



# FALSE ASSURANCES

A BRIEFING FOR INTERNATIONAL BUYERS AND CUSTOMS AUTHORITIES  
ON HOW INDONESIA'S TIMBER LEGALITY VERIFICATION SYSTEM  
FAILS TO PROTECT COMMUNITY RIGHTS



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*Main Briefing Contributors: Emily Harwell and Lafcadio Cortesi*

*This briefing was reviewed by a wide cross section of stakeholders including both the Indonesian and EU government, as well as civil society groups and independent forest monitors who have played an active role in drafting and implementing the timber legality system.*

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PHOTOS: KELOMPOK STUDI DAN PENGEMBANGAN PRAKARSA MASYARAKAT (KSPPM)

# EXECUTIVE SUMMARY

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Indonesia's vast forests are home to some 30,000 of the nation's poorest communities, the majority of whom are directly dependent on the forest for their livelihoods. Many of these communities are indigenous,<sup>1</sup> with rights to land and resources that are recognized in both international human rights law, as well as the national constitution. In addition, Indonesia's forestry law recognizes the legal rights of all affected local communities, regardless of ethnicity, including the rights:

- » to be consulted and participate in decisions related to the resources on which they depend,
- » to be compensated for loss of access to such resources,
- » to have their villages and locally important sites removed from operational areas, and
- » to receive benefit-sharing and development assistance from companies who profit from forestry operations on community-claimed land.

Yet both the Ministry of Forestry and forestry companies routinely violate these rights with impunity. These violations of the legal rights of communities are often associated with corruption, a problem of such massive scale in Indonesia's forestry sector that estimates of annual state losses reach into the billions of dollars. This widespread disregard for legal rights also fuels ongoing conflicts between companies and communities—disputes that often turn violent. The risk of illegality in Indonesia's forestry sector is therefore indisputably high.

In recognition of the role of consumers in driving demand for cheap wood products, often of illegal origin, many consumer countries have passed laws requiring legality assurance for imported forestry products. Indonesia in turn has implemented a wood products audit and certification system, known as the Indonesian Timber Legality Assurance System, or *Sistem Verifikasi Legalitas Kayu* (SVLK). There are two auditing standards under the SVLK:

- » The mandatory "legality standard" (resulting in "V-Legal" certificates), and
- » The voluntary "sustainability standard" (resulting in certificates known as SFM certificates or PHPL in the Indonesian acronym, but which also includes the legality standard as a prerequisite).<sup>2</sup>

While the SVLK system is an undeniable step forward in controlling the timber supply and reducing many illegal practices, this briefing outlines the ways that the SVLK remains woefully inadequate in providing assurance of legality with respect to community rights.

Weaknesses in the legality standard include the lack of legality verifiers regarding community rights. While the sustainability standard includes verifiers relating to community rights, these social verifiers are given relatively low weight, creating unacceptable loopholes that allow a company to pass even if they score poorly across the board on these verifiers. Furthermore, both the legality and sustainability standards have auditing procedures that rely on documents instead of field inquiry and involve vague scoring guidelines that allow for auditors' broad discretion and arbitrary interpretation. Coupled with the lack of meaningful oversight, the system provides inadequate safeguards against the violation of community legal and human rights.

Finally, while recent changes now allow certificates to be rescinded in cases of corruption, these compliance failures are crippled by the requirement that the Ministry or courts first revoke the company's operational permit. Further, the certificates are invalidated only in cases where the corruption findings are against entire companies (not when individuals are convicted of corruption, even when they act on a company's behalf). Indonesia's weak judiciary and wide spread corruption severely hinder the effectiveness of these mechanisms as a safeguard against corruption.

The undervaluing of community rights in the SVLK standards represents a dereliction of the responsibilities that both governments and companies bear to respect these legal rights, and undermines the legitimacy and credibility of the SVLK as a tool for verifying either legality or sustainability. What's more, issuing SVLK certificates to products even when they are associated with widespread violations of communities' legal rights contributes to continued abuses of impoverished forest communities but also potentially increases the market share for these companies by offering them a false veneer of legality and sustainability. At present, the weaknesses in the SVLK mean that its certificates, even for the higher standard of sustainability, do not in themselves allow

buyers and consumers to differentiate between companies complying or not complying with the laws protecting community rights.

Until weaknesses in the SVLK standards, audits, and oversight mechanisms are addressed, the assurance of respect for third party rights provided by V-legal and PHPL sustainability certificates does not meet the legal standards required for imports into the EU or Japan's green procurement policies, nor the standard of due care required by the U.S. and Australian legislation to ensure forest products are produced in compliance with national laws. Further, the certificates do not provide assurance that forestry revenues associated with SVLK-certified companies are not the products of forestry crime, and therefore, liable under Indonesia's anti-money laundering legislation.

Buyers have a responsibility to ensure that their products do not violate community rights and are in compliance with the law. Therefore, buyers should make it clear to their suppliers as well as the Indonesian

government that reforms to the legality and sustainability standards, auditing guidelines, and oversight capacity are essential to the credibility of the SVLK.

Buyers wishing to avoid introducing products that violate community legal rights into their supply chain, as well as authorities charged with enforcing import legality legislation, should refrain from relying solely on SVLK certificates for this assurance, and should apply rigorous, enhanced due diligence into the legal sourcing of wood products. Buyers should avoid those products where additional investigation fails to provide adequate evidence that companies are in compliance with communities' legal rights.

Detailed recommendations for investors, corporate consumers of forest products and for customs authorities may be found at the end of the report.

