

CHAPTER 4

Legal Frameworks at the Interface between Industrial Agriculture and Ape Conservation

Introduction

This chapter discusses the legal frameworks relating to the interface between agribusiness investment and ape conservation. It assesses how applicable rules, and the institutions that implement them, address this interface in a range of countries that host important ape populations.

If policy is often the primary driver of change, laws constitute the framework via which government policies are implemented and relevant stakeholders can lawfully operate. Analyzing such legal frameworks can provide a useful understanding of formal policy goals, as well as of existing pressure points and leveraging tools that can help to drive change from within the system. It also serves to identify both inconsistencies and

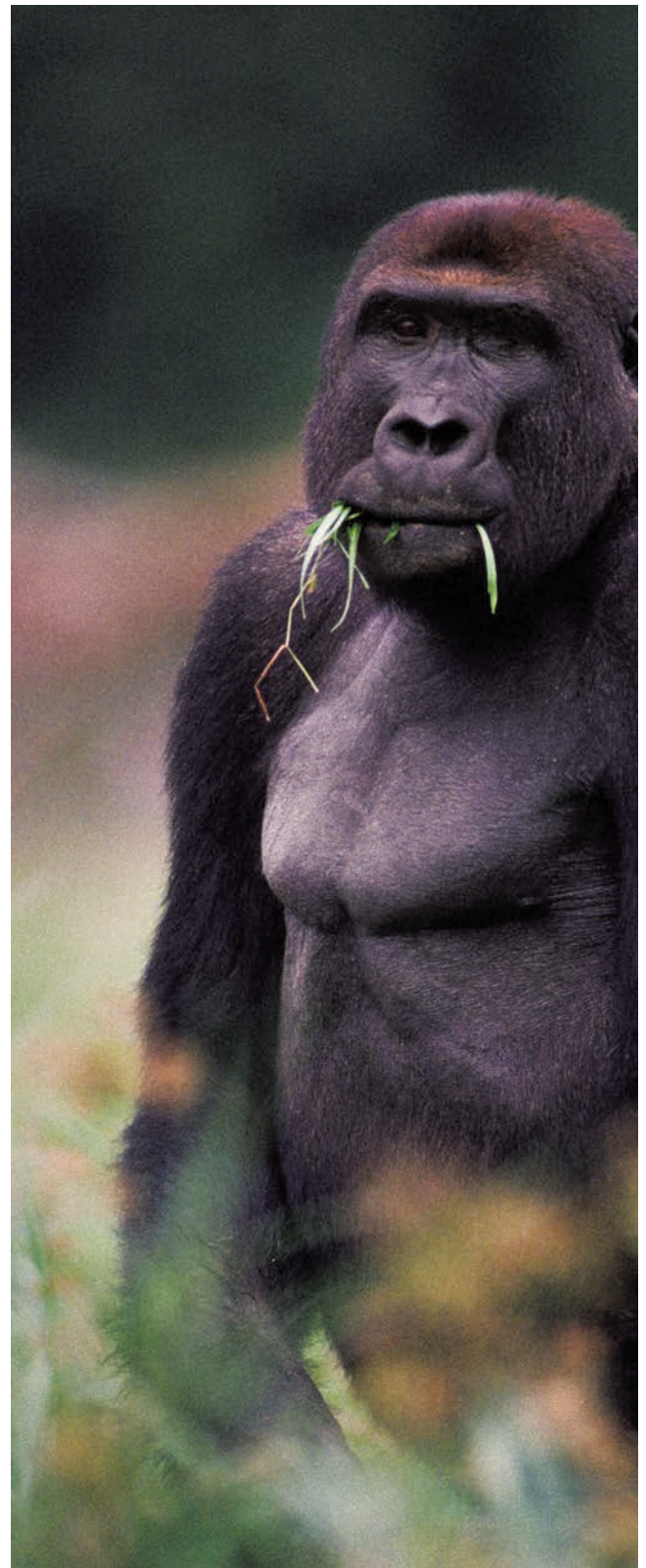
Photo: The conservation of apes and their habitats—a matter of global concern—is largely dependent on national measures.
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bottlenecks in a country's laws, affording an opportunity for reform. Yet since laws and regulations are only one aspect of policy frameworks, it is also crucial to develop an overall view of existing policies to thoroughly understand a specific context.

The interface between agribusiness investment and ape conservation has become the object of animated policy debates. These debates raise issues relating to options for reconciling the objectives of conservation and economic development, the rights and role of local communities in habitat conservation and productive activities, the most appropriate levels of decision-making authority, and the different models of land tenure and conservation schemes.

In a sense, law is crystalized policy, and many of the issues discussed in policy debates are regulated, in one way or another, in legislation that frames property rights, decision-making, environmental safeguards and compliance procedures, among other mechanisms. At the same time, a legal analysis is inevitably a snapshot of the normative arrangements adopted by a given society at a given point in time. It takes prevailing policy choices largely as a given and does not preclude the possibility of change in future policy preferences. In fact, some of the countries reviewed in this chapter are currently considering legislative reforms in relevant policy areas.¹

Similarly, while a discussion of legal trends reveals much about the formal policy goals that a society has set for itself, it says little about the extent to which legal arrangements are actually implemented on the ground, how compliance is monitored and how the failure to comply is sanctioned. While the gap between the statute books and the realities on the ground represents a notorious challenge, a discussion of legal frameworks can be pivotal to addressing critical shortcomings. As this chapter demonstrates, the individual features of





legal frameworks can fundamentally shape interactions between industrial agriculture and ape conservation.

Recent developments in international environmental law have strengthened conservation efforts significantly and enhanced their coordination across borders. Indeed, several multilateral treaties set out obligations that are directly relevant to ape conservation, at both the global and the regional level (see Table 4.1). Yet, none of these international measures will be effective unless individual states ratify them and establish the institutional systems required for their implementation.

The conservation of apes and their habitats—a matter of global concern—is thus largely dependent on national measures and their governing legal frameworks. Consequently, it is important to assess the preparedness of national legal systems and institutions to assist in mitigating the pressures that agribusiness investments place on apes and ape habitats. In that vein, this chapter explores national laws that establish and govern environmental protection measures. It identifies important gaps between national law and practice, as well as factors that lead states to allow the conversion of ape habitats into industrial plantations. To explore these issues, the chapter presents a trend analysis and a case study.

The trend analysis focuses on legislative frameworks in eight key ape range states: four in Southeast Asia—Cambodia, Indonesia, Malaysia and Myanmar—and four in West and Central Africa—Cameroon, the Democratic Republic of Congo (DRC), Gabon and Liberia. These countries were selected due to the density of their ape populations and the presence of significant agribusiness developments. For each of the countries under review, the section presents findings from the authors' systematic review of national legislation on the management of land, forests and other natural resources, investment

TABLE 4.1

State Ratification of Multilateral Treaties Relevant to Ape Conservation, as of May 2015*

Instrument	Area of cooperation	No. of parties	Cambodia	Cameroon	DRC	Gabon	Indonesia	Liberia	Malaysia	Myanmar
Global										
Convention on Biological Diversity (UN, 1992)	Establishment of general principles of conservation at the global level	195	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973)	Regulation of the import and export of endangered species	180	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Convention on Conservation of Migratory Species of Wild Animals (CMS, 1979)	Establishment of standards of conservation with a focus on individual species	120	No	Yes	Yes	Yes	No	Yes	No	No
International Tropical Timber Agreement (UN, 2006)	Promotion of international trade of timber and sustainable management of timber-producing forests	69	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Regional										
African Convention on the Conservation of Nature and Natural Resources (African Union, 2003)	Coordination of conservation measures and establishment of types of protected areas	59	n/a	Yes	Yes	Yes	n/a	Yes	n/a	n/a
Treaty on the Conservation and Sustainable Management of Forest Ecosystems in Central Africa and to Establish the Central African Forest Commission (COMIFAC, 2005)	Harmonizing national sustainable forestry policies, instruments and certification systems	10	n/a	Yes	Yes	Yes	n/a	n/a	n/a	n/a
Agreement on the Conservation of Nature and Natural Resources (ASEAN, 1985)	Coordination of development planning and conservation of species and ecosystems	6	Yes	n/a	n/a	n/a	Yes	n/a	No	Yes

Notes: * Yes = the state has signed and ratified the convention; No = the state is not party to the convention; n/a = the regional convention is not applicable to the state.

governance, environmental protection and redress mechanisms. The analysis relies on a review of primary legal documents and available secondary literature, including gray literature, both for commentary on features of national legal frameworks and for insights into the relationship between law and practice.

The case study considers how the multiple elements of legislation studied in the trend analysis interact in practice. In particular, it examines the experience of instigating judicial proceedings against agribusiness companies in Aceh province, Indonesia. The case study offers guidance on how best to bridge the gap between law and practice and suggests ways in which conservation groups can use legal arrangements to protect apes and ape habitats.

