

4-30-2019

INDONESIAN TIMBER LEGALITY ASSURANCE SYSTEM (SVLK): IN PURSUIT OF SUSTAINABILITY IN FOREST GOVERNANCE

M. Yakub Aiyub Kadir

"Faculty of Art, Law, and Social Sciences, Anglia Ruskin University, Cambridge, United Kingdom",
m.yakub.akadir@unsyiah.ac.id

Follow this and additional works at: <https://scholarhub.ui.ac.id/ilrev>



Part of the [Environmental Law Commons](#)

Recommended Citation

Kadir, M. Yakub Aiyub (2019) "INDONESIAN TIMBER LEGALITY ASSURANCE SYSTEM (SVLK): IN PURSUIT OF SUSTAINABILITY IN FOREST GOVERNANCE," *Indonesia Law Review*. Vol. 9: No. 1, Article 6.

DOI: 10.15742/ilrev.v9n1.539

Available at: <https://scholarhub.ui.ac.id/ilrev/vol9/iss1/6>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesia Law Review by an authorized editor of UI Scholars Hub.

INDONESIAN TIMBER LEGALITY ASSURANCE SYSTEM (SVLK): IN PURSUIT OF SUSTAINABILITY IN FOREST GOVERNANCE

M.Ya'kub Aiyub Kadir *

*Ph.D. candidate in International Law, the Faculty of Art, Law, and Social Sciences, Anglia Ruskin University, Cambridge, United Kingdom. Lecture in International law, Syiah Kuala University, Aceh-Indonesia.

Article Info

Received: November 20 2018 Received in Revised Form: 16 January 2019 | Accepted: 2 April 2019

Correspondence Author's Email: m.yakub.akadir@unsyiah.ac.id

Abstract

This paper investigates the Indonesian Timber Legality Assurance (Sistem Verifikasi Legalitas Kayu, SVLK) and its nature to produce legal wood under the European Union-Forest Law Enforcement Governance and Trade (EU-FLEGT) system. It is intended to ensure the exporting states control over legality of wood under new forest governance and its enforcement in EU market. Using a critical legal analysis, this paper argued that the SVLK could present legality in a formalistic way, but it could not guarantee the substantial meaning of benefit for sustainability, participatory and community. Therefore this paper contributes to provide a better understanding of the application of SVLK in Indonesia, along with reflecting some recommendations, as developing SVLK for domestic market, and replicating it into other exporting natural resources products. The comprehensive approaches for enforcing SVLK can lead to accelerate sustainability in more practical and grounded sense, to improve forest governance and welfare for local people therein.

Keywords: FLEGT, SVLK, Legality, Sustainability, Indonesia

Abstrak

Makalah ini menganalisa tentang Sistem Verifikasi Legalitas Kayu Indonesia (SVLK) dan sifat sifatnya dalam memproduksi kayu yang sah sesuai hukum dalam sistem Uni Eropa tentang Penegakan Tata Kelola Hutan dan Perdagangan (EU-FLEGT). Sistem ini dibuat untuk memastian kontrol negara-negara ekportir tentang legalitas kayu dalam tata kelola kehutanan dan penagakannya di pasar Uni Eropa. Dengan pendekatan kajian hukum kritis, makalah ini berpendapat bahwa SVLK hanya dapat memastikan legalitas kayu yang di expor secara formal, tapi belum tentu dapat memastikan subtasi dari azas kelestarian, partisipasi dan keuntungan bagi masyarakat. Karena itu makalah ini berkontribusi untuk memberikan pemahaman lebih baik tentang penerapan SVLK di Indonesia serta beberapa rekomendasi seperti mengembangkan SVLK untuk pasar domestik, dan menerapkannya untuk produk produk sumber daya alam yang lain. Pendekatan secara komprehensif dalam penegakan SVLK akan meningkatkan potensi kelestarian secara lebih praktis dan membumi, dalam rangka untuk memperbaiki tata kelola hutan demi untuk kesejahteraan masyarakat. =

Kata Kunci: FLEGT, SVLK, Legalitas, Kelestarian, Indonesia

I. INTRODUCTION

The increasing concern on combating deforestation and achieving conservation and sustainability has become a global trend recently.¹ The initiative led to a fundamental move of 2003 European Union-Forest Law Enforcement Governance and Trade (EU-FLEGT), as a regulatory framework to attract ratification of forest product exporting countries to EU market.² It indicated to promote legality of forest product in exporting states, in forms of certification of forest product to ensure that only legal timber products enter the EU market.³ It is voluntary without any binding agreement attracting states to be bound through ratification and national legislation.⁴ Then in March 2013 the EU reinforced this commitment by the enactment of EU Timber Regulation (EUTR) that place a 'due diligence' process for importing timber to EU market.⁵

The FLEGT Action Plan encompasses support for timber-producing countries to develop multilateral collaboration to combat the trade in illegally harvested timber, and measures to avoid investments in activities that encourage illegal logging.⁶ This Action Plan emerged of a growing international consensus that action was needed to control in rampant of illegal logging.⁷ This was followed by the Voluntary Partnership Agreement (VPA) as a central of this process to contribute to forest governance improvements, in terms of accountability, coordination, transparency, stakeholder participation and capacity.⁸

This is in line with the Forest Principles adopted at the UN Conference on Environment and Development (UNCED) in 1992 outlining that states have the sovereign rights to exploit their forest resources following their own environmental policies, linked to responsibility for environmental harm and the notion of sustainable forest management (SFM).⁹ This direction then re-emerged in 1998, when the G8 launched an action program on forests that gave priority to eliminating illegal logging and trade in illegally logged timber. The World Bank subsequently initiated support for regional forest law enforcement and governance process, designed to encourage the enforce-

¹ The extraction of forest resources has increasingly shifted from developed countries, which relatively advanced environmental protection standard to developing countries which permissive and poorly enforced forestry policies. See Agrawal et al., "Changing governance of the world's forests", *Science* 320, (2008) 1460; Tacconi (ed) *Illegal Logging: Law Enforcement, Livelihoods and the Timber Trade* (Earthscan, London, 2007); Benton L., *Law and Colonial Cultures: Legal Regime in World History*, (Cambridge: Cambridge University Press, 2001) 1400-1900; A. L. Mayer et al., "Ecology. Importing timber, exporting ecological impact", *Science*, 359 (2005) 15 April, p. 359.

² Humphreys, D., *Logjam: Deforestation and the Crisis of Global Governance*, (London: Earthscan, Sterling VA 2006) p.142

³ See Bollen, A., Ozinga, S., "Improving Forest Governance: A Comparison of FLEGT VPAs and their Impact", *FERN*, 10. <http://www.fern.org/>.

⁴ Arts B and Buizer, M., "Forest Discourse, Institutions, a discursive-institutional analysis of global forest governance", *Forest Policy and Economics* 11, (2009) p. 340-349.

⁵ See J. Buckrell and A Hoare, *Controlling Illegal Logging: Implementation of the EU Timber Regulation* (London: Chantham House, 2011).

⁶ See D. Brack, 'Controlling illegal logging and the trade in illegally harvested timber: the EU's Forest Law Enforcement, Governance and Trade initiative', *RECIEL*, 14 (2005), 28, at 32-37.

⁷ See the G8 1998 Action Plan on illegal logging, the 2001 Bali Declaration and the 2002 Convention on Biological Diversity among others.

⁸ See "Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union", 30 September 2013, come into force 1 May 2014, Official Journal of the European Union, L 150/252-335. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0520%2802%29&from=EN>, accessed on 29 September 2016. (hereafter called VPA EU-Indonesia 2013)

⁹ *Ibid.*, Preamble, para. C. see also FAO, "FAO Forestry Sustainable Forest Management", (FAO, Rome 2008) <<http://www.fao.org/forestry/sfm/en/>>, accessed on 12 May 2014.

ment of forest laws in tropical countries and eradicate illegal timber from the domestic markets of importing countries for sustainability.¹⁰ Forest sustainability has been characterised as a holistic approaches to forest management, biodiversity preservation, equitable benefit-sharing and collaborative governance, encompassing administrative, legal technical, economic, social and environmental aspect of forest conservation and uses.¹¹

With FLEGT the EU set out to establish a licensing scheme to ensure that only timber products that had been created in compliance with the national legislation of the producing country entered the EU market.¹² The licensing system established presupposes the negotiation of VPA between producer and the EU, to establish a legally binding obligation on partner countries. In particular providing a set of procedures and requirement that aims to verify and attest that timber products shipped to the EU have been created legally.¹³

The VPAs largely rely on existing control mechanisms and legislation in third country, and the development of national legality standards remains the responsibility of the government of the country concerned. Other than privileged access to the EU market, the main incentive for countries to sign VPAs is the provision of assistance to reform and improve legal and administrative frameworks on forest management. In particular, the development of community based forest management and the empowerment of local people to help prevent illegal logging.¹⁴ The system applies to timber products traded between the VPA partner countries and the EU consists of five main elements, i.e. a clear definition of legal timber; a mechanism to control timber supply chains; verification of compliance; licensing of legally harvested timber and legal timber products for export; and independent monitoring to ensure the system is fully implemented.¹⁵

This paper is intended to describe the transformation of the FLEGT-VPA into Indonesian SVLK as an effort to develop a wider regime of international forest governance for sustainable development. This initiated with introduction of this paper; then in second part set out the FLEGT-VPA in Indonesian SVLK system. The third section will discuss the crisis of sustainability of SVLK; and in the last part concludes by considering how lesson learned from Indonesian SVLK could contribute to better forest governance and meet with social and environmental sustainability.

