal interpretation of the consent principle was not desirable. Explained one: 'Our basic agenda is to go as far as possible in the current framework.'

Assessors did note that they could not rely on signed documents alone as evidence of agreements as such documents are too easily falsified. As for the question of who should give consent, one assessor again noted: 'Frankly speaking no one has a valid solution to that'. Many assessors accept that there are doubts about the representativity of village leaders. Some held the view that 'the way to apply P2&3 properly would be to establish a local forum to act as cross-checker and arbitration body', although it was noted that this is not happening in any of the HPH even though such a '*forum konsultasi daerah'* is required by the LEI standards.

7) Appropriate dispute resolution mechanisms (2.3.): Asked about the mechanisms in place to resolve disputes, we noted a considerable confusion of roles, whereby certifiers explained how **they** resolved disputes rather than how the forest managers resolved disputes with the local communities (and see section 6.5.4 below). As far as we could determine both the Diamond Raya and Perum Perhutani concessions were certified in the absence of any **agreed** mechanisms for dispute resolution being in place. In general, certifiers accepted concessionaires' evidence that they had a mechanism for granting compensation as an 'appropriate' dispute resolution mechanism. As the case studies above amply demonstrate, the affected com-

munities clearly do not feel that effective dispute resolution is taking place.

8) Identifying sites of special significance (3.3): Required mechanisms for mapping significant sites are also not clearly defined by certifiers. Most do not require participatory mapping of such sites and in general such sites are not mapped by the companies. Assessors agreed that sites should be identified in management plans and that if communities did really exercise the control required under 2.2, the currently one-sided nature of management planning would not present such an obstacle.
9) Compensation and consent for the use of traditional knowledge (3.4): The interpretation of this requirement is likewise unclear to many assessors and no formal verification is carried out to ensure that such compensation is paid 'before forest operations commence'. However, the only evident use of such knowledge occurs when tree spotters ('timber cruisers') use their local knowledge to identify extractable timbers. They are then paid wages for their work accordingly. No allegations came to light of this principle being violated by concessionaires.

Implementation of Standards by Certification Bodies

There are also differences in the way the certification bodies' own standards are implemented. Both SGS Qualifor and Rainforest Alliance Smartwood now structure their standards in accordance with the FSC Principles and Criteria. However, they operate different systems for determining whether their standards have been complied with by forest managers. SGS Qualifor checks whether each of its indicators is complied with – non-compliance with an indicator results in a 'minor' corrective action. A decision is then made as to whether the FSC criterion is complied with, and non-com-

pliance would result in a 'major' corrective action, which would preclude certification.

Rainforest Alliance Smartwood operates a different system, in which the operation's performance on each FSC criterion is given a score on a scale of 1 to 5. A score of 1 is defined as "Extremely weak performance; strongly unfavourable or data lacking". A score of 2 is defined as "Weak performance improvement is still needed". A score of 3 is defined as "Satisfactory performance". Performance on each indicator informs this judgement, but is not explicitly scored.

In both systems there is considerable room for flexibility in terms of the inspectors' judgement as to the extent to which an FSC criterion is complied with. However, this is made much more risky when the standard itself requires considerable local interpretation, and yet a judgement is required as to whether the compliance is good or bad.

This is a major problem. As noted above, several times inspectors and certification bodies' representatives interviewed in this study admitted that if applied 'literally', then specific aspects of specific FSC criteria were not being applied by the forest managers. Some noted that indeed 'strict' compliance would be impossible given the current legal and institutional framework. The representatives expressed the need to be 'realistic', or to find a way through these problems. Such comments related particularly to issues such as establishment of legal tenure and the provision of local consent for logging operations.

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.

Relations between Certification Bodies and Forest Managers

Under current FSC procedures, FSC accredited certification bodies are independently contracted by forestry operators to scope (pre-assess) and then assess their forest management systems with the aim of ascertaining whether or not a specific forest management unit complies with FSC standards. Scopings (pre-assessments) are currently not subject to the FSC's *Guidelines for Certification Bodies* and are used by forest managers as an opportunity for them to get familiar with the FSC's requirements and take advice from the certification bodies on what steps they should take to modify their management procedures and plans to bring them into compliance with the FSC's Principles and Criteria. Clearly it is desirable that forest managers can get this kind of management advice, but the fact that they tend to get this advice from the certification bodies themselves leads to a blurring of the role of the certification bodies as impartial evaluators and their role as forest management consultants for the same companies.

A detailed examination of this issue is beyond the scope of this study but it seems important to flag up that there is a real risk that this confusion between the certification bodies' two roles can lead to a conflict of interests which could potentially undermine the certification process.

Photo: *Sawit Watch Doc*.

7 Prospects for Reform

> Following the change in Government in 1999, there has been a recognition that a fundamental overhaul of land policy, regulation, and institutions - both for land within and outside the gazetted forest - is needed and for the first time GOI has indicated that it is ready to consider the adequacy of the [BAL] and to recognize and address the more difficult *adat* law issues, particularly those concerning community tenure. (World Bank[293])

The previous sections of this report have sought to elu cidate the obstacles in the way of a wide application of FSC Principles 2&3 in Indonesia. Current institutions, policies and laws related to land tenure, customary rights and forestry do not provide an easy enabling framework for the recognition of local communities' rights to own, control and manage the natural resources that they customarily depend on and use. What, then, are the prospects for reform ? This section attempts to summarise current reforms that are underway in natural resource management laws, autonomy, land tenure and forestry, with the aim of ascertaining the prospects for certification in the future.

New NRM Law and Legislative Act #9 of 2001

Pressure for a reform of the whole legal framework relating to land and resource extraction has been building up in Indonesia for years. An escalation of land conflicts, public indignation about land expropriations and widespread demands for the restoration of communities' rights to land and forests, have obliged a rethink of land tenure and natural resource management laws.[294] With the advent of the period of *reformasi,* and the establishment of genuinely elected legislatures, this pressure became patently effective in the form of new laws. One of the most significant of these is the so-

called TAP MPR IX/2001 concerning Agrarian Reform and Natural Resource Management, a decree passed by the Indonesian National Assembly, Indonesia's highest constitutional body, in September 2001.

The decree is one of the first pieces of law which acknowledges that agrarian and natural resources in Indonesia are being used unsustainably, that existing laws on land and natural resources overlap and contradict each other, that the agrarian regime is characterised by assymetrical notions of proprietorship (ie domination of access to land by the State and the private sector) and that all this has led to serious social conflicts over natural resources.

The decree invokes as its underlying principles the need for: respect for human rights; the recognition of the rights of customary law communities (*masyarakat hukum adat*); and sustainability. The decree likewise stipulates the needs to respect national unity, while encouraging legal pluralism, the rule of law, social justice, democracy, gender equality, inter-sectoral linkages and coordination, balance between rights and responsibilities and decentralization. The aim of the law is to provide a legal basis for fundamental land and natural resource reform aimed at resolving land and natural resource conflicts with the full engagement of the communities.

Accordingly, the decree mandates the Executive and the Parliament (DPR) to restructure tenurial rights and rights of use and access to natural resources and to reform the legal, regulatory and institutional frameworks governing agrarian and natural resource relations. It calls for an integration of agrarian reform and natural resource management objectives. It also instructs the Executive to carry out a legal analysis of the current laws, develop implementation strategies for reform and lay the ground for effective application of these reforms through the empowerment of implementing

institutions and the provision of adequate funds.[295] Notwithstanding its coherence and wide scope, considerable legal and institutional ambiguity remains about just how these ambitious reform goals should be realized in practice.

Since the law was passed, a concerted NGO coalition has emerged to support both the application of the decree and those members of the legislature that protagonised the law. The hoped for outcome is a national framework law on Natural Resource Management, which would ensure coherence between sectoral laws and policies and would provide a basis for the resolution of land and natural resource conflicts. Progress has been slow, however, partly because the decree does not mandate any particular government agency to carry the work forward. A cost of the decree's intersectoral intent is that no one ministry or agency feels obliged to follow through on the proposed reforms. Observers note, in particular, a marked lack of enthusiasm for developing new laws and regulations in line with the decree in the Ministry of Forestry, which appears to be dismissive of the decree and passively resisting proposed reforms that threaten its control. There are concerns that the proliferation of sectoral committees to consider the implications of the decree is really a delaying tactic being deployed by those who would see this provision overturned.

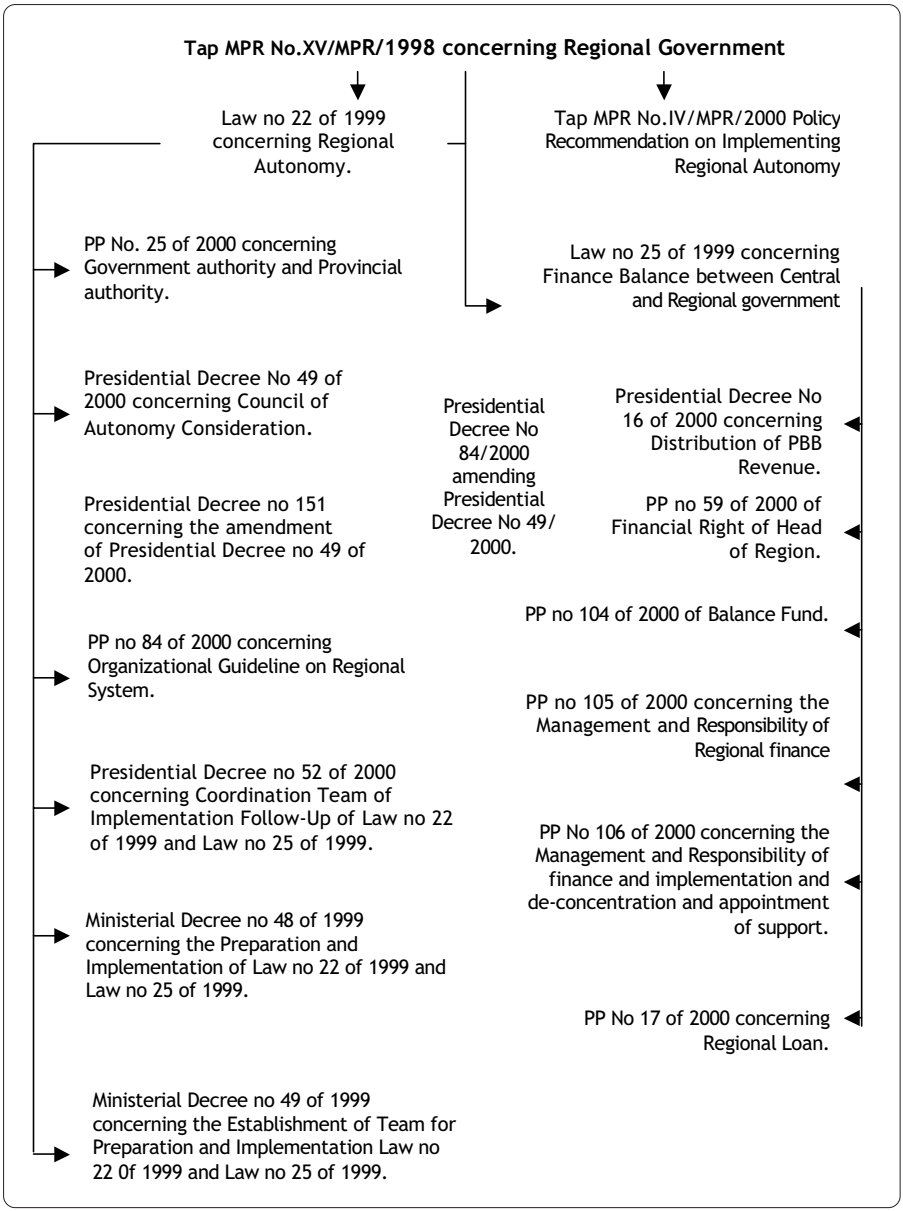
The reforms are also being sidelined by other concerns. The more recent, TAP MPR II/2002 concerning Policy Recommendation to Accelerate National Economic Recovery, for example, to some extent competes with the natural resources reform agenda and indicates where the government's priorities lie. TAP MPR II/2002 gives emphasis to the conventional development model and calls for increased production through forestry, plantations, fishing, mines, manufacturing and tourism. Production is given priority over management. Influential agencies like the World Bank have ex-

pressed concern about radical reforms in natural resource management, noting that even under the existing system the institutions charged with environment, forestry and land titling are struggling to cope. Radical legal reforms, they argue, are likely to precipitate chaos not an improvement in natural resource management given the weakness of regulatory capacity, which has been aggravated by decentralization.

Administration and Autonomy

Whereas moves to overhaul radically the current systems of ownerhip and management of natural resources have been stymied by competing political priorities and interests, the parallel process for government decentralization has gathered pace. The basic framework for this process of decentralization was given in TAP MPR XV/1998 concerning the Implementation of Regional Autonomy, which noted that past failures to share revenues and control of resources with the regions had been inimical to justice and equity.

The decision reaffirmed the unity of the nation while calling for national development through regional autonomy and a just sharing of revenues. This provided the basis for the Law 22/1999, generally referred to as the Regional Autonomy Act, which, while retaining the authority of the centre to issue framework legislation, devolved much administrative and managerial authority to districts and townships, including over key issues such as land, forestry, plantations, and environment. (Conservation was retained as a central government function). The Act also stressed the importance of democratic principles, public participation, justice and equity. Further guidance was then given by the National Assembly through TAP MPR IV/2000. A large number of other pieces of legislation then followed to give effect to these


Tap MPR No.XV/MPR/1998 concerning Regional Government
Law no 22 of 1999 concerning Regional Autonomy.
Tap MPR No.IV/MPR/2000 Policy Recommendation on Implementing Regional Autonomy
PP No. 25 of 2000 concerning Government authority and Provincial authority.
Law no 25 of 1999 concerning Finance Balance between Central and Regional government
Presidential Decree No 49 of 2000 concerning Council of Autonomy Consideration.
Presidential Decree No 84/2000 amending Presidential Decree No 49/ 2000.
Presidential Decree No 16 of 2000 concerning Distribution of PBB Revenue.
Presidential Decree no 151 concerning the amendment of Presidential Decree no 49 of 2000.
PP no 59 of 2000 of Financial Right of Head of Region.
PP no 104 of 2000 of Balance Fund.
PP no 84 of 2000 concerning Organizational Guideline on Regional System.
PP no 105 of 2000 concerning the Management and Responsibility of Regional finance
Presidential Decree no 52 of 2000 concerning Coordination Team of Implementation Follow-Up of Law no 22 of 1999 and Law no 25 of 1999.
PP No 106 of 2000 concerning the Management and Responsibility of finance and implementation and de-concentration and appointment of support.
Ministerial Decree no 48 of 1999 concerning the Preparation and Implementation of Law no 22 of 1999 and Law no 25 of 1999.
PP No 17 of 2000 concerning Regional Loan.
Ministerial Decree no 49 of 1999 concerning the Establishment of Team for Preparation and Implementation Law no 22 0f 1999 and Law no 25 of 1999.

various pieces of law but a number of them, notably PP 25/2000, appear to have restored the authority of central government over many of these sectors. The relations between all these pieces of law are shown schematically above.

A detailed consideration of these laws is beyond the scope of this study, but, as the right-hand column of the diagram suggests, a focus of controversy has been over exactly how revenues should be shared between the centre and the regions. As far as natural resource management and authority over land and forests is concerned, it is fair to sum up by saying that decentralization has generated more confusion than clarity and has resulted in a 'tug-of-war' between central and district level authorities.

