



# **Executive Summary with Conclusions and Recommendations**

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

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## FSC PRINCIPLES AND CRITERIA 2&3

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

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

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

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

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

### PRINCIPLE #3: INDIGENOUS PEOPLES' RIGHTS

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

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

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

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

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

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

### **International Experiences**

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

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

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

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

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

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

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

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

court.

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

## Indigenous Peoples in an Indonesian Context

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

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

## Land Tenure and Resource Rights in Indonesia law

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

- Outside of State forests, the conclusion is that while the concept of collective land rights (*hak ulayat*) is recognized in Indonesian law, no **effective** procedures exist to secure these rights. Secure titles are only offered to individuals and even then the administrative procedures for securing land are deficient. All tenures in Indonesia are subordinate to State interests to a degree that far exceeds prevalent concepts of 'eminent domain'.
- An unclear right of possession (*hak kepemunyaan*) 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 gazettelement 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 gazettelement processes mean that concession rights are insecure and of uncertain duration. In this case, neither PT Inhutani I nor PTIM have fulfilled their obligations to delineate the boundaries of the concession. (P&C 2.1)
- There is a lack of clear evidence that the forest manager, PTIM, has long-term forest use rights to the land, owing to the fact that PTIM acquired rights from PT Inhutani I but, in the opinion of the regional forestry offices, PT Inhutani I's rights to the PTIM area have lapsed. (P&C 2.1)
- The conflicts of interest between the national, provincial and district forest offices further undermine the forest manager's security of tenure. (P&C 2.1)
- The entire concession area is claimed by indigenous

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

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

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

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

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

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

## **FSC Certification Procedures in Indonesia**

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

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

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

### **Prospects for Reform**

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

## Conclusions

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

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

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

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

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

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

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

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

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

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

### Prospects for legal and institutional reform

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

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

## Recommendations

### FSC certification in Indonesia

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

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

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

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

with free and informed consent (2.2, 3.1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

promoting the certification of community-based forest management.

### **Recommendations for the Government**

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

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

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

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

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

## **Recommendations for FSC**

### *Specific recommendations related to Indonesia*

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

### *General recommendations*

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

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

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

### **Recommendations for Certifiers**

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



Photo: *Sawit Watch Doc.*