The conclusion of the chapter distils key insight from the analysis and develops recommendations for moving forward.

Findings from the Trend Analysis

Land and Resource Tenure and the Agribusiness–Conservation Interface

Forests—the primary ape habitats—are the resources that are most directly at stake in transactions promoting industrial agriculture. To operate lawfully, a company that establishes an agro-industrial plantation typically needs legal authorizations to use the land and clear the forest.

The legal frameworks governing tenure of land and forests determine who owns or controls these resources, who has the legal authority to allocate resources to agribusiness investments, and how. Tenure regimes also govern the nature and extent of the rights of individuals and groups that use

land and natural resources, such as small-scale farmers and forest communities. While national legal frameworks vary considerably across countries, the trend analysis shows that three specific factors—widespread ownership or control by central government agencies, weak local rights, and inadequate mechanisms for transparency and accountability—facilitate large-scale land acquisitions for industrial agriculture and enable deals that flout social and environmental concerns, thereby potentially threatening apes and ape habitats.

In most of the countries under review, a constitutional provision sets key principles concerning the status of land and natural resources (see Table 4.2). The core principle in a majority of the constitutions examined is that the state owns or otherwise controls these resources, while public institutions are tasked with enacting implementation laws.² Some of the newer constitutions go further and explicitly affirm the right of government authorities to allocate land and resources through concessions, in particular in order to ensure the productive use of these resources.³ Comparable regimes of centralized state ownership and control are also present in countries whose constitutions are silent on the matter of allocating concessions.⁴ Relevant laws on land and forestry tend to echo this principle and set the framework for more detailed provisions on implementation.

This is not to say that private land ownership is prohibited. On the contrary, with very few exceptions,⁵ most of the laws reviewed enable private property ownership as well as the conversion of permanent use of land into officially recognized title, as a way of establishing private ownership rights⁶ (see Table 4.2). However, the registration procedures required for this conversion are often costly and cumbersome, or otherwise inadequately adjusted to rural contexts. As a result, only relatively small shares of the

Photo: Many communities are only able to secure land tenure in the face of industrial agriculture if they can show they are engaged in the productive use of the land themselves.

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national territory are privately owned in most of the countries reviewed, and the state ends up controlling most of the land, even if the statute books allow private land ownership (Rights and Resources Initiative, 2014).

In most ape range states under review, communities hold rights to the land owned by the state. In fact, the majority of them have legal arrangements that allow for the recognition of traditional communal rights—which could potentially play a positive role in the conservation process (Stevens *et al.*, 2014)—and that limit the allocation of land to industrial agriculture. However, the extent of this legal recognition varies significantly from country to country, as does the effectiveness of the associated legal protection. In most cases, the legal recognition of community land rights does not provide strong safeguards against government decisions to allocate lands to agribusiness investments (see Table 4.2).

A brief discussion of a few specific issues illustrates these limitations. First, legal protection may be subject to formalization requirements, although these vary across countries. In some states, such as Cameroon and the DRC,⁷ customary occupancy is protected and no collective action is required for a community to enjoy formal protection. However, such recognition does not typically entail a high level of protection of community rights (van Kempen and Mayifuila, 2013). Moreover, most countries provide for higher formalization requirements, including registration-type procedures that create communal title to land.⁸ Some observers find that these solutions provide greater land tenure security for the community, but that they also create significant procedural hurdles, many of which are too difficult for rural residents to overcome. Multiple approaches may coexist in the same jurisdiction; for example, mere occupancy may be nominally protected while registration procedures are available





to convert customary rights into full-fledged land ownership.⁹

Second, in most countries under review, communities are able to secure their land tenure in the face of industrial agriculture only if they can show they are engaged in the productive use of the land themselves (see Table 4.2).¹⁰ In Cameroon, for example, land legislation explicitly conditions legal protection to proof of evident productive use. Land that is claimed by local communities that use it for grazing, hunting and gathering, or hosting sacred sites can potentially be allocated to agribusiness operators, as can land that has been set aside for future generations. While it is difficult to come by reliable estimates, areas that are used by communities for non-productive purposes are thought to account for a substantial share of communal lands. As the protection of local land rights is often tied to productive use requirements, ape habitats—which are typically among the least cultivated areas—are particularly at risk of being allocated to agribusiness investments. Such requirements might also create perverse incentives for communities to clear land, although there is as yet little empirical evidence of the extent to which these incentives are affecting ape conservation in practice.

Furthermore, most of the countries reviewed have enacted far-reaching laws on expropriation, which often date back to the early post-colonial era. Such laws allow governments to acquire land on the basis of vague concepts—such as “public purpose” in Gabon or “national interest” in Indonesia—which tend to receive the widest interpretation from implementing administrations (Alden Wily, 2012).¹¹ As a result, public authorities can—and often do—compulsorily invalidate local tenure rights to pave the way for agribusiness investments.

Another important variable in the tenure structure relates to the types of rights

over land and resources that agribusiness operators themselves can acquire, and to the mechanisms established to enable businesses to access those rights. Virtually all countries under review have taken steps to facilitate access to land for agribusiness operators, often through long-term land

leases or concessions and joint venture agreements on state-owned land. However, important differences in relevant regulatory frameworks exist, particularly between the countries that are old hands at hosting agribusiness estates, such as “traditional” palm oil or rubber exporters, and the newcomers,

TABLE 4.2**Land and Resource Tenure**

Instrument	Cambodia	Cameroon	DRC	Gabon	Indonesia	Liberia	Malaysia*	Myanmar**
Global								
Does the national constitution set out the principles of ownership over land and natural resources?	Yes	No	Yes	No	Yes	Yes	Yes	Yes
Is the state designated as the principal owner of all natural resources?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Is private ownership of land permitted by law?	Yes	Yes	No	Yes	Yes	Yes	Yes	No
Is private ownership of forest permitted by law?	Yes	Yes	No	No	Yes	Yes	No	No
Are customary rights to land recognized by the constitution?	No	No	Yes	No	No	No	Yes	No
Are customary rights to land recognized by primary legislation?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Are customary land rights legally protected if they are not formally registered?	Yes	No	Yes	No	No	No	No	n/a
Are communal forest rights legally protected if they are not formally registered?	Yes	No	Yes	No	No	No	No	n/a
Is the protection of communal land rights conditioned on productive use?	No	Yes	No	No	No	No	Yes	n/a
Are there legal arrangements that facilitate the transfer and use of land for commercial agriculture (joint venture agreements, financing institutions, etc.)?	Yes	No	No	Yes	No	Yes	Yes	Yes
Is there a legal requirement for the productive use of land by the concessionaire of the land?	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes

Notes: * The information on Malaysia reflects a focus on the Sabah region, one of the two autonomous regions that has full competency to make decisions concerning land and natural resource management (and therefore functions under a distinct set of state regulations), and that also hosts the most extensive ape population in the country. ** n/a = not applicable. Since the law does not recognize communal or customary rights in Myanmar, these issues remain unregulated.

Sources: Alden Wily (2007, 2012); Cambodia (1993a, 2001, 2002, 2003); Cameroon (1974, 1992, 1994, 1995b); DRC (2002, 2006c, 2008a, 2008b, 2011a, 2011c); Gabon (1961, 1967, 1987a, 1991, 2001, 2004, 2007, 2008); Indonesia (1945, 1960, 1999, 2006a, 2010); Kennedy (2011); Liberia (1904, 1956, 1984, 2000, 2006, 2009c, 2010b); Majid Cooke (2006); Malaysia (1930, 1957, 1965a, 1968a, 1968b); Myanmar (1894, 1992, 2008, 2011, 2012c); Nguiffo, Schwartz and Hoyle (2012); Oberndorf (2006, 2012); USAID (2010a, 2010b, 2011); van Kempen and Mayifailla (2013)

meaning countries whose engagement with agricultural investors has occurred relatively recently.

Malaysia is an example of an old hand. The country has implemented several generations of elaborate schemes to promote agribusiness operations (Majid Cooke, Toh and Vaz, 2012). The consequence of this complex legal set-up is the rapid conversion of undeveloped areas into plantations across Malaysia. At the same time, these well-established instruments also seem to provide a more defined space for regulation, while creating at least some legal safeguards for local farmers.

At the other end of the spectrum, the relative newcomers to large-scale industrial agriculture include countries such as Gabon and Myanmar, as well as Cameroon and DRC, with the exception of some major concessions that date back to the colonial era. These countries have vast forest resources available for industrial logging, as examined in the first edition of *State of the Apes* (Arcus Foundation, 2014). Yet, although they are increasingly turning to the agricultural sector as another viable source of income and economic development, their legal frameworks continue to reflect the needs and concerns of industrial logging, rather than those of commercial agriculture. As effective institutional arrangements to manage forest conversion processes are often lacking, agribusiness developments are taking place in an uncontrolled and largely unplanned manner, which in itself can threaten apes and ape habitats.