Tenure

Under the Regional Autonomy Act (Law No.22/1999), primary responsibility for routine land administration has now been given to the District Administration (kabupatens), while the role of the national land agency (BPN) has been reduced to that of monitoring, training, and provision of some services. In practice, lack of capacity in the districts to take over land administration means that in the interim the previous system is still operating. Meanwhile, it seems that Bappenas has lost its responsibility for land policy, which has been transferred to the Ministry of Home Affairs/BPN. Considerable confusion about land matters has thus resulted.[296]

In line with the the Amendments to the Constitution which recognises the existence of customary communities (see section 3.3 above) and which recognises both individual and collective human rights, including rights to property, cultural identity and the 'rights of customary communities', Law No. 25/2000 regarding the 2000-2004 development

programme stresses the need for popular participation in decision-making, including by NGOs, gives priority to local communities' rights and the rights of *masyarakat adat* and the need to strengthen their institutions. Specifically with respect to natural resource management, the law also establishes the need to give local communities control of natural resources and environmental management and acknowledges the rights of indigenous and local institutions to own and manage natural resources. It remains unclear just how effect is to be given to these provisions.

If the reform era governments do plan to recognise the collective rights of customary law communities, they face the challenge of finding a legal formulation that is at the same time national in its encompass and yet does not try to impose a single form of tenure on the great diversity of local situations. It is perhaps wise to recall that eighty years ago, after exhaustive reviews, the Dutch concluded that a uniform detailed land law for the recognition of *adat* would not be desirable because of the very wide variety of customary regimes in the archipelago.[297]

Forestry

Whereas BFL (41/1999) has advocated a Forest Ecosystem Based Management approach to reform of the forestry sector, GR 34/2002 one of the implementation guidelines so far issued on this law seeks to return forestry to the old paradigm. PP34/2002 seeks to restore the authority for handing out HPH and HTI concessions to the Ministry of Forestry, while granting provincial governments the authority to hand out forest concessions for environmental services and non-timber forest products. The move has been strongly objected to by both the Regional Government Association (APKASI), and the Community Forestry Network (FKKM).

REFORMING THE HPH SYSTEM[298]

Between 1991 and 1999, Britain's Department for International Development provided long-term support to Indonesia's forestry sector in the form of the so-called KPHP project.[299] The project was designed to develop through field experiments a rationalised model of timber harvesting using improved silvicultural and felling systems, enlarging the size and duration of forest concessions and training government forestry staff in improved forest management techniques. Social components were built into the project as it moved into the experimental phase in the field but were not central to the project's original conception. The KPHP project suffered the major detraction that it did not seek to address directly the power imbalances in forests. The project was 'adapted to the systems, government apparatus and political culture' prevalent in Indonesia and the Ministry of Forestry and Plantations (II:266). As such the project implicitly endorsed and even entrenched a basically poverty-creating model of forest development in which 10 companies controlled 43% of Indonesia's forests and where industrial capacity is about 3 times official estimates of sustained yield of timber of the forests. Illegal timber extraction, estimated at 30 m m3/year, exceeds legal extraction rates (I:6-7).

As the concluding reports written by DfID and the Forestry Department note, under Indonesian law, forest dwellers are effectively disenfranchised (II:216). Local rights and aspirations are overridden by central government and current laws (II:217). Consequently, local communities have insufficient land for their subsistence and development needs (II:253). In the ensuing conflicts of interest between forest-dwellers and the government/industry nexus 'business interests are always dominant' (II:253). Belatedly, in 1995, the project officially recognised forest dwellers as 'major stakeholders'. To reduce conflicts and meet the needs

of the poor, the KPHP project attempted to introduce processes for zoning customary land in forestry concessions and provide mechanisms for benefit-sharing. However, these attempts to resolve land use conflicts failed because they relied on existing power structures and institutions without genuine engagement of the primary 'stakeholders' (I:14). A finding of the KPHP project was that, because the present mechanisms of decision-making about forests favour business interests at the expense of forest-dwellers, experiments in benefit sharing were ineffective because they were not accompanied by tenure reforms or changes in power-sharing. Surveys showed that communities targetted for benefit-sharing by the project were no better off than those not so targetted. Most benefits were siphoned off by more powerful players (II:254). Participation processes introduced into the project were not effective, although well received at the level of rhetoric. Implementation was still top-down: '...various development projects have been undertaken by the government but in a top-down fashion so that [they] have not been effective or have failed due to lack of support from the community. The participation of the community did not occur' (II:265). Owing to communities having no rights and thus a 'very weak bargaining position' (II:266), participation was weak and current models of decision-making by official functionaries predominated. 'Community representation on the project promoted functional team has been very limited or non-existent' (II:267).

The KPHP project report concludes that major reforms in the 'rights of access' of forest-dwellers are required if forest development in Indonesia is to become sustainable and equitable(I:32). 'Further regulation is required to ensure the recognition of customary rights to forests, the development of forest communities, and the support of local systems of forest management and conservation, which preceded the current laws and date back to the original habitation of the forest areas' (II:258). '*Without such reforms no progress can be*

made in forest sector development' (I:32). The project concluded that procedures for zoning the lands and forests used by forest resident communities should be 'legally formalised' and new procedures introduced to formalise participation (I:40-1).

Judged in terms of DFID's renewed commitment to a 'rights-based approach' to poverty-alleviation, the KPHP project was essentially a failure. It neither secured rights nor alleviated poverty. It failed because it worked through existing (corrupt) power structures and did not promote tenure reforms. The failure does, however, teach important lessons for future forestry programmes in Indonesia.

In 1999, the Ministry of Forestry initiated a new process of negotiation in all the provinces to revise the designation of State forest lands (TGHK) by synchronising these negotiations with the Provincial Spatial Planning processes (RTRWP). This process of reedesigntaing forests has not yet been complted in some provinces like North Sumatera, Riau and Central Kalimantan. As noted in section 4.6, as a result the State forest lands have been reduced to around 120 million hectares only 12 million hectares of which have actually been delineated and gazetted, meaning that most forest areas are not yet officially State forest lands.

The process of spatial planning, which forms the basis for the designation of areas as forests does not adequately involve communities in the way prescribed in GR 69/1996 on Implementation of Rights and Duties and on the form and custom of people's participation in spatial management, planning, and exploitation which states:

> Participation comes in several forms such as acts of suggestion, consideration, opinion, response, objection or in-

> put, as well as accountable input of data or information. The provincial government has a duty to follow up with concrete actions, by implementing a large meeting or forum discussion, involving several experts and public figures along with the provincial government. The authorized institution will then follow up and complete the Provincial RTRW Program by paying serious attention to the suggestions, considerations, opinions, responses, objections or inputs from the people as well as those that result from the forum meeting.[300]

The quality of the revised Regional and Provincial RTRW is gradually improving, especially where participatory mapping of community areas is included in the planning and also as people's awareness increases of the overwhelming importance of spatial planning for the accommodation of their livelihoods. Spatial planning exercises are likely to continue for the next 5-10 years and their success will depend to a large extent on whether or not the Ministry of Forestry conducts intensive discussions in the districts and assigns authority for designation and gazettement to the lower levels of the administration. Lands thus excised from previously designated State forest lands must either be reclassified as agricultural areas or accommodated in a revised forest act.

In November 2001, a Multi-Stakeholder Working Group for Dispute Settlement of Lands in Forest Areas (WG-Tenure) was set up, facilitated by the Ministry of Forestry (Directorate General of Planology), with representatives of the private sector, NGOs, indigenous peoples, farmers' unions, DPR, local government, BPN and Ministry of Home Affairs. WG-Tenure has sought to identify the pattern of conflict in the forest areas and novel mechanisms of conflict resolution. It also makes recommendations for reforms of

policy, law and administration.

Over the past few years, policies towards land and forests have diversified in the different parts of Indonesia under pressure from local communities and the policies of regional autonomy. One clear example is regulation UU No. 21/2001 on Special Autonomy for the Papua Province, which results from a recognition by the Ministry of Forestry and sectoral departments that they cannot easily apply a uniform approach to every region, especially with respect to indigenous peoples' land rights. Similar problems are likely to arise if the government seeks to apply in an uniform manner the criteria for recognising indigenous communities and customary forests according to the revised BFL (No. 41/1999). Indeed, the very act of classifying community lands as customary forests (*hutan adat*), which by definition are in State forest land where proprietary rights are denied, could be construed as a violation of human rights under the near simultaneous Human Rights Act (UU no 39/1999), which was passed only a few weeks earlier.

Another example relates to the Special Autonomy Law for Papua Province (UU no 21/2001), Chapter XI of which refers to the Protection of Indigenous Peoples' Rights. Article 43 states:

1) The provincial government of Papua is obliged to recognise, respect, protect, empower, and develop the rights of the indigenous people taking into account the provisions of existing laws.
2) The rights of the indigenous community stated in paragraph 1) include both the collective rights (hay ulayat) and individual rights of the indigenous people.
3) Implementation of ulayat rights, insofar as they still exist, shall be conducted by the leader of the indigenous people concerned, in accordancw with the provisions of customary

law, while respecting the rights of others over ulayat lands, which were legally obtained by other parties based upon due procedures and regulations

4) Ulayat land and private land of the indigenous community will be made available for any need based on deliberation with the indigenous people and concerned community to reach an agreement on the land transfer land and the compensation payable.
5) The provincial government provides an active mediation with the intention to resolve any dispute between the ulayat land holders and former private owners in a fair and wise manner to reach an agreementthat favours all parties.

These special rights have also been adopted for the indigenous peoples in Aceh Darusallam, through the issuance of the Special Autonomy Act for that province. Similar provisions with respect to indigenous peoples would also seem to be required for the other provinces.

The judicial system in Indonesia is being reformed very slowly due to resistance from many parties, and the consequent lack of access to justice remains a serious problem (and see section 5.4). A special judiciary system for dealing with land and natural resource conflicts has been proposed for provinces where these conflicts are common, an issue currently under intensive discussion in the Supreme Court. In Papua, Aceh and other provinces, customary law systems are now being revitalized creating a pressing need for legal mechanisms to allow these plural legal systems to function in an agreed framework.

At the national level, a proposal to establish a National Commission for Conflict Settlement and Natural Resource Management is being discussed by the 2nd Committee of the National Parliament (DPR) together with BPN. It is planned that this commission will be comprised of commissioners of

high integrity and will operate openly like the Commission in Human Rights (KOMNAS HAM). NGOs have proposed establishing a preparatory commission to raise awareness about the role of the Commission to ensure, when it is finally approved, that it functions effectively and credibly.

Court verdicts have meantime introduced the concepts of restitution and recovery, as mere financial compensation has left compensated victims with a sense of not having received justice or had their reputations restored. Government Regulation 31/2002 regarding Restitution, Compensation and Rehabilitation for Victims of Human Rights Violations allows for such remedies in the case of severe human rights violations. This raises the possibility that dispossessed communities could secure the restitution of their lands, for example lands lost in the designation of their customary lands as State forest lands, although there are risks that the process of land restitution could provoke further land conflicts.

One of the most significant changes in forest policy over the past year was signalled by the announcement by the Forestry Ministry that in future all concessions will be progressively subjected to mandatory certification. Full details about the standards and procedures to be used for these mandatory certifications is not yet available but preliminary announcements suggest that they will incorporate social, environmental and economic considerations.

Local Alternatives

The lack of a national process for recognizing and protecting customary rights to land has led to a number of local government initiatives to resolve land claims and promote community control of forests. These include efforts such as the zoning of indigenous peoples' lands under the Spatial Planning process, as in West Kalimantan; the allocation of

usufructory and management rights for harvesting non-timber forest products, as in Krui in West Lampung; and the passing of 'local regulations' (*perda*) by district legislatures, as in Lebak in Java. Although to date only one 'local regulation' (*Peraturan Daerah – perda*) has been issued relating to the land rights of *Masyarakat Adat*, many NGOs and indigenous peoples' organizations see this as the most practicable method for regularising indigenous land rights in Indonesia at this time.

The precedent has been established by the district legislature in Lebak Kabupaten in Java, which passed a *perda* in June 2001 recognising the collective rights of two subgroups of the Baduy people, resident in 52 villages in West Java. The *perda* recognises the Baduy as *Masyrakat Adat* on the basis of the differences between their culture and customs and those of the mainstream population, and defines *hak ulayat* as the authority, in accordance with *adat* law, that a community governed by custom has over a defined territory, which is the living habitat where it uses the natural resources for survival and the maintenance of life, and which derives from the physical and spiritual relation over generations, which continuously exists between the customary community and its territory.[301]

The *perda* excludes village lands which have already been surveyed and registered (Article 2) and those fields already subject to individual land ownership, or areas which have otherwise been bought or obtained by other interests (Article 5), but recognizes as the Baduy's collective territory all the land in a broadly defined area and entrusts it to their own management (Article 4 and explanatory note 2).[302]

The *perda* is not without its deficiencies, however.

- It gives authority for the demarcation and definition of the area's boundaries to the district resident (*bupati*), instead of requiring a participatory process involving the

Baduy themselves.

- Likewise the regulation fails to identify which Baduy institutions will manage the area or deal with outsiders.
- It fails to make clear what the relationship now is between the customary community, now recognized as having authority over its territory, and the various protected areas, protection forests, production forests and timber concessions which have been entrusted to various state agencies and parastatals.
- It empowers government officials to punish outsiders who violate these customary rights rather than conferring these powers on the *adat* authorities.

Another problem is that the new *perda* invokes rather than revokes a previous *perda* agreed during the heyday of the Suharto dictatorship. The 1990 *perda,* couched in language typical of the New Order regime, aims to 'Guide and Develop the Customary Institutions of the Baduy People'. While recognizing the pre-existing institutions of the Baduy (Article 1 e.), the *perda* only protects those aspects of Baduy culture and custom that 'enhance national stability in ideological, political, economic, social, cultural, religious and security terms, in order to smooth the way for government development activities in the community' and in order to 'further national cultural development' (Articles 2 – 4(1)). The *bupati* is given the discretion to decide which institutions need to be 'guided and developed' (Article 4(2)).[303] Arguably, the 1990 *perda* is now unconstitutional.

Several other districts have passed *Perda* acknowledging Customary Forests, such as those in Kerinci District and Bunga Tebo District, which cover hundreds of hectares of land mainly located outside forest areas. In addition Regional Regulation No. 9/2000 on Nagari Government of West Sumatra Province, although it does not recognise customary

forest management rights, does recognise the legitimacy of indigenous institutions to govern the area under their jurisdiction. *Perda* are also being prepared in other districts such as Landak, West Kutai, Malinau, Donggala, Jayapura, with the aim of giving legal recognition of indigenous peoples' rights to manage their own resources, including forest resources.

8 Conclusions and Recommendations

> Indonesia's current forest-tenure system is working against the health of the nation's forests and against the prospects for their sustainable management. By overriding traditional rights, the relatively new system of nationally sanctioned rights and access rules has eroded local communities' incentives to manage forest for the long term and engendered social conflict in many areas. (World Resources Institute 1994[304])

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 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, adminis-

trative system and legal framework deny customary rights, disempower 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 sumarises 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. Communi-

ties 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.
- Propietary 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.[305]
- Likewise, under the Basic Forestry Law, the weak rights of usufruct of local communities do not secure their right to free and informed consent regading 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 concession are routinely granted without consultation with local communities and indigenous peoples, much less their 'free and informed conent'.

- 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.

Implications for FSC Certification in Indonesia

The social acceptability of FSC certification 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 failt 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 recognized 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.

As noted, the FSC Board has stated that *'FSC Principles 2 & 3 require that the legal and customary rights of*

*indigenous peoples be **legally established** and respected'* and has 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' (see section 2.4: emphasis added). Minimum reforms that are required to meet these requirements 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 to whom 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 as interpreted by the FSC Board, 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.