¹⁰ See L.H Gulbrandsen and D. Humphreys, "International Initiatives to address tropical timber logging and trade", Report for the Norwegian Ministry of the Environment (2006), and J. Rayner, A. Buck and P. Katila, (Eds.) *Embracing Complexity: Meeting the Challenges of International Forest Governance, A Global Assessment Report*. Prepared by the Global Forest Expert Panel on the International Forest Regime (Vienna: IUFRO, 2010), p. 75-92.

¹¹ This definition is provided by the FAO at www.fao.org/forestry/sfm/en/. For an overview on the conceptualization of SFM, see Davenport, D, et al., "Forest and sustainability" in J. Rayner, A. Buck, and P. Katila, P. (eds.) . *Ibid*.

¹² European Commission, "Forest Law Enforcement, Governance, and Trade (FLEGT) Action Plan", (May 21 2003) p. 12. <http://www.euflegt.efi.int/files/attachments/euflegt/01flegtactionplanenfinalen.pdf>, accessed on 24 September 2015. (FLEGT Action PLAN).

¹³ See para. 8 of preamble and article 6 of the VPA EU and Indonesia 2013.

¹⁴ To this specific end the EU finances a FLEGT Support Programme for African, Caribbean and Pacific (ACP) countries that are managed by the Food and Agricultural Organisation (FAO). See (FLEGT Action PLAN), pp. 6-8.

¹⁵ See FLEGT Briefing Note 3, "Forest Law Enforcement, Governance and Trade, A Timber Legality Assurance System" (March 2007), p. 2. <http://www.euflegt.efi.int/documents/10180/28299/FLEGT+Briefing+Notes+3+-+A+timber+legality+assurance+system/e9ce3bcd-6243-4bb6-b702-d48e8843079c>, accessed on 26 September 2016.

II. FLEGT-VPA WITHIN INDONESIAN-SVLK

A. Overview

Indonesia is one of the major exporters of timber products in the world, with serious illegal logging and deforestation issues. Improvement of forest governance and law enforcement and halting of further deforestation and forest degradation is crucial to ensure legality and sustainability of the industry.¹⁶ Thus Indonesia and the European Union (EU) have agreed that from 15 November 2016 Indonesia can start FLEGT licensing of verified legal timber products it exports to the EU.¹⁷ Such commitment was based on the VPA between EU and Indonesia 2013 that aims to foster improvements in forest governance, forest law enforcement and to support sustainable forest management as well as worldwide efforts to stop deforestation and forest degradation. The essential elements of the VPA is to ensure that Indonesian timber products imported into the EU, which are covered by the VPA are produced, harvested and shipped in compliance with the laws and regulations of Indonesia. This marks the beginning of the last phase of a long process starting in September 2001 with Indonesia hosting the first FLEGT Ministerial Conference in the East Asia and Pacific region.¹⁸

Indonesia was the first country in Asia to enter into VPA negotiations with the EU, beginning in March 2007, was signed in 30 September 2013, ratified in April 2014, and came into force on 1st May 2014.¹⁹ Under the VPA Indonesia needs to (1) define the country's laws and regulations that apply to the forestry sector; and (2) develop a system that verifies the legality of the country's timber exports to the EU against these laws. After a long multi-stakeholder dialogue involving government, trade associations and civil society organizations, the legal definition of Timber Legality Assurance System (Sistem Verifikasi Legalitas Kayu, SVLK) was initially established in two Ministerial Regulations in June 2009 (Forestry Minister's Decree P.38/Menhut-II/2009) and (Director General of Forestry Enterprise Regulation No. P.6/VI-Set/2009). Then these has been regulation revised several times to Forestry Ministerial Regulation Number P.68/Menhut-II/2011, P.45/Menhut-II/2012 and Number P.42/Menhut-II/2013. It is also supported by the Ministerial of Trade Regulation number 64/M-DAG/PER/2012.²⁰

¹⁶ See the problem of TW countries in enforcing forest law in Constance MecDermott, L., "REDDuced: From Sustainability to legality to units of carbon-The search for common interests in international forest governance", *Environmental Science Policy* 21 (2012) pp.1-8.

¹⁷ Timber Trade federation, "Indonesia to Start FLEGT Licensing on 15 November 2016", <http://www.ttf.co.uk/article/indonesia-to-start-flegt-licensing-on-15-november-2016-408.aspx>, accessed on 26 September 2016.

¹⁸ For the first annual report of SVLK April 2015 to May 2016. See the "Annual Report-Progress update- April 2015 to May 2016, Implementing the Indonesia -EU FLEGT Voluntary Partnership Agreement", <http://silk.dephut.go.id/app/Upload/informasisvlg/20160825/de1796e789fd7a7a08784c4b2745560e.pdf> and "EU-Indonesia FLEGT VPA", <http://silk.dephut.go.id/index.php/svlg/files/1/information-data>, accessed on 26 September 2016.

¹⁹ "EU-Indonesia FLEGT VPA", <http://silk.dephut.go.id/index.php/svlg/files/1/information-data>, accessed on 26 September 2016. (EU-Indonesia FLEGT VPA).

²⁰ SVLK has referred to various legislative law and Ministerial Regulation (Permen), i.e. Law number 41/1999 on Forestry and its amendment law number 19/2004, law number 18/2013 on prevention and eradication of deforestation, Government Regulation (PP) number 6/2007 on Forest Governance and establishment of Plan to manage forest, and MOEF number P.30/Menlhk/Setjen/PHPL.3/3/2016 on evaluation of kinerja pengelolaan Hutan Lestari and Verification of timber legality for the right holder and forest right. Concerning the timber exporting mechanism and its qualification can be referred to the Ministerial Trade Regulation number 89/M-DAG/PER/10/2015 on the provision of product export in forestry industry; Regulation of Dirjen Pengelolaan Hutan Produksi Lestari Number P.15/PHPL/PPHH/HPL-3/8/2016,

Indonesia has revised the SVLK regulation several times to accommodate stakeholder needs and improve efficiency. This triggered a revision of three VPA annexes in 2014/2015, until recently in April 2016 the Ministry of Trade issued a new regulation which restored the requirement for exports of all products listed in Annex I of the VPA to be verified legal by the SVLK. By bringing the domestic regulation in line with the VPA, Indonesia cleared the last main barrier before FLEGT licensing.²¹ There are 40 regulations enacted²² and 22 institutions were established for verifying and issuing V-Legal designated during SVLK development, which mostly based in Java island, except one in Samarinda, Kalimantan.²³ The institution has resulted 1.649 holders of Legal Timber Certificates²⁴ and 1.732 Exporters to date.²⁵ Since that time SVLK has been modified several times for improvement as recently the Ministry of Forestry and Environment has issued the regulation No. P.30/2016 and the Ministry of Trade issued the regulation No. 25/2016 to improve this initiative.²⁶

They are framed around key principles covering essential aspects of forest production and processing and associated criteria, indicators and verifiers, as well as verification guidelines describing the method and appraisal norm to be used. The system will also cover all exports, both to the EU and to other importing countries.²⁷

Indonesia initiated to develop the SVLK before VPA negotiations started and the SVLK passed into law before VPA negotiations ended. The SVLK forms the basis of the VPA; meanwhile, VPA negotiations and implementation have influenced reforms of the SVLK. When the SVLK is operating as described in the VPA, Indonesia can begin issuing FLEGT-licences to verified legal timber it exports to the EU. FLEGT-licensed timber automatically meets the requirements of the EU Timber Regulation, which prohibits EU importers and domestic producers from placing illegally harvested timber and timber products on the EU market.²⁸

As set out above from 15th November 2016 the timber legality assurance system will issue FLEGT licences to accompany Indonesian exports of verified legal timber products to the EU and other markets with be accompanied by 'V-Legal Documents'. Thus when FLEGT licensing starts on that date all Indonesian exports to the EU of timber products covered by Indonesia's timber legality assurance system must be accompanied by FLEGT licences.²⁹

The Indonesian VPA recognizes the SVLK as the system for verifying the legality

annex 4 of this MOEF Regulation on framework for independent monitoring of SVLK. See "Tentang SVLK", <http://silk.dephut.go.id/index.php/info/vsvlk/1>, accessed on 28 September 2016.