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PHOTO: KELOMPOK STUDI DAN PENGEMBANGAN PRAKARSA MASYARAKAT (KSPPM)

# LEGAL RIGHTS OF FOREST COMMUNITIES

## **International Human Rights Law**

Indigenous peoples have rights to land and natural resources that are well supported by international human rights law, including by the International Convention on Civil and Political Rights,<sup>3</sup> the International Convention on Economic and Social Rights,<sup>4</sup> the International Convention on the Elimination of All Forms of Racial Discrimination<sup>5</sup>—all binding conventions to which Indonesia is a party—as well as the UN Declaration on the Rights of Indigenous Peoples,<sup>6</sup> and the International Labor Organization Convention No. 169 on Indigenous Peoples.<sup>7</sup> For example, in its General Recommendation on Indigenous Peoples, the Committee on the Elimination of Racial Discrimination requires that States:

*Recognize 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 or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation.<sup>8</sup>*

## **Indonesian Law**

Indonesian law further protects the rights of both indigenous and other local communities living near areas licensed to forestry companies. The Indonesian Constitution<sup>9</sup> recognizes the land rights of indigenous communities. Two recent landmark Constitutional Court rulings further underscored these rights. First, Constitutional Court Ruling No. 35/2012 found that the Ministry of Forestry’s categorization of indigenous lands as “state forest” (and therefore eligible to be licensed to forestry companies) is discriminatory and unconstitutional. Likewise, ruling No. 45/2011 found the issuing of forestry concessions without investigating the existence of preexisting claims to be discriminatory to Indigenous communities and damaging to their livelihoods.

Further, Indonesia’s Basic Forestry Law of 1999 recognizes the rights of indigenous communities to manage and access forests,<sup>10</sup> as well as the rights of all communities to compensation for loss of access to forests they depend on for livelihood when the forests are allocated as concession.<sup>11</sup> Forestry law also requires forestry companies to distribute

to communities a share in the profits made by forestry companies to offset the local impacts of timber harvest.<sup>12</sup> This benefit-sharing may take the form of “joint ventures” in partnership with community forest management cooperatives, provision of employment opportunities for local residents, and village economic development assistance).

In addition to government responsibilities, companies also have legal obligations to respect community rights. Forest regulations require companies to delineate the borders of their concession in the field, and in the process:

- » Identify and remove villages and locally important sites from operations;<sup>13</sup>
- » Assess, avoid, mitigate and monitor significant social and environmental impacts;<sup>14</sup>
- » Allow access for indigenous communities to non-timber forest resources that are important for their subsistence;<sup>15</sup>
- » Consult with local communities regarding their operations;<sup>16</sup> and
- » Fairly distribute economic benefits and development assistance.<sup>17</sup>

Although Indonesian law recognizes the rights of forest communities, implementation and enforcement of these legal rights remains weak. The government of Indonesia routinely grants licenses to companies to clear timber and establish plantations on the lands claimed by communities<sup>18</sup>—a violation of communities’ legal rights under national law, as well as the rights of Indigenous peoples under national and international law to control communal land and natural resources, and the internationally recognized rights to security of person; noninterference with privacy, family and home; and the peaceful enjoyment of possessions.

Likewise, forestry companies themselves often fail to comply<sup>19</sup> with their legal responsibilities as license holders to communities, as outlined above. Oversight of compliance, grievance mechanisms and mechanisms for conflict resolution are virtually nonexistent, and accountability for violations is rare. These shortcomings have resulted in ongoing land disputes, and violent conflicts are increasingly common. Nowhere is the lack of legal protections greater than in the plantation sector, where forests are permanently converted.

# WIDESPREAD CORRUPTION AND WEAK ENFORCEMENT OF COMMUNITY LEGAL RIGHTS

A major reason for the lack of enforcement of community rights is the result of persistent corruption in the forest sector, as well as Indonesia's law enforcement and judiciary, yet the SVLK system provides virtually no safeguard to buyers wishing to avoid these widespread illegalities.

By any measure, the scale and costs of corrupt activity in Indonesia's forestry sector is staggering, creating a context within which the risk of illegality of this type is high. For example, analysis in 2012 by Human Rights Watch estimates found the Indonesian government loses billions of dollars in state revenue each year to forest-sector corruption.<sup>20</sup> Significantly, the analysis found that the losses continued to rise even after the SVLK became mandatory in 2010—largely due to the rapid expansion of the plantation sector. In addition, the Indonesian government's own Corruption Eradication Commission found in 2010 that the forestry concession licensing process has resulted in billions of dollars of lost state revenue from corruption in issuing illegal and overlapping licenses.<sup>21</sup> As a result of these findings, in 2012, the commission released a white paper that observed that the environment of illegality in the sector has also caused widespread conflicts over land and resources with deep negative impacts on economic, social and cultural rights, as well as civil and political rights of local communities.<sup>22</sup>

Such corrupt practices are a violation of Indonesian law, enshrined in the country's Anti-Corruption Law 20/2001, as well as the UN Convention Against Corruption (UNCAC), to which Indonesia is a party. Further, for many international investors in Indonesia, corruption is also a violation of the law of their home countries, as well as international

conventions such as UNCAC and the OECD 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which Australia, France, Germany, Japan, the U.K., and the U.S. are all parties. Corruption and forestry crimes are also offenses under Indonesia's Anti-Money Laundering Law,<sup>23</sup> making trafficking in their proceeds not just a violation of forestry law but also of Indonesia's financial crime laws.

Following outcry from NGOs about the weaknesses of the SVLK in relation to corruption, a revised regulation published in 2014 includes a provision for sustainability certificates to be revoked by auditors if "a company's operational permits are affected by criminal activity, including as a result of corruption convictions."<sup>24</sup> While a positive step forward, this safeguard remains inadequate. The compliance failure is not automatic based on the legal finding itself, but rather depends on the court or the Ministry first acting to revoke the permit as a result of the finding. If either fails to act, the sustainability certification will still stand.