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 unambiguously legally defined rights, if forest managers, certification bodies, 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 certfication 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. However, 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 head 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.[306] 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 communites' organizations, other civil society groups having the time, capacity and resources to engage in it

- If a national initiative is decided on, a reasonable number of national organizations would need to become members of the 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 agree-

ments 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 mechanism 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 the 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 instituitions are able to monitor certification processes and forest management agreements.[307]
- 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 cre-

dible 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.[308]
- 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 Council 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 should consider halting certification in developing countries in the absence 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 custom-

ary rights of local communities need be 'legally established' or this provision only applies to forest managers.[309]
- 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.

Annex 1: The Obligations of HPH Holders

Period 1: 1968-1997

According to Forest Agreement (FA) which implementation had been initiated in 1968 and was extended by the HPH decree under the PK Act No. 5/1967 and Government Regulation No.21/1970 on Forest Management, the rights and responsibilities are as follows:

1. The duration of concession is 20 years with the possibility of extension for companies that exercise their given responsibilities
2. Only allowed to exploit commercial types of wood and

not including non-timber forest resources, minerals, fossil fuel, natural gas, chemicals, precious and semi-precious stones, agriculture, agricultural products and other natural resources.

3. The working area of the concession excludes areas determined as protected forest, nature reserve, tourism forest and other types of land ownership or reservation for other specific purposes. MoF may determine specific areas as more productive if converted to agricultural function in order to serve other purposes.
4. The working area only includes the area of Production Forest determined by the MoF. Delineation must be completed within three years after the permit is issued. The implementation can be done by MoF at the expense of the company. Individual property or land burdened with other ownership right may not be included in the working area. The company is accountable for all effects of the operation on individual property or land burdened with other ownership rights before the delineation is concluded.
5. Rights may not be transferred without the MoF's permission.
6. Do not employ directly or indirectly human resources related to the Communist Party and/or its 1965 attempted coup (G30S/PKI)
7. Rights and privileges of indigenous people accordingly to the law would not be limited or influenced by this agreement (FA). The company has to acknowledge the right and privileges of indigenous people to, among other, enter the working area, collect certain types of plant to fulfill daily needs and to collect subsidiary forest resources as regulated by the Regional Forestry Office and by referring to GR No.21/1970. The government along with the company together would try to find the best solution for the indigenous people. The solutions should aim to

establish permanent (non-nomadic) farming communities. The company should try its best to promote and train members of indigenous community within its working area.

8. The company is obliged to aid the regional government in the development of the community within and around its working area such as by building religious facilities, communication facilities for the regional government, electricity for the people.
9. Protected species and those on the brink of extinction should not be hunted, there should be no fishing except with MoF's permission, the use of explosives and poison are banned without MoF permits.
10. The company should protect objects with historical and scientific value from damage and should report any such damage to MoF. The company is accountable to the government for any of its employees' or its visitors' actions or neglect in the working area.
11. MoF has the right to lessen the size of the working area accordingly to Article 15 of GR No.21/1970. MoF also has the right to reduce the size of the working area on grounds of public welfare. This also applies to the amalgamation or exchange of working areas. Exchange or reducing the size of the working area would be conducted by MoF at the expense of the company.
12. When the company fails to fulfill its obligations based on the FA and SKHPH, MoF should issue a written reprimand, and if after 60 days the company has not mended its ways or offered an explanation, the FA agreement may be annulled. Should the agreement be terminated because of violation, then the obligation stated in article 13 paragraph 2 and article 16 of GR No. 21/1970 should be exercised, along with other regulations and the determination of performance bond amounting to US$12,515.00

(regulated in the calculation of the quality and quantity of the working area).
13. Report should be kept and maintained in the central office of the company for auditing for at least 10 years after the operation has been concluded.
14. The monitoring of the company is the obligation of MoF.
15. FA Addendum may be conducted if viewed as necessary by the department or both parties accordingly to a special procedure.

Period 2: 1998-2001

By the enactment of Forestry Act no 5/1967 and the replacement of GR No. 21/1970 with GR No. 6/1999 on Utilization of Production Forest, the rights and obligations of HPH were altered as follows:

1. The concession lasts for 75 years (20+ cycles)
2. The utilization should only cover commercial timber types and does not include non-timber resources, minerals, fossil fuel, natural gas, precious and semi-precious gemstone, farming, agricultural products and other natural resources.
3. The company is forbidden to fell trees in protected areas, including those with certain aesthetic and or scientific value, where supporting trails should be established accordingly to the prevailing provisions.
4. Forest inventory should be the obligation of the company to avail accurate, credible and most recent data; physical and socio-cultural data and should be included in the RKT, RKL and RKPH of the company, accordingly to the prevailing provisions on forest inventory.
5. The company should carry out parameter management and the mapping of the whole working area within 3 years after the SKPH is issued. The company should be accountable for any effect that may arise as the result of its op-

eration on individual properties or owned lands.

6. The company is obliged to allow members of customary law communities to collect non-timber forest resources accordingly to the community or the indigenous people's right.
7. The company is forbidden from hunting wild animals, be they protected or non-protected species and should prevent illegal poaching in its working area.
8. The company should provide and distribute/sale RKT timber for the regional development/ domestic needs according to the prevailing provision.
9. The company should increase the value of the forest by planting on productive land or vacant lands, prioritizing critical areas and the areas bordering communities' lands.
10. Elimination of forest should be prevented and overcome, such as by preventing shifting cultivation and illegal logging.
11. Protection of objects with cultural, scientific or religious values is the obligation of the company, including by reporting the discovery of such sites and creating supporting trails around them.
12. The development of communities living around the forest is the responsibility of the company, including the provision of religious, education, health, and sports facilities along with training for employees. Development must be carried out in 1 village at the minimum. Supervision is obligated to be exercised in 1 village including the promotion of an employees cooperative[310] and a village cooperative. Opprtunities must be provided for the public to purchase shares in these cooperatives.
13. Partnerships should be entered into the community cooperatives in order to involve them in the company's operations (planting, cruising, logging, paring, etc.)
14. Providing access for the collection of non-timber forest

products to the people around the forest individually or through cooperatives.

15. Allocating 20% of the shares for the local community cooperative, 10% immediately after the venture is established and the rest within 5 years afterwards, and also allocating another 20% of shares to a foundation/cooperative chosen by MoF.
16. The company must respect the rights of indigenous communities to enter the working area to collect, retrieve, gather and take non-timber forest products such as rattan, honey, sago, extract of fruits, grass, bamboo, bark and others to fulfill their daily needs.
17. Supervision is the duty of the government which includes physical observation, administration and company management.
18. Should the SKHPH be revoked, the company must uphold its obligation as stipulated in the GR No.6/1999 Article 21 Paragraph 2.
19. If the Working Area is returned to the Department, the company should already complete and fulfill its technical and financial obligations as stated in the SKHPH.

Period 3: 2001- Present

By the implementation of revised Forestry Act No.41/1999 and GR No.34/2001, there were further alterations regarding the rights and obligations of HPH concession holders.311

1. The concession would last for 55 years at the most and can be renewed if the auditor views the working performance well. The renewal of permit would also depend on the company having secured a certificate of sustainable management of natural forest from MoF.
2. The size of area is the same with the articles of GR No. 6/1999 and GR No. 34/2002, namely 100.000 hectares

per province (except Papua, where the limit is 200,000 hectares) and the maximum of national level is 400,000 hectares per year.

3. Forest Utilization should fulfill the criteria and indicators of sustainable forest management, which covers the aspects of economy, social, and ecology. However, there is also pre-condition criteria, one of the indicators being the definite sustainable natural productive forest management unit area, whereas for the social aspect, the criteria include (Forestry Ministerial Decree 4795/2002:

- Define the size of, and boundaries between, the unit and the territory of local indigenous community with the consent of related parties.
- Agreements involving the customary lw or local community with equal share of management responsibilities.
- Availability of mechanism and implementation of effective incentive distribution, and equal share of cost and benefit between parties.
- Planning and implementation of forest management should consider the rights of the customary law and local communities.
- Increase of role of the customary law and local community whose economic activity is forest-based.

4. The Timber Exploitation of Natural Forest can only be conducted in production forests which still have the potential to be exploited subject to set criteria.
5. The permit for an area cannot be transferred
6. Permit of Venture is given to individuals, Cooperatives, BUMN (State Business Enterprise), BUMD (Village Business Enterprise), BUMS (Social Business Enterprise) through auctions and offers made by the Ministry of Forestry.
7. The delineation of the working area's boundaries should be carried out at most within 3 months after the permit is

issued.

8. Exercising forest protection and pay the determined fees.
9. Preparing annual, 5 yearly and 55 yearly work plan.
10. Cooperating with the local Cooperatives at the longest within 1 year after the permit is issued; such as sharing the shares and cooperation in aspects of operation (planting, logging, etc.)
11. The permit may be revoked as administrative sanction by the government. The holder of permit should still exercise its financial obligations and adhere to all the regulations, since the government has no accountability over the obligations of the permit holder to third parties.
12. Administrative sanctions may be in form of temporary suspension of administrative services, a one-year suspension of field activities or revocation of the permit entirely after 3 warnings each given with the space of 30 days.
13. Reduction of working area up to 20% may be done if the permit holder leases its operation to other party, has not re-planted according to the work plan or not exercised credible financial management.
14. Revocation of permit is an administrative sanction for: not delineating the boundaries of the working area; if there is no material operation within 180 days of the permitbeing issued; not involving community cooperatives; not paying the determined fees; or collecting forest resources not included in the permit. If the violations relate to illegal logging and mining within the working area and transferring the permit of exploitation to other party, the permit may be revoked without prior warning.
15. For companies that have obtained their HPH through the previous procedures, the obligation and rights are not altered until the old permit has expired.

Annex 2: The Obligations of HTI holders

The obligations of HTI holders between 1990 and 2002 include the following:

The Aspect of HPHTI Working Area

a. A certain size set out on a map 1:40,000 scale map. The size is not yet defined as it depends on ground surveying and boundary delineation.
b. The concession would last for 42 years, meaning 35 years plus one cycle (7 years), which should not be transferred in any form without the consent of the ministry
c. The implementation of working area delineation should be concluded within two years after the HPHTI permit is issued.
d. Any individual property, village, paddy field or residential area, or areas managed bu the third party, should be excised from the working area.
e. Should the concessionaire desire to include any such area, settlement should be conducted by the HTI company with the party according to prevailing legal provisions.
f. The alteration of the working area's size is possible and the implementation should be in accordance to the prevailing legal provisions.
g. The company has no right over other natural resources such as non-timber forest resources, mineral, natural gas, precious gems and so forth aside from timber.

In the Planning Aspect, the Company Should Provide

a. Aerial photo at a scale of 1:20,000, or a Citra Landsat TM Band 542 image at a scale of 1:50,000, covering the whole working area must be provided with a legend explaining the set out of the plantation and other land.
b. Forest inventory including the environmental parameters

within and around the HPHTI including information such as: condition of soil, animals, plantation, community's socio-culture.

In the Aspect of Land Preparation

a. The company is forbidden from using fire
b. At the latest, 5 years after the HPHTI is issued, 1/10th of the working area should already be planted.
c. At the latest, 25 years after the HPHTI is issued, all of the working area should already be planted.
d. Substitution Plantation (*tumpang sari*) practices should be exercised in line with the development of primary industrial forest plantation as stated in the RKHT

4. In the aspect of Natural Sustainability

a. The community is obliged to prevent or avoid violation conducted by its employees or other parties that causes the damage to forest within the working area, such as by shifting cultivation, forest clearance and erosion prevention.
b. The company is obliged to prevent the poaching of wild animals, whether protected or not, within the area, except by permission.
c. The company has to prevent any damage being done to objects with scientific and/or cultural value within its work area
d. The company should report to the appropriate state agency should it encounter objects with scientific and/or cultural value within its work area
e. In order to secure protected areas, natural conservation areas and natural reserves, the company is obliged to establish a buffer zone at least 500 meters wide along the boundaries of the working area.
f. A processing facility may be constructed within the area only if there is a road for transport. This should be only

done after securing permission from the ministry.

In the Aspect of Community Development

a. Obliged to permit the customary law community and its members access to the working area to collect, take, gather and carry away non-timber forest products to fulfill or support their daily needs
b. Assist the improvement of the community's welfare within and around the working area.
c. Support the area's development, regional development and the development of the welfare and economy of customary law communities living around the working area.
d. Allocating 20% of the shares for the local community cooperative as a form of community compensation. The implementation shall be conducted in stages. The first 10% once the cooperative is established and the other 10% in installments over the next five years.
e. Assisting the government in community development, such as constructing religious, education and health facilities
f. Work opportunity and training
g. The opportunity for the local community, though not the company's employees, to use the health facilities with minimum cost.
h. The company is obliged to set aside at the most 20% of its profit for the supervision and development of Village Unit Cooperative (KUD), primary cooperative and those who are economically deprived.

Monitoring

a. Every 5 years the Government would assess the management of HPHTI
b. The holder of HPHTI would be sanctioned if violating the prevailing regulations.

Revocation of HPHTI

a. Should exercise all the provisions set by the ministry accordingly to Article 21 of the GR No.6/1999.
b. Should the HPHTI expire or be revoked, the plantations become the property of the state, while mobile assets belong to the company.
c. If the company return the right of utilization to the government, it should complete and fulfill all its technical and financial obligations.

After 2002 with the enactment of GR No. 34/2002 HTI holder obligations were modified as follows:

1. The concession at most can last for 100 years and can be renewed if the auditor views the working performance well. The renewal of permit should also be subject to certification for sustainable management to be conducted by the ministry.
2. The size of area is the same as was stipulated in GR No. 6/1999, namely 100.000 hectares per province (except Papua, where the limit is 200,000 hectares), with a maximum of 400,000 hectares per year nationally.
3. Forest Utilization should fulfill the criteria and indicators of sustainable forest management, which covers the aspects of economy, social, and ecology. However, there is also pre-condition criteria, one of the indicators being the definite sustainable natural productive forest management unit area, whereas for the social aspect, the criteria include (Forestry Ministerial Decree 4795/2002:

a. Defined size and clear boundaries between the unit and the territory of local customary law community and with the consent of related parties
b. Types and amount of agreements involving the customary law community or local community with equal share of management responsibilities

c. Availability of mechanisms to implement equitable benefit sharing among all parties.
d. Planning and implementation of forest management that has considered the rights of customary law communities and local communities.
e. Increase the role of customary law communities and local communities, whose economic activity is forest-based.

4. Plantations may only be established on vacant land, pastures or bush.
5. The concession area cannot be transferred unless legally permitted.
6. Shares to be given to individuals, cooperatives, BUMN (State Business Enterprise), BUMD (Village Business Enterprise), BUMS (Social Business Enterprise) through auctions and offers made by the Ministry of Forestry.
7. The delineation of working area boundaries must be done within 3 months of the permit being issued.
8. At least 50% of the plantation should be established within 5 years.
9. Exercising forest protection and pay the determined fees and compensation.
10. Preparing annual, 5 yearly and 100 year work plans.
11. Cooperating with the local cooperatives at most within 1 year after the permit is issued; such as share holding and cooperation in aspects of operation (planting, logging, etc.)
12. The permit may be revoked as an administrative sanction by the government. The holder of permit should still exercise its financial obligations and all the regulations, since the government has no responsibility for the obligations of the permit holder to third parties.
13. Administrative sanctions may be in form of temporary suspension of administrative services, a one-year suspension of field activities or revoking the permit entirely after 3 warnings, each given with the space of 30 days.

14. Reduction of working area up to 20% may be done if the permit holder leases its operation to other party, does not re-plant according to the work plan or does not exercise credible financial management.
15. Revocation of permit is an administrative sanction for not delineating the working area boundaries, no material operations within 180 days after the permit is issued, not cooperating with community cooperatives, not paying the determined fees, or collecting forest resources not included in the permit. Concerning violations related to illegal logging and mining within the working area and transferring the permit of exploitation to other party, the permit may be revoked without prior warning.
16. For companies that have obtained their HPH through the previous procedures, the obligation and rights would not be altered until the old permit has expired.