An additional area of concern relating to tenure arrangements for agribusiness companies relates to productive use requirements. A number of countries have adopted legislation or negotiated concession contracts that require companies to make productive use of the land leased (see Table 4.2). Non-compliance with this commitment would entitle government authorities to impose

sanctions, including the termination of the concession agreement.¹² These requirements have a clear rationale in terms of discouraging speculative land acquisitions and ensuring that leased land is used productively. However, the requirements can create perverse incentives, as they might make it more difficult for companies to set aside conservation areas even if they are willing to do so. In Indonesia, for example, some palm oil companies that are committed to “zero deforestation” have claimed they have had issues trying to set aside areas of high conservation value and high carbon stock forest due to productive use requirements. Yet, such claims should be treated with some caution, not least because if environmental impact assessment legislation is properly implemented, conditions attached to environmental permits may enable, and in fact require, conservation in specified concession areas.

To sum up, notwithstanding the great diversity of contexts and applicable rules, certain recurring features of national legal frameworks tend to facilitate large-scale land acquisitions for agribusiness investments, both in the countries reviewed and beyond (Alden Wily, 2012; Anseeuw *et al.*, 2012a). Centralized government control, coupled with weak local land rights, means that governmental authorities have extensive discretion in decisions on conversion of forests to industrial agricultural purposes—which can be problematic if decision-making on forest conversions and on the allocation of agribusiness concessions lacks transparency and accountability. Other aspects of tenure arrangements also raise direct concerns about ape conservation, including in relation to the perverse incentives that may be associated with poorly conceived productive use requirements and the overall level of preparedness of tenure arrangements to deal with the issues raised by rapid agribusiness developments in sensitive habitats.



Decision-making on Allocation of Agribusiness Concessions

The aforementioned finding that governments play a central role in land allocations raises a number of important issues about the mechanics of decision-making regarding

agribusiness concessions, including the distribution of decision-making authority among different government bodies, and opportunities for public scrutiny and accountability. Indeed, the ways in which decision-making authority is distributed among government agencies, and between different levels of

government—local to national—can have important implications for the overall coherence, coordination and effectiveness of government action in addressing the interface between agribusiness investment and ape conservation. By reducing the scope for rent-seeking behavior, transparency and downward accountability can also have important reverberations for the effectiveness of conservation efforts.

All of the national legal frameworks reviewed in this chapter include different sets of laws that potentially play a role in regulating, to different degrees, decision-making on agribusiness concessions in forest areas, with varying degrees of coherence and coordination. The main set of laws is the one that regulates allocation of rights to land (land laws). When the land is forested, laws governing the regime for forest protection, exploitation and conversion (forestry laws) and laws on wildlife protection also play a role. In most countries, land allocation for agribusiness investments appears to be taking place at the intersection of all of these regulations, each of which has a distinct rationale, principles and instruments of implementation, and, in most instances, a dedicated administrative institution.

The interplay between the different sets of legislation—particularly those on land and forestry—is generally a contested matter that has created much confusion in the practice of issuing agricultural concessions, with important repercussions for the interface between agribusiness and ape conservation. One example relates to the national authority responsible for making decisions on land allocations for agribusiness concessions, particularly where forestlands are at stake. Some companies have reportedly used multiple institutional routes to obtain concessions, whereby several institutional authorities in the same countries have signed different contracts. In Cameroon, for example, three different ministries are in charge

of issuing relevant concessions (Nguiffo *et al.*, 2012).

The balance of negotiating power among different ministries is another important issue. The balance tends to vary considerably across countries, in accordance with the national context, political will, contracting processes and other aspects. Broadly speaking, however, ministries and agencies charged with agribusiness development tend to be particularly powerful, especially in comparison to bodies that are charged with environmental protection. The latter, judging from their competencies under national law, tend to be marginalized in decision-making processes; they cannot fulfill their mandate as effectively because they intervene relatively late in the process, their economic resources are more limited and they cannot rely on relevant backing from the highest level of government (Oberndorf, 2006; Alden Wily, 2007). Owing to the dynamic nature and high economic stakes in the agribusiness sector, decision-making generally emphasizes the prerogatives of the executive; even in Liberia, where recent agribusiness concessions have been approved by the parliament,¹³ contract negotiations, terms and monitoring have all been driven by the executive.

Indonesia is characterized by a vertical distribution of power through which its regions enjoy autonomous decision-making powers. As the case study below illustrates, this power structure raises a distinct set of issues; in particular, regional governments are incentivized to exploit natural resources for the purpose of fostering economic development, which then might—and, in the case of Indonesia, did—result in fast-paced commercialization of forested areas. All in all, the trend analysis illustrates that in the context of decentralization there is no “golden rule” of vertical power distribution within the state that would foster the responsible use of natural resources and ensure adequate conservation efforts. Instead,

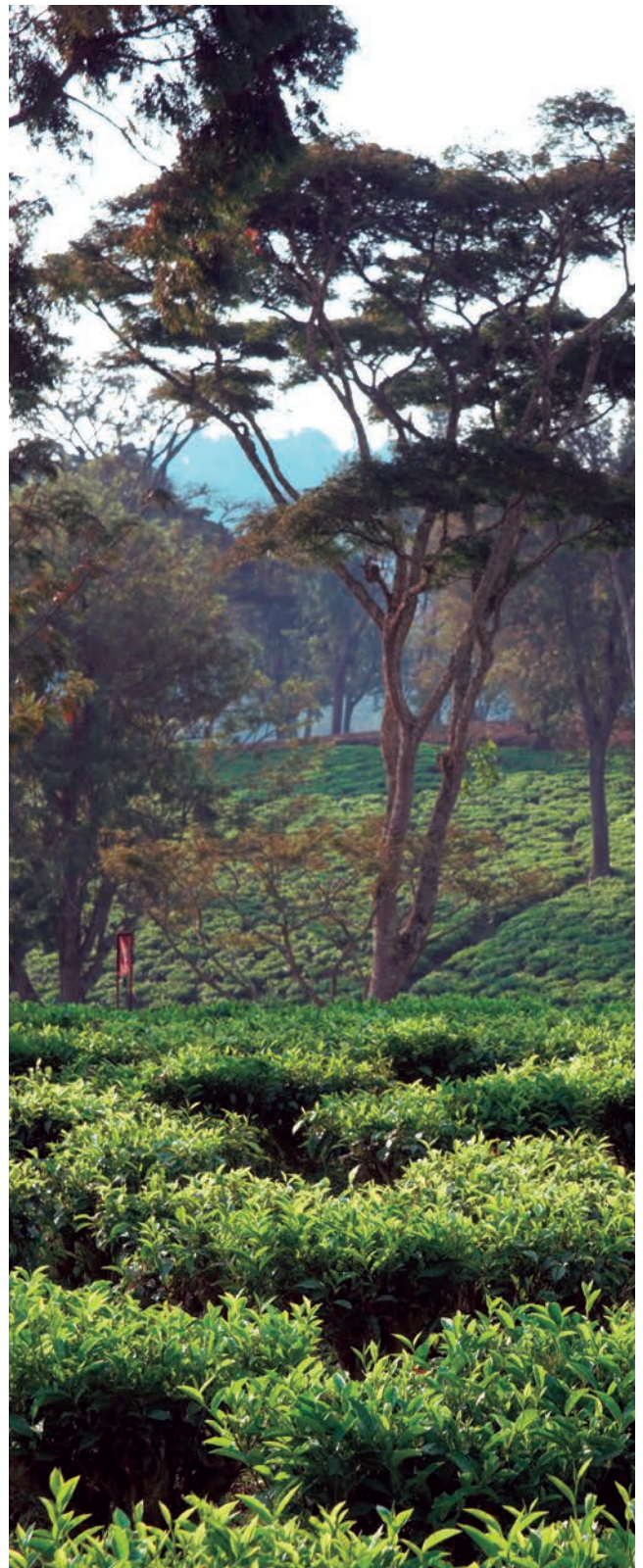
Photo: Malaysia has implemented generations of schemes to promote agribusiness operations, resulting in the spread of plantations across the country. © HUTAN - Kinabatangan Orang-utan Conservation Project

Photo: Environmental impact assessments—which are probably the most important procedural safeguards—have become a standard tool of environmental protection that potentially promotes ape conservation. © Arcus Foundation and Jabruson, 2014. All rights reserved.

natural resources are clearly highly vulnerable to any changes of power distribution within the state—which is why every internal governance reform has an equal chance of creating positive results or accelerating the pace of habitat conversion.

Finally, another important issue concerning the allocation of agribusiness concessions relates to mechanisms to ensure transparency and accountability in decision-making processes. Transparency can provide an important safeguard against arbitrary or illegal decision-making, as it facilitates public scrutiny and challenges to government action. There have been some important legislative advances in transparency requirements concerning environmental impact assessments (EIAs, as discussed below) and in transparency requirements concerning public revenues, particularly in a number of laws regulating investments in the extractive industries (Arcus Foundation, 2014).

