



The Forests Dialogue

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The Forests Dialogue

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Field Dialogue on Free, Prior and Informed Consent

12–15 October, 2010 | Pekanbaru, Indonesia

Briefing Paper¹

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INTRODUCTION

This short briefing paper has been written just to convey some basic information about the country and the area to be visited by this field dialogue to help people understand some of the complexity and challenges. It cannot and does not claim to be a comprehensive treatment of the issues that need to be understood and has been written principally for visitors from outside Indonesia who may not be familiar with the country or the matters that the dialogue seeks to address. The summaries which follow are offered in good faith as a spur to a better informed dialogue. The authors alone are responsible for any incorrect details.

BASIC FACTS ABOUT INDONESIA

Indonesia emerged as an independent country, made up of the islands previously ruled as the Dutch East Indies, during the turmoil of the second world war. The country claimed independence from the Dutch in 1945. Before the arrival of the Dutch, Indonesia had never been unified under a single authority although numerous Hindu, Buddhist and Islamic kingdoms, chieftaincies and sultanates had flourished in various parts of the archipelago between the 8th century or earlier until the arrival of the Dutch in the 17th century. There are some 500 different languages in Indonesia: most of these are Austronesian languages that are thought to have entered the archipelago from Taiwan and the Philippines between 1000 and 3000 BCE. In the provinces of Papua and West Papua on the western end of the island of New Guinea, the majority of the people speak some 300 unrelated Papuan languages. These languages evolved within Papua since first human occupation some 50,000 BCE.

Indonesia is the third most populous country in the world with a current population of 240 million people. It spans a wide archipelago making up an arc as broad as the USA from Washington State to Maine comprised of some 17,000 islands. Indonesia

is a secular republic which also has the largest Muslim population in the world and in which belief in God is a legal requirement: six religions are officially recognised—Muslim, Catholic, Protestant, Hindu, Confucian and Buddhist.

According to the Constitution, Indonesia is democratic country. Today this is true. However between the late 1950s until 1998, the country experienced highly centralised rule, with relatively little powers given to the electorate and to political parties, first as a socialist country with a planned economy under founding President Sukarno and then as a neo-liberal country which favoured foreign direct investment and private sector enterprises under President Suharto. During all this period the army had a strong role in both politics and business.

The fall of Suharto in 1998 ushered in a period of reform (*reformasi*) during which multi-party democracy and political decentralisation were introduced. This period has seen a flourishing of civil society organisations and social movements which have raised issues and grievances that could not previously be addressed are now being aired.

THE FORESTS

The total land area of the country is 192 million hectares and the majority of this remained forested until the 1960s. The Ministry of Forestry claims jurisdiction over the 70% of the country which is classed as the forest area (*kawasan hutan*). Although only 12% of these forests have been officially gazetted (a process which should confirm if areas classed as forests are encumbered with rights or not—see below) the Ministry considers almost all these forests to be State forest areas (*kawasan hutan Negara*). The 60–90 million people who live in areas classed as forests thus enjoy few rights according to the way the forestry laws are applied.

Since the 1960s, the country has experienced one of the fastest rates of deforestation in the world averaging around one million hectares per year but during the late 1990s being nearer 3 million ha. per year according to some NGOs. Negative impacts include loss of biodiversity, erosion, floods and landslides, takeover of indigenous peoples' lands, poverty, conflict, emissions of greenhouse gases and localized climate change. The main direct drivers of deforestation are industrial logging, plantations and clearance for agriculture, exacerbated by planned Transmigration and spontaneous migration, from the more populous central islands of Java, Madura, Bali and Lombok to the so called 'Outer Islands.' Illegal logging has long been a major problem in Indonesia and remains so today, exacerbated by the fact that wood processing capacity (sawmills and pulp mills) is up to ten times the annual allowed cut determined by the Forestry Ministry.

It is estimated that current rates of deforestation and peatland clearance make Indonesia the world's third highest emitter of greenhouse gases in the world. Simple calculations would thus make per capita greenhouse gas emissions in Indonesia similar to those of western Europeans. In September 2009, the President of Indonesia pledged to curb Indonesia's greenhouse gas emissions by 26% below business as usual projections by 2020 and by up to 41% if foreign financial assistance was made available. As 85% of Indonesia's emissions come from deforestation, forest degradation and agriculture, the govern-

ment is planning that the bulk of the emissions reductions will come through implementing a so-called REDD process (and see below).

THE LEGAL FRAMEWORK: SOME BASIC CONSIDERATIONS RELEVANT TO FPIC

Rights to Lands and Forests

The Constitution of the Republic of Indonesia acknowledges the rights of citizens and recognises ‘customary law communities’ and other self-governing entities. It does so however through entrusting the State with a controlling power over lands and natural resources to be used for the benefit of the people.