Photo: *Sawit Watch Doc.*

Bibliography: Works Referred to In Preparing This Report

Abot Darif,
2000 Punan Bengalun Village, Malinau subdistrict, Bulungan district. Unpublished memo.

Achmaliadi, R.
1999 *Negara, Masyarakat Adat Dan Konflik Ruang. Daerah Konflik.* Jaringan Kerja Pemetaan Partisipatif, Bogor.

Ahmad Sodiqi
2001 Paper presented in Workshop for TAP MPR Prepa ratory on The Reform of Agrarian and Natural Resources Management, Bandung.

Alcorn, Janis B. and Antoinette G. Royo
2000 *Indigenous Social Movements and Ecological Resilience: Lessons from the Dayak of Indonesia.* PeFoR Discussion Paper, Biodiversity Support Program, Washington DC.

Aliadi, A. et. al. (eds)
1999 *Kembalikan Hutan Kepada. Rakyat.* Penerbit Pustaka Latin, Bogor.

Andasputra, N. & Vincentius, J. (eds)
1995 *Mencermati Dayak Kanayatin.* Institute of Dayakology Research and Development, Pontianak.

Anyonge, Christine Holding and Yuli Nugroho
1996 *Rural Populations Living Within Logging Concessions in Indonesia: a reviww of social*

development programmes and a case study from South Kalimantan. Ministry of Forestry and ENSO Forest Development Oy Ltd, Jakarta.

Atok, K. et al. (eds)
1998 *Peran Masyarakat Dalam. Tata Ruang.* Pembinaan Pengelolaan Sumbar Daya Alam Kemasyarakatan, Pebruari.

Bach, Christian Friis, Gram, Soren, Helles, Finn, Kanafani, Noman and Treue, Thorsten
1995 *Incentives for the Sustainable Production of Tropical Timber.* Royal Veterinary and Agricultural University, Copenhagen.

Badan
2000 *Panduan Umum: Pengembangan Kesejahteraan Sosial Komunitas Adat Terpencil.* DPKAT, Badan Kesejahteraan Sosial Nasional, Jakarta.

Barber, C. V.
1999 *The Case Study of Indonesia.* World Resources Institute, Washington.

Barber, Charles V. and Gregory Churchill
1987 *Land Policy in Irian Jaya: Issues and Strategies.* Government of Indonesia and UNDP / IBRD project INS/83/013.

Barber, Charles, Nels Johnson and Emmy Hafild
1994 *Breaking the Logjam: obstacles to forest policy reform in Indonesia and the United States.* World Resources Institute, Washington DC.

Bailey, Conner and Charles Zerner
Nd Community-Based Fisheries Management Institutions in Indonesia. *Maritime Anthropological Studies 5 (1):*

Bassi, M.
1996 *I Borana. Una società assembleare.* Milano: Franco

Angeli. (Forthcoming in English by Red Sea Press).
BCVFC
1998 *Standards for Certification of Forest Management of Timber-Yielding Prodcuts in the Lowlands of Bolivia.* Bolivian Council for Voluntary Forest Certification, Santa Cruz.
Bell, Gary F.
2001 The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws. *Asian Pacific Law and Policy Journal* 2(1):1-44.
Benedanto, P.
1999 *Dari Linnaeus Sampai Monsanto. Pembajakan Sumberdaya Hayati.* Penerbit Pustaka Latin, Bogor.
BMAB,
1993 *Himpunan Ketetapan Musyawarah Adat Berusu*, 22-25th November 1993 in Sesua, *Badan Musyawarah Adat Berusu (BMAB)* Kecamatan Malinau-Sesayap sub district, Bulungan district, East Kalimantan, 1993
BMAB,
1994 Himpunan Ketetapan Musyawarah Adat Berusu, 27-30th November in Limbu Sedulun, Adat Concultative Council of Berusu (*Badan Musyawarah Adat Berusu (BMAB)* Malinau-Sesayap subdistrict, Bulungan district, East Kalimantan, 1994. Kabupaten Bulungan Kalimantan Timur.
Brody, Hugh
1981 *Maps and Dreams.* Faber and Faber, London.
Bryant, R.L., Rigg, J. and Stott, P. (eds)
1993 The political ecology of South East Asia's forests: trans-disciplinary discourses. Special issue *Global Ecology and Biogeography Letters* 3 (4-6):101-296.
Budiarjo, Ali, Nugroho and Reksodiputro
1998 *Law Reform in Indonesia: Diagnostic Assessment*

of Legal Development in Indonesia. Volume 1. Results of a research study undertaken for the World Bank. Cyberconsult, Jakarta.

Budiardjo, Carmel

1986 The Politics of Transmigration. *The Ecologist* 16 (2/3):111-116.

Budiardjo, Carmel and Liem Soei Liong

1988 *West Papua: the obliteration of a people*. Tapol, London. Revised edition.

Burgess, Peter with Carol Pierce Colfer and Ravi Prabhu (eds.)

1995 Final Report: test Indonesia March 5-April 2: PT Kiani Lestari Jaya. CIFOR, ms.

Burns, Peter

1989 The Myth of Adat. *Journal of Legal Pluralism* 28:1-127.

1999 *The Leiden Legacy: Concepts of Law in Indonesia.* PT Pradnya Paramita, Jakarta.

Colchester, Marcus

1986a Unity and Diversity: Indonesian policy towards tribal peoples. *The Ecologist* 16 (2/3):89-98

1986b The Struggle for Land: tribal peoples in the face of the Transmigration Programme. *The Ecologist* 16 (2/3):99-110

1989 *Pirates, Squatters and Poachers: the Political Ecology of Dispossession of the Native Peoples of Sarawak.* Survival International and INSAN, Kuala Lumpur.

1992 *Sustaining the Forests: the community-based approach in South and Southeast Asia.* Discussion Paper 35, United Nations Research Institute for Social Development, Geneva.

1995 Indigenous Peoples' Rights and Sustainable Resource Use in South and Southeast Asia. In: RH Barnes, Andrew Gray and Benedict Kingsbury (eds.)

Indigenous Peoples of Asia, Association for Asian Studies, Monograph Number 48, Ann Arbor:59-76.
Colchester, Marcus (ed.)
2001 *A Survey of Indigenous Land Tenure*. A Report for the Land Tenure Service of the Food and Agriculture Organisation, Rome.

Colchester, Marcus and Lohmann, Larry (eds)
1993 *The Struggle for Land and the Fate of the Forests*. World Rainforest Movement and Zed Books, London.
Colfer, Carol J. Pierce
1996 *Beyond Slash and Burn: Building on Indigenous Management of Borneo's Tropical Rainforests.* New York Botanic Garden, New York.
Colfer, Carol J. Pierce and Byron,Yvonne (eds.)
2001 *People Managing Forests: the links between Human Well-being and Sustainability.* Resources for the Future and CIFOR, Washington DC and Bogor.
Collins, N. Mark, Sayer, Jeffrey A.&Whitmore,Timothy C.
1990 *The Conservation Atlas of Tropical Forests: Asia and the Pacific.* MacMillan Press, London.
Counsell, Simon and Kim Loraas
2002 *Trading in Credibility.* Rainforest Foundation UK, London.
Crouch, Harold
1978 *The Army and Politics in Indonesia.* Cornell University Press, Ithaca.
Craven, Ian and Wardoyo, Wahyudi
1993 Gardens in the Forest. In: Elizabeth Kemf (ed.). *Indigenous Peoples and Protected Areas. The Law of Mother Earth.* Earthscan, London:23-28.
Culhane, Dara
1998 *The Pleasure of the Crown: Anthropology, Law and First Nations.* Talon Book, Burnaby.
Darusman Dudung, et.al.

2001 *Resiliensi Kehutanan Masyarakat di Indonesia.* Debut Press, Yogyakarta.

Dauvergne, Peter

1997 *Shadows in the Forests: Japan and the Tropical Timber Trade in South East Asia*. MIT Press, Los Angeles.

De Foresta, Kusworo, Michon & Djatmiko (ed):

2000 *Ketika Kebun Berupa Hutan; Agroforest Khas Indonesia, Sebuah Sumbangan Masyarakat*. ICRAF, Bogor.

DPHKM

2001 *Perkemnagun Hutan Kemasyarakatan: sampai dengan Mei 2001.* Departmen Kehutanan, Direktorat Jenderal Rehabilitasi Lahan Dan Perhutanan Sosial, Direktorat Bina Hutan Kemasyarakatan, Jakarta.

de Beere, Jenne and Melanie McDermott

1989 *The Economic Value on Non-Timber Forest Products in South-East Asia*. IUCN(Netherlands), Amsterdam.

DEPHUT

2001 *Keputusan Menteri Kehutanan Republik Indonesia: Tentang Penyelenggaraan Hutan Kemasyarakatan. Nomor 31 Tahun 2001.* Departemen Kenhutanan, Jakarta.

DEPSOS

2001a *Pedoman Umum Pelaksanaan Pemetaan Sosial Komunitas Adat Terpencil.* DPKAT, DEPSOS, Jakarta.

2001b *Pedoman Umum Pengukuran Indikator Kinerja Keberhasilan Program Pemberdayaan Komunitas Adat Terpencil.* DPKAT, DEPSOS, Jakarta.

2001c *Standardisasi Monitoring dan*

EvaluasiKebijaksanaan Komunitas Adat Terpencil. DPKAT, DEPSOS, Jakarta.

2002a *Secercah Mentari Pagi.* DPKAT, DEPSOS, Jakarta.

2002b *Pedoman Teknis Usaha Perlindungan Komunitas Adat Terpencil.* DPKAT, DEPSOS, Jakarta (draft ms).

DfID

1999 *Indonesia: Towards Sustainable Forest Management*, Final Report of the Senior Management Advisory Team and the Provincial Level Forest Management Project, 2 vols, Department for International Development (UK) and Department of Forestry, Jakarta.

Djohani, R. (ed.)

1998 *Working Together as Equals. Participatory Rural Appraisal Reference Book.* Studio Driya Media for Nusa Tenggara Community Development Consortium, Bandung.

Djuweng, S. et al. (eds)

1998 Kalimantan. The Dayak of Kalimantan Who are They? *The Dayak: Culture, Nature and Peoples*. Vol.1, May 1998.

Djuweng, S.

1997 *The Dominant Paradigm and the Cost of Development. Some implications for Indonesia.* Institute of Dayakology Research and Development, Pontianak.

1997 *Indigenous Peoples and Land-Use Policy in Indonesia. A Dayak Showcase.* Institute of Dayakology Research and Development, Pontianak.

Dove, Michael R.

1985a *Swidden Agriculture in Indonesia: the Subsistence Strategies of the Kalimantan Kantu'.* Mouton Publishers, Berlin.

1985b The Agroecological Mythology of the Javanese and the Political Economy of Indonesia. *Indonesia* 39:1-30.

DTE

1991 *Pulping the Rainforest*. Down to Earth - the International Campaign for Ecological Justice in Indonesia, London.

1999 Indonesia's Indigenous Peoples Form New Alliance. *Down to Earth Bulletin,* Special Issue, October 1999. Down to Earth - the International Campaign for Ecological Justice in Indonesia, London.

2001 *Certification in Indonesia: a briefing.* Down to Earth - the International Campaign for Ecological Justice in Indonesia, London.

2002 *Forests, People and Rights.* Down to Earth - the International Campaign for Ecological Justice in Indonesia, London.

Eghenter, Cristina

2000 *Mapping Peoples' Forests: the role of mapping in planning community-based management of conservation areas in Indonesia.* PeFoR Discussion Paper, Biodiversity Support Program, Washington DC.

Elliott, Christopher

2000 *Forest Certification: a Policy Perspective.* CIFOR, Bogor.

Erni, Chris

1996 *Vines that Won't Bind: Indigenous Peoples in Asia*. Proceedings of a Conference held in Chiang Mai, Thailand, 1995. International Work Group for Indigenous Affairs, Document No. 80, Copenhagen.

Fauzi Noer,

2001 Making Strategy on Denial Culture, A Concept and Law-Political Practice that denies the Fact of the Indigenous Community's Rights, presented in the

Second KEDAI discussion, 2001, Cisarua.
Fay Chip,
1994 Social Forestry in Java, 1994; where to go from here? In: Simon Hasanu et al (ed) *Social Forestry and Sustanable Forest Management.* Perum Perhutani, Jakarta. 1994
Fay, Chip, Martua Sirait and Ahmad Kusworo
2000 *Getting the Boundaries Right: Indonesia's Urgent Need to Redefine its Forest Estate.* International Centre for Reseacrh in Agro-Forestry, Bogor.
Florus, P.
1998 *Pemberdayaan Masyarakat.* Institute of Dayakology Research and Development (IDRD), Pontianak.
Fourie, Clarissa and Nasution, Asma Affan
1997 Institutional Setting for Land Management Policy-Indonesia. Land Administration Project Document. National Planning Agency and National Land Agency, Jakarta.
Freeman, Derek
1955 *Iban Agriculture: a report on shifting cultivation of hill rice by the Iban of Sarawak*. HM Stationery, London.
FSC
2002 *FSC Certifications and the ILO Conventions.* Forest Stewardship Council, Working Document.
FSC-BC
2002 *Forest Stewardship Council Regional Certification Standards for British Columbia (Final).* July 11, 2002, FSC Canada Working Group – BC Regional Initiative, Vancouver. Ms.
Gibson, Clark C., Margaret A. McKean and Elinor Orstrom (eds.)
2000 *People and Forests: Communities, Institutions and Governments.* MIT Press, Cambridge Massachusetts.

Gouda, Frances and Elsbeth Locher-Scholten
1991 Indonesia and the Dutch Colonial Legacy. Woodrow Wilson Center, Occasional paper no. 44, Washington DC.
Haryanto, I. (ed.)
1998 *Kehutanan Indonesia Pasca Soeharto: Reformasi Tanpa Perubahan.* Penerbit Pustaka Latin, Bogor.
Holleman, J.F. (ed.)
1981 *Van Vollenhoven on Indonesian Adat Law.* Konninklijk Institut Voor Taal-, Land- en Volkekunde, Martinus Nijhoff, The Hague.
Hooker, M.B.
1978 *Adat Law in Modern Indonesia.* Oxford University Press, Kuala Lumpur.

International Crisis Group
2002 *Indonesia: Resources and Conflict in Papua.* Brussels.
ICRAF
1999 *Agroforests. Examples from Indonesia.* ICRAF, Bogor.
IDEAL
1999 *Tanah Pengidup Kitai. The undermining of indigenous land rights and the victimisation of indigenous people in Sarawak.* IDEAL TIME Sdn. Bhd., Sibu.
Ihromi Tapi Omas.
2001 *Masyarakat Adat dan Pengurangan Kemiskinan dalam Masa Transisi: Kebijakan, Aksi dan Implikasi, Beberapa Butir Pemikiran.* Makalah dalam lolakarya Masyarakat Adat dan Penanggulangan Kemiskinan, Jakarta 25-26 Sep. 2001.
International Alliance of Indigenous and Tribal Peoples of the Tropical Forests

1994 Report of the Asia Regional Meeting of the International Alliance of Indigenous-Tribal Peoples of the Tropical Forests. Baguio.
1998 *International Alliance of Indigenous and Tribal Peoples of the Tropical Forests. 3rd International Conference. Nagpur, India, 3rd-8th March 1997. Report.* International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, London.

Iorns Magallanes, C. J. & Hollick, M.
1998 *Land Conflicts in Southeast Asia. Indigenous Peoples, Environment and International Law.* White Lotus Press, Bangkok.