Nevertheless, transparency requirements affecting broader decision-making on agribusiness investments remain limited in most of the countries reviewed. The Liberia Extractive Industries Transparency Initiative Act of 2009, which covers agribusiness and forestry, as well as extractive industries, is one of the few examples of legislation that mandates the disclosure of agribusiness concession agreements.¹⁴ The DRC also provides for some limited transparency through a 2011 decree that requires the publication of forestry contracts (in addition to mining and oil contracts), although it is not clear whether this covers the agribusiness sector and whether contracts are indeed being systematically published (DRC, 2011a). Yet, even if contract disclosure is required, it occurs after key decisions have already been made; moreover, in contexts characterized by high illiteracy rates and significant capacity challenges, disclosure alone is unlikely to make a significant difference





unless it is accompanied by complementary support for civil action.

Overall, patterns in decision-making authority vary considerably across the countries examined, including with respect to the extent of decentralization; transparency and public participation requirements; and the nature of relationships between different agencies of central and local government. Beyond this diversity, however, prevailing legal and institutional contexts point to significant challenges affecting the interface between agribusiness and ape conservation. In particular, there seems to be a general lack of clarity about roles, powers and procedures in allocating agricultural concessions; imbalances of power between government agencies with different mandates; and inadequate arrangements to ensure transparency and public accountability. This situation tends to undermine the coherence, coordination and the effectiveness of government action to pursue ape conservation in the face of agribusiness expansion.

General Provisions on Environmental Protection

The previous sections discuss key trends in ownership, control and decision-making regarding resources that have a direct bearing on facilitating, or regulating, the interface between industrial agriculture and ape conservation. This section considers the nature and effectiveness of mechanisms designed to protect the environment, focusing on generally applicable legislation, and specifically on the obligations with which agribusiness projects need to comply. This section is followed by an exploration of conservation measures put in place to protect ape species and habitats.

All of the countries under review in this study have stand-alone laws that deal

“Good environmental laws do not necessarily result in more stringent environmental protection on the ground, largely because of significant problems in implementation and enforcement.”

exclusively with issues of environmental protection, which, by their very nature, should contribute to the protection of apes and ape habitats.¹⁵ In broad terms, the content of these provisions has become more elaborate and comprehensive over time, and more recent environmental laws tend to include global best practice in their regulatory approach.¹⁶ However, this trend still depends largely on the political environment that prevails in each state; Myanmar, for one, has drawn repeated criticism for adopting a “weak model” of environmental protection in its relatively recent national environmental law (Burma Environmental Working Group, 2011).

The analysis of prevailing trends shows that good environmental laws are usually in place, and that they mandate government authorities to protect the environment, require EIAs for major development projects and include sanction and monitoring mechanisms. Nevertheless, these laws do not necessarily result in more stringent environmental protection on the ground, largely because of significant problems in implementation and enforcement, yet also due to some legal design issues.

One problem that is especially apparent in post-conflict settings, such as the DRC, is the design of environmental provisions that do not match a country’s institutional capacity to implement them and thus prove unrealistic (Bwiza, 2013). This is not to say that a “weak model” of environmental protection is preferable; yet, if lawmaking does not fully factor in institutional capacity to enforce legislation on the ground, challenges in implementation and enforcement may prove insurmountable, and legislation will be unlikely to make any difference at the local level. In this respect, environmental regulation runs a serious risk of regulatory failure.

Moreover, some of the most comprehensive laws, with highly ambitious and elaborate environmental goals, only serve as a framework for further action, rather

than as an effective institutional apparatus through which sound environmental policies can be readily implemented; such laws are rarely implemented further through secondary legislation. An example of this problem is Cameroon’s 1996 Law on Environmental Management, which, as comprehensive as it is, also contains a whole array of provisions that require the government to enact further implementing decrees and regulations—some of which have not yet been adopted, nearly 20 years after the adoption of the primary text (Cameroon, 1996; Fuo and Semie, 2011). Similar regulatory gaps exist in Cambodia and the DRC (De Lopez, 2002; Moutondo, 2008).

Environmental impact assessments—which are probably the most important procedural safeguards—have become a standard tool of environmental protection that potentially promotes ape conservation. Depending on the degree of protection they establish, EIAs might also include a social impact assessment (SIA) and result in an environmental management plan (EMP). The EMP normally identifies measures necessary to protect the environment and comply with applicable legislation.

An EIA is usually required before a governmental authority can issue a license or permission, or grant a contract for certain types of development projects, including significant agribusiness developments. All countries reviewed require some procedure of this sort, with the exception of Myanmar (see Table 4.3). While Myanmar has now established the competency for its Ministry of Environment to regulate these matters and has adopted draft rules concerning EIAs, these rules have not yet been adopted by the ministry and are therefore not yet in force.

There is significant variation among countries with respect to the kind of impact assessment required, including in relation to whether local consultation, public hearings or a full-fledged SIA are mandated; the types of legal instrument that ensure mitigation

of risks (an area in which EMPs are particularly important); and the range of projects for which this procedure is mandatory (see Table 4.3). Within this diversity, the more stringent procedures do not necessarily result in more effective protection in practice. Instead, mandatory requirements for “heavy” EIAs are often merely disregarded by public officials, and consequently fail to be effective—as has been documented in Cameroon (Fuo and Semie, 2011).

In almost all of the countries reviewed, national legislation requires a degree of transparency in EIA procedures (see Table 4.3). Transparency clauses vary significantly, however. In some countries, the government must simply publish EIA reports that have already been accepted; elsewhere, the government is required to disclose draft reports before approving the EIA, a process that is more likely to allow stakeholders to provide input and influence decision-making. Some countries also require companies to engage in public participation while preparing an EIA, which potentially allows affected people to voice their concerns. By its very nature, transparency regulation is a process of opening up decision-making to external scrutiny and allowing civil society to monitor developments—a precondition for advances in any area. Yet much remains to be done to translate these openings into real change.

The value of the law rests primarily in its practical application. This study thus examines to what extent countries under review have established legal mechanisms to promote proper implementation, including through the allocation of responsibilities and the stipulation of procedures for monitoring compliance with environmental standards—and for dealing with non-compliance.

All of the countries considered in this study have established some process for monitoring compliance with environmental standards. In addition, national environmental laws tend to designate an institution—or

several of them, in the case of decentralized decision-making¹⁷—that is responsible for this process (see Table 4.3). In practice, monitoring compliance requires significant resources and strong institutional capacities, particularly if agribusiness concessions cover very large areas in remote parts of the country. Many observers have noted the lack of human, financial and technical resources in forest administrations—in particular in ape range states in West and Central Africa (Nguiffo *et al.*, 2012). This lack is known to affect crucial matters such as the demarcation of boundaries between protected and convertible forest areas, and institutional capacity to gather evidence of environmental non-compliance (Oates *et al.*, 2007).

By and large, environmental legislation in the eight ape range states under review tends to satisfy the requirements of good environmental regulations. With respect to EIAs, the laws seem to reflect a general trend toward more transparency and public participation, as evidenced to varying degrees across the countries. Tighter transparency requirements do not mean that decisions are necessarily made transparently in practice; however, they do provide benchmarks on how companies and officials should behave. As noted above, it is important to recognize that more stringent laws are not always more effective in practice. In the worst cases, stringent laws can create an impression of environmental commitment, despite the absence of the institutional apparatus necessary to back it up.

Protected Areas and Species

All countries under review have adopted legislation that allows for the creation of protected areas (Morgera, 2010); Table 4.4 reveals the percentage of protected areas in national territory (land) in all eight states. This legislation is primarily embodied in laws relating to environmental protection,

“The value of the law rests primarily in its practical application.”

TABLE 4.3**Legal Aspects of Environmental Impact Assessments**

Instrument	Cambodia*	Cameroon	DRC	Gabon	Indonesia	Liberia	Malaysia***	Myanmar****
Types of rules that govern EIAs								
Is the EIA procedure required by primary legislation (enacted by the highest authority within the state)?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Is the size and type of project that must undergo EIA procedures set out in primary legislation?	No	No	Yes	Yes	Yes	No	Yes	No
Are there official guidelines for implementing primary legislation that governs EIAs?	Yes	Yes	No**	No	Yes	No	Yes	No
Scope of obligation								
Is an SIA a mandatory part of the EIA?	Yes	Yes	Yes	No	No	Yes	No	n/a
Is an EMP a mandatory part of the EIA?	Yes	Yes	Yes	No	Yes	Yes	Yes	n/a
Are there explicit requirements with regard to the specific content of the EIA?	Yes	Yes	No	No	Yes	Yes	Yes	n/a
Is an authoritative institution charged with assessing the quality and content of the EIA before it is accepted?	Yes	Yes	No	No	Yes	Yes	Yes	n/a
Is there a requirement for a competent authority to consent to the measures set out in the EIA before the project can be implemented?	Yes	Yes	No	Yes	Yes	Yes	Yes	n/a
Transparency								
Is there a requirement to inform the public about the intention to initiate the EIA?	No	No	Yes	No	Yes	Yes	No	n/a
Is there a requirement to hold public consultations during the preparation of the EIA?	No	Yes	No	No	Yes	Yes	No	n/a

although laws dealing specifically with protected areas do exist. Other legislation may also be relevant, particularly forest laws, which may include provisions that deal with the zoning of forest resources for both productive and conservation purposes. Despite the close interrelationship between forest codes and laws regulating protected areas, explicit cross-referencing between them is frequently missing,¹⁸ which generally makes it difficult to assess whether or not they overlap, and if so, to what extent (Oberndorf, 2006).