²¹ See the latest development of FLEGT-VPA of Indonesia in <http://www.euflegt.efi.int/publications/indonesia-eu-voluntary-partnership-agreement#art2>, accessed on 29 October 2016.

²² See "Daftar Peraturan", in http://silk.dephut.go.id/index.php/download/regulation_lain, accessed on 28 September 2016.

²³ See "Daftar Penerbit V-Legal" at <http://silk.dephut.go.id/index.php/info/vlegal>, and "Daftar LVLK" at <http://silk.dephut.go.id/index.php/info/lvlg>, accessed on 28 September 2016.

²⁴ See "Daftar Pemegang Sertifikat LK", <http://silk.dephut.go.id/index.php/info/iuiphhk>, accessed on 28 October 2016.

²⁵ See Daftar Eksportir, <http://silk.dephut.go.id/index.php/info/exporters>, accessed on 28 October 2016.

²⁶ "Timber Legality Information System (TLIS)", <http://silk.dephut.go.id/index.php/article/vnews/152> accessed on 26 September 2016.

²⁷ About half of Indonesia's land area is covered by forests, with over 90 million hectares of forests. The annual rate of deforestation for the period 2010-2015 was 0.7%, See FAO, Global Forest Resources Assessment 2015, How are the World's Forests Changing?(Rome: FAO 2016)

²⁸ See "EU-Indonesia FLEGT VPA", Loc.cit.

²⁹ See the latest development of FLEGT-VPA of Indonesia in <http://www.euflegt.efi.int/publications/indonesia-eu-voluntary-partnership-agreement#art2>, accessed on 29 October 2016.

of Indonesian timber exports,³⁰ so ratification will concretize SVLK certification as the basis for exempting operators from having to carry out due diligence on timber shipped from Indonesia. The VPA provides for “periodic evaluation” and a two-yearly independent monitoring mechanism, the findings of which the Joint Implementation Committee may cite in deciding on “remedial measures” to the VPA³¹. This mechanism provides the EU an opportunity to adjust the requirements for obtaining a FLEGT license, and may give it leverage in requesting changes to a faulty SVLK scheme.

Indonesia made SVLK certification mandatory for all timber producing, trading, processing and exporting companies. A number of independent certification & verification bodies were accredited by the Indonesian National Accreditation Committee (Komite Akreditasi Nasional, KAN) to audit the operations of forestry companies based on the assessment standards for legality or sustainable forest management. Then certificates are issued for Timber Legality (Legalitas Kayu, LK) or Sustainable Production Forest Management (Pengelolaan Hutan Produksi Lestari, PHPL), named as ‘V-legal’ documents for exporters.³² However, in practise it provides for insufficient monitoring, and that under-capacity and conflicts of interest will render verification.³³

The SVLK seeks to ensure that all timber in Indonesia’s supply chain is harvested, transported, and processed in accordance with Indonesian law. Timber harvesters and processors are required to obtain certification, at their own expense, demonstrating that their timber operations are conducted legally³⁴. Failure by an exporter to present a valid legality certificate can lead to consequences including denial of an export license.³⁵

B. Legality Certification

Legality certificates are awarded by Independent Assessment and Verification Agencies (Lembaga Peneliti, LP & Lembaga Verifikasi, LV), which inspect timber operations for conformity with one or more of four “legality definitions”.³⁶ Timber harvested in state-owned forests, for example, is legal when the harvester is authorized to operate in the area, and when procedural and substantive harvest laws have been followed. Timber originating in privately owned forests need only be accompanied by proof of ownership. Timber harvested in land designated for clearing requires proof that clearing activity is authorized and compliance with relevant timber harvest and transport laws.³⁷

Certification of processed timber requires proof those processors are authorized to operate and that a timber tracing system is in place. As Indonesia prohibits the export of unprocessed wood, all timber exports must meet the legality standard both for processed timber and for the area type from which the raw timber was harvested.³⁸ If

³⁰ See VPA EU-Indonesia 2013, Op.cit., para 8,

³¹ See VPA EU-Indonesia 2013, Loc. Cit., Article 14.5 (b.c.d).

³² See a complete view of SVLK in “Indonesian Timber Legality Assurance System”, Annex V of VPA EU-Indonesia 2013.

³³ See Laura van Heeswijk and Esther Turnhout, “The Discursive Structure of FLEGT(Forest Law Enforcement, Governance and Trade): The Negotiation and Interpretation of Legality in the EU and Indonesia”, *Forest Policy and Economics*, 32(2013) 6-13.

³⁴ See Annex V of VPA EU-Indonesia 2013, Introduction para 4.

³⁵ Regulation of the Ministry of Trade of the Republic of Indonesia No. 20/M-DAG/PER/5/2008 Concerning Export Products of the Forestry Industry, article 21.

³⁶ See article 4.1. of Annex V of VPA EU-Indonesia 2013.

³⁷ See VPA EU-Indonesia 2013 Annex II on Legality Definition.

³⁸ See Agung Prasetyo, James Hewitt and Chen Hin Keong, *Indonesia: Scoping baseline informa-*

the auditee objects to the result on an inspection, he or she may submit the objection to the auditing LP&LV, and the LP&LV will establish an independent ad-hoc team to evaluate the objection and correct the audit if appropriate.³⁹

If the timber operation fails the audit, it must be given an opportunity to come into compliance with the applicable legality definition. The result upon successfully passing an audit depends on the type and size of the auditee. Harvesting operations in state-owned forests, forests designated for conversion, and large timber processors become certified for three years, but remain subject to annual surveillance audits. Small timber processors become certified for six years and must be audited at least every two years⁴⁰ Private forest owners that send timber for processing become certified for ten years and must also be audited every two years. Individuals, NGOs, and civil society groups may challenge an LP&LV's audit of a timber operation.⁴¹ If the LP&LV is unable to resolve the issue of objection, the challenging party may bring its complaint to the National Accreditation Commission (Komisi Akreditasi Nasional, KAN).⁴²

C. Monitoring and Evaluation

A multi-stakeholder monitoring and evaluation working group provides additional monitoring by reviewing independent monitoring reports and other information sources to track SVLK implementation⁴³. In the context of the VPA, several additional mechanisms will monitor the SVLK. First, the agreement creates a system of annual "periodic evaluation" to review the functioning and effectiveness of the SVLK's legality control measures and timber traceability systems.⁴⁴ Second, it requires the EU to appoint every two years an "Independent Market Monitor," which will assess how Indonesian timber bearing FLEGT licenses is performing in the European market.⁴⁵ On the basis of the reports from these two mechanisms, a Joint Implementation Committee comprising Indonesian and EU appointees will review the overall functioning of the SVLK.⁴⁶ Finally, the VPA mandates a one-time independent technical evaluation of the SVLK before issuance of FLEGT licenses commences⁴⁷ to check whether the SVLK delivers the intended results in practice and to examine any revisions Indonesia has made to the SVLK since signing the VPA.⁴⁸

The EU provides technical assistance and capacity-building support for VPA to

tion for Forest Law Enforcement, Governance and Trade,(EU FLEGT Facility Kuala Lumpur January 2012), <http://www.euflegt.efi.int/documents/10180/23308/Baseline+Study+7.%20Indonesia+-+Overview+of+Forest+Law+Enforcement,%20Governance+and+Trade/fb7ef7de-ead6-4238-b28b-7a3c57fb7979>, accessed on 26 September 2016.

³⁹ See point 4.4. and 4.5. of VPA EU-Indonesia 2013 Annex V on Indonesian Timber Legality Assurance System.

⁴⁰ See article 1.4. of the Regulation of the Minister of Forestry of the Republic of Indonesia No. P.45/Menhut-II/2012 Amending for a Second Time Minister of Forestry Regulation P.38/Menhut-II/2009 Concerning Standards and Guidelines for Performance Assessment of Sustainable Production Forest Management and Timber Legality Verification of Permit Holders or Private Forest Owners.

⁴¹ See point 4.5. (independent Monitor) of VPA EU-Indonesia 2013, Annex V on Indonesian Timber Legality Assurance System.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ See Article 15 (a) of VPA EU-Indonesia 2013.

⁴⁵ See Article 15 (b) of VPA EU-Indonesia 2013.

⁴⁶ See Article 14(5 b) of VPA EU-Indonesia 2013.

⁴⁷ See Article 14 (5 e) of VPA EU-Indonesia 2013.