Olof Johansson,
1998 Reindeer Herding and Forestry in Northern Sweden: a case study about conditions, problems and possible solutions regarding the relationship between forestry and reindeer-herding, ms.

Juwono, P. S. H.
1998 *Ketika Nelayan Harus Sandar Dayung. Studi Nelayan Miskin di Desa Kirdowono.* KONPHALINDO, Jakarta.

Kasim Ifdal & Johanes da Masenus Arus (ed.).
2000 *Civil Rights & Politics.* Collection of Essays (Vol 1.), Elsam, Jakarta

Kasim Ifdal & Johanes da Masenus Arus (ed).
2001 *Economic, Social, and Cultural Rights;* Collection of Essays (Vol 2), Elsam, Jakarta

Kasim Ifdal (ed.)
1999 A *Constraint on Fundamental Freedom; Pictures of Three Fundamental Freedoms in Asia*. Elsam, Jakarta

Kabupaten Lebak
1990 Peraturan Daerah Kabupaten Daerah Tingkat II Lebak Nomor 13 Tahun 1990. Pembinaan dan Pengembangan Lembaga Adat Masyarakat Baduy

di Kabupaten Daerrah Tingkat II Lebak. Bagian Hukum, Sekretariat Daerah Kabupaten Lebak.
2000 Peraturan Daerah Kabupaten Lebak Nomor 32 Tahun 2001. Perlindungan Atas Hak Ulayat Masyarakat Baduy (Lembaran Daerah Kabupaten Lebak Tahun 2001. Nomor 65 Seri C. Bagian Hukum, Sekretariat Daerah Kabupaten Lebak.

Kahin, Audrey R. and George McT. Kahin
1995 *Subversion as Foreign Policy: the Secret Eisenhower and Dulles Debacle in Indonesia.* The New Press, New York.

Kartodihardjo, Hariadi
1999 Policies on Decentralized Forest Administration in Indonesia and their Implementation. CIFOR. Ms.

Kibas,
2000 *Menelusuri Bonua Titipan Anak Cucu; Bidoih Mayao*, PPSDAK Pancur Kasih, Pontianak.

Kingsbury, Benedict
1996 The Concept of Indigenous Peoples in Asia: International Law Issues. In: Erni (ed.) 1996:53-73.
1998 "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. *The American Journal of International Law*, 92(3):414-457.

Kuusipalo J.
1996 Forest Degradation and rehabilitation prospects in Indonesia. In: Matti Palo and Gerardo Mery (eds.) *Sustainable Forestry Challenges for Developing Countries.* Kluwer Academic Publishers, Dordrecht:175-186.

Lammerts van Bueren, Erik M., and Blom, Esther M.
1997 *Hierarchical Framework for the Formulation of Sustainable Forest Management Standards: Principles, Criteria and Indicators.* Tropenbos,

Leiden.
Laudjeng Hedar, Simarmata Ricardo, C. Kanyan & Zulkifli
2000 LEGAL OPINION: Critical Legal Analysis of UU No 41 1999 on Forestry, UGM.
LEI.
2001 Annual Report 2001, The Indonesian Ecolabelling Institute, Jakarta
LEI
2002 Kerangka Acuan; Pilot Project Sertifikasi Pengelolaan Hutan Berbasis Masyarakat Lestari (PHBML), April 2002. Web site: http://www.lei.or.id
Leigh, Michael (ed.)
2000 *Borneo 2000: environment, conservation and land.* Proceedings of the Sixth Biennial Borneo Research Conference, Universiti of Malaysia Sarawak, Kuching.
Lev, Daniel S
2000 *Legal Evolution and Political Authority in Indonesia: selected essays.* Kluwer Law International, The Hague.
Linaeus Sampai Monsanto, D.
1999 *Pembajakan Sumberdaya Hayati* LATIN, Bogor.
Lynch, Owen
1998 Law, pluralism and the promotion of sustainable community-based forest management., *Unasylva*, 49(194).
Lynch, O. J. & Talbott, K.
1993 *Balancing Acts: Community-Based Forest Management and National Law in Asia and the Pacific.* World Resources Institute, Baltimore.
Lynch, O and Emily Harwell
2002 *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia.*

ELSAM, Jakarta.
Makarim, Nabiel
2002 Council for Sustainable Development: Country Report – Indonesia. Ministry of the Environment, Jakarta, June 2002.
Mamung Dollop & Abot Darif,
2000 *Telang Otah Urun Lunang*; The Ethos of Punan tribe in managing the natural resources, breaking the myths – building the role ; local initiative in man aging the natural resources in East Kalimantan. Plasma, Samarinda.
Meek, Chanda L.
2001 *Sustainable for Whom? A discussion paper on certification and communities in the boreal region – case studies from Canada and Sweden.* Taiga Rescue Network, Boreal Footprint Project, Jokkmokk.
Miden S., M.
1999 *Dayak Bukit. Tuhan, Manusia, Budaya.* Institut Dayakologi, Pontianak.
Misbach H.
Nd. *Dinamika Permasalahan dan strategi Pelayanan Pertanahan di Kabupaten Sumedang dalam Diskusi Perspektif Tanah Adat/Ulayat dan Pemdekatan Komprehensif Penyelesaian Konflik Tanah,* Jakarta, June 19-20, The Department of Domestic Affairs.
Minority Rights Group International
1999 *Forests and Indigenous Peoples of Asia* Minority Rights Group International, London.
Momberg, Frank
1992 *Indigenous Knowledge Systems – Potentials for Social Forestry Development: Resource Management of Land-Dayaks in West Kalimantan.* Institute for Geography, Freie Universitat Berlin, Berlin.

Momberg, F. et al.
1996 *Drawing on Local Knowledge: A Community Mapping Training Manual. Case Studies from Indonesia.* Ford Foundation, WWF Indonesia Programme, Yayasan Karya Social Pancur Kasih, Jakarta.
Moniaga, Sandra
1991 Towards Community-Based Forestry and Recognition of Adat Property Rights in the Outer Islands of Indonesia. WALHI, Jakarta.
Moniaga Sandra,
1993 The Systematic Destruction of Indigenous Communities' Rights, Paper presented in Seminar of Walhi-Pontianak in Pontianak
Muhshi, M. A. et al. (eds)
1999 *Menggali Potensi Bersama. Untuk Memekarkan. Community Forestry Manjelang Abad 21.* Forum Komunikasi Kehutanan Masyarakat (FKKM), Ujung Pandang.
Munggoro, D. W. et al.
1998 *Intervensi Perhutanan Sosial.* Lembaga Alam Tropica Indonesia, Bogor.
Munggoro, D. W. et al.
1999 *Menggugat Ekspansi Industri Pertambangan di Indonesia* LATIN, Bogor.
Murray Li, T. (ed.)
1999 *Transforming the Indonesian Uplands. Marginality, Power and Production.* Harwood Academic Publishers.
1999 Compromising Power: Development, Culture, and Rule in Indonesia. *Cultural Anthropology* 4(3):295-322.
2000 Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot. *Comparative Studies in Society and History* 42(1):149 - 179.

In press Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone. *Modern Asian Studies....*

Nawir & Calderon

2001 Towards Mutually Beneficial Partnerships in Outgrower Schemes: Learning from experiences in Indonesia and the Philippines. CIFOR draft 1, In collaboration with: The Faculty of Forestry, Bogor Agricultural University, College of Forest and Natural Resources, University of the Philippines Los Banos.

Oliveira, Nicolette Burford, with Cynthia McDougall, Bill Ritchie, Herlina Hartanto, Mandy Haggith and Titiek Steyawati

2000 *Developing Criteria and Indicators of Community Managed Forests as Assessment and Learning Tools: Objectiives, Methodologies and Results.* CIFOR, Bogor.

O'Rourke, Kevin

2002 *Reformasi: The Struggle for Power in Post-Soeharto Indonesia.* Allen and Unwin, Crows Nest.

Peluso, Nancy

1992 *Rich Forests, Poor People*. Harvard University Press, Cambridge.

Persoon, Gerard

1985 From Affluence to Poverty: the 'Development' of Tribal and Isolated Peoples. In: Leen Boer, Dieke Bujis and Benno Galjart (Eds.) *Poverty and Interventions: Case Studies from Developing Countries,* Leiden Development Studies No. 6, Institute of Cultural and Social Studies, Leiden University: 89-110.

Pierce Colfer, C. J. & Dudley, R. G.

1993 *Shifting Cultivators of Indonesia: Marauders or Managers of the Forest? Rice Production and*

Forest Use Among the Uma'Jalan of East Kalimantan. FAO, Rome.

Pokja PAPSDA,

2001 Agrarian Resources Management. Workshop Proceedings : PAPSDA for Applied TAP MPR on Agrarian Reform and Natural Resources Management, Bandung.

Poffenberger, Mark (ed.)

1990 *Keepers of the Forest: Land Management Alternatives in Southeast Asia*. Kumarian Press, West Hartwood.

Rezende de Azevedo, Tasso

2001 Catalyzing Changes: an Analysis of the Role of FSC Forest Certification in Brazil. Prepared for "EnviReform Conference - Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance" Toronto, November 8-9, 2001. Ms.

Richards, AJN

1961 *Sarawak Land Law and Adat*. Sarawak Printing Office, Kuching.

Ruwiastuti Rita Maria,

2000 *"Sesat Pikir" Politik hukum Agrarian; membongkar Alas Penguasaan Negara Atas Hak-Hak Adat.* Insist Press, KPA & Pustaka Pelajar, Yogyakarta.

Safitri Myrna, Kusworo, A & Bediona Philipus.

1997 The Local Community's Role on Forest Management: A Study of Policy in Lampung, East Kalimantan and East Lesser Sundas (NTT). P3AE-UI, Jakarta.

Safitri Myrna & Bosco Rafael Eddy

2000 HASIL DISKUSI TIM PERUMUS; LOKAKARYA MASYARAKAT ADAT DAN PENAGGULANGAN KEMISKINAN, Department

of Justice and Human Rights and ADB, Jakarta, 25-26 September 2001

Sangaji, A. (ed.)
1999 *Negara, Masyarakat Adat Dan Konflik Ruang.* Jaringan Kerja Pemetaan Partisipatif, Bogor.

Sellato, Bernard
1994 *Nomads of the Borneo Rainforest: the Economics, Politics and Ideology of Settling Down*. University of Hawaii Press, Honolulu.

SFDP/PPHK,
2001 Sistem Manajemen Hutan Pada Pengelolaan Hutan Oleh Masyarakat Untuk Hutan Alam Produksi, GTZ-Sanggau Regency-GFA-Dept. of Forestry, Sanggau December 2001.

Simbolon, Indira
1999 Caring for Toba Land and the Environment: what about the people? In: van Meijl and von Benda-Beckman:57-87.

Sirait Martua, Kusworo & Chip Fay,
2001 Bagaimana Hak-Hak Masyarakat Adat Diatur? *Seri Kebijakan ICRAF* I, Mei 2001, ICRAF Bogor.

Sirkuler-LEI
2002 Sekilas Tentang Sistem Sertifikasi Pengelolaan Hutan Berbasis Masyarakat Lestari (PHBML). Sirkuler Lembaga Ekolabel Indonesia (LEI), Jakarta.

Slaats, Herman
1999 Land Titling and Customary Rights: comparing land registration projects in Thailand and Indonesia In: van Meijl and von Benda-Beckman:88-109

Smartwood
2000 *Forest Management Public Summary for: Pictou Landing First Nation.* www.smartwood.org
2001 *Forest Management Public Summary for Cepu, Kebonharjo and Mantingan Forest Management*

Districts, Perum Perhutani, Unit 1, Central Java, Indonesia . www.smartwood.org

SMERI

1998a *Forest and Land Fires in Indonesia. Impacts, Factors and Evaluation. Volume 1.* The State Ministry for Environment Republic of Indonesia with UDNP, Jakarta.

1998b *Forest and Land Fires in Indonesia. Plan of Action for Fire Disaster Management. Volume 2.* The State Ministry for Environment Republic of Indonesia with UDNP, Jakarta.

Soemardjan Selo,

1981 Perubahan Sosial di Yogyakarta. UGM Press, Yogyakarta.

Soemardjono Maria, Prof Dr.

2001 *Kebijakan Pertanahan antara Regulasi & Implementasi*, Penerbit KOMPAS, Jakarta.

Suharjito Sisik,

2002 Peran Sertifikasi Ekolabel bagi CBFM di Indonesia. Paper presented at Sarasehan Program Lingkungan dan Pembangunan. Ford Foundation. Hotel Santika, Jogyakarta May 5-8 2002.

Suntana et al

2001 Kriteria Indikator, Verifier dan Skala Intensitas; Pengelolaan Hutan Alam Produksi Lestari (PHAPL). Lembaga Ekolabel Indonesia. Bogor 2001.

Suntana Asep,

2002 Sertifikasi Hutan: Salah Satu Alat Pendorong Pengelolaan Hutan Produksi Berbasis Masyarakat Lestari. Presented at Sarasehan Program Lingkungan dan Pembangunan. Ford Foundation. Hotel Santika, Jogyakarta May 5-8 2002.

Ter Haar, B

1948 *Adat Law in Indonesia.* Institute of Pacific

Relations, New York.
Thrupp, L. A. et al.
1997 *The Diversity and Dynamics of Shifting Cultivation: Myths, Realities, and Policy Implications.* World Resources Institute, Washington.
TRN
1999 *Forest for every one? Or just for timber?* Taiga Rescue Network, Jokkmokk.
Upton, Christopher and Bass, Stephen
1995 *the Forest Certifcation Handbook.* Earthscan, London.
Viana, Virgilio M., Ervin, Jameson, Donovan, Richard Z., Elliott, Chris, and Gholz, Henry
1996 *Certification of Forest P:orducts: Issues and Perspectives.* Island Press, Washington DC.
Van Gelder, Berry and O'Keefe, Phil
1995 *The New Forester.* Intermediate Technology Publications, London.
Van Meijl, Toon and Franz von Benda-Beckmann (eds.)
1999 *Property Rights and Economic Development: Land and Natural Resources in SouthEast Asia and Oceania.* Kegan Paul International, London.
Vogt, Kristiina A., Larson, Bruce C.,Gordon, John C., Vogt, Daniel J., and Fanzeres, Anna
1999 *Forest Certification: Roots, Issues, Challenges and Benefits.* CRC Press, Boca Raton.
von Benda-Beckman, Franz and Keebet
1999 A Functional Analysis of Property Rights with special reference to Indonesia. In: van Meijl and von Benda-Beckman: 15-53.
Wallace, Jude, Parlindungan, AP, and Hutagalung, Arie S.
1997 Indonesian Land Law and Tenures – Issues in Land Rights. Land Administration Project. Government of the Republic of Indonesia, National Planning

Agency and National Land Agency, Jakarta.
Wells, J.
1998 *BRE-X. The Inside Story of the World's Biggest Mining Scam.* Orion Business, London.
Wignjosoebroto Sutandyo
1990 Perbedaan Konsep Tentang Dasar Hak Penguasaan Atas Tanah Antara Apa Yang Dianut dalam Tradisi Pandangan Pribumi dan Apa yang dianut dalam Hukum Positif Eropa", *Arena Hukum*, Tahun XV (1990) No. 1 pages 39-43
Wignyosubroto Sutandyo,
1999 Local Community versus State; A Different Perception and Concept on the Significance of the Environment (Due to National Policy). Background paper in the Discussion " RUU on Forestry Resources Management", FKKM, Mei 21st 1999, Jakarta
Wijardjo, Boedhi and Herlambang Perdana
2001 *Reklaiming dan Kedaulatan Rakyat.* YLBHI and RACA Institute, Jakarta.
Wright, Warren
1999 Final Report on the Review of the Basic Agrarian Law 1960. Indonesia: Land Administration Project. www.worldbank.org
World Bank
2000 *Indonesia: Land Administration Project II*. Project Information Document PID 8915, Washington DC.
WWF
2002 Laporan Fasilitasi Semiloka. Penguatan Hukum Adat dan Pengukuhan Wilayah Adat. Malinau 14-15 Mei 2002. Forum Musyrawah Masyarakat Adat dan WWF-KM. Tarakan, Kalimantan Timur.
Zakaria Yando, Abih Tandeh,
2000 Masyarakat Desa dibawah Rejim Orde Baru, Elsam, Jakarta.