Although there is no language in the regulation to this effect, a source close to the SVLK drafting process revealed that because it is companies who receive certification, "stakeholders have agreed to focus this element on proven corruption case(s) by companies."<sup>25</sup> The compliance failure therefore appears not to apply in cases against individuals found guilty of corruption, even if they were acting on the company's behalf. In the Indonesian context, the likelihood of a successful prosecution against a company for corruption or human rights violations is extremely low.<sup>26</sup>



# EUROPEAN UNION AND JAPANESE IMPORT REGULATIONS ON FOREST PRODUCTS

## **European Union Trade Regulation (EUTR) Requirements for Legality of Timber Imports**

In 2010, the European Union passed a trade regulation (No. 95/2010) obliging importers to ensure the legality of wood products they place on the market in Europe. One of the explicit intents of the regulation is to reduce illegal logging, and thereby, its associated “social, political and economic implications, including undermin[ing] progress towards good governance and threatening the livelihood of local forest-dependent communities.”<sup>27</sup>

The regulation requires that companies placing imported wood products on the European market for the first time (“operators”) exercise “due diligence” to ensure the products have not violated the law of the producer country, except where the risk of such illegality is “negligible.” The regulation defines that the timber producers must comply with laws regulating (among other things):

- » “Rights to harvest, within legally gazetted boundaries” and
- » “Third parties’ legal rights concerning use and tenure that are affected by timber harvesting.”

These clauses clearly indicate that community rights fall within the purview of the EUTR. However, as explained below, the SVLK does not audit compliance with Indonesia’s laws concerning third party rights and gazettement, and so cannot offer assurance of legality to the standard of the EUTR.

## **Japan’s Public Procurement Policy for Forest Products**

Japan’s “Basic Policy on Promoting Green Purchasing” and “Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities” (Law No.100 of 2000) require that wood products, including pulp and paper, supplied to government agencies be legal and, preferably, sustainable. Guidelines from the Forestry Agency of Japan explain that forest products should be verified as “harvested in a legal manner, consistent with procedures in the forest laws of timber producing countries and areas” as well as “harvested from forest areas under sustainable management.”<sup>28</sup> Because the guidelines do not define these terms in detail nor require specific evidence, green procurement requirements have not been the subject of focused scrutiny and enforcement by government. As a result, importers of forest products often rely on the SVLK as adequate assurance of legal compliance.

However, in response to questions raised in July 2012 by members of Parliament on how the law should be interpreted, the Japanese Prime Minister Yoshihiko Noda’s administration specifically acknowledged that, “respecting Indigenous Peoples and local communities’ forest and land use rights in the process of issuing of forest management permits” falls within expectations of legality that must be verified for wood and paper products “when they are covered by laws or regulations relating to forests in the production countries or areas”.<sup>29</sup> Therefore, reliance by the government and consumers in Japan on SVLK certificates as assurance of legality carries significant risk of violating the Japanese government’s stated interpretation of its green procurement law.

***The SVLK does not audit compliance with Indonesia’s laws concerning third party rights and gazettement, and so cannot offer assurance of legality to the standard of the EUTR.***



PHOTOS: KELOMPOK STUDI DAN PENGEMBANGAN PRAKARSA MASYARAKAT (KSPPM)

# KEY WEAKNESSES OF THE SVLK AS A SAFEGUARD OF COMMUNITIES' LEGAL RIGHTS

Given the high risk of illegality in Indonesian timber and paper products, the SVLK has several critical weaknesses in how it defines and verifies “legality” in its auditing process.<sup>30</sup>

First, the SVLK legality definition includes no audit criteria or verifiers that provide protections against illegalities related to:

- » Forestry licenses that are issued on indigenous lands or lands with other preexisting claims,
- » Violation of communities' rights to consultation and participation in management planning,
- » Failure of companies to provide economic benefits or development assistance to local communities affected by timber harvest, nor
- » Failure to protect access to forest resources vital to communities' livelihoods, or compensation for loss of these areas.

Avoiding such practices are not merely normative principles for sustainability best practices or aspirations for improvement through future law reform—they are requirements of existing Indonesian forest management law and, as such, belong in the legality standard for wood products.

In addition to its silence on violation of these rights, the SVLK system assesses only corporate behavior and is silent on government behavior. The scheme assumes that all licenses and permits issued by the government are, by definition, legal. But civil society monitors report that many auditors only verify that the concessionaire possesses licenses, permits and tax-receipt documents that appear to be issued by the government and do not conduct any further inquiry to ensure that these documents were not issued through corruption or simply forged.<sup>31</sup> These weaknesses mean that, by their very design, SVLK legality certificates may be issued on timber products that arise from corruption and violation of community rights.

The SVLK also has weak auditing procedures that rely on the existence of documents rather than field evidence of implementation. This weakness compounds the fact mentioned above that auditors need not verify the legitimacy of documents. Taken together, the standard provides ample opportunity for corruption, fraud and a lack of compliance with legal requirements.

Although the SVLK regulations describe a system of bar coding timber that is intended to link each individual log back to its specific stump, field experience suggests that the use of these tags remains spotty. The Indonesian government reports that at present, bar codes are only used for logs cut from natural forest. The lack of a fully functional chain of custody means it is still possible for uncertified wood to be being laundered into the supply chain. Indeed, the government continues to

allow pulp and paper mills to mix up to 30% uncertified fiber into their supply.<sup>32</sup> In addition, despite the obvious conflict of interest, the SVLK system relies on “self-reporting,” meaning that, once certified, logging and mill operations produce their own production reports (and, in the case of mills, their own fiber supply reports).

These reports, by regulation, are meant to be “sample checked” by local forestry officials, but again, field experience suggests that government surveillance of “self-reporting” remains weak.<sup>33</sup> Although there are provisions for “sudden audits” and periodic evaluations of the auditing process, there is no requirement that these audits be surprise visits and in practice the visits are announced in advance to the operator or auditor under evaluation. This approach makes the SVLK more similar to a voluntary business-to-business certification scheme undertaken by a few good actors, rather than a regulatory system designed to ensure that all companies comply with the law. This approach is especially problematic given that the SVLK is operating in a context of widespread illegality. These weaknesses mean that, as currently conceived and implemented, the SVLK offers a weak ability to determine whether a given wood product originated from an area under dispute with local communities or where other rights have been violated.