⁴⁸ See Annex VIII of VPA EU-Indonesia 2013.

ensure that timber products exported to the EU come from legal sources. The agreements also help timber-exporting countries stop illegal logging by improving regulation and governance of the forest sector.⁴⁹ Indonesia's SVLK certified timber product as evidence by the accompanying FLEGT-licences will be considered as zero-risk in terms of illegal logging and its associated trade, and thus no 'due diligence' need to be carried out to prove its legality. The lengthy FLEGT-VPA since 2007 to 2016 is the learning process to understand the need for legal timber product from sustainable managed forest. Therefore the recognition and acceptance of SVLK by the EU is an essential stepping stone toward global recognition of SVLK. The full implementation of SVLK is launched on 1st January 2015, and by October 2015 the SVLK had certified more than 2,300 timber-based industries.⁵⁰

III. IN SEARCH OF SUSTAINABILITY IN SVLK

It is a positive driving force for enforcing forestry government in Indonesia, which remain problematic in managing forestry issues. The EU FLEGT Action Plan has stated that VPAs should 'strengthen land tenure and access right specifically for marginalized rural communities and indigenous peoples, strengthen effective participation of all stakeholders, notably non-states actors and indigenous peoples, in policy making and implementation, and increase transparency'.⁵¹ It is an outcome of interaction, competition, and learning of the world forestry system, and its transformative of future forms of transnational forest governance.⁵² The above article has explicitly confirmed the meaning and scope of sustainability to be the goal of this arrangement. The issue of sustainability would much related to the Indonesia context, which has plurality of legal system, complex of colonial impact, and profit centralisation, and deforestation.⁵³ So it would be assumed that more legality certification of SVLK may lead to deforestation if sustainability is not demonstrated.⁵⁴ In other words, the increasing legality certification means the increasing logging area, degraded forest, and converted to palm oil to feed global market.⁵⁵ Hence the emerging SVLK as timber legality regime in Indonesia may 'overtake sustainability certification',⁵⁶ as it still need other supporting program to cover legality into sustainability, such as expanding tim-

⁴⁹ Currently six countries have implementing this VPA scheme, covering: Cameroon, central African republic, Ghana, Indonesia, Liberia and Republic of Congo. While nine other countries now in negotiation with the EU, including Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand, and Vietnam. See 'VPA Countries', at <http://www.euflegt.efi.int/vpa-countries>, accessed 17 May 2016.

⁵⁰ See the latest development of FLEGT-VPA of Indonesia in <http://www.euflegt.efi.int/publications/indonesia-eu-voluntary-partnership-agreement#art2>, accessed on 29 October 2016.

⁵¹ European Commission, "Forest Law Enforcement, Governance and Trade (FLEGT Action Plan).

⁵² See Cashore B and Stone M, "Does California Need Delaware? Explaining Indonesian, Chinese, and United States Support for Legality Compliance of Internationally Traded Products", *Regulation & Governance* 8, (2014) 49-73, p. 66.

⁵³ Indarto et al also confirmed that is 'significant positive impact of Plantation conversion permits (PCP) on forest cover loss at national level in Indonesia'. See J. Indarto et al, "Do Forest Permits Cause Deforestation in Indonesia?", *International Forestry Review* 17 (2) 165-181, 175.

⁵⁴ See more analysis in Axel Mark, "Forest Certification as a global environmental governance tool: What is the macro-effectiveness of the Forest Stewardship Council", *Regulation & Governance* (2010) 4, 408-434. Doi:10.1111/j.1748-5991.2010.01088.x

⁵⁵ See T.K. Rudel, et al., "Changing drivers of deforestation and new opportunities for conservation", *Conservation Biology* 23 (2009) 1396-1405. DOI: 10.1111/j.1523-1739.2009.01332.x.

⁵⁶ See Tim Bartley, "Transnational Governance and the Re-centered state: Sustainability or Legality?", *Regulation and Governance* 8 (2014), p. 93. Doi:10.1111/rego.12051.

ber legality regime into mining, oil and gas, and palm oil product.⁵⁷

The Indonesian government confirmed that SVLK is to ensure that the all timber product has a convinced legality to seek for global market, rather than domestic market.⁵⁸ This would like to shed light on the essential of Indonesian SVLK for short term therapy, an essential factor for developing sustainability when other sectors and factors also followed.⁵⁹

So SVLK may certify operations which are not in compliance with various government regulations, not sustainable, and no sufficient monitoring in place.⁶⁰ But it could not guarantee the exclusion of timber products derived from licenses obtained through corrupt practices, clearing of large area of natural forest of an indigenous community, habitats of critically endangered species, draining of deep peat lands causing mega tons of GHG emissions, and/or concession areas which had recurrent fires.⁶¹

The sustainable forest management certificates for forest management units and the timber legality certificates for timber based industries articulated the evidence of the sustainability of forest resources and the legality of timber products through a series of audit carried out by independent auditors at the point of forest harvesting, timber trade, processing and all the way to the export points. In developing sustainability standard and enforcement there are some complexities issues should be taken into account, as follows:

A. The Formality Meaning of Legality in SVLK

A definition of legality will be an important component of the Legality Assurance Systems that will form part of VPA A practical definition of legally-produced timber will require more than just listing all laws applicable to a country's forest sector.⁶² However, practicality of assessment, its impact on achieving the definition's goals, the consistency between laws, and equity in relation to all forest stakeholders' rights, all need to be taken into consideration. The meaning of legality has been understood in narrow sense, while the sustainability becomes undermined both EU and Indonesia system.⁶³ In explicit way the undermining of sustainability can be seen in the VPA itself, when using merely two times o word 'sustainability', and 95 times word 'legality'. It has rigorously explained on legality procedures but not for term sustainability.⁶⁴

⁵⁷ Tim Bartley, Institutional emergence in An Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, *American Journal of Sociology* 113, (2007) 297-351.

⁵⁸ The SVLK was intended to attract global market, "Pemberlakuan SVLK itu sendiri adalah untuk memberikan kepastian legalitas produk kayu Indonesia pada pasar global. See in formal website "Tentang SVLK", <http://silk.dephut.go.id/index.php/info/vsvlk/1>, accessed on 28 September 2016.

⁵⁹ See Tim Bartley, *Op.cit.*, p. 95.

⁶⁰ Since August 2013 focusing at 183 forestry companies that have attained SVLK certificate in all of Indonesia found that since its inception the SVLK standard was weakened repeatedly. See the report from Anti Forest-Mafia Coalition, "SVLK flawed: An independent evaluation of Indonesia's timber legality certification system". 18 March 2014.

⁶¹ See the report from Anti Forest-Mafia Coalition, *Ibid.*

⁶² See European Commission, FLEGT briefing note 6: "Voluntary Partnership Agreements,"(2007) p.1-3. <http://www.euflegt.efi.int/documents/10180/28299/FLEGT+Briefing+Notes+6+-+Voluntary+Partnership+Agreements/a10165b0-5bef-4e39-8f2a-fda2b1ceb6d5>, accessed on 26 September 2016.

⁶³ See a deep analysis in Laura van Heeswijk and Esther Turnhout, *Op.Cit.*, pp. 6-13.

⁶⁴ See "Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union", 30 Sep-

Each VPA defines 'legal timber', based on the laws and regulations of the partner country. The national legality definition sets out the legal and regulatory requirements that must be met before a FLEGT licence can be issued. The laws cover the economic, environmental and social aspects of forest management and timber processing. The definition also provides criteria and indicators to be used for checking compliance with those laws, i.e. (a) Controlling the timber supply chain from legal sources, from the forest where the timber is harvested, to its transport, storage facilities and processing, through to the point of export; (b) Verifying compliance by choosing a governmental or non-governmental body to verify that timber or timber products are legal.

The credibility of SVLK system is safeguard by performed NGOs and communities in performing their works, independent monitors have the right to full access to location as well as information relevant to their monitoring.⁶⁵ Equally a summary of each audit report is made publicly available; and (c) Mandatory implementation bodies that the independent auditor reports to a Joint Implementation Committee, which is established for each VPA. The Committee is made up of representatives from the partner country and the EU. It facilitates and monitors the implementation of the VPA, resolving any conflicts and disputes. Also there (d) Optional implementation bodies to be used to complement the independent audit, for example by the ministry in charge of forests. Stakeholders may also be involved, which ensures that the civil society and private sector groups which are involved in the VPA negotiation.⁶⁶

The Legality Standards of different forest entitlement divided into five entitlement, i.e. (1) the standard for concessions within production forest zones on state-owned lands: Natural Forests, Plantation Forest, Ecosystem Restoration, Forest Management Right (Hak Pengelolaan); (2) the standard for community plantation forests and community forests within production forest zones on state-owned lands; (3) the standard for privately-owned forests; (4) the standard for timber utilisation rights within non-forest zones or from convertible production forest on state-owned lands; (5) the standard for primary and downstream forest based industries and traders.⁶⁷

Definitions of legally produced timber should therefore incorporate laws that address the three pillars of sustainability, i.e., economic, environmental and social objectives. These are likely to include: granting of and compliance with rights to harvest timber within legally-gazetted boundaries; Compliance with requirements regarding forest management, including compliance with relevant environmental, labour and community welfare legislation; Compliance with requirements concerning taxes, import and export duties, royalties and fees directly related to timber harvesting and timber trade; Respect for tenure or use rights to land and resources that may be affected by timber harvest rights, where such rights exist; Compliance with requirements for trade and export procedures.