Zerner, Charles
1990 Community Rights, Customary Law and the Law of Timber Concessions in Indonesia's Forests: Legal Options and Alternatives in Designing the Commons. Ms.
1992 Indigenous Forest-Dwelling Communities in Indonesia's Outer Islands: Livelihood, Rights and Environmental Management Institutions in the Era of Industrial Forest Exploitation. Paper for Forest Sector Review, World Bank, Washington DC.

End Note

[1] LEI requires the setting up of a *forum konsultasi daerah* to resolve local disputes. Case studies carried out for this investigation did not encounter these fora. A study should be made of their functioning to determine if they are worthy of and wider applicability as an interim mechanism for use at the local level that could compensate for the current lack of a formal regulatory framework that recognizes, and which can enforce, customary rights.

[2] With an appropriate three chambered structure for participation and voting, or preferably with a fourth chamber for indigenous peoples, and with votes being limited to FSC members.

[3] A 'strong' interpretation of Principle 2 suggests that local communities' customary rights should be 'legally established' (see for example the Brazilian standards which require that such rights be 'regularized' which in the case of Mil Madeira meant titling of community lands). A 'weak' interpretation of Principle 2 suggests that it is only forest managers' rights that need be 'legally established'.

[4] CPA, SKEPHI, APPEN and TWN statements to FSC found-

ing meeting in Toronto. See also Upton and Bass 1995:148-9.

[5] In Malaysia however indigenous peoples have felt obliged to withdraw from the process owing to the lack of progress made in addressing their rights.

[6] Smartwood 2001.

[7] DTE 2002; *New Scientist,* 'Logged out: Indonesia's forests are disappearing at an alarming rate', 2 March 2002.

[8] FWI/GFW 2002; DTE 2002.

[9] SMERU 1998a, b; DTE 2002; FWI/GFW 2002.

[10] FWI/GFW 2002; DTE 2002. As this study shows, however, definitions of what is or is not 'legal' and 'illegal' are not at all clear in Indonesia.

[11] Indonesian NGOs demanded a logging ban in the mid-1980s and first called for a revocation of the concession system in 1998 (DTE:2000).

[12] Letter from FSC to certification bodies.

[13] Rezende de Azevedo 2001:1.

[14] Based on http://www.fscoax.org/principal.htm with amendments and clarifications by the authors

[15] LEI 1999 Guideline 99 - Sustainable Production Forest Management Certification System.

[16] LEI 1999 Guideline 55 – Resolution Guideline to Appeal Against the Certification Decision.

[17] 'FSC and the ILO Conventions: May 2002' emphasis added (FSC 2002). Some staff in FSC Secretariat have since disputed this interpretation however.

[18] MacKay 2002.

[19] The following countries have ratified ILO Convention 169: Bolivia, Brazil, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and Venezuela. The Soviet Union also endorsed the Convention in 1989 but the Russian Federation has yet to inform the ILO of its adherence to the Conven-

tion. The following countries have ratified ILO Convention 107 but not yet the new Convention: Angola, Argentina, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia.

[20] Bennett 1978; see also Culhane 1999; for a more detailed assessment of ILO Convention 169 see MacKay 2001a

[21] MacKay 2001b.

[22] Human Rights Committee, General Comment 23, Article 27 (1994): In, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994).

[23] Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments)*, at para. 10*.

[24] *General Recommendations of the Committee on the Elimination of Racial Discrimination XXIII(51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, on 18 August 1997, CERD/C/51/Misc.13/Rev.4 cited in Kambel and MacKay 1999.

[25] MacKay 2001a

[26] Ibid.

[27] *Concluding Observations by the Committee on the Elimination of Racial Discrimination : Australia. 24/03/2000. CERD/C/56/Misc.42/rev.3. (Concluding Observations/ Comments*), at para. 9.

[28] ITTO 1989; WWF 1996; IUCN 1996; EC 1998; WCPA 1999; International Alliance 1997; WCD 2000.

[29] Upton and Bass 1995:xx.

[30] BCVFC 1998.

[31] The Sami are considered to be descendants of Finno-Ugric speaking peoples thought to have inhabited northern Scandinavia ever since the withdrawal of the continuous

ice sheets that covered the area during the Wurm glaciation up until about 7000 BC. The Sami are officially accepted as an indigenous people. The domestication of reindeer as transport animals is thought to have occurred many hundreds of years ago but the domestication of entire herds apparently only occurred in the C16th in response to the imposition of taxation regimes and notions of private property, as the Swedish State gradually established itself. Similar transformations have been reported for the Nenets and Evenki peoples of Siberia (Anderson 2000; Balzer 1999; Golovnev and Oshorenko 1999).

[32] Johansson 1998; TRN 1999.

[33] Johansson 1998; TRN 1999; Meek 2001.

[34] SGS cited in Meek 2001:18.

[35] For a general overview of forest certification processes in Canada see Elliott 2000:144-162. An alternative national forest certification standard developed by the Canadian Standards Association has been criticised for not adequately recognizing indigenous peoples' rights and for weak participatory mechanisms (Ibid:152).

[36] Smartwood 2000.

[37] Meek 2001:19.

[38] Brody 1981.

[39] The exception is the Nisga'a who negotiated a settlement in 1998.

[40] Stevenson and Peeling 2000:3.

[41] The group went through various stages from being an informal grouping in 1996, to becoming an 'Interim Steering Committee for BC in 1998, to finally emerging as an elected 8-member, four chamber Steering Committee in 1999.

[42] The Canadian Constitution gives the Provincial government authority over forestry issues, but entrusts matters relating to 'Indians' and 'Indian lands' to the Federal Gov-

ernment. Although the Provincial government is not a member of the working group, resolution of land matters is required for compliance with Principles 2 & 3. The government's interpretation and application of the laws is thus crucial to a satisfactory result.

[43] For more detailed treatments see MacKay 2001; Culhane 1998; Bennett 1976.

[44] MacKay 2001:18.

[45] Stevenson and Peeling 2000:40.

[46] FSC-BC 2002:9.

[47] FSC-BC 2002: 28-29.

[48] FSC-BC 2002: 18.

[49] FSC-BC 2002:48-50.

[50] FSC-BC 2002:18.

[51] FSC-BC 2002:10.

[52] Rezende de Azevedo 2001 and Rezende de Azevedo pers. comm. 4 March 2002.

[53] Rezende de Azevedo 2001:20.

[54] Rezende de Azevedo 2001:20.

[55] In the Caribbean such peoples are referred to as 'Maroons'.

[56] This phrase has been lifted from Article 10c) of the Convention on Biological Diversity. The suppression of the term 'peoples' is consonant with Brazilian Government demands in international forest-policy negotiations and has potentially negative implications regarding recognition of Brazilian indigenous peoples' right to self-determination.

[57] It is not always self-evident why these standards are different but most are explained by the different laws which regulate logging and plantation activities in Brazil (see below).

[58] FSC Brazil 2001 and 2002. Translations by the author.

[59] FSC Brazil 2001 and 2002 translations by the author.

[60] WRM 2001.
[61] Rezende de Azevedo 2001.
[62] Counsell and Loraas 2002.
[63] The Ministry of Justice and Human Rights has drafted a bill for the ratification of these instruments which is to be presented to Parliament shortly.
[64] In ratifying the CERD, the DPR placed a reservation on recognition of Article 22 but this will not affect indigenous peoples' rights to prior and informed consent which flow from Article 5 of CERD: MacKay Pers. Comm.. 22/02/2002.
[65] ADB 2001.
[66] FSC 2002.
[67] E/CN.4/Sub.2/1986/7. Anomalously, the FSC's glossary includes a previous definition of indigenous peoples used by the UN Working Group on Indigenous Populations: *"The existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement, or other means reduced them to a non-dominant or colonial situation; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form a part, under State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant."*
[68] AITPN 1999.
[69] Daes 1996b.
[70] Gray 1995; Thornberry 1996; Kingsbury 1995; 1998.
[71] Alcorn and Royo 2000; earlier estimates have noted 300 ethnic groups speaking 250 languages (Colchester

1986a:89).

[72] Colchester 1986a.

[73] Colchester 1986a:91;

[74] Colchester 1995:63; cf Colchester 1986a.

[75] DEPSOS, Internal Memorandum 24 October 1975 cited in Colchester 1986a:93.

[76] Persoon 1985.

[77] Colchester 1986b.

[78] And before its creation, the Ministry of Agriculture.

[79] Colchester 1986a; Safitri and Bosko 2001:17.

[80] Roedy 1996; Rahail 1996.

[81] Safitri and Bosko 2001:16.

[82] Li 1999.

[83] Safitri and Bosko 2001:17.

[84] Li 1999.

[85] Wignyosubroto 1990: 39-43..

[86] Soemardjan 1981; Zakaria 2000; Sirait, Kusworo & Fay 2001.

[87] The term *terpencil* literally means 'made remote', 'isolated' or 'desolated' and carries connotations of backwardness, of being removed from civilized life. 'Cut off' might be a better gloss.

[88] Interview with Drs. M. Natsir AB, Drs Afrinaldi MSi., Pino Kasubdit PSDM, DPKAT, 15 May 2002. DEPSOS 2001a provides a breakdown by province and *kabupaten*, giving a total of 1,159,000 in the 23 provinces where 'social mapping' has been carried out.

[89] Badan 2000; DEPSOS 2001a, 2001b, 2001c, 2002a.

[90] DEPSOS 2002b.

[91] DEPSOS 2002b.

[92] Interview with Drs. M. Natsir AB, Drs Afrinaldi MSi., Pino Kasubdit PSDM, DPKAT, 15 May 2002.

[93] Colchester 1986.

[94] World Bank 1991.

[95] DTE 1999.

[96] Poffenberger 1990; Lynch 1991; Zerner 1992; Lynch and Talbott 1993; cf FWI/GFW 2002:3.
[97] Stone and D'Andrea 2001:125.
[98] Makarim 2002.
[99] FSC 2002.
[100] According to Burns (1999:xi) the Bahasa Indonesia term *adat* derives from the Arabic *'adda,* 'which means "he counted/enumerated/ considered" '. However, the Borana of Ethiopia who speak a Kushitic language related to Semitic, the term *aadaa* has a similarily inclusive sense, variously meaning cultural heritage, appropriate behaviour, customary usage, tradition, etiquette, ritual and traditional knowledge. *Aadaa* is the foundation of Borana identity (Bassi 1996).
[101] Van Hollenhoven (1918 and 1931) in Holleman 1981; Ter Haar 1948; Hooker 1978; Burns 1989; Lev 2000.
[102] Ter Haar 1948.
[103] Hooker 1978:1.
[104] Lev 2000:41-3.
[105] Hooker 1978: 2-3; Burns 1989; Lev 2000:37, 46.
[106] Lev 2000:51.
[107] Hooker 1978:62.
[108] Barber and Churchill 1987:50.
[109] Burns 1999.
[110] Barber and Churchill 1987:49. cf F & K Von Benda-Beckman 1999.
[111] Cf Burns 1989; 1999.
[112] *Hak ulayat* is not a term held in common by all peoples in Indonesia. It derives from the Minangkabau of Sumatra and has since been used as a generic term in *Bahasa Indonesia* (the Indonesian common tongue) to apply to indigenous concepts of collective rights in land in all parts of Indonesia. Concepts that correspond to the Minangkabau concept of *hak ulayat* are found widely throughout the archipelago. It is now a legal category.

(see also Burns 1999:92 for a discussion).
[113] In Holleman 1981.
[114] Ter Haar cited in Wright 1999.
[115] Burns 1999:19; Plant nd.
[116] Burns 1989.
[117] Ihromi 1999
[118] Burns 1989:9.
[119] F&K von Benda-Beckman 1999; ADB 2001:21.
[120] Culhane 1998; Mackay in Colchester 2001.
[121] Wright 1999:18. In a recent study the Centre for International Environment Law has characterised these Indonesian customary tenures as forms of 'community-based property rights' (Lynch and Harwell 2002).
[122] Barber, Johnson and Hafild 1994:16.
[123] Synthesised from Sellato 1994.
[124] Synthesised from Dove 1985a.
[125] The Province of Bengkulu and a great part of western coastal area of Lampung was once under British colonial rule. The area was later handed over the Dutch in exchange for another area.
[126] Momberg, Atok & Sirait 1996; Bappeda-Watala-FF 2000; Nadapdap, Tjitradjaya and Mundarjito 1995)
[127] Nadapdap, Tjitradjaya and Mundarjito 1995.
[128] Kusworo 2000.
[129] Michon et al in Zerner (ed) 1999.
[130] Dephut et al 1998
[131] Nadapdap, Tjitradjaya and Mudarjito, 1995; de Foresta, Kusworo, Michon and Djatmiko 2000.
[132] Wright 1999:iii-iv.
[133] Moniaga 1991.
[134] Barber and Churchill 1987:15-16; Moniaga 1991.
[135] Based on Barber and Churchill 1987:20-23; Wright 1999: 6-12; Plant nd; ADB 2001. As noted, customary concepts of tenure are quite different from those recognized in 'positive law'.

[136] Barber and Churchill 1987:17; Wright 1999:12-13. According to Article 58, the BAL also overrides all prior land legislation 'contrary to the spirit' of the BAL. Theoretically, a vast number of colonial regulations on land, which may **not** be contrary to the BAL thus remain in force. As far as we can determine, no assessment of these regulations has, however, ever been carried out.

[137] Moniaga 1991:11. Belief in one God is a requirement of Indonesian citizenship and Indonesian law only recognises five religions – Islam, Catholicism, Protestantism, Buddhism and Judaism. (Hinduism, prevalent on Bali, was only recognised by Presidential Decree in 1962). The basis for *adat* in indigenous religious belief is thus weakened not strengthened by this provision.

[138] Plant nd.

[139] Hooker 1978:114.

[140] Gautama 1995:154

[141] Wright 1999:24.

[142] Hooker 1978.

[143] Butcher 1988.

[144] Colchester 1986b; World Bank 1994/5.

[145] Wright 1999:19.

[146] Wright 1999:14 (and see Ibid.14-15).

[147] Safitri and Bosko 2001:para. 38.

[148] Cited in Wright 1999:84.

[149] Wright 1999:85.

[150] Wright 1999:31.

[151] Barber and Churchill 1987:111.

[152] Wright 1999:85.

[153] Budi Harsono cited in Wallace, Parlindungan and Hutagalung 1997: 6.3.

[154] Wright 1999:88

[155] Wright 1999:90.

[156] Sumardjono 2001: Ruwiastuti 1999.

[157] ADB 2001:21.