The Basic Agrarian Law provides for a variety of tenure options including private ownership, private use rights and various forms of leasehold on State lands by companies. It also recognises the existence of collective rights based on custom (*hak ulayat*) but treats these rights as usufructs on State lands that must give way to national development. According to the World Bank less than 40% of all land holdings in Indonesia have been titled. The majority of lands are held under informal or customary tenures. Most landowners in Indonesia thus have difficulties proving they are legitimate rights-holders and rely on letters (SKT) from local officials authorizing land transfers or documents proving they have paid land tax. Procedures for recognising and titling customary rights to land have never been developed, and no land titling of customary collective tenures has been carried out apart from a few pilot projects with World Bank assistance in West Sumatra.

The Forest Law entrusts all forests to the jurisdiction of the Ministry of Forests and recognises two kinds of forest areas: those which are unencumbered with rights which are then considered State Forest Areas and those areas which are encumbered with rights (*hutan hak*). The process of gazettelement which determines the legal status of forest areas has only been completed for 12 % of the forest zone. There are no procedures for the recognition or management of *hutan hak*. De facto the State has seized control of more than one hundred million hectares of forests without ascertaining if there are rightsholders within them or not.

There are well developed procedures and requirements for allocating forest areas to logging (HPH) and timber plantation (HTI) companies to manage as long term leaseholds. By contrast equivalent regulations and procedures are lacking for allocating state forest areas to communities, although a variety of tenure options exist on paper including: community forests (*Hutan ke Masyarakatan*), peoples forest (*Hutan Rakyat*), customary forest (*Hutan Adat*), village forest (*Hutan Desa*) and people’s plantation forests (*Hutan Tanaman Rakyat*). In reality less than 0.2% of the forest estate has been allocated to communities. Other sectoral laws, like those related to mining and plantations also make provisions that favour corporate entities.

These legal realities mean that local communities and especially indigenous peoples are weakly protected when companies seek access to forests and lands by getting permits from State agencies. The Committee on the Elimination of Racial Discrimination has noted that Indonesia’s land and forest laws are incompatible with Indonesia’s obligations under the Convention on the Elimination of All Forms of Discrimination to which Indonesia is a signatory.

Representation

Customary courts and higher level traditional authorities—such as rajahs and sultans—were largely abolished in the 1950s as part of a government programme to eliminate ‘feudalism’ and ‘backward’ ways. In the 1970s, the whole of Indonesia was reorganised into a single administrative framework, which reorganised settlements into hamlets (*dusun*), communities (*kampung*), villages (*desa*) and sub-districts (*kecamatan*), which meant that village level customary institutions were no longer recognised and thereby deprived of legal personality.

Since the 1990s, the decentralization laws have allowed local legislatures to recognise and revive customary institutions and this has happened in a few provinces and districts such as West Sumatra (*nagari*) and Toraja (*lembang*). However, the majority of communities are still represented through these introduced structures. It is common in Indonesia that the prior but unrecognised customary institutions continue to operate *de facto* alongside the formal structures imposed during the Suharto era.

EXPERIENCES WITH FREE, PRIOR AND INFORMED CONSENT:

Obviously the combination of weak State recognition of rights, lack of tenurial security and imposed, alien systems of administration, makes it hard for communities to assert their interests when companies plan activities on their lands. Asserting the right to ‘Free, Prior and Informed Consent’ implies a significant change in the way communities engage with outsiders, as it requires these outsiders to respect peoples’ customary rights in land, which is something the State does not usually do, and to respect that the people can choose their own representative institutions, which may mean they sidestep the authority of the imposed administrative structures.

On the other hand it is exactly because the national legal framework is so deficient that respect for the right to FPIC is so important, as it lays the basis for a much more equitable relationship between communities and others, more closely in line with the requirements of the Indonesian Constitution and international law.

In the past five years, there have been a number of important efforts to respect the right to FPIC in Indonesia including through voluntary certification procedures such as those of the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil, through a project in three provinces run by the national indigenous peoples organisation (AMAN—*Aliansi Masyarakat Adat Nusantara*), with help from the Forest Peoples Programme and the national participatory mapping network (JKPP). Support for FPIC has also been an outcome of complaints against oil palm operations filed by NGOs and indigenous peoples’ organisations with the International Finance Corporation’s Compliance Advisory Ombudsman. New initiatives are now also underway to respect the right to FPIC in REDD projects. The following paragraphs offer short summaries of several of these cases to highlight the progress being made despite the unfavourable legal framework.