Checking compliance with and enforcing a definition of sustainability produced timber requires that the definition is clear, operationally workable and objectively

tember 2013, come into forced 1 May 2014, Official Journal of the European Union, L 150/ 252-335. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0520%2802%29&from=EN>, accessed on 29 September 2016.

⁶⁵ See Agus Justianto, "Opening Remarks on the Readiness of Indonesia's SVLK Certified Timber Products to Becoming the FLEGT-Licensed Timber", Paper materials during Road Show and presentation in the Indonesia's Embassy, London 10 May 2016.

⁶⁶ This has been the case in Ghana, which set up the Timber Validation Council, and in the Republic of the Congo, which has the Multistakeholder Technical Secretariat. EC Regulation No 2173/ 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.

⁶⁷ See Annex II of VPA EU-Indonesia 2013.

verifiable. It must be easily understood by staff of both forest operators and enforcement agencies apply a definition in practice may require significant training of operational and enforcement staff in the forest sector. These efforts have been gaining momentum and have mobilized Indonesian governments to increase efforts with regards to sustainability and good forest governance. 'Legal' timber is defined as timber produced in compliance with the laws of the country where it is harvested. But it would be a concern within the substance of the legality itself.

Despite the complexity of the term 'legality' it was understood that legality system was established for sustainability purposes.⁶⁸ It is a means to reach sustainability, covering participatory process and safeguarding social and environmental issues as a term to describe an ideal situation of forest governance.⁶⁹ So it would be an inter-linked design of legality, sustainably and good forest governance notion.⁷⁰ Legality certification in SVLK should also cover the sustainability certification, that required to accountability of exporters, harvester, government (forest stakeholders) to ensure that sustainability occurred, via collective monitoring.⁷¹

It should be noted that Legality in western legal system can merely lead to formalistic nature in TW states without seriousness understanding of different circumstances and historical background of associated states.⁷² Indonesia as an emerging state based on different indigenous and ethnic group, which has informally tenure on forest area remain unresolved.⁷³ It should be noted that there some inconsistency that strictly restrict forest timber product from developing countries, but allowed their companies involved in the exploitation in mining, oil and gas and palm oil and the likes. Like Bartley held that 'both "sustainable" and "illegal" timber can easily coexist in the same company, supply chain and product'.⁷⁴

B. Indirect Exporting to EU

The VPA only governs timber that is exported from Indonesia to the EU, and is unconcerned with timber that enters the European market from other points of departure. Thus, the EUTR applies where Indonesia exports timber products (which are covered by the Regulation) to a third country, which then re-exports or reprocesses and then re-exports them to the EU. Somewhat mitigating the likelihood that the quantity of indirectly imported Indonesian timber is large is the fact that Indonesia prohibits the export of unprocessed wood.⁷⁵ Consequently, timber products shipped from Indonesia to third countries and then on to Europe are legally limited to semi-processed products that undergo further processing in the third countries, or finished products that are merely transhipped. At the same time, Indonesia exports a great

⁶⁸ See Speechly H., and Setyarso A., *Defining Legal Timber*, December IISD(2006).

⁶⁹ European Commission, FLEGT briefing note 6, Loc.Cit.

⁷⁰ B. Cahsore and M. W. Stone, "Can Legality verification rescue Global Forest Governance?: Analyzing the Potential of public and Private Policy intersection to ameliorate forest challenges in Southeast Asia" *Foreign Policy Economy* 18 (2012)13-22.

⁷¹ Sabel CF, and Zeitlin J, "Learning from Difference: The New Architectures of Experimentalist Governance in the European Union", *European Law Journal* 14, (2008) 271-327.

⁷² See more explanation in Seidman AW, Seidmen RB "lawmaking, development and the rule of Law" in Arnscheidt, J., et al.(eds.)*Law Making for Development :Explorations into the theory and practice of international practice projects*, (Leiden University press 2008) 91-131.

⁷³ See Oey Hong Lee, *Power Struggle in South-East Asia*, (Inter Documentation Company AG, 1976)59; See Alexandrowick, C.H., *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th centuries)*, (Oxford: OUP 1967)1.

⁷⁴ Se Tim Bartley, Loc.Cit., p. 100.

⁷⁵ See Prasetyo, et al., Loc.Cit.

deal of its forestry products to third countries that are important sources of imports to the EU, as 'the Chinese furniture industry has often been charged with driving demand for illegal timber from Indonesia.'⁷⁶

The significant percentage of Indonesia's timber is likely to reach Europe through third countries, especially major markets in the Asia-Pacific region. The VPA does not cover this segment of the market, meaning that the EUTR will still serve to screen out illegal products exported from these countries which originate in Indonesia. Consequently, with respect to these indirect exports, the SVLK downgrades from constituting sure proof of legality to merely being one of a number of factors for EU regulators to consider when determining if operators have satisfied their due diligence obligations.

This exemplifies one weakness in the EU FLEGT- VPA system that it can be omitted by exporting illegally sourced wood firstly to a non-VPA country, and afterwards exporting it legally to the EU as further processed products. However, the EUTR is intended to address this loophole in the regulatory framework. Thus, the decreasing trend in the tropical timber trade can be associated with, on one hand, efforts to raise good forest governance and sustainable management in producing countries, on the other hand however, these tendencies can be a result of unintentional implications generated by these trade related initiatives. These include uncertain consumption patterns combined with an unstable European market weakened by economic downturn, increased risk avertence of European importers, and trade diversion to other markets. Therefore, it not unlikely that trade in tropical hardwoods in the near future will continue to be diverted from Europe to other regions.⁷⁷ Such situation may lead to manipulate legality as well as sustainability.

C Lack of Human Resources

Another concern with the SVLK is that its task is too wide to be carried out effectively. There are too many timber harvesting and processing units to evaluate, and too complex legal framework against which to evaluate them. It is not even clear how many units in there,⁷⁸ as Java approximately 121,438 handicrafts and small furniture businesses that use timber. Thus "ensuring conformity with all national and local laws may be factually impossible".⁷⁹

Such large scale of the task and complexity may face capacity constraints and effectiveness of the auditing process. When the SVLK became mandatory, there are only four evaluators were capable of performing legality verification.⁸⁰ Evaluators are limited because few people in Indonesia are properly trained to carry out SVLK audits.⁸¹

⁷⁶ Peter Dauvergne P, Lister J, Timber, (US:Polity Press 2011)

⁷⁷ Alexandru Giurca, "Marked based and regulatory/ enforcement mechanism-assessment of impacts on timber trade between South-east Asia and Europe", Master Thesis no. 214, (Southern Swedish Forest Research Centre Alnarp 2013).

⁷⁸ See Adams M., & Asycarya D. Timber industry stakeholder's mapping (Report for the European Commission, Jakarta, Indonesia 2012)

⁷⁹ Brown D., et al. Legal timber: Verification and governance in the forest sector (London: Overseas Development Institute 2008)

⁸⁰ Anggi M Lubis, "Timber certification moves on despite EU agreement delay", Jakarta Post 28 Mei 2013, <http://www.thejakartapost.com/news/2013/05/28/timber-certification-moves-despite-eu-agreement-delay.html>, accessed on 29 September 2016.

⁸¹ For example in 2011 there were only 150 auditors. See Cecilia Luttrell et al., Lessons for REDD+ from measures to control illegal logging in Indonesia, Working Paper 74, (Bogor: CIFOR 2011), http://www.cifor.org/publications/working_papers/74

Another flaw is that the SVLK imbues LP&LV with a great deal of responsibility, authorizing them to evaluate timber operations, issue legality certificates, and respond to objections raised concerning their own activities. Such a concentration of responsibility within one institution may expose the system to capture by interest groups.⁸² Moreover, the multiplicity of licensing authorities which the SVLK permits raises more complexity. Although this approach has been justified as necessary due to Indonesia's large size and decentralized government, and although national accreditation should provide a level of consistency among licensors, there remains a fear that the result could be uneven application of the SVLK.⁸³

Essentially, the role that the SVLK authorizes independent monitors to play is fairly circumscribed. Unlike the higher level monitoring mechanisms that the VPA requires, independent monitors are limited to bringing complaints concerning individual assessments of timber operations, meaning that they cannot lodge more general complaints. Although the multi-stakeholder monitoring group which the Ministry of Forestry Director General's decree created is tasked with conducting more systemic monitoring, the results of its monitoring efforts are confined to recommendations, which legally need not be entertained. Independent monitors also have no opportunity to appeal decisions concerning their complaints to the courts, and may not be able to appeal to the accreditation body either, depending on the obscure interpretation of SVLK related laws.