Independent monitors themselves complain that oversight of the system is manifestly inadequate, especially given the high risk of illegality. Although civil society has a legally recognized role in monitoring, which is a critical step forward, monitors report that their limited capacity and the continued lack of access to necessary documents means that the monitoring network has been able to conduct oversight on only 30 of the thousands of audits conducted.<sup>34</sup> In particular, the monitoring network does not have sufficient expertise and capacity to adequately monitor field compliance with complex social issues such as land rights, compensation and benefit sharing. Given that independent oversight is a critical element to any certification system, its weaknesses under the current SVLK allow violations of community rights to go unchecked and conflicts to continue unabated.

These weaknesses were reportedly noted in two independent evaluations of the SVLK conducted in 2013 and 2014. Although the evaluation reports have not been made public,<sup>35</sup> they may be requested by importing companies as part of their due diligence, as well as by Competent Authorities reviewing compliance with legality requirements of the EUTR. Action plans have been developed by the Indonesian government on how to address some of the weaknesses identified in these evaluations, including some revisions to the regulations relating to the SVLK, but these steps do not address the failure of the SVLK noted here to ensure legality in relation to corruption and community rights.



### **SVLK Reliance on Often Fraudulent Social Impact Documents**

In its approach to community rights, the SVLK legality standard relies on environmental and social assessments (known by the Indonesian acronym AMDAL) and the reporting on mitigation activities through various annual reports submitted by companies, known in Indonesia as RKT (annual work plan) and RKL/RPL (environmental management/monitoring plans). These documents are nominally intended to identify social and environmental impacts from forest conversion and forestry company activities, and the means by which companies avoid, reduce, mitigate and offset these negative impacts.

However, it is widely acknowledged that in practice AMDAL documents are routinely fraudulent, with entire sections cut and pasted from the documents of other, unrelated operations. For example, Certisource (an independent U.K. timber-monitoring body in Indonesia) confirmed this widespread practice and the inability of certification to address it:

*This is a very valid and worrying concern (and Certisource has experienced such occurrences). However, this is to a large extent the responsibility of the government. If the government approves these despite (often blatant) cut-and-paste documents, it is ultimately the government's responsibility. It is not the mandate of the CertiSource auditors to audit the government. The auditors can only verify documents according to legal requirements.<sup>36</sup>*

While the approval of blatantly fraudulent documents constitutes illegal behavior on the part of the government officials, it is also illegal behavior on the part of the companies to falsify and submit such documents. The SVLK in its current form does nothing to curtail such illegal behavior because, as previously mentioned, its auditors do not investigate the legality of even blatantly fraudulent documents.

It is arguably well within the scope of a legality audit to assess a company's monitoring and mitigation of their social impacts through examination of their annual management and monitoring reports. Unfortunately, independent monitors report that, in practice, these documents are often verified only for their existence, and not for their accuracy with actual field performance.<sup>37</sup> The environmental impact assessment and mitigation process in Indonesia, in its current form, is too shaky a foundation on which to rest the safeguarding of community rights. To provide credible assurance of legality, the SVLK must, therefore, include a more rigorous investigation of field performance by auditors and independent monitors.

***A major reason for the lack of enforcement of community rights is the result of persistent corruption in the forest sector, as well as Indonesia's law enforcement and judiciary, yet the SVLK system provides virtually no safeguard to buyers wishing to avoid these widespread illegalities.***

# “SUSTAINABLE” TIMBER THAT VIOLATES COMMUNITIES’ LEGAL RIGHTS

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Those companies seeking sustainability (PHPL) certification must first pass the legality audit as a prerequisite. The regulation governing the SVLK requires all companies to be PHPL certified after their initial five-year legality certification expires, although independent monitors report that this requirement has not been upheld.<sup>38</sup>

The PHPL standard is an improvement over the “V-Legal” standard, in that it includes several criteria and verifiers related to community rights, including seeking broad agreement of communities to a company’s right to harvest in specific operational areas, mapping of areas claimed by local communities and the clear segregation of operational activities from those areas, providing compensation for lost access to resources, engaging communities in management planning, and making provisions for social benefits and development assistance. However, while these are actually existing legal requirements, they are included as a voluntary, aspirational standard, rather than a legality standard that is immediately mandatory for all companies.

Further, although the inclusion of these criteria is a step forward, there are loopholes in the weighting of criteria and the standards for rating that inappropriately allow companies to attain the higher standard of “sustainable” (and by definition “legal”) even while violating community rights. In addition, once sustainability certification is achieved, the company has the added benefit of no longer requiring government approval of its annual work plan. As demonstrated by the case study at the end of this document, these loopholes have proved particularly damaging to community rights, as they remove a regulatory safeguard that might otherwise prevent companies from beginning to clear forest on land in their concession that is claimed by local communities.

The PHPL sustainability standard differs from the V-legal standard, in that each criterion in the PHPL is rated as “good,” “fair” or “poor”, rather than simply “pass” or “fail.” Further, where all verifiers in the legality standard are essential to passing certification, the sustainability verifiers are weighted differently, as either “dominant” or “co-dominant.” A company is granted sustainability certification as long as it scores at least “fair” on 60% of all criteria, and receives no “poor” rating for any of the “dominant” criteria.