The most important practical implication of such overlap between environmental and forest legislation may be that various institutions implement these laws, which means that it might not be entirely clear which agency is ultimately responsible for effective results on the ground. Moreover, it has been noted with regard to several national frameworks that the agencies charged with conservation efforts tend to be relatively weak in terms of their institutional capacity—and hence not able to enforce stringent protection regimes over

TABLE 4.3

Continued

Instrument	Cambodia*	Cameroon	DRC	Gabon	Indonesia	Liberia	Malaysia***	Myanmar****
Is there a requirement to hold consultations with affected communities during the preparation of the EIA?	No	Yes	Yes	No	Yes	Yes	Yes	n/a
Is there a requirement to publish the EIA and EMP?	No	No	No	No	Yes	Yes	Yes	n/a
Implementation and enforcement								
Is there an explicit requirement for the authorities to monitor the implementation of the EIA?	Yes	Yes	No	Yes	Yes	Yes	Yes	n/a
Does the law explicitly state that failure to implement the EMP (or other operational parts of the EIA) should result in termination of the concession?	No	No	No	No	Yes	No	No	n/a
Are there specific sanctions for state officials who fail to implement requirements relating to the EIA?	Yes	No	No	No	Yes	No	No	n/a
Are there specific sanctions for companies that fail to implement requirements relating to the EIA?	Yes	Yes	No	No	Yes	Yes	Yes	n/a

Notes: * The assessment is based on the Law on Environmental Protection and Natural Resource Management, its implementing sub-decree on the EIA process and Prakas on General Guidelines for Initial and Final Environmental Impact Assessment Reports (Cambodia, 1996, 1999, 2009). At the time of writing, the new draft law on EIAs was in the process of being adopted.

** No general guidelines are applicable to all sectors (including agriculture); however, there are some sector-related guidelines, such as those that are applicable to mining projects in the DRC.

*** The information on Malaysia reflects a focus on the Sabah region, one of the two autonomous regions that has full competency to make decisions concerning land and natural resource management (and therefore functions under a distinct set of state regulations), and that also hosts the most extensive ape population in the country.

**** n/a = not applicable. Since EIA procedure is not regulated in Myanmar, questions regarding the relevant scope, transparency, implementation and enforcement cannot be answered.

Sources: Cambodia (1996, 1999, 2002, 2009); Cameroon (1996, 2005, 2011, 2013); DRC (2002, 2006b, 2011b, 2011c, 2011d); Fuo and Semie (2011); Gabon (1993, 2001, 2005, 2007); Indonesia (1999, 2007, 2009, 2010); Kennedy (2011); Liberia (2000, 2002a, 2006, 2009a, 2009c, 2010b); Malaysia (1968b, 1974, 1987, 2000, 2002, 2010); Myanmar (1994, 2012a, 2012b); Syarif (2010); Tieguhong and Betti (2008)

the vast protected areas that they may be overseeing (ICEM, 2003).

National laws on protected areas vary considerably, both within and across countries, including in the degree of protection that is accorded to flora and fauna, and in the conditions under which the status of protected areas can be revoked or changed. This study shows that, generally speaking, national parks are not only subject to the most stringent conservation regimes, but are also designated by the highest authorities of the state.¹⁹ This means that national

parks cannot easily be converted back into production areas—a finding that underscores the need to prevent external interventions in such territories to ensure the protection of wildlife and its habitat.

That said, national parks do not necessarily provide the most effective and sustainable ways of protecting endangered species in the long term. There are long-standing debates about the restrictions on communities that live in national parks or use resources located within park boundaries (Alden Wily, 2012). It is often difficult

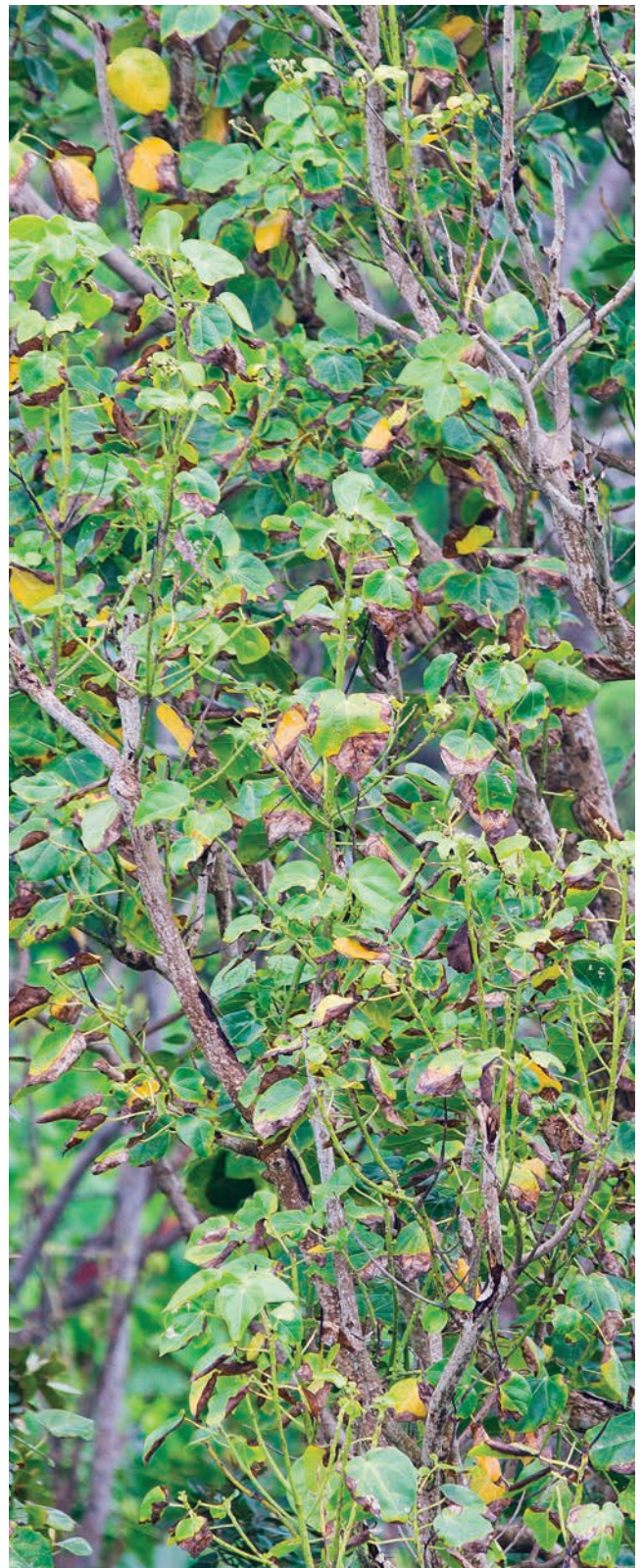
Photo: All countries under review have adopted legislation that allows for the creation of protected areas. Siamangs in the Bukit Barisan Selatan National Park, Indonesia. © Paul Hilton/Greenpeace