As a practical matter, Indonesian civil society may not have the capacity to carry out effective monitoring.⁸⁴ Despite requirements that information be made public, the head of the Environmental Investigation Agency's Forests Campaign Team has observed that "[t]here is absolutely no system of information for the SVLK implementation that is up and running and accessible".⁸⁵

Beyond any conceptual problems with the SVLK, the experience of the first few years of implementation has revealed certain weaknesses. Reports have surfaced that LP&LV are not fully auditing timber processors that possess timber utilization permits and that claim to source their timber from conversion forests, on the assumption that these permits attest to legal operation. Other reports criticize the mechanism for addressing civil society complaints as weak, with many complaints receiving inadequate responses or being ignored entirely.⁸⁶

Concessions are commonly approved to entities that are short of proper qualifications, and forest clearing is commonly done using fire, which is particularly prohibited when done in deep peat soil.⁸⁷ Processed wood coming out of a number of large plywood mills may be illegal since mill owners ignored a Ministry of Forestry order that they cease operations due to indebtedness. Passionate regulators and operators might view such violations as a basis for severely curtailing trade in Indonesian timber. Indonesia's timber sector may be too complex to permit effective legality verification of all harvesters and processors, and even if it were not, there is a shortage of qualified, impartial experts to serve as auditors.⁸⁸

cifor.org/publications/pdf_files/WPapers/WP74Obidzinski.pdf, accessed on 26 September 2016.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Environmental Investigation Agency (EIA 2013) "Road to reform & Indonesian legality assurance system", <https://eia-international.org/the-road-to-reform-the-indonesian-legality-assurance-system>, accessed on 26 September 2016.

⁸⁶ Ibid.

⁸⁷ Prasetyo A., et al. Loc.Cit.

⁸⁸ Ibid.

The Trade Ministry's decision to deregulate sustainability certification for exports of wooden furniture's policy has raised concerns not only among NGOs working to prevent deforestation, but also in the furniture industry, that the government needs to help. It is a time for government to reflect its policy to prevent wider deforestation.⁸⁹ Equally progress in tackling illegal logging is loaded by persistent corruption, insufficient transparency of information and a poorly functioning decentralized governance system.⁹⁰

D. Decentralisation and Re-centralisation

The power of administration in decentralisation era post Suharto regime under Reformation Order constitutes as 'recentralisation' of central government over provincial and district power. So the SVLK and legal wood faces decentralisation boundaries, without clearly define the game instruction between players in the ground.⁹¹ In article 14 of the Law 23/2014 on Regional Government states that 'the central and regional governments will share power over implementing government affairs regarding forestry, marine environments, as well as energy and mineral resources'. This article was understood that the power remains in central government, but the emerging decentralisation has opposed this idea in which tension may occur. SVLK was design under VPA system where central government has a full power to issue the FLEGT licences. This may collided with the existing decentralisation and special autonomy in some regions, (e.g. Aceh and Papua province). Hence the power of SVLK administration constitutes as 'recentralisation' of Jakarta over provincial and district power.⁹²

Further, it may be inconsistencies between laws, particularly where legislation is enacted at both national and regional level. For example, a review of Indonesian forest governance found inconsistencies and contradictions between laws and government department decrees.⁹³ This can make it impossible to be fully compliant with all laws and, it is necessary to establish which law takes precedence at least on an interim basis until such contradictions are resolved.

E. The Uncertainty of Indigenous People (MHA)'s Forest

The application of SVLK has strongly related to challenge the indigenous people's forest. The judicial review of Forestry Law number 41/1999 has been questioned in terms of the status of indigenous people (MHA) and its entitlement over its forest under the general term of state's forest. Article 1(6) stated that 'Adat forest is state forest within MHA's area'. This expressed the power of state to claim indigenous forest to be under control of government to issue a licence to investors. Similarly in article 4(3) stated that the government will respect the right of MHA subject to qualification of Constitution, i.e. as long as existed, recognition by government, and inconformity with the national interest.⁹⁴ It would be difficult to meet such requirements as to the

⁸⁹ Smita Notosusanto, "Timber trade deregulation: Barking up the wrong tree", The Jakarta Post Friday, October 30, 2015, <http://www.thejakartapost.com/news/2015/10/30/timber-trade-deregulation-barking-wrong-tree.html>, accessed on 26 September 2016.

⁹⁰ Jade Saunders, "Trade in Illegal Timber The Response in Vietnam", A Chatham House Assessment, Energy, Environment and Resources (London: December 2014) pp.1-25.

⁹¹ See MAK Sahide et al., "Decentralisation Policy as Recentralisation Strategy: forest management units and community forestry in Indonesia", International Forestry Review 18(1) (2016), pp.78-95.

⁹² Ibid.

⁹³ Nana Suparna, "Forest Governance and Forest Law Enforcement in Indonesia" Paper for Forest Law Enforcement and Governance, (East Asia Ministerial Conference, September 2001).

⁹⁴ See the article 18B (2) of Indonesian 1945 Constitution.

full control of government remain prevalent.

In the first ruling in 2011 MK argues with the conditionality unconstitutional over the claim.⁹⁵ However in 2012 in the second review MK has amended the law, as it considered against the Constitution.⁹⁶ The essential objective of this law is stated under article 3 that “forestry resources are intended to maximum benefit of people on the basis of justice and sustainable”. However in reality this law has taken over the right of MHA in forestry area under the term state’s forest, by which the government issued a licence to investor to exploit resources therein without consent of MHA, as the conflict between MHA and investor continued without clear settlement.⁹⁷

Finally the MK ruled that the term “state” under article 1(6) Law number 41/1999 is against the Constitution,⁹⁸ and replaced to be “adat forest is a forest within the area of MHA”.⁹⁹ The Decision has specifically recognized indigenous people forest apart from State-owned forest.¹⁰⁰ This recognition is being part of confirmation of states over the existence of indigenous people and its entitlement to the right of land in forestry area.¹⁰¹ However in the ground there is no clear identification of MHA’s forest, in which allowed stated forest to be demonstrated.¹⁰²

Moreover, following the MK decision there is no clear role to implement this, as the Ministry of forestry stated that they are waiting for the Provincial Regulation as refer to article 67 of the law on forestry to issue a technical guidance to implement this ruling.¹⁰³ Adversely various local authorities has been waiting for the Ministerial Regulation to clarify the MK decisions.¹⁰⁴ Thus the application of this ruling is remain uncertain.

Equally there has been overlapped authority, and jurisdiction of community forest, such as community forest (Hutan Kemasyarakatan) under MoFoR Regulation 37/2007, Village Forest (Hutan Desa) under MoFor Regulation 49/2008, People Forest Plantation (HutanTanaman Rakyat) under MOEF Regulation 23/2007 and Indigenous Forest (Hutan Adat) under Constitutional Court Decision 35/2012 and MOFE Regulation 32/2015.¹⁰⁵

Thus in practice the formal legalisation of SVLK tend to undermine the informal or traditional tenure system delegitimizes socials system and replaces them with formalistic bureaucratic approaches led by powerful and non local commercial interest on the ground.¹⁰⁶ Additionally it has contributed to increasing forest lost as the impact of this SVLK application that lead to deforestation and adversely impacted to climate change and natural disasters. So the issue of sustainability has to cover prevention and recovering of forest lost as it remain absent in explicit articulation in

⁹⁵ See the MK decision number 34/ PUU-IX/ 2011.

⁹⁶ See MK Decision number 35/ PUU-X/ 2012, pp.4-5.

⁹⁷ Ibid.

⁹⁸ See point 1.1. of MK decision, Ibid.

⁹⁹ See point 1.2. of MK decision, Ibid.

¹⁰⁰ See consideration point 30 of the MK Decision Number 85/ PUU-XI/ 2013.

¹⁰¹ Hukum Online, “membaca tiga reguansi pasca pembubaran BPMigas” <<http://hukumonline.com>>, accessed on 5 January 2015.

¹⁰² It stated that ‘Adat forest is not part of state’s forest’. See MK decision No 35/ PUU-X/ 2012, 179.

¹⁰³ This proposition can be seen from the Ministry Forestry circulation No.1/ Menhut II/ 2013.

¹⁰⁴ See a complete analysis in Yance Arizona, “the Application of MK decision No 35/ PUU-X/ 2012 in the regional legal reform”. Article was delivered in the workshop strengthening the management of Adat forest and conservation area of Masyarakat Adat , Working Group ICCAs Indonesia (WGII) and FoMMA, Malinau, 24-26 September 2013.

¹⁰⁵ See more explanation in MAK Sahide at al., Loc.Cit, p. 80.