[158] Wright 1999:88.
[159] M Sumadjono 'Land Policy Reforms' *Kompas* 18 September 1998.
[160] Barber and Churchill 1987:25-26.
[161] World Bank 2000:3.
[162] World Bank 2000:3.
[163] World Bank 2000:1-2 emphasis added.
[164] The number of kabupaten keeps changing. There were 268 in 1999.
[165] World Bank 2000.
[166] Moniaga 1991:14.
[167] Previous analyses have assumed that the BAL does not apply in 'forests' (eg Barber and Churchill 1987:120) but there appears to be no legal basis for this limitation of the BAL.
[168] Barber and Churchill 1987:35.
[169] ADB 2001; Zerner 1990:27; Barber and Churchill 1987.
[170] The BFL actually delegates authority over forests to the Minister, who was, until 1983, the Minister for Agiculture. A separate Department of Forestry with its own Cabinet-level Minister was only established in 1983.
[171] Moniaga 1991.
[172] Zerner 1990:25. These estimates of numbers of forest residents have since been increased (see section 3.1).
[173] Barber and Churchill 1987:45.
[174] Colchester 1986b.
[175] DTE 1990
[176] Barber and Churchill 1987:54.
[177] ADB 2001.
[178] Fay, Sirait and Kusworo 2000.
[179] As stated in Forestry Law 41/1999, Article 5:
(1) According to its status, twotypes of forest are determined: a). state forest, and b). private forest
(2) State forest as referred to in paragraph (1) point a,

can be in the form of "adat" forest.
(3) Government shall determine the status of forest as referred to in paragraph (1) and paragraph (2); and adat forest shall be determined as long as it exists in reality and its existence is recognised.
(4) If during its development, concerned customary communities are no longer existing, the management right of those "adat" forests shall be returned to government.
Article 67:
(1) Customary law community, as long as it exist and recognised shall have the rights to:
a.collect forest products for daily needs of concerned communities;
b.undertake forest management in accordance with prevailing customary laws which is not contradicting the laws; and
c.be empowered for improving their welfare.
(2) Confirmation of existence and abolishment of customary law community as referred to in paragraph (1) shall be stipulated in Local Regulation.
(3) Further provisions as referred to in paragraph (1) and paragraph (2), shall be regulated by a Government Regulation.

[180] Fay and Sirait 2002.

[181] Moniaga 1991:13.

[182] Successive legislation modified these procedures including Official Decision No 579/1978 of the Ministry of Agriculture, General Directive of Forestry No. 3183/1978, Decision of the Minister of Forestry 399/1990, Decision of Minister of Forestry 400/1990, Decision of Minister of Forestry 634/1996, Decision of Minster of Forestry 635/1996, Decisions of Minister of Forestry 31/2001 and 70/2001. The broad direction of these decisions are summarised in the table.

[183] ICRAF, 2001, unpublished, Policy Memo to Bupati Lampung Barat on the Decree of Minister of Forestry No. 31/2001 and No. 70/2001

[184] Fay, Sirait and Kusworo 2000. Ahmad.

[185] Exact figures are not yet available as three provinces have yet to complete the negotiation of new State Forest designation.

[186] And see Santoso Harry 2002. Rasionalisasi kawasan Hutan di Indonesia; Kajian Keadaan Sumber Daya Hutan dan Reformasi Kebijakan. Badan Planology Dephut-ICRAF-WB

[187] DepHut-DFID-USAID-ICRAF 2001, Proceeding of Workshop on Lands conflict in State's Forest Area November 12-13/ 2001, Novotel, Bogor.

[188] Fay, Sirait and Kusworo (2000) recommended two alternatives by which between 50 to 80 million hectares be excised from State forest lands

[189] World Bank 2002. Rationalization of State's Forest Area

[190] Peluso 1992:45 ff.

[191] PT. Perhutani (Persero), 2002. Annual Report 2001; Fay 1994 in Simon et al (ed), 1994.

[192] Perum Perhutani 1976, Perum Perhutani Proceeding Meeting 13-15 Dec 1984; Perhutani Annual Report 1986; Perum Perhutani Annual Report 1999; PT Perhutani (persero) annual Report 2001; Statistik Perum Perhutani 1996-2000.

[193] Perum Perhutani, 1976, Report of Task Force Team for Agrarian Problem/Forest Area in Central and East Java.

[194] Anyonge and Nugroho 1996:5.

[195] The 35 largest HPH occupy 24.9 million hectares of production forest.

[196] Nawir & Calderon draft 2001.

[197] 14 HTI concessions were revoked in October 2002 (*Warta Kota* 12 November 2002) and a further 13 HTI conces-

sions were revoked on 22 November 2002 (*Suara Pembaharuan* 23 November 2002). The companies were required to reurn the land and assets to the state and repay any debts to MoF within 30 days. Of 10 companies which brought their cases to the court (PTUN), 8 companies were given injunctions delaying the execution letter, while another 2 did not (*Kompas* 30 November 2002).

[198] Perhutani Annual Report 2002

[199] Up to now there has not been any new HTI Decree issued by the procedure; preconditions, right and obligation as set in the Governmental Regulation no.34/2002, thus the rights and obligations are derived from the Governmental Regulation.

[200] Anyonge and Nugroho 1996:11.

[201] Anyonge and Nugroho 1996:102-103.

[202] Anyonge and Nugroho 1996:12.

[203] "Forest for People's Welfare" (Anon. 2001)..

[204] DPHKM 2001: 32 (Table 1 as corrected in errata).

[205] DEPHUT 2001.

[206] DPHKM 2001: 34 (Table 3 as corrected in errata).

[207] Interview with Ibu Erna Rosdiana, Forest Engineer, Directorate of Community Forest Development, Ministry of Forestry and Estate Crops, 15 May 2002.

[208] The implication of GR 24/1997 is that 'customary land' does indeed provide the basis for the recognition of a proprietary right in land. recognised

[209] All such concessions would also be invalid in terms of Principle 1 which requires adherence to relevant national laws.

[210] The exact number of 'native communities' was then, and is now, unknown (Fay, Sirait and Kusworo 2000).

[211] Cited in Lynch and Harwell 2002: 26.

[212] Kahin and Kahin 1995.

[213] O'Rourke 2002:4.

[214] Lynch and Harwell 2002:27.
[215] Lynch and Harwell 2002:27.
[216] The *desa* became the village level unit of colonial administration in Java in the early 19th century (Burns 1999).
[217] Wignijosoebroto 1994; Jatiman 1995:36.
[218] Jatiman 1995.
[219] Roedy 1996
[220] Safitri and Bosko 2001:39.
[221] 'Administrative village consensus association'.
[222] Lynch and Harwell 2002:30.
[223] Budiardjo 1986. cf. O'Rourke 2002:9.
[224] Lynch and Harwell 2002:30.
[225] A contentious term which has not been well defined.
[226] Cf Ribot 2002.
[227] IFW/GFI 2002; DTE 2002.
[228] Eghenter 2000; 2002.
[229] Sirait 1997.
[230] DTE 2002.
[231] O'Rourke 2002:150.
[232] Budiardjo, Nugroho and Reksodiputro 1998:157-9.
[233] *Jakarta Post* 30 July 2002.
[234] Budiardjo, Nugroho and Reksodiputro 1998:159.
[235] Crouch 1978; ICG 2002; *Down to Earth Newsletter* 55 (November 2002).
[236] As a para-statal company PP has three objectives; 1.) managing forest lands for soil and water conservation in naitonal interest 2.) employment and income generating for the rural poor 3.) profitable timber production (Fay in Simon et al 1994).
[237] SmartWood 2001.
[238] SmartWood 2000.
[239] Smartwood notes that efforts were made by PP to exclude sacred sites, particularly gravesites, from harvesting.
[240] Clearly this Constitutional provision is open to various

interpretations. The villagers interpret this provision to mean that benefits should flow to the local communities.

[241] SGS 2000.

[242] PT SGS International Certification Services Indonesia, Buku I, Laporan Hasil Penilaian Lapangan Unit Managemen PT.Diamond Raya Timber Di Kabupaten Bengkalis Propinsi Riau, Jakarta 2000

[243] Overseas Development Administration, today renamed DfID (Department for International Development).

[244] SGS 2000.

[245] SGS 2000:19. These meetings were carried out **after** the main assessment. SGS (2000:8) notes 'The local government facilitated these and a general memorandum of understanding was drawn up between each individual community and the concession. Individuals within the company are identified to liaise with the communities and there are clear systems for communication.

[246] SGS 2000:36.

[247] SGS 2000:19.

[248] Counsell and Loraas 2002.

[249] SGS 2001:3.

[250] SGS 2000:18-19. At the time that SGS Qualifor carried out its assessment of DRT the relevant indicators for its generic standards were the following. (The indicators were revised in 2002.) 2.2.1 Local communities, or other stakeholders, who have recognised legal or customary tenure use rights have been identified. 2.2.2 All holders of such rights are aware of current and proposed management activities that may affect their use rights. 2.2.3 There is evidence that free and informed consent to management activities affecting use rights has been given by affected parties. 2.3.1 There are records of all previous and ongoing disputes over tenure and use rights. 2.3.2 Appropriate mechanisms are employed to resolve disputes, in-

cluding legal requirements and internal procedures. 2.3.3 There is commitment to resolution of on-going disputes.

[251] SGS Qualifor's study also notes a tradition of small-scale timber extraction in area (SGS 2000:8) but this is not addressed in the assessments of Principles 2&3.

[252] Personal names have been removed to protect the personal security of informants.

[253] Respecting this sense of grievance, the team decided it would be inappropriate to interview the company after the community visits. Company officials were interviewed for the other three case studies.

[254] The 2000 Social Responsibility Report.see http//WWW/homedepot.com

[255] Notary Act #43/1988 on the Tenure Agreement; Notary Act #131/1988 on change of tenure agreement; Notary Act #62/1988 on timber concession agreement (*Perjanjian Pengelolaan Hutan*).

[256] PT Intraca Hutani Lestari, is a joint venture HTI concession owned by of PT Intraca and PT Inhutani. The company received a non-commercial loan of Reforestation Funds from the MoF. This company was revoked in October 2002 by the Mof due to its financial and technical problems (*Kompas*, 30 November 2002

[257] Interview with Kadishutbun (*Kepala Dinas Hutan Perkebunan*) Malinau District and Mr. Soedarsono in Samarinda 27 July 2002. This information contradicts PTIM's claim that it has secured a long term tenure agreement of 75 years, which is far longer than the 20-year tenure usually granted to concessionaires.

[258] Such as LHP, LAKB, RKT, DR, IHH, PKB.

[259] Overlay TGHK 1994 and Concession Area: Sub Biphut Tarakan 1999: Laporan TBT Inhutani 1 No. 1333/1998; Sesayap Sub District Letter no 522/348/EK/V/1998.

[260] Based on the 35 year cycle, supposedly each year PT

Inhutani should only be allowed to cut 1/35 of the production forest. However, by 1995 the unlogged areas was already down to only 24.4%.

[261] Statement to community workshop 24 July 2002.

[262] BMAB 1993; Abot 2002.

[263] Interviews with Berusu and Punan community members in Malinau, Sesua, Rian and Sekatak 24-26th July 2002.

[264] Mamung and Abot 2000.

[265] Punan and Berusu have separate overlapping land claims in the western part of the concession.

[266] This investigation was not able to check BPN land cadasters to ascertain the existence or otherwise of registered individual property rights in the area.

[267] Interview with villager from Sekatak 25 July 2002.

[268] Villagers note however that most of these disputes have been settled in accordance with customary law, which most of the Javanese machine operators employed by PTIM feel obliged to respect.

[269] This is a very high figure for such an offence.

[270] Public testimony given by village members to 'Participants Workshop', 16 December 2002, PKBI, Jakarta.

[271] UPT Intag - at the time.

[272] East Kalimantan Governor's letter # 522/8737/Proda.2.2/EK, dated on 17 October 2000.

[273] (*Pemungutan Hasil Hutan Kayu pada Hutan Milik*, *Hutan Rakyat dan Hutan Adat.*

[274] These permits are locally known as IPK (local cutting permits) or HPHH/IPPK.

[275] A further complication arises from the fact that Bulungan district has passed another local regulation (Perda) giving the *bupati* authority to issue small concession rights (up to a maximum 50.000 hectares) for 20 years to forestry companies. Many companies, including previous HPH owners have put themselves forward to secure such

licences.

[276] Details provided at a public presentation by PT Intracawood on February 26, 2002.

[277] Nawir and Calderon 2001.

[278] Based on the 1984 delineation exercise (TGHK).

[279] Sub-district military post.

[280] Law No 5/1979 was repealed through the so-called Regional Autonomy Act 22/1999, but the relationships between the local government officials and village leaders is only changing slowly.

[281] Kibas 2000.

[282] Nawir & Calderon 2001.

[283] By comparison oil palm companies generally pay compensation of between Rp 60,000 to Rp. 120,000 per hectare for lost crops and their land then becomes State land.

[284] Suntana et al. 2001; LEI 2001; LEI 2002a; LEI 2002b; Suharjito 2002; Suntana 2002.

[285] See Nussbaum 2002 for a discussion.

[286] Smartwood 2000.

[287] Smartwood 2000:9,10,18.

[288] SFDP/PPHK 2001.

[289] FSC 1998:subject 2.18 (emphasis added).

[290] FSC 2002.

[291] Qualifor Programme Main Assessment Checklist (2000).

[292] SmartWood Generic Guidelines for Assessing Forest Management (2000).

[293] World Bank 2000:2.

[294] Moniaga 1993; Safitri, Kusworo and Bediona 1997; Wignyosubroto 1999; Laudjeng et al. 2000; Fauzi 2001.

[295] The preceding four paragraphs derive substantially from a seminar presentation by Upik Djalins and Mubariq Ahmad on 16 May 2002 on the topic of 'NGO Working Group on Land Reform-Natural Resources Management (Pokja Ornop PA-PSDA) Initiative and Implementation

of TAP MPR IX/2001 on Agrarian and Natural Resources Governance Reform'.

[296] World Bank 2000:2-3.

[297] Burns 1999:129, 227.

[298] DfID 1999: 2 vols.

[299] Technically the 'KPHP project' was conceived as two sub-projects – Senior Management Advisory Team and Provincial Level Forest Management - of the 'UK Tropical Forest Management Programme' which included three other sub-projects in Forest Research, Forest Training and Forest Conservation.

[300] PP 69/1996 Chapter II Appendix 2-6; RTRWP Orientation Chapter III-Depkimprasiwil-Dirjen Penataan Ruang 2002.

[301] Authors' translation. The *perda* thus considers *hak ulayat* to be much more than a proprietary interest in land and recognises it as implying a measure of community sovereignty over resources based on the exercise of customary law and the autonomous functioning of customary institutions.

[302] Kabupaten Lebak 2001.

[303] Kabupaten Lebak 1990.

[304] Barber, Johnson and Hafild 1994:17.

[305] The BFL does allow for communities to be accorded a managemebt right (*pengelolaan Hutan Adat)* but regulations and procedures for permitting the exercise this right do not exist.

[306] A call for a suspension of this kind is not unprecedented. Temporary suspensions of certification have all occurred in New Zealand, USA and Canada, without jeopardising FSC processes.

[307] LEI requires the setting up of a *forum konsultasi daerah* to resolve local disputes. Case studies carried out for this investigation did not encounter these fora. A study should

be made of their functioning to determine if they are worthy of wider application as an interim mechanism that could compensate for the current lack of a formal regulatory framework that recognizes, and which can enforce, customary rights.

[308] With an appropriate three chambered structure for participation and voting, or preferably with a fourth chamber for indigenous peoples, and with votes being limited to FSC members.

[309] A 'strong' interpretation of Principle 2 suggests that local communities' customary rights should be 'legally established' (see section 2.5.4 for the example of the Brazilian standards which require that such rights be 'regularized' and which, in the case of Mil Madeira, meant titling of community lands). A 'weak' interpretation of Principle 2 suggests that it is only forest managers' rights that need be 'legally established'. If the FSC decides to adopt the 'weak' interpretation, it should be understood that this is contrary to its decision to operate in conformity with the requirements of the ILO Conventions.

[310] Cooperatives are collective economic ventures which is non-profit or minimum-profit in nature and focuses mainly on ensuring the welfare of its members through various economic-related services, such as soft loans, etc.