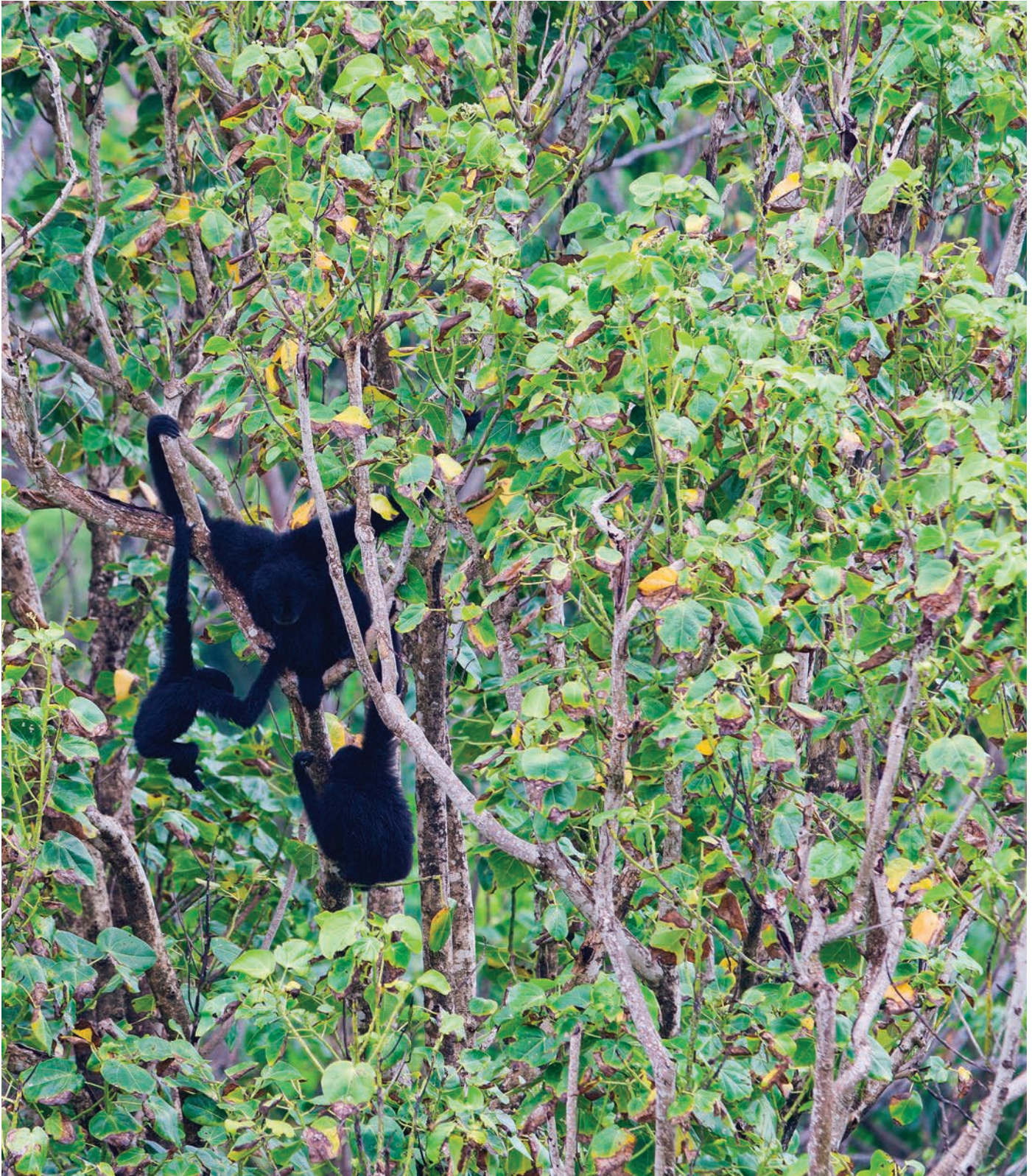
for state officials to enforce such strict regulations; only one country among those under review—Gabon—has set up the kind of institutional infrastructure through which effective administration of extensive national park territories is feasible (ITTO, 2011).

In many contexts, the density of the population is such that forbidding all forms of human activity in protected areas cannot be sustained in the long run. Most countries have enabled the creation of other types of protected areas, in which some agricultural, hunting and even logging activities are allowed (Morgera and Cirelli, 2009; Morgera, 2010; Morgera and Tsioumani, 2010). Less stringent regulations apply to such areas, whose protected status is generally easier to change, partly depending on the state of the forest. If, for instance, a forest has been overexploited and its conservation value has dropped, it could be “reclassified” as a production area instead.²⁰ Evidence shows that community forestry can be more effective than conventional protected areas in protecting forests.²¹

Many studies note that protected areas often do not cover the full range of forests where primates live, such that many primates actually live outside these formally protected territories (Arcus Foundation, 2014; Dunn *et al.*, 2014). It therefore becomes important to consider to what extent the individual animals and their species enjoy direct protection under the law—and what kind of protection this entails.

Most of the countries reviewed have passed legislation, often in connection with ratification of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), placing apes under the highest level of protection accorded to endangered species. While CITES only regulates international trade, and trade in apes is a relatively minor driver of their loss, ratification of CITES can indirectly lead countries to take legislative action at the national level. Indeed, legislation to protect





apes typically prohibits hunting and killing apes, keeping them in captivity, and engaging in any related trading activities (Morgera and Cirelli, 2009; Morgera and Tsioumani, 2010). However, the enforcement of these provisions is often undermined by a number of factors, including corruption, vested interests, inadequate resources and capacities, and the absence of powerful pressure groups, which could otherwise create political incentives for government agencies to enforce applicable norms.

Moreover, national legislation on protected areas and species faces real challenges

in tackling the interface between agribusiness investments and ape conservation, as norms that prohibit the killing of apes are of relatively little effectiveness in contexts where the principal threat is in the form of habitat conversion for agribusiness developments. In most of the countries reviewed, there is no explicit prohibition against the clearing of forests outside protected areas (see Table 4.4). In other words, while the killing of individual apes is strictly forbidden,²² a severe intervention that destroys the habitat on which the survival of apes depends could be entirely legal—as

TABLE 4.4
Protected Areas and Recognition of Apes as Protected Species

	Forests as % of national territory (land)*	Protected areas as % of national territory (land)*	Agricultural land as % of national territory (land)*	Can communal forests be established in protected areas?	Do apes fall under the most stringent protection regime applied to individual species?
Cambodia	55.7	26.2	32.6	Yes	Yes, via adherence to CITES classification
Cameroon	41.2	11.0	20.6	No	Yes, as “Class A” under national law
DRC	67.7	12.0	11.5	Yes	Yes, as “wholly protected game” under secondary legislation
Gabon	85.4	19.9	20.0	No	Yes, as “strictly protected” under secondary legislation
Indonesia	51.4	14.7	31.2	Yes	Yes, as “endangered protected species” under secondary legislation
Liberia	44.3	2.5	28.1	No	Yes, as “protected” under secondary legislation and via adherence to CITES classification
Malaysia	61.7	18.4	23.6	No	Yes, as “totally protected” under provincial law
Myanmar	47.7	7.3	19.3	No**	Yes, as “completely protected” under secondary legislation

long as activities take place outside protected areas and on the basis of prescribed procedures.

An exception to this approach appears in Indonesian legislation, which regulates the protection of endangered species in terms of individual animals as well as their habitat (Indonesia, 1990, art. 6). Unfortunately, these provisions have not yet been fully implemented through subsequent regulations, and therefore their effectiveness in practice cannot be tested.

Most of the countries under review have adopted legislation that creates protected

areas and provides direct protection of ape species. However, the implementation and enforcement of such norms are often undermined by a lack of institutional capacities, ambiguities concerning institutional responsibilities, and limited human, financial and technical resources. Moreover, legislation that protects species is poorly suited to deal with the interface between industrial agriculture and ape conservation since the main threat to ape conservation in an agri-business context stems from ape habitat destruction rather than the killing of individual animals.

TABLE 4.4
Continued

▶ What protection is granted to apes (beyond prohibition of illegal trade and export as stipulated in CITES)?	Are there protection mechanisms beyond the focus on individual animals and outside protected areas?
Prohibition of hunting	No
Prohibition of hunting	No
Prohibition of hunting; it is justifiable to kill an animal only if it threatens a person's life or property	No
Prohibition of hunting and keeping in captivity; it is justifiable to kill an animal only in defense of human life, livestock or crops	No
Prohibition of catching, injuring, killing, keeping in captivity, possessing and transporting animals in live and dead condition; it is justifiable to kill or injure an animal only if it endangers human life	Yes, the conservation of endangered species is also regulated "ex situ," and the law requires protection of "life support systems" by both holders of land rights and institutions administering the land
Prohibition of hunting and keeping in captivity; it is justifiable to kill an animal in the process of taking "reasonable measures" to protect human life, livestock or crops	No, although the law requires constant monitoring of endangered species
Possession only with authorization; it is justifiable to kill an animal in the process of taking "reasonable steps" to protect human life, livestock or crops	No
▶ Capture and possession only with authorization; prohibition of hunting	No

Notes:

* The figures reflect 2012 World Bank development indicators based on the following definitions:

Forest area: "land under natural or planted stands of trees of at least 5 meters in situ, whether productive or not, and excludes tree stands in agricultural production systems (for example, in fruit plantations and agroforestry systems) and trees in urban parks and gardens."

Protected areas: "totally or partially protected areas of at least 10 km² (1,000 ha) that are designated by national authorities as scientific reserves with limited public access, national parks, natural monuments, nature reserves or wildlife sanctuaries, protected landscapes and areas managed mainly for sustainable use."

Agricultural land: "the share of land area that is arable, under permanent crops, and under permanent pastures. [. . .] Permanent pasture is land used for five or more years for forage, including natural and cultivated crops."