¹⁰⁶ Feja Lesniewska et al., “FLEGT VPAs: Laying a pathway to sustainability via legality lessons from Ghana and Indonesia”, *Forest Policy and Economics* 48 (2014) 16-23, 17.

the EU –FLEGT and its application in SVLK.¹⁰⁷ Lesniewsk et al. has confirmed that ‘this overemphasis on timber licensing fails to address the leading role of the agricultural sector in driving forest loss, constrains civil society participation and creates disproportionate market barriers for local producers.’¹⁰⁸

E. Incompatibility with the Reducing Emission from Deforestation and Forest Degradation (REDD) Program

Forest lost has contributed significantly to 12-17 % of annual global carbon dioxide emissions which led to the initiative on REDD.¹⁰⁹ This program intended to reward the forest stakeholders when they keep their forest. Hence the emergence of SVLK may potentially collided with the application of the REDD program which existed in Indonesia. The former attracted to have legal formalities of logging, while the later encourage community to reserve the forest for environmental purposed, in particular when a certified legal logging occurred in REDD area.¹¹⁰ So it can attract illegal logging become legal wood formalities to meet SVLK standard. So FLEGT should be restricted in the REDD covered area in theory, but in practice it would be hardly to identify between two conflicted territories.¹¹¹ So this situation may open a space to deforestation under legal wood banner.¹¹²

IV. CONCLUSION

It has been a common goal of international law and community to zeroing deforestation for sustainable development, responding climate changes issue, preserving biodiversity and other environmental concerns. It is the underlying issues of the emergence of the EU-FLEGT initiation and its manifestation within SVLK in Indonesia. It implicitly means that Indonesian law enforcement was deemed as insufficient to stop the massive logging of the forests, especially in decentralized territories where the management of natural resources falls in the hands of many local governments. The SVLK therefore complements of law enforcement measures by utilizing market forces and providing incentives to timber-based industry players to trade their products.

Indonesia has made significant steps in improving the SVLK standards adhere to the FLEGT- VPA and being the first country to receive the FLEGT license by 15 November 2016, confirming timber products from Indonesia will have full access to the European market. However, in practice SVLK has tended to narrowly understood in timber product legislation and certification for trade process, while community development and economic justice distribution becomes overridden.

Therefore this paper highlighted the Indonesia’s predominance of legality ambition to meet external EU market, overriding internal domestic market which becomes inconsistent to achieve the set out goal of sustainability. While advancing

¹⁰⁷ ‘it is critical to consider if VPAs might actually drive forest conversion’. See Feja Lesniewska et al., *Ibid.*, p. 18.

¹⁰⁸ See Feja Lesniewska et al., *Ibid.*, pp. 16-23.

¹⁰⁹ See G R Van der Werf et al., “CO2 Emissions from Forest Loss”, 2 *Nature Geosciences* (2009) p. 737.

¹¹⁰ Kate Dooley and Saskia Ozinga, “Building on Forest Governance Reforms through FLEGT: The Best Way of Controlling Forests’ Contribution to Climate Change?”, *Review of European Community & International Environmental Law* 20 (2) (2011) pp. 163-170.

¹¹¹ See M H Kallio et al., “Information Exchange in Swidden Communities of West Kalimantan: Lessons for Designing REDD+”, *International Forestry Review*, 18 (2) (2016) p. 204.

¹¹² See M H Kallio et al., *Ibid.*, p. 203-217.

sustainability may face several challenges, including lack of definition of sustainability in FLEGT-VPA and SVLK, the potential of indirect export to EU, decentralisation and re-centralisation, lack of human resources, inconsistency with the REDD initiatives, and the obscure of MHA's forestry entitlement. However, minding to current shortcomings, the improving of sustainability content of SVLK system and its applicability to domestic market will gradually increase the expectation to meet the long goal, and automatically rebranding sustainability under Indonesia's forestry government in global arena.

BIBLIOGRAPHY

Legal Documents

- Government Regulation (PP) number 6/2007 on Forest Governance and establishment of Plan to manage forest.
- Indonesia. Law number 18/2013 on prevention and eradication of deforestation,
- Indonesia. Article 18B (2) of Indonesian 1945 Constitution.
- Indonesia. Law number 41/1999 on Forestry and its amendment law number 19/2004.
- Indonesia. MK decision number 34/PUU-IX/2011.
- Indonesia. MK Decision number 35/PUU-X/2012.
- Indonesia. MK Decision Number 85/PUU-XI/2013.
- Ministry Regulation, MOEF number P.30/Menlhk/Setjen/PHPL.3/3/2016 on evaluation of kinerja pengelolaan Hutan Lestari and Verification of timber legality for the right holder and forest right.
- Ministry Regulation. Ministry Forestry circulation No.1/Menhut II/2013.
- Ministry Regulation. Minister of Forestry Regulation of the Republic of Indonesia No. P.45/Menhut-II/2012 Amending for a Second Time Minister of Forestry Regulation P.38/Menhut-II/2009 Concerning Standards and Guidelines for Performance Assessment of Sustainable Production Forest Management and Timber Legality Verification of Permit Holders or Private Forest Owners.
- Ministry Regulation. Regulation of Dirjen Pengelolan Hutan Produksi Lestari Number P.15/PHPL/PPHH/HPL-3/8/2016, annex 4 of this MOEF Regulation on framework for independent monitoring of SVLK.
- Ministry Regulation. Regulation of the Ministry of Trade of the Republic of Indonesia No. 20/M-DAG/PER/5/2008 Concerning Export Products of the Forestry Industry.
- Ministry Trade Regulation number 89/M-DAG/PER/10/2015 on the provision of product export in forestry industry.

Books

- Alexandrowick, C.H., *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th centuries)*, (Oxford: OUP 1967)1.
- Benton L., *Law and Colonial Cultures: Legal Regime in World History* (Cambridge: Cambridge University Press, 2001) 1400-1900.
- Brown D., et al. *Legal timber: Verification and governance in the forest sector* (London: Overseas Development Institute 2008)
- Buckrell J., and Hoare, A., *Controlling Illegal Logging: Implementation of the EU Timber Regulation* (London: Chatham House, 2011).
- Dauvergne P, Lister J, *Timber*, (US: Polity Press 2011).
- Humphreys, D., *Logjam: Deforestation and the Crisis of Global Governance*, (London: Earthscan, Sterling VA 2006).
- Lee, O. H., *Power Struggle in South-East Asia*, (Inter Documentation Company AG, 1976)59.
- Seidman AW, Seidmen RB "lawmaking, development and the rule of Law" in Arnscheidt, J., et al. (eds.) *Law Making for Development: Explorations into the theory and practice of international practice projects*, (Leiden University press 2008) 91-131.
- Speechly H., and Setyarso A., *Defining Legal Timber*, December IISD(2006).

Tacconi (ed) *Illegal Logging: Law Enforcement , Livelihoods and the Timber Trade* (Earthscan, London, 2007).

Articles

- Adams M., & Asycarya D. *Timber industry stakeholder's mapping* (Report for the European Commission, Jakarta, Indonesia 2012).
- Agrawal et al., "Changing governance of the world's forests", *Science* 320, (2008) 1460
- Agung Prasetyo, James Hewitt and Chen Hin Keong, *Indonesia: Scoping baseline information for Forest Law Enforcement, Governance and Trade*, (EU FLEGT Facility Kuala Lumpur January 2012), <http://www.euflegt.efi.int/documents/10180/23308/Baseline+Study+7,%20Indonesia+-+Overview+of+Forest+Law+Enforcement,%20Governance+and+Trade/fbbe7de-ead6-4238-b28b-7a3c57fb7979>, accessed on 26 September 2016.
- Arizona, Y., "the Application of MK decision No 35/PUU-X/2012 in the regional legal reform". Article was delivered in the workshop strengthening the management of Adat forest and conservation area of Masyarakat Adat, Working Group ICCAs Indonesia (WGII) and FoMMA, Malinau, 24-26 September 2013.
- Arts B and Buizer, M., "Forest Discourse, Institutions, a discursive-institutional analysis of global forest governance", *Forest Policy and Economics* 11, (2009) p. 340-349.
- Bartley, T., "Transnational Governance and the Re-centered state: Sustainability or Legality?", *Regulation and Governance* 8 (2014), p. 93. Doi:10.1111/rego.12051.
- Bartley, T., Institutional emergence in An Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, *American Journal of Sociology* 113, (2007) 297-351.
- Bollen, A., Ozinga, S., "Improving Forest Governance: A Comparison of FLEGT VPAs and their Impact", FERN, 10. <http://www.fern.org/>.
- Brack, D., 'Controlling illegal logging and the trade in illegally harvested timber: the EU's Forest Law Enforcement, Governance and Trade initiative', *RECIEL*, 14 (2005), 28, at 32-37.
- Cahsore, B., and M. W. Stone, "Can Legality verification rescue Global Forest Governance?: Analyzing the Potential of public and Private Policy intersection to ameliorate forest challenges in Southeast Asia" *Foreign Policy Economy* 18 (2012)13-22.
- Cashore B and Stone M, "Does California Need Delaware? Explaining Indonesian, Chinese, and United States Support for Legality Compliance of Internationally Traded Products", *Regulation & Governance* 8, (2014) 49-73, p. 66.
- Constance Mcdermott, L. , "REDDuced:From Sustainability to legality to units of carbon-The search for common interests in international forest governance", *Environmental Science Policy* 21 (2012) pp.1-8.
- Dooley, K. and Saskia Ozinga, "Building on Forest Governance Reforms through FLEGT: The Best Way of Controlling Forests' Contribution to Climate Change?", *Review of European Community & International Environmental Law* 20 (2) (2011) pp. 163-170.
- Environmental Investigation Agency (EIA 2013) "Road to reform & Indonesian legality assurance system", <https://eia-international.org/the-road-to-reform-the-indonesian-legality-assurance-system>, accessed on 26 September 2016.
- European Commission Regulation No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.
- European Commission, "Forest Law Enforcement, Governance, and Trade