Forest Stewardship Council

Obtaining the Free and Informed Consent of indigenous peoples before undertaking forestry operations on their customary lands is a requirement of the Principles and Criteria of the FSC. A number of logging operations in Indonesia have secured FSC certificates so it could be expected that these certificates would shed light on how consent is best secured in the Indonesian context. However, close analysis of these operations and the documentation accompanying the certifications suggests that operators have gained FSC certificates without first identifying customary rights areas and without clear and negotiated processes for obtaining the consent of the customary owners to have access to and log their lands. Some companies have been able to secure certificates even where the auditors have found that they have not obtained FPIC. In such cases the certified companies have instead been issued with Corrective Actions Requests which require that steps are taken by the company before the next annual audit to move towards getting consent.

FSC is now in the process of revising its standards and procedures and there is an expectation that to conform with advances in international law, the requirement for FPIC will be strengthened in the revised standard.

Roundtable on Sustainable Palm Oil

Building on the lessons from the FSC, the Principles and Criteria of the RSPO make obtaining Free, Prior and Informed Consent from indigenous peoples and local communities a ‘major’ requirement. The RSPO has funded a series of training workshops on FPIC with companies and communities and this led to the development of a manual for the use of companies which sets out step by step what companies should do to respect the right to FPIC. A copy of the Guide can be found in your conference pack.

To date, one company PT Musim Mas operating six estates and two mills in Riau has secured an RSPO certificate. In this case the company was able to show auditors documentary proof of payment of compensation to named landowners, which was taken as evidence that lands had been acquired by due process with the consent of titled owners.

AMAN Project

AMAN, FPP and JKPP worked with indigenous peoples in Riau, East Kalimantan and Flores to help them negotiate with a plantations company, a logging company and a local government respectively over lands taken from their communities without FPIC. The projects involved: i. developing working relations with the communities, ii. carrying out training in rights and FPIC; iii. helping the communities map their customary rights areas; iv. agreeing on mapped areas with community members and neighbours; v. helping the communities organise and decide how they wanted to represent themselves; vi. mediating discussions between the communities and the other parties over their rights; vii. negotiation of revised agreements; viii. legalisation of the agreements; ix. monitoring and assessment of implementation of the agreements.

In the case of the Melayu community of Kuntu which wished to renegotiate over lands that had been allocated to the plantation company PT RAPP, the project advanced to the third stage where it stalled

for lack of endorsement of the map by the full council of elders from the village. This obstacle was recently overcome and the community is now preparing for engagement with PT RAPP. The main lesson from the case was that the community authorities had become divided because some had benefited from previous deals with the company where others had not as these deals had been struck through untransparent processes. Divisions in the community have taken a long time to heal. AMAN continues to assist the community.

In the case of the Lusan Dayak community of Paser District in East Kalimantan, the project advanced through all phases and led to a renegotiated agreement between the community and the logging company whereby the community agreed to allow the company continued access to its customary forests in exchange for improved benefits: schools, roads, housing, scholarships and jobs. The main challenge for the community, which had a long history of suffering intrusive developments from logging, oil exploration, gold and coal mining, was to revive their customary associations and establish a representative institution through which to deal collectively with the logging company. The legalised agreement is now being implemented, somewhat tardily, and is being monitored. Iterative negotiations continue over implementation.

In the case of the Lewolema community in Flores, the project built on a previous community organising and multi-stakeholder project financed by the UK Government (DfID). Under the FPIC project the communities went through all the stages of the project and entered into extended discussions with the local government to secure access to farmlands that had been taken from them by the unilateral declaration by the Ministry of Forestry of protection forests (*hutan lindung*) on the hillsides above their villages. Although the local government did not recognise the full rights of ownership of the communities to their traditional lands, it did agree to permit them to resume access to their farmlands within the protection forest on condition of sound management of the vegetation. The agreement reached with the community was then made lawful by the issuance of a local legislative act (PERDA) by the district legislature. The same process is now being extended into neighbouring communities.

IFC CAO

Following a complaint filed by a consortium of NGOs about IFC's support for the Wilmar International palm oil group some of whose subsidiaries were operating in contravention of IFC Performance Standards, the IFC's Compliance Advisory Ombudsman (CAO) took on a role of mediating a dispute between the company and two Melayu communities in Sambas District, West Kalimantan. It was agreed that the company would accept that the communities were rightsholders even if this was not affirmed in law (see lack of titling above) and that the company would not seek to go ahead against the will of the communities. The NGOs agreed not to publicise the issues being discussed while the negotiations were underway.