** There is no legal mechanism that recognizes or enables communal forests in Myanmar.

Sources:

indicators: World Bank (n.d.-b);

definitions: World Bank (n.d.-a, n.d.-c, n.d.-e);

legislation: Alden Wily (2007, 2012); Cambodia (1993b, 1994, 1996, 2002, 2003); Cameroon (1978, 1994, 1995a, 1995b, 1996); CITES (1973); Cotula and Mayers (2009); DRC (1969, 1975, 1982, 2000, 2002, 2006a, 2011d); Dunn *et al.* (2014); Gabon (1987b, 1993, 1994a, 1994b, 2001, 2004, 2007); ICEM (2003); Indonesia (1990, 1999, 2006a, 2009); Liberia (1988, 2002b, 2003, 2006, 2009c); Majid Cooke (2006); Malaysia (1963, 1965b, 1968a, 1968b, 1973, 1980, 1984, 2002, 2008, 2010); Morgera (2010); Morgera and Cirelli (2009); Morgera and Tsioumani (2010); Myanmar (1992, 2012b); Nguiffo and Talla (2010)



Issues of Enforcement and Legal Opportunities to Challenge Decision-making

The issue of implementation and enforcement is a fundamental concern in all areas of environmental protection, including ape conservation. As emphasized in the previous sections, it is not enough to have good laws—they must also be put into practice. Sound environmental practice requires an ongoing effort not only on behalf of the entire state administration, but also on behalf of other stakeholders engaged in conservation and accountability.

In the ape range countries reviewed, legislation typically tackles several enforcement-related issues:

- (a) sanctions for environmental damage caused in violation of environmental legislation;
- (b) institutional responsibilities to monitor and ensure compliance and to impose the applicable sanctions;
- (c) rules that regulate the exercise of public authority in these matters; and
- (d) norms empowering citizens and stakeholders to challenge decision-making.

Rules that establish sanctions and enforcement mechanisms can be a part of the general regime of criminal and administrative responsibility and civil liability, that is, a regime set in the constitution or in civil or administrative codes; alternatively, they can be tailored regimes based on legislation that creates specific sanctions for wrongdoing in environmental matters. While general state institutions—such as the police or prosecution services—tend to enforce common rules of responsibility and liability, specialized institutions²³ are often established to monitor compliance and to investigate breaches of environmental law.

With regard to environmental sanctions, there is a noticeable trend in environmental laws to criminalize specific types of environmental damage. Most countries reviewed have introduced criminal provisions that prescribe penalties for illegal forest use or unlicensed exploitation of land. However, only a few countries have explicitly criminalized the failure to comply with some of the key requirements of environmental procedural safeguards; in the DRC, for example, it is illegal to provide misleading information in the preparation of an EIA (DRC, 2011d, arts 72–73).

Another important issue concerning industrial agriculture is the extent to which environmental violations can justify the termination of the agribusiness concession. In most of the countries reviewed, national law does not unequivocally empower the government to terminate a concession if environmental obligations are not complied with. There are exceptions—such as provisions in Cambodia’s Law on Forestry that allow the government to terminate logging contracts for environmental violations (Cambodia, 2002, arts 17, 88)—but they do not seem to apply to agribusiness. A lack of explicit provisions effectively deprives administrative agencies committed to conservation of important legal backing. Moreover, investors are less likely to challenge government action to revoke permits or terminate contracts if sanction clauses are integrated in legislation. Yet, even if countries have adopted provisions allowing termination, they do not necessarily apply them.

The discussion in the previous sections highlights that many problems are rooted not in the formulation of laws, but in institutional capacity challenges or political economy considerations that affect the political and administrative will to apply the law. An important enforcement issue thus concerns the extent to which legislation establishes mechanisms to review and sanction the exercise of government powers in

relation to compliance with procedural requirements or the outcome of decision-making processes. In this regard, the trend analysis reveals gaps in accountability and sanction mechanisms. While enforcement norms often establish administrative and criminal sanctions for malpractice by low-level officials, they seldom address abuse of authority by high-level decision-makers. There are important exceptions; for example, the Forestry Code of the DRC explicitly limits the discretionary powers of the minister to issue harvesting concessions—although the application of this provision has never been tested in practice (DRC, 2002, art. 5; Lawson, 2014). Indeed, it is very difficult to hold high-level officials to account, for both legal and political reasons.

A final point that needs to be considered in this review of national frameworks is the availability and nature of legal mechanisms that rights holders can use to foster compliance with legal requirements. In several countries, forestry laws and environmental legislation allow public interest litigation or legal “action on behalf of the community,” thereby establishing an opportunity for actors to challenge government action without having to prove they have been directly affected by the decision in question.²⁴ In Cameroon, where no such explicit clause exists in the relevant laws, a similar outcome has been reached by a court decision, which concluded in 2009 that a local non-governmental organization (NGO) had the right to question the legality of an investment project that did not undergo the necessary EIA procedure (Fuo and Semie, 2011).²⁵

In contrast to this positive trend, certain legal arrangements limit access to justice, including in relation to land matters. In Malaysia, for example, farmers who participate in joint venture agreements with agribusiness are required to waive their right of access to courts in relation to the agribusiness venture (Majid Cooke *et al.*, 2012). Similarly, Myanmar’s Farmland Law

Photo: Legislation to protect apes typically prohibits hunting and killing apes, keeping them in captivity, and engaging in any related trading activities. However, the enforcement of these provisions is often undermined by a number of factors. A pet infant orangutan named Rika, chained under a house at the time of rescue by IAR Indonesia and BKSDA in Ketapang. © Argitoe Ranting, IAR Indonesia

CASE STUDY 4.1

Protecting Orangutan Habitats on Sumatra, Indonesia, Using Legal Action

This case study focuses on “law in action”—that is, practical experiences that highlight the opportunities and challenges of using legal mechanisms for ape conservation purposes. Based on the experience of taking legal action to protect orangutans on Sumatra, Indonesia, it highlights the advantages and limitations inherent in the use of judicial proceedings.

Indonesia ranks 107 out of 174 countries in the 2014 Corruption Perceptions Index²⁶ and is well known for the lack of law enforcement within the forestry and plantation sectors. Yet, as this case study shows, enabling conditions have led to partial enforcement of some of Indonesia’s environmental laws in the Tripa peat swamp forests of the Leuser Ecosystem in Sumatra’s Aceh province (see Figure 4.1).

To date, Indonesia has sanctioned one oil palm company by revoking its plantation permit, sentencing its owner and manager to jail terms, and imposing a multi-million dollar fine. Meanwhile, seven civil and criminal cases are ongoing or in preparation against four other palm oil companies operating in Tripa’s peat swamps. These cases are rare examples of how—despite the odds—the law can be used effectively to challenge, and potentially halt or even reverse, decisions leading to the destruction of ape habitat in Indonesia. Understanding these early successes and the conditions that enabled them is fundamental to any efforts at replication elsewhere.

FIGURE 4.1

The Tripa Peat Swamp Forests, within the Leuser Ecosystem in Aceh Province, Sumatra, Indonesia



The enabling conditions for these cases of law enforcement fall into three main categories:

- accurate documentation of illegal activities;
- a public campaign that demands action from the government; and
- government agencies that are willing to act in response to the documentation of illegal activities.

Background

Along with the two other remaining peat swamp forests in Aceh, namely the Kluet and Singkil swamps, Tripa harbors the highest densities of orangutans recorded anywhere in the world. In the late 1980s Tripa was covered by around 600 km² (60,000 ha) of primary peat swamp forest and was home to at least 3,000 orangutans. At that time, however, it was removed from Indonesia’s national forest estate and reclassified as “land for other uses”—commonly known by its Indonesian acronym, APL, which stands for areal penggunaan lain. Beginning in 1990, several major oil palm concessions were progressively awarded, and the companies proceeded to clear forests, drain the peat and plant oil palms. By 1999, about half of the peat swamp forest had been cleared and large tracts of the cleared areas were already planted. Yet then a dramatic increase in hostilities between Aceh’s separatist rebels and Indonesia’s central government led to a cessation of activities in all of the concessions. During the ensuing few years, the plantations were effectively abandoned and vegetation began recovering naturally until peace was finally restored in 2005, in the aftermath of the December 2004 tsunami.

Plantation activities gradually began to resume in the years following the 2005 Helsinki peace accord between the warring factions and a return to near normalcy in Aceh province. Between mid-2007 and the end of 2009, almost 80 km² (8,000 ha)—or 28% of the remaining forests—were lost, mostly to the concessions of just three companies. Despite considerable lobbying by local communities and environmental groups, no action was taken to stop the burning or land clearing.

By this time, a number of other developments relevant to Tripa’s land status had also occurred. Even though it was no longer part of the national forest estate, in 1998, Tripa was included in the newly established Leuser Ecosystem, an area that covers more than 26,000 km² (2.6 million ha) of mostly upland primary forests and that also contains the last remaining lowland forest habitats of any significance in Aceh and North Sumatra. The Leuser Ecosystem is one of the richest expanses of tropical rainforest in Southeast Asia and the only place on earth where the Sumatran elephant, Sumatran rhinoceros, Sumatran tiger and Sumatran orangutan live side by side.