A critical weakness in the sustainability standard is that several important verifiers relating to community rights are weighted as “co-dominant,” meaning that a “poor” rating does not jeopardize sustainability certification. For example, assuming a cumulative score of more than 60% “fair” on all verifiers, sustainable certification could still result if a company scores “poor” on all of the verifiers weighted as co-dominant. Therefore, according to the current SVLK standard, a company could still be certified as sustainable if it:

- » Has made no effort to implement mechanisms for fulfilling its social responsibility to communities, including paying compensation for loss of access to resources and land (Verifier 4.2.4 and 4.2.5),
- » Has implemented no economic-benefit sharing activities (Verifiers 4.3.4 and 4.3.5),
- » Has no mechanisms for community participation in boundary-setting or management planning (Verifiers 4.1.2 and 4.1.3),
- » Has no map of areas within its concession that are claimed by communities (Verifier 4.4.1),
- » Has established no clear boundary between community livelihood areas and company operational areas (Verifier 4.1.4),
- » Has widespread conflict with communities related to these boundaries and/or management activities (Verifiers 1.1.2 and 4.1.5),
- » Has made no effort to resolve conflict (Verifier 1.1.3), and
- » Has no institutional structure, human resources, or budget for resolving conflicts with communities (Verifier 4.4.5).

The undervaluing of community rights in the SVLK standards represents a dereliction of the responsibilities that both governments and companies bear to respect these legal rights, and undermines the legitimacy and credibility of the SVLK as a tool for verifying either legality or sustainability. What’s more, issuing SVLK certificates to products even when they are associated with widespread violations of communities’ legal rights contributes to continued abuses of impoverished forest communities but also potentially increases the market share for these companies by offering them a false veneer of legality and sustainability. At present, the weaknesses in the SVLK mean that its certificates, even for the higher standard of sustainability, do not in themselves allow buyers and consumers to differentiate between companies complying or not complying with the laws protecting community rights.

Even for criteria weighted as “dominant,” which therefore must be rated at least “fair” in order to pass certification, there are weaknesses in the auditing standard. The standard does not require verification of implementation and performance of the sustainability criteria, but rather relies on the simple availability of documents, of unspecified quality, thereby allowing for broad interpretation by the auditor. For example, to gain compliance with legal requirements for distribution of social benefits to affected communities, the auditor is simply required to verify “documents/reports related to the distribution of benefits,” and the scoring allows companies to be scored as “fair” as long as they can produce “some” documents, “even if they are incomplete and unclear.”<sup>39</sup>

There is also widespread concern expressed by the independent monitors related to the integrity of many auditors, who are often pressured or potentially offered inducements in exchange for favorable

audits,<sup>40</sup> meaning the auditing process is still deeply problematic and requiring substantial oversight. Therefore, unfortunately, the burden of ensuring the credibility and legitimacy of the auditing process remains in large part on the shoulders of the independent monitors, who, as previously noted, have the most challenges and the least amount of political power in comparison to the other actors involved in implementing the SVLK.

In summary, these persistent weaknesses in the SVLK certificates must be addressed before buyers and customs agents can rely on them to provide the assurance necessary to meet their responsibilities and keep illegal products out of their markets and supply chains.



# CASE STUDY: HOW SVLK HAS FAILED TO PROTECT COMMUNITY RIGHTS

## **Indigenous forest gardens felled for pulp plantation by Toba Pulp Lestari**

The SVLK certification of the pulp plantations of PT Toba Pulp Lestari (TPL) is one vivid example of how the current SVLK process fails to protect community rights. TPL was issued a pulp plantation license in 1992 on 262,060 hectares over 11 districts, including Humbang Hasundutan District of North Sumatra Province.<sup>41</sup>

The TPL concession area includes forests that are claimed and managed by the indigenous Tano Batak communities of Padumaan and Sipituhuta. These communities have for hundreds of years used traditional methods to manage native *Styrax* (kemenyan) trees for the production of fragrant resins, which is valuable for incense and lacquers and critical to local livelihoods and culture. In 1940, the Dutch colonial government recognized and registered these gardens as well as other claimed farm- and forest-lands as indigenous communal land, in an area known as Register 41.<sup>42</sup>

However, TPL disregarded these long-standing legal rights and in 2009 began clearing the communities' managed forests for conversion to monoculture eucalyptus plantation for paper production. TPL began destroying hundreds of hectares of forests that have sustained local communities for generations, without any consultation, participation or compensation of local people. In protest, community members confronted TPL employees working in their traditional territory, and confiscated their chainsaws. Residents also began replanting these cleared areas and destroying the timber harvested from them. These actions resulted in clashes with district riot police and the arrest of several community members.<sup>43</sup>

In 2010, a sustainability audit was conducted by PT Sucofindo, a subsidiary of SGS. After meeting with the community and a local NGO—KSPPM, who provided information related to communities' disputes with TPL—the Sucofindo auditors scored TPL “poor” on the SVLK's “sustainable” (PHPL) verifiers of clear and broadly agreed rights to harvest, delineation of operational area boundaries, inventory and recognition of local claims. Nevertheless, under the SVLK certification guidelines, although aspects of community rights are included in the standard, weaknesses in the weighting and verification process mean that TPL was certified as both “sustainable” and “legal.”

KSPPM filed a formal complaint to Sucofindo disputing the “good” ratings of other audit verifiers related to TPL's environmental management and their distribution of community development funds and support for the local economy. (KSPPM were not granted access to the audit in order to assess the status of the other verifiers.)<sup>44</sup> However,

a weak grievance process has meant that TPL's certification still stands and the complaints raised by communities and local NGOs have been unaddressed by either the auditor, the company or the government.<sup>45</sup>