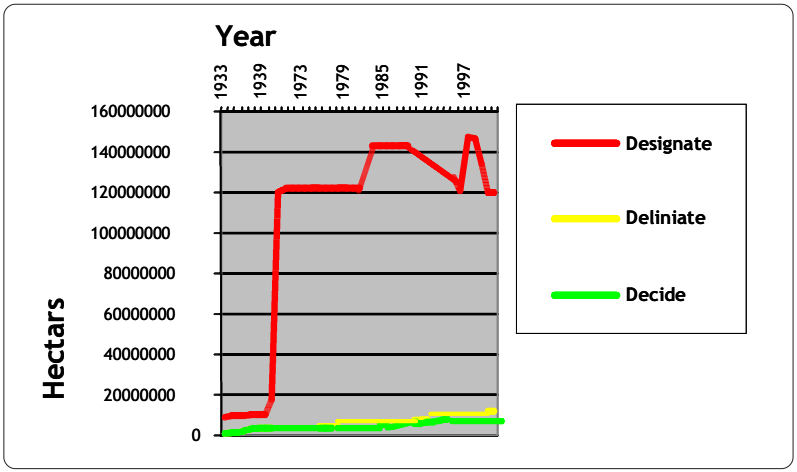
[311] At the time this study was being completed, no new or renewed HPH had been given out subject to these new regulations. It is planned, that in the future HPH would be granted or renewed through a selection process conducted by government (Department of Forestry) based on the criteria and indicators of the Sustainable Management of Natural Forest (PHAL) accordingly to the Decree no 4795/2002. Thus the elaboration of right and obligation would be derived from the stipulations contained in the Governmental Regulation no.34/2001 and not from the

copy of HPH Decree or FA.
Presidential Decree No 84/2000 amending Presidential Decree No 49/ 2000.
Ministerial Decree no 49 of 1999 concerning the Establishment of Team for Preparation and Implementation Law no 22 0f 1999 and Law no 25 of 1999.
Ministerial Decree no 48 of 1999 concerning the Preparation and Implementation of Law no 22 of 1999 and Law no 25 of 1999.
Presidential Decree no 52 of 2000 concerning Coordination Team of Implementation Follow-Up of Law no 22 of 1999 and Law no 25 of 1999.
Presidential Decree No 16 of 2000 concerning Distribution of PBB Revenue.
PP No 17 of 2000 concerning Regional Loan.
PP No 106 of 2000 concerning the Management and Responsibility of finance and implementation and de-concentration and appointment of support.
PP no 105 of 2000 concerning the Management and Responsibility of Regional finance
PP no 104 of 2000 of Balance Fund.
PP no 59 of 2000 of Financial Right of Head of Region.
PP no 84 of 2000 concerning Organizational Guideline on Regional System.
Presidential Decree no 151 concerning the amendment
of Presidential Decree no 49 of 2000.
Presidential Decree No 49 of 2000 concerning Council of Autonomy Consideration.
Law no 25 of 1999 concerning Finance Balance between Central and Regional government
PP No. 25 of 2000 concerning Government authority and Provincial authority.
Tap MPR No.IV/MPR/2000 Policy Recommendation on Implementing Regional Autonomy

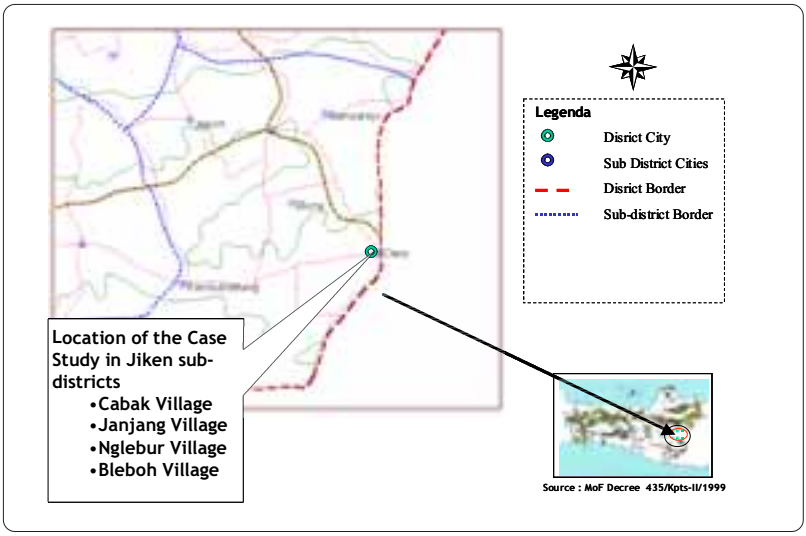
Law no 22 of 1999 concerning Regional Autonomy.
Tap MPR No.XV/MPR/1998 concerning Regional Government

Appendixies

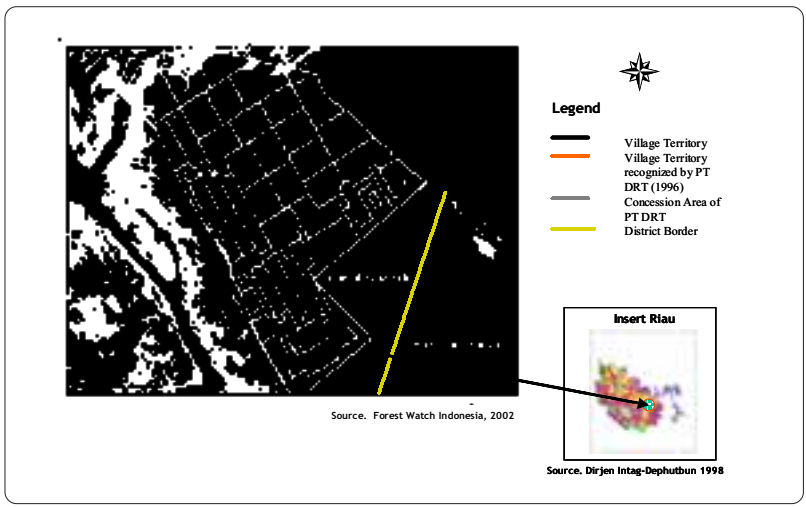
Figur 1 *Forest Designation, Polygon Boundary Deliniation & Official State Forest Decision*



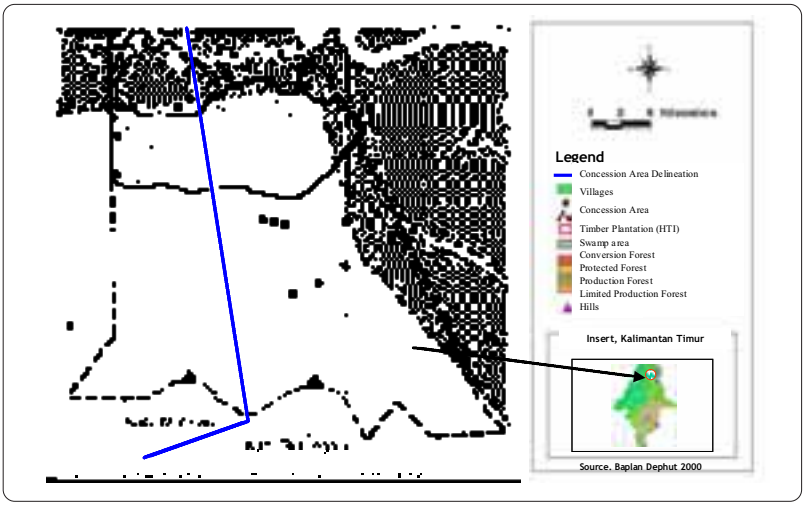
Map 1 *Case Study Area in Perhutani*



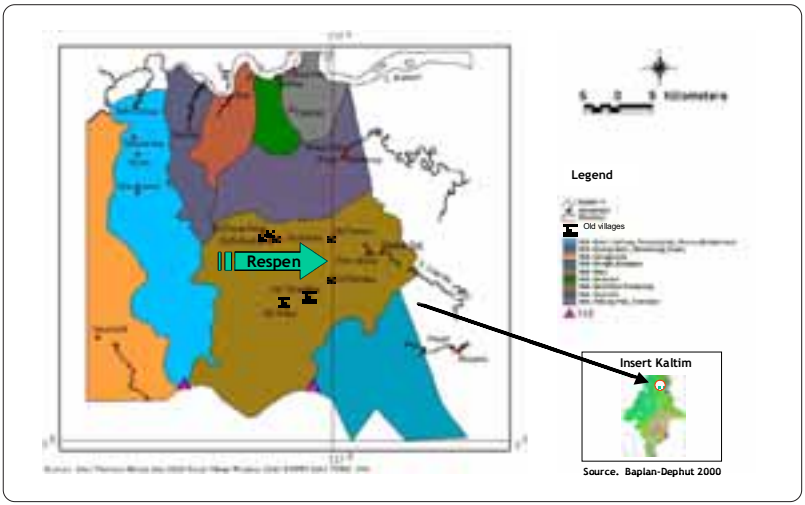
Map 2 *Case Study Area of 8 Village within PT. DRT Area*



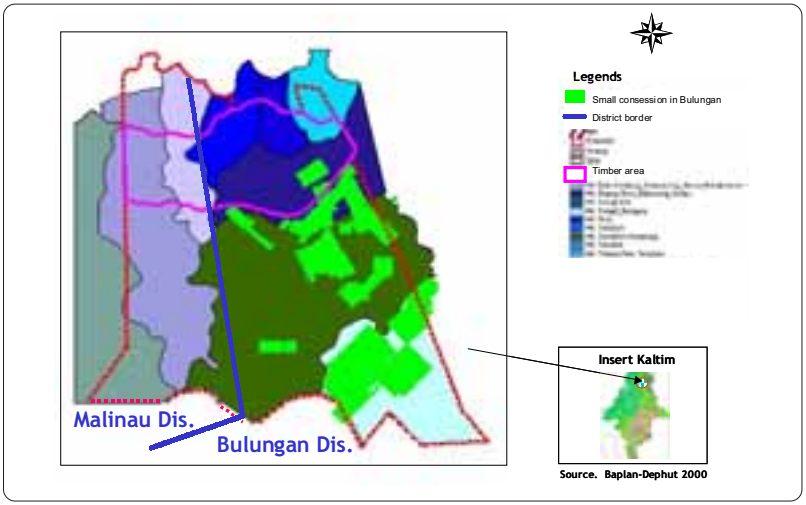
Map 3 *New State Forest Designation and PT. IM Concession in Bulungan and Malinau District*



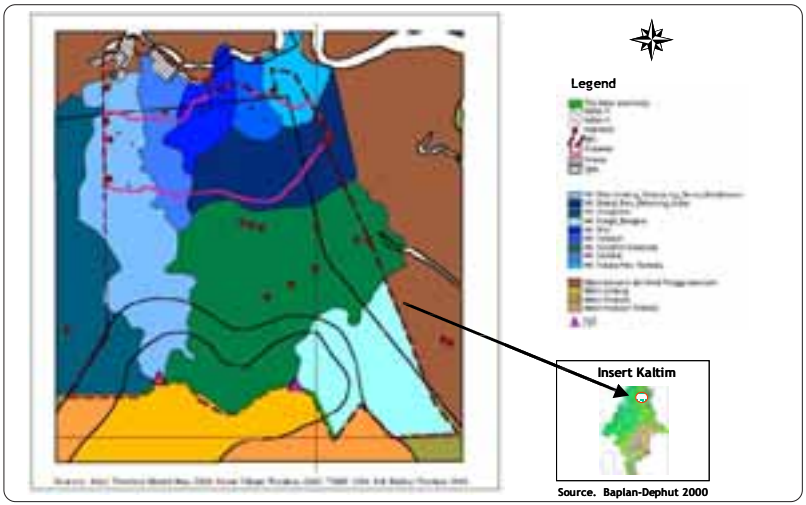
Map 4 *Adat Territory in the Border of Bulungan and Malinau District*



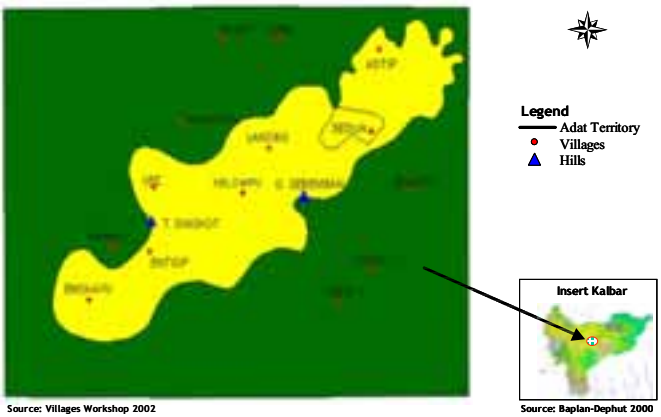
Map 5 *Bulungan District Small Scale Concession inside the PT.IM Concession Area*



Map 6 *Overlap area of PT.IM with the* Adat *Territories*



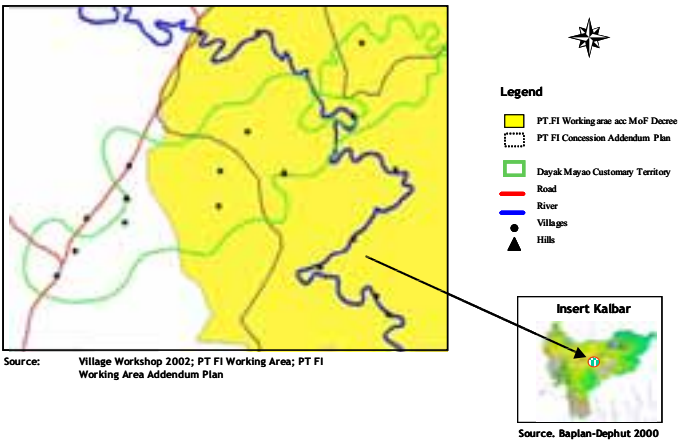
Map 7 *The Bidoih Mayau Customary Territory*



Source: Villages Workshop 2002

Source: Baplan-Dephut 2000

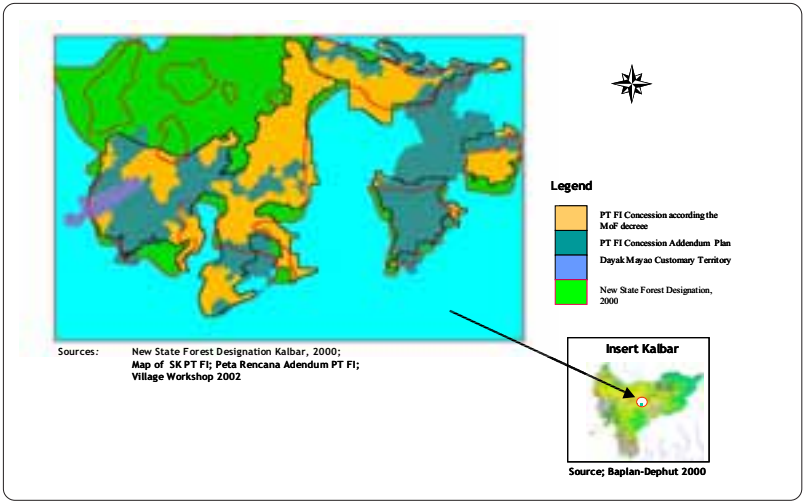
Map 8 *The Bidoih Mayao Costumary Area & The PT. FI Area*



Source: Village Workshop 2002; PT FI Working Area; PT FI Working Area Addendum Plan

Source. Baplan-Dephut 2000

Map 9 *State Forest Designation and the PT FI Concession Area*



Sources: New State Forest Designation Kalbar, 2000;
Map of SK PT FI; Peta Rencana Adendum PT FI;
Village Workshop 2002