- (FLEGT) Action Plan”, (May 21 2003) p. 12. <http://www.euflegt.efi.int/files/attachments/euflegt/01flegtactionplanenfinalen.pdf>, accessed on 24 September 2015. (FLEGT Action PLAN).
- European Commission, FLEGT briefing note 6: “Voluntary Partnership Agreements,”(2007)p.1-3. <http://www.euflegt.efi.int/documents/10180/28299/FLEGT+Briefing+Notes+6+-+Voluntary+Partnership+Agreements/a10165b0-5bef-4e39-8f2a-fda2b1ceb6d5>, accessed on 26 September 2016.
- Indarto, J. et al, “Do Forest Permits Cause Deforestation in Indonesia?”, *International Forestry Review* 17 (2) 165-181, 175.
- Kallio, MH., et al., “Information Exchange in Swidden Communities of West Kalimantan: Lessons for Designing REDD+”, *International Forestry Review*, 18 (2) (2016)p. 204.
- Laura van Heeswijk and Esther Turnhout, “The Discursive Structure of FLEGT(Forest Law Enforcement, Governance and Trade): The Negotiation and Interpretation of Legality in the EU and Indonesia”, *Forest Policy and Economics*, 32(2013) 6-13.
- Lesniewska, F., et al., “FLEGT VPAs: Laying a pathway to sustainability via legality lessons from Ghana and Indonesia”, *Forest Policy and Economics* 48 (2014) 16-23, 17.
- Mark, A. “Forest Certification as a global environmental governance tool: What is the macro-effectiveness of the Forest Stewardship Council”, *Regulation & Governance* (2010) 4, 408-434. Doi:10.1111/j.1748-5991.2010.01088.x
- Mayer A.L. et al., “Ecology. Importing timber, exporting ecological impact”, *Science*, 359 (2005) 15 April.
- Rayner, J., Buck, A. and Katila, P., (Eds.) *Embracing Complexity: Meeting the Challenges of International Forest Governance*, A Global Assessment Report. Prepared by the Global Forest Expert Panel on the International Forest Regime (Vienna: IUFRO, 2010),p. 75-92.
- Rudel, T.K. et al., “Changing drivers of deforestation and new opportunities for conservation”, *Conservation Biology* 23 (2009) 1396-1405. DOI: 10.1111/j.1523-1739.2009.01332.x.
- Sabel CF, and Zeitlin J, “Learning from Difference: The New Architectures of Experimentalist Governance in the European Union” , *European Law Journal* 14, (2008) 271-327.
- Sahide MAK., at al., “Decentralisation Policy as Recentralisation Strategy: forest management units and community forestry in Indonesia”, *International Forestry Review* 18(1) (2016), pp.78-95.
- Saunders , J. “Trade in Illegal Timber The Response in Vietnam”, A Chatham House Assessment, Energy, Environment and Resources (London: December 2014) pp.1-25.
- Suparna, N., “Forest Governance and Forest Law Enforcement in Indonesia” Paper for Forest Law Enforcement and Governance, (East Asia Ministerial Conference, September 2001).
- Timber Trade federation, “Indonesia to Start FLEGT Licensing on 15 November 2016”, <http://www.ttf.co.uk/article/indonesia-to-start-flegt-licensing-on-15-november-2016-408.aspx>, accessed on 26 September 2016.
- Van der Werf, G.R. et al., “CO2 Emissions from Forest Loss”, *2 Nature Geosciences* (2009) p. 737.

Others

- 'VPA Countries', at <http://www.euflegt.efi.int/vpa-countries>, accessed 17 May 2016.
- "Daftar Pemegang Sertifikat LK", <http://silk.dephut.go.id/index.php/info/iuiphhk>, accessed on 28 October 2016.
- "Daftar Penerbit V-Legal" at <http://silk.dephut.go.id/index.php/info/vlegal>, and "Daftar LVLK" at <http://silk.dephut.go.id/index.php/info/lvlgk>, accessed on 28 September 2016.
- "Daftar Peraturan" , in http://silk.dephut.go.id/index.php/download/regulation_lain, accessed on 28 September 2016.
- "EU-Indonesia FLEGT VPA", <http://silk.dephut.go.id/index.php/svlg/files/1/information-data>, accessed on 26 September 2016. (EU-Indonesia FLEGT VPA).
- "Tentang SVLK , <http://silk.dephut.go.id/index.php/info/vsvlg/1>, accessed on 28 September 2016.
- "Timber Legality Information System (TLIS)", <http://silk.dephut.go.id/index.php/article/vnews/152> accessed on 26 September 2016.
- "Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union", 30 September 2013, come into force 1 May 2014, *Official Journal of the European Union*, L 150/252-335. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0520%2802%29&from=EN>, accessed on 29 September 2016.
- FAO , "FAO Forestry Sustainable Forest Management" , (FAO, Rome 2008) <<http://www.fao.org/forestry/sfm/en/>>, accessed on 12 May 2014.
- FAO, "Global Forest Resources Assessment 2015, How are the World's Forests Changing?" (Rome: FAO 2016).
- FLEGT Briefing Note 3, "Forest Law Enforcement, Governance and Trade, A Timber Legality Assurance System" (March 2007), p. 2. <http://www.euflegt.efi.int/documents/10180/28299/FLEGT+Briefing+Notes+3+-+A+timber+legality+assurance+system/e9ce3bcd-6243-4bb6-b702-d48e8843079c>, accessed on 26 September 2016.
- FLEGT-VPA of Indonesia in <http://www.euflegt.efi.int/publications/indonesia-eu-voluntary-partnership-agreement#art2>, accessed on 29 October 2016.
- Giurca, A., "Marked based and regulatory/enforcement mechanism-assessment of impacts on timber trade between South-east Asia and Europe", Master Thesis no. 214, (Southern Swedish Forest Research Centre Alnarp 2013).
- Gulbrandsen, L.H., and D. Humphreys, "International Initiatives to address tropical timber logging and trade", Report for the Norwegian Ministry of the Environment (2006),
- Hukum Online, "membaca tiga regulasi pasca pembubaran BPMigas" <<http://hukumonline.com>>, accessed on 5 January 2015.
- Justianto, A., "Opening Remarks on the Readiness of Indonesia's SVLK Certified Timber Products to Becoming the FLEGT-Licensed Timber", Paper materials during Road Show and presentation in the Indonesia's Embassy, London 10 May 2016.
- Lubis, A. M., "Timber certification moves on despite EU agreement delay", Jakarta Post 28 Mei 2013, <http://www.thejakartapost.com/news/2013/05/28/timber-certification-moves-despite-eu-agreement-delay.html>, accessed on 29 September 2016.
- Notosusanto, S., "Timber trade deregulation: Barking up the wrong tree", The

- Jakarta Post Friday, October 30, 2015, <http://www.thejakartapost.com/news/2015/10/30/timber-trade-deregulation-barking-wrong-tree.html>, accessed on 26 September 2016.
- Cecilia Luttrell et al., Lessons for REDD+ from measures to control illegal logging in Indonesia, Working Paper 74, (Bogor: CIFOR 2011), http://www.cifor.org/publications/pdf_files/WPapers/WP74Obidzinski.pdf, accessed on 26 September 2016.
- Daftar Eksportir, <http://silk.dephut.go.id/index.php/info/exporters>, accessed on 28 October 2016.
- Anti Forest-Mafia Coalition, "SVLK flawed: An independent evaluation of Indonesia's timber legality certification system". 18 March 2014.
- "Annual Report-Progress update- April 2015 to May 2016, Implementing the Indonesia -EU FLEGT Voluntary Partnership Agreement", <http://silk.dephut.go.id/app/Upload/informasisvlk/20160825/de1796e789fd7a7a08784c4b2745560e.pdf>.
- "EU-Indonesia FLEGT VPA", <http://silk.dephut.go.id/index.php/svlk/files/1/information-data>, accessed on 26 September 2016.