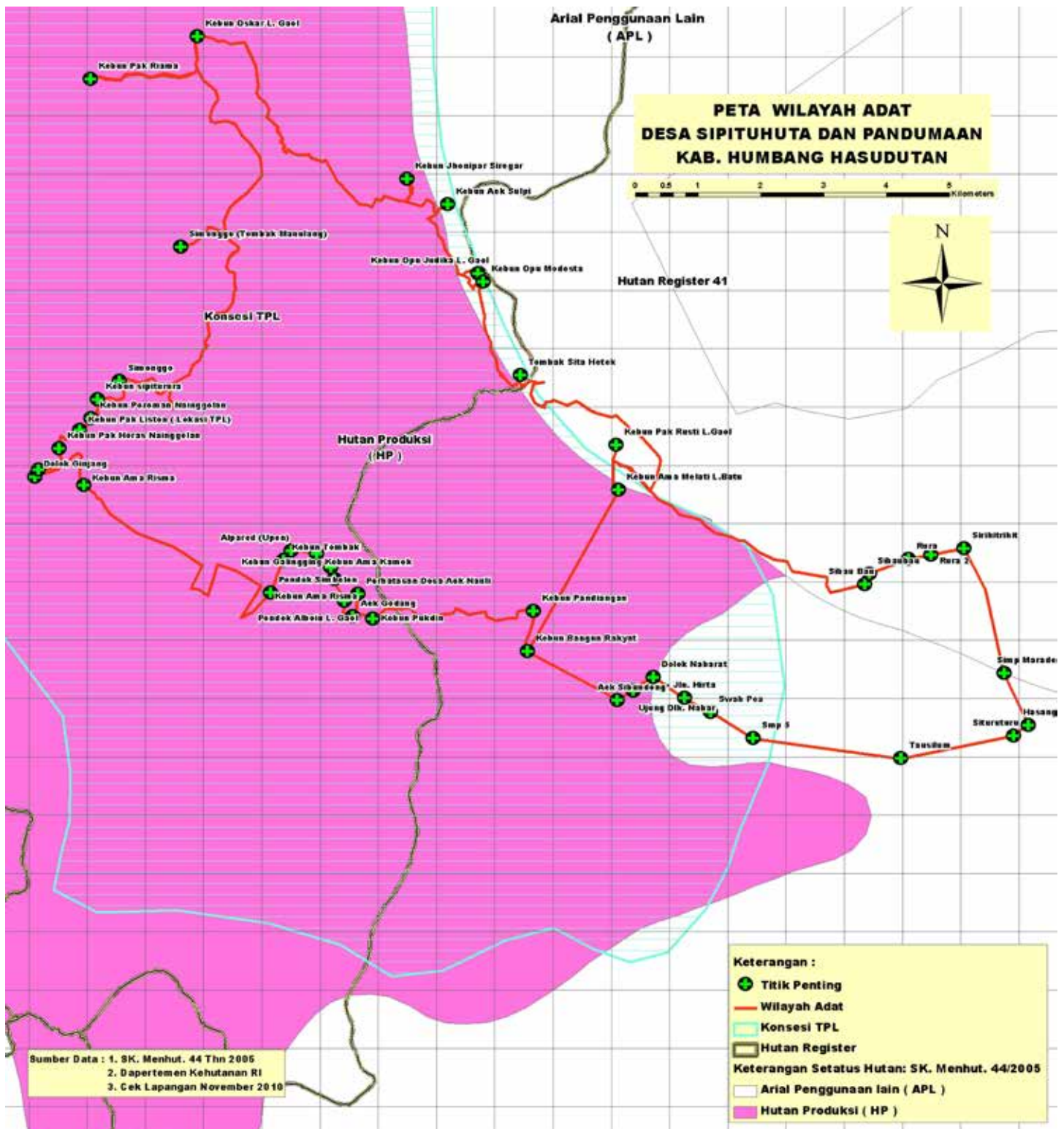
The community, supported by civil society, complained to the local and provincial government about the destruction of their managed forests and the violation of their rights, and in 2012 a multi-stakeholder investigation by the National Forest Council and the Conflict Resolution Desk of the Ministry of Forestry was formed to undertake a fact-finding mission. According to the findings of this team, the TPL pulp plantation claimed 4,100 hectares of community lands and managed forests as part of its work area, and has already logged and partly planted significant portions of this area.<sup>46</sup> Based on the team's findings, the District Head forwarded to the Ministry of Forestry his recommendations that the boundaries be revised to remove the gardens from the plantation area so the disputed areas would not be further developed.<sup>47</sup> The local parliament concurred.<sup>48</sup>

In 2013, notwithstanding the recommendation of the National Forest Council and local parliament for TPL to refrain from operating in the disputed area, TPL continued operations to clear-cut and convert the communities' managed forests. These actions were met by angry protests from increasingly desperate local people, resulting in confrontations with local riot police and the arrest and detention of 17 local residents.

TPL has offered to work in partnership with the community to harvest the areas already planted in eucalyptus. However, the community rejected this offer because they did not want to prejudice their land claim or to be employees of the company that destroyed their traditional forests. Instead, the community insisted that their lands and managed forest areas must be excised from the concession in recognition of their rightful ownership, and as recommended by both the District Head and district parliament pursuant to the joint fact-finding mission. Yet as of spring 2015, there was still a standoff and the disputed area remains inside TPL's concession, apparently without intervention from forestry officials or impact to sustainability certification.

This is just one conflict among many in the forest sector in Indonesia where community rights have long been ignored and local people have been intimidated into silence while the forests they claim and on which they depend to survive are unlawfully destroyed with impunity. In its current form, the SVLK provides products with a false veneer of legality and even sustainability, from forest operations and mills that continue to harm communities and violate their legal and human rights.