Negotiations continued for a year and led to agreements whereby the company agreed that that lands belonged to the communities, and communities were compensated for damages, paid for the use of lands where planting was agreed, and assured that an increased proportion of planted areas would be allocated for smallholdings. The company also agreed to relinquish other lands back to the communities. Regular multi-stakeholder monitoring has since ensued and some details in the agreements

remain to be implemented to the satisfaction of all parties. There remain disputes within the communities about how they should be represented and benefits shared.

This case was successful because Wilmar was open in admitting that its recently acquired subsidiaries had been precipitate in acquiring lands without FPIC and clearing forests without EIAs and was keen to upgrade its procedures to ensure compliance with both the IFC Performance Standards and RSPO Principles and Criteria. New SOPs were developed for its operations.

Following a second NGO complaint to IFC and further engagement by the CAO, Wilmar is now in the process of resolving disputes in line with the principle of FPIC in several other provinces. This includes the community of Pangean in Kuantan Singingi District which will be visited during one of the field trips. The Pangean indigenous community lost control of some 500 hectares of their rubber gardens in 1999 to an oil palm plantation company, CRS. In 2004, CRS was acquired by Wilmar. Following the filing of the second complaint to the CAO, in 2008, Scale Up met with community leaders to discuss their problems. In April 2009, Wilmar requested Scale Up to provide mediation assistance. Negotiations have been ongoing and are now in their final stages. Wilmar has recognised the community's lands, and recent negotiations have been focused on where the company will provide oil palm plantations for the community, in return for the community having given up some of its land for the company's plantations.

Pulp and Paper

A second village to be visited during the field trip is Lubuk Jering, an indigenous community whose lands were partly taken over to establish an Acacia pulpwood concession, managed by RAPP, the plantation arm of APRIL. During the 2007 TFD field trip, the CEO of APRIL announced that APRIL would respect the principle of FPIC in resolving his company's existing disputes with communities and in developing new plantation sites. At the request of the community and company, in mid 2007, Scale Up started to mediate a negotiated settlement of the dispute between the two parties. In late 2008 an agreement was reached between the community and company in which the company recognised the community lands covering some 1,600 hectares, provided compensation for areas where the community was willing to have Acacia on its lands and made other reparations. The negotiations were witnessed (providing tacit endorsement) by the local and district governments and the agreement was signed by the village head. However, new heads of village, subdistrict and district were elected in the following months and they refused to sign or recognise the agreement. This has stopped the agreement being fully implemented.

REDD

The importance of recognising the right to Free, Prior and Informed Consent has been affirmed by the TFD and by the two voluntary standards that have developed to assess REDD pilots. FPIC is also required by the UN REDD Programme and a trial implementation of the application of an FPIC-based approach is now underway in Central Sulawesi. In Aceh, under a programme endorsed by the Provincial Governor, a deal has been negotiated with SwissRe and Merrill Lynch and with the advice of Fauna and Flora International, to reduce rates of deforestation in the Ulu Masen forests in exchange for

FIG 1: MAP OF TFD FIELD TRIPS IN RIAU, INDONESIA



the sale of forest carbon credits on the voluntary market. The project accepts in principle that the rights of the communities to their customary lands must be respected and they should consent to the inclusion of their areas in the scheme. The details are still being in the process of being worked out.

Another community implicated in a REDD project will be visited as part of the field trip. The indigenous community of Teluk Meranti is on the southern bank of the Kampar River, opposite the Kampar Peninsula in eastern Riau. Much of the area is underlain by deep peat. The village was moved from its original site on the Peninsula to the other side of the river in the 1960s. The community still uses and manages lands both on the Kampar Peninsula and surrounding the current village site. RAPP began developing Acacia plantations on the western end on the Kampar Peninsular in the mid 2000's, and has created a plan to potentially manage most of the 700,000 hectare peninsula, proposing a core protected area of some 550,000 ha ringed by 150,000 ha. of Acacia. RAPP hopes to secure REDD funding for reducing emissions in the core zone. In 2008 the company obtained permits to develop Acacia on about 15,000 ha. of the lands of the Teluk Meranti community. RAPP's plans for a REDD site (for which it is yet to obtain permits) would overlap with some 50,000 ha of forest lands under current usage and customary ownership of the Teluk Meranti community. RAPP began negotiating with the community in 2009 and recently reached an agreement with community leaders, although many members of the community have publically denounced the agreement.

ENDNOTES

- 1 This paper was prepared for TFD's Field Dialogue on FPIC hosted by Kemitraan and Scale Up in Pekanbaru, the Province of Riau, Indonesia.
- 2 Forest Peoples Programme and Scale Up
- 3 The authors recognise that this briefing summarises the work of very many colleagues and partners who are too numerous to name here but we would like to note in particular AMAM, JKPP, Pusaka, HuMA, Gemawan and SawitWatch.