Map of TPL pulp plantation and indigenous traditional territory



PINK = Area zoned as production forest by the Ministry of Forestry

LIGHT BLUE = TPL concession

RED = Indigenous territory

GREEN CROSS = Location of tree gardens

SOURCE: KELOMPOK STUDI DAN PENGEMBANGAN PRAKARSA MASYARAKAT (KSPMM)

# RECOMMENDATIONS

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## **Buyers and investors in Indonesia's forestry sector must:**

- » Refrain from using the SVLK as a sole indicator of legality of timber harvest in Indonesia;
- » Avoid purchasing products where additional due diligence fails to yield sufficient evidence of compliance with communities' legal rights;
- » Make it known to producer companies, home governments and the Indonesian government that communities' legal and human rights are an important part of the legality of the supply chain and that the SVLK should be strengthened in order to provide better assurance that community rights are respected;
- » Engage the EU government and urge them to refrain from offering a "green lane" to shipments with SVLK certificates until the weaknesses described in this briefing are addressed;
- » Engage the Japanese government and urge them to further clarify and enforce Green Purchasing laws and not accept SVLK as adequate assurance of legality until the weaknesses described in this brief have been addressed;
- » Encourage the companies they purchase from to lobby the Indonesian government, particularly the newly reconstituted Ministry of Environment and Forestry, to adopt the following reforms:
  - » Pass relevant laws/regulations to further strengthen recognition of collective land rights and provide adequate resources for their timely mapping and registration;
  - » Implement existing forest regulations, including those related to forest gazettement, which requires participatory investigation of preexisting claims to land *before issuing concessions*, in order to clearly establish rights to harvest;
  - » Amend the existing SVLK legality standard to include sufficient verifiers to protect community rights, including the existing rights to consultation and participation in management planning, provision of benefit sharing and development assistance, and the establishment of credible grievance procedures;
  - » Amend the sustainability standard so that verifiers important for protecting existing community rights are ranked as "dominant" (and as such are an automatic obstacle to certification if ranked "poor");
  - » Strengthen auditing guidelines of both legality and sustainability scoring to include field checks of implementation and assessment of validity of documents;
  - » Require that "sudden audits" and periodic evaluations be surprise (unannounced) visits;
  - » Make immediate improvement of the oversight of audits by increasing recruitment, funding and training of independent monitors;
  - » Freeze certification audits when monitors register a complaint regarding access to information necessary to conduct oversight until the complaint is resolved.

## **Competent Authorities charged with enforcing the EUTR should request:**

- » The full reports of the independent evaluations of the SVLK, which outline the gaps in coverage with respect to EUTR legality requirements, and
- » Clarification from the monitoring body and/or operator about how these gaps are being sufficiently addressed in order to reduce risk of illegality.

**The EUTR (Art. 8.4) states that Competent Authorities may carry out checks when they receive "relevant information, including substantiated concerns from third parties or when it has detected shortcomings in the implementation" of the legality assurance system being used by a company. This briefing outlines such "substantiated concerns."**

# REFERENCES

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<sup>1</sup> In Indonesian law, there is no direct parallel to the term “Indigenous” because, on a national scale, the vast majority of Indonesians are ethnically indigenous to Indonesia, although historically many have migrated (often with government assistance or under coerced displacement) within the country from densely populated areas to more sparsely populated forested islands. Indonesian law refers to “customary law communities” (*masyarakat hukum adat*), which are defined as those groups maintaining traditional social and legal institutions rather than on the basis of their ethnicity/language. For simplicity, in this brief we use the term “indigenous” to indicate communities that maintain such traditional institutions as well as continuous physical presence, use, and habitation of particular, defined territories.

<sup>2</sup> The regulations governing the SVLK require companies to achieve sustainability certification after completing 5 years of legality certification. However, more than four years later legality certification became nominally mandatory, sources close to the process reported that more than half of the country’s companies still had not complied, with no penalty since the SVLK does not contain sanctions for non-compliance. Further, as recently as February 2015, mills continue to be allowed to mix up to 30% uncertified wood into their fiber supply. Therefore, sustainability as a mandatory standard remains a distant aspiration.

<sup>3</sup> Article 27 protects the right of minorities to enjoy and develop the various attributes of their distinct cultures, including the right of indigenous peoples to maintain their cultural patterns relating to lands and resources (Human Rights Committee, General Comment 23), CCPR/C/21/Rev.1/Add.5.

<sup>4</sup> In General Comment 21, the Committee for IESCR recognized “the strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” (UN Doc E/C.12/GC/21).

<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 U.N.T.S. 195, entered into force Jan. 4, 1969. Indonesia ratified the ICERD in 1999. Article 5 entitles all persons to freedom from discrimination and equality before the law, including with regards to the right to own property.

<sup>6</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007), art. 8(2) (“States shall provide effective mechanisms for prevention of, and redress for:...(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;”).

<sup>7</sup> International Labor Organization (ILO), Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 72 ILO Official Bull. 59, entered into force Sept. 5, 1991. Articles 4, 7, 13–18 requires states to recognize and protect the rights of Indigenous peoples (IPs) to land and resources that they traditionally occupy and use, to allow IPs to set their own priorities for development of their resources and be involved in decisions that affect them, and to not be removed or alienated from access to their territories without their consent.

<sup>8</sup> Committee on the Elimination of Racial Discrimination (CERD), General Recommendation Number 23 on Indigenous Peoples, 51st session, 1997, para. 5.

<sup>9</sup> Constitution of the Republic of Indonesia, arts. 18B, 28.H and 28L (“The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.”).

<sup>10</sup> National Forestry Law, No. 41 of 1999, art. 67.

<sup>11</sup> National Forestry Law, No. 41 of 1999, art. 68, para. 3–4.

<sup>12</sup> Government Regulations 6/1999 and 34/2002 on forest management of logging concessions and timber/pulp plantations.

<sup>13</sup> Ibid.

<sup>14</sup> Government Regulations 27/1999 jo. 27/2012.

<sup>15</sup> Government Regulations 6/1999 and 34/2002.

<sup>16</sup> Government Regulations 7/1990, 6/1999 and 34/2002, and Ministerial Decision 4795/2002.

<sup>17</sup> Ibid.

<sup>18</sup> See for example, Human Rights Watch, 2013, “The Dark Side of Green Growth: The Human Rights Impacts of Weak Governance in Indonesia’s Forest Sector.” See also, Indonesia Independent Forestry Monitoring Network (JIPIK), 2014. “SVLK in the Eyes of the Monitor: Independent Monitoring and a Review of the Timber Legality Verification System, 2011–2014”; The Anti-Forest Mafia Coalition (AFMC), March 18, 2014. “SVLK Flawed: An Independent Evaluation of Indonesia’s Timber Legality Certification System,” the Joint NGO Submission to Rainforest Alliance’s Evaluation of APP on Its Sustainability Commitments and “APP’s Performance on Meeting Its Social Responsibility Commitments,” January 2015.

<sup>19</sup> Ibid.

<sup>20</sup> Human Rights Watch. 2013. “The Dark Side of Green Growth: The Human Rights Impacts of Indonesia’s Weak Governance in the Forestry Sector.” New York, New York.

<sup>21</sup> Indonesia Corruption Eradication Commission (KPK), Research and Development Directorate, December 2010. “Study on Forestry Sector Planning, Licensing, and Management Policy.”

<sup>22</sup> KPK. December 3, 2012. “Integrated White Paper: Toward a Forest Estate with Legal Certainty and Justice.”

<sup>23</sup> Law 25 of 2003.

<sup>24</sup> Government Regulation 14/2014, Annex 3.1.3.c for PHPL. Annex 3.2.2 related to compliance failures for legality certificates does not specifically mention corruption.

<sup>25</sup> Personal email communication from Alex Hinrichs, Regional Coordinator, Forest Law Enforcement, Governance and Trade (FLEGT) Support Program, European Forestry Institute. March 9, 2015.

<sup>26</sup> Although Article 1.3 of Indonesia's Anti-Corruption Law (31/1999 jo. 20/2001) specifically defines corporations as a "person" under the law and therefore having legal liability, a 2014 legal brief for the American Chamber of Commerce found Indonesia's courts rarely bring cases against corporations and only two cases in which corporations were found legally liable for corruption (neither of which were natural resource companies). Michael S. Carl and Nico Angelo Putra Mooduto. June 29, 2014. "Corporate Liability for Corruption in Indonesia." <http://www.amcham.or.id/nf/features/4656-corporate-liability-for-corruption-in-indonesia>, accessed March 27, 2015. See also: "Measuring the Effectiveness of the Indonesian Corruption Eradication Commission (KPK)," *Deutsche Asienforschungszentrum* 2013, Volume 3, Issue 5.

<sup>27</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, para. 3.

<sup>28</sup> Forestry Agency of Japan, Guideline for Verification on Legality and Sustainability of Wood and Wood Products, 2006 [http://www.rinya.maff.go.jp/j/boutai/ihoubatu/pdf/gaido1\\_e.pdf](http://www.rinya.maff.go.jp/j/boutai/ihoubatu/pdf/gaido1_e.pdf)

<sup>29</sup> Yoshihiko Noda as the prime minister of Japan, The 155th answer in the House of Councillors in the 180th ordinary session of the National Diet, June 29, 2012 <http://www.sangiin.go.jp/japanese/joho1/kousei/syuisyo/180/touh/t180155.htm>

<sup>30</sup> For a detailed analysis of these and other weaknesses of the SVLK in addressing legality, see The Indonesia Independent Forestry Monitoring Network (JPIK), November 2014. "SVLK in the Eyes of the Monitor: Independent Monitoring and a Review of the Timber Legality Verification System, 2011–2014." See also The Anti-Forest Mafia Coalition (AFMC), March 18, 2014. "SVLK Flawed: An Independent Evaluation of Indonesia's Timber Legality Certification System."

<sup>31</sup> JPIK, 2014.

<sup>32</sup> Ibid. While this is reportedly intended as a temporary measure, it is the third time that industry has been granted an extension since 2010 to continue mixing uncertified fiber in their mills.

<sup>33</sup> While similar to other voluntary certification systems such as Forest Stewardship Council's certification of timber, this is different from regulatory systems that require all operators to demonstrate legality (such as is required by the EUTR and U.S. Lacey Act), such as Liberia's timber tracking undertaken by SGS/Liberfor and the Kimberley Process for diamonds, both of which were requirements for UN sanctions to be lifted from these commodities that were used to fund armed conflict.

<sup>34</sup> JPIK, 2014.

<sup>35</sup> Brief summaries of the reports were made public, but with little detail on the findings and a focus instead on general recommendations.

<sup>36</sup> Certisource. "Legality Standard for Indonesia: Second Draft for Public Consultation." March 2013.

<sup>37</sup> JPIK, 2014; EIA, 2014. "Permitting Crime: How Oil Palm Expansion is Driving Illegal Logging in Indonesia."

<sup>38</sup> JPIK, 2014.

<sup>39</sup> Verifier 4.1.3 concerning "mechanisms for recognizing community rights and involving communities in management planning."

<sup>40</sup> JPIK, 2014.

<sup>41</sup> Working Group on Forest Land Tenure. *WartaTenure Bulletin* No 9. June 2011.

<sup>42</sup> Ibid.

<sup>43</sup> KSPPM, "Laporan Khusus: Konflik Masyarakat Adat Pandumaan dan Sipitu Huta vs PT Toba Pulp Lestari, Tbk (TPL)"

<sup>44</sup> Letter (Studi-Adv/KSPPM/ XII/2010) from KSPPM to Sucofindo, "Pengajuan Keberatan dan Saran Terhadap Hasil Penilaian PHPL PT Toba Pulp Lestari Tbk," December 1, 2010.

<sup>45</sup> Sources close to the process have noted that this TPL case was apparently a specific focus of the most recent independent evaluation of the SVLK. However, the public summary provided no details or recommendations.

<sup>46</sup> Letter Number 079/DKNIIMG/08/2011 from the National Forest Council to the Director General of Production Forestry, August 5, 2011.

<sup>47</sup> District Regent decision letter No 522/083/DKLH/2012; June 25, 2012.

<sup>48</sup> North Sumatra's Provincial Parliament Decision Letter (DPRD SK) No. 14/2012.