The importance of protecting the Leuser Ecosystem was emphasized in National Law No. 11/2006 on Aceh Governance (Indonesia, 2006b).²⁷ In Article 150 of this law, the Aceh government was specifically obligated to protect the 80% of the ecosystem that lies within Aceh. The protected

status of the Leuser Ecosystem was further strengthened when it was designated a national strategic area (NSA) based on its environmental functions in Government Regulation 26/2008 on the National Spatial Plan, a derivative of National Law No. 26/2007 on Spatial Planning (Indonesia, 2007, 2008).²⁸

In May 2011, as a direct result of a US\$1 billion pledge by the government of Norway to help Indonesia reduce its carbon emissions from deforestation and degradation, then president Susilo Bambang Yudhoyono signed a moratorium preventing new concessions from being granted in primary forests and peatlands. The moratorium included a map, which the Ministry of Forestry was to revise every six months, the PIPB or Peta Indikatif Penundaan Izin Baru (map indicating areas for which no new concession permits may be granted for the duration of the moratorium). The first editions of this map included significant tracts of Tripa that had not already been allocated for concessions.

In August 2011, the then governor of Aceh issued a new plantation concession permit for 16 km² (1,600 ha) of previously unallocated peat swamps to a palm oil company. This same area was clearly identified on the PIPB as “protected peatland.” It was also inside the Leuser Ecosystem, which by then was an NSA for environmental functions, within which concessions that damage environmental functions are prohibited.

The Resistance Begins

On these grounds, a group of NGOs spearheaded by Walhi Aceh (an affiliate of Friends of the Earth) filed a legal challenge to the new permit in Aceh’s administrative court in November 2011. In April 2012, the court dismissed the challenge, but Walhi Aceh instantly appealed the decision to the high court in Medan, North Sumatra.

Around the same time, a group of local community representatives also filed a complaint against the same permit with Indonesia’s National Police in Jakarta, alleging that the new concession was a criminal breach of National Spatial Planning Laws and Aceh’s own Governance Law, all of which prevent new concessions from being granted inside the Leuser Ecosystem. This complaint was passed on to the Aceh police force and was taken no further.

While the case was still at the administrative court in Banda Aceh, the palm oil company at the heart of the case continued to clear land, as did four other companies with major oil palm concessions in Tripa. In response, concerned NGOs organized a press conference and prepared a press release that featured dramatic footage of the clearing fires; the issue soon made headlines in the national and international media. During the rest of 2012 and much of 2013, Tripa was in the national news almost daily and international news items were an almost weekly occurrence. Petitions launched by the environmental groups became news items in themselves, as local and national government figures and agencies received numerous demands for intervention. The degree of news coverage helped considerably in focusing public attention on the

legal cases and significantly reduced the potential for corruption to interfere in the legal process.

On 30 August 2012, the High Court in Medan ruled in favor of Walhi Aceh and instructed Aceh’s new (and current) governor to cancel the permit, which he did on 27 September 2012. The company appealed the decision, taking the case to the Supreme Court in Jakarta on 6 November 2012. Their appeal was rejected on 25 April 2013, the Medan High Court decision was upheld and the concession permit remains cancelled.

Due largely to these privately initiated legal actions and the massive national and international attention focused on the cases via mass and social media, Indonesia’s national government began to take notice. In particular, the president’s Sustainable Development Unit, known locally as UKP4, set up under the pledge agreement with Norway, dispatched fact-finding investigative teams to the field on several occasions, starting in early 2012. UKP4 lawyers also met with the Aceh provincial government’s dedicated Leuser Ecosystem Management Authority and with local NGOs, which provided several years’ worth of temporal and spatial information on land clearing and burning activities in Tripa. Teams from UKP4 and Indonesia’s Ministry of the Environment then investigated the legality of all the oil palm concession permits in Tripa and cross-checked the NGO reports on illegal activities within each concession, finding them both accurate and verifiable. The teams paid special attention to the large-scale, highly publicized fires raging on most of the concessions at the time and found them in contravention of National Law 32/2009 on the Protection and Management of the Environment, which specifically prohibits the use of fire to clear land and the clearance of peat more than 3 m deep.

These investigations led public authorities to file additional legal cases against all of the major palm oil companies operating in Tripa. They included several civil cases filed by the Ministry of Environment against two of the companies and criminal cases brought by the state against these and two (and eventually three) other companies and some of their key personnel, mostly based on the illegal use of fire to clear land.

Lessons Learned

There are two ways to look at the Tripa case study. The conservation perspective places weight on the fact that Indonesia continues to experience forest clearance and loss of biodiversity. Many observers argue that the Tripa peat swamp forest and its orangutan population were already a lost cause when the area was taken out of the national forest estate in the late 1980s, and certainly by the time large-scale oil palm concessions were being issued in the 1990s. Indeed, there is a widespread perception in Indonesia that large companies and powerful individuals essentially have a free hand to do whatever they want on APL lands, and that it is better to focus conservation efforts on areas with more obvious legal control or protection, such as within the national forest estate and in formal protected areas. By extension, however, this mindset writes off all but the broadest brushstrokes of



► spatial planning and environmental management. Laws and regulations that forbid the burning of land, require the maintenance of riparian zones and other environmentally sensitive areas, and protect endangered species should be enforced wherever they are applicable, be it within the forest estate or on APL lands.

The other way to look at the Tripa case is to recognize the capacity to create conditions under which at least some of the abovementioned laws can be enforced. An illegal oil palm concession has been successfully cancelled, a plantation owner and manager have been sentenced to prison terms, their plantation has been handed a multi-million dollar fine and further legal cases are ongoing or in the pipeline. In January 2014, following intense local lobbying, the provincial government began to block the drainage canals created by the company in the cancelled concession area; plans are also in place for a large-scale swamp forest restoration program. While the rehabilitation of a large, significant area of the Tripa peat swamp forests will take many years, legal precedents have been set and some first successes have been achieved.

As noted earlier, three main factors have contributed to these successes. The first is precise, accurate and verifiable data collection and reporting on variables such as peat depth, hotspots (fires), deforestation and environmental infractions. This documentation has allowed for the development of strong, clear legal cases against the companies based on largely indisputable evidence.

The second key enabling factor has been the successful use of this information by a consortium of many actors, including

environmental, social and human rights NGOs and local community members, to publicize the issues. This joint effort eventually developed into a major national and international campaign that gained and maintained global public interest, putting significant political pressure on key government actors to pursue legal action and helping to minimize opportunities for interference in the legal process.

The third main enabling factor is the presence of a government agency (or agencies) with the political will to take action. In this case, the now defunct UKP4, the Ministry of Environment and the Public Prosecution Service took the wealth of evidence and data on environmental wrongdoing and—under public scrutiny and pressure—used it to prepare and prosecute cases.

Arguably, this third factor—namely the presence of government agencies that are willing to enforce environmental laws—is the most crucial. While communities and NGOs can file class action suits and administrative cases, only the Public Prosecution Service can argue criminal cases in Indonesian court. Donors interested in promoting better environmental law enforcement in Indonesia would do well to direct results-based support toward the legal arm of the Ministry of the Environment and Forestry and the Public Prosecution Service.

While current environmental legislation in Indonesia is not perfect, it does provide an adequate foundation for improving environmental management in the country. This will not happen overnight, but if further efforts are made to establish legal precedents, jail and fine senior offenders and sanction concessionaires, it should be possible to turn the tide.

effectively blocks access to courts by those who wish to challenge decisions made under that law (Oberndorf, 2012).

Commentators have argued that the general process of judicial review would normally allow for legal challenges to environmentally unsound acts, even if specialized laws are silent about this possibility (Oberndorf, 2006, 2012). Nevertheless, few court cases have involved challenges to government decisions that potentially harm the environment. Multiple factors may help to explain this situation, including the fact that local communities are not normally recognized as legal persons; costly and inaccessible procedures; inadequate institutional capacity in government and civil society; and the limited independence and impartiality of the judiciary—as well as the resulting lack of faith in the court system. As described in Case Study 4.1, however, environmental litigation is not unheard of, at least in some of the covered countries, and one important task is to assess the effectiveness of legal action and understand the conditions that make it possible.

Conclusion

This chapter has explored the legal frameworks that regulate the interface between industrial agriculture and ape conservation. It has drawn on an analysis of trends in eight ape range states—including four in Central and West Africa, and four in Southeast Asia. It has also presented a case study that illustrates both the challenges affecting those legal frameworks in practice, and the opportunities that are being pursued to harness the law for ape conservation.

Overall, the analysis reveals multiple issues in the design of applicable laws and their operation in practice. There is an inherent tension between industrial agriculture and ape conservation, as goals and beneficiaries differ significantly. Legal rules, and

the institutions mandated to apply them, provide a basis for managing this tension. The approaches pursued in different countries vary depending on the institutional structures of the states, the laws that govern them and the division of competencies in decision-making. In most cases, such approaches have led to unsatisfactory solutions that not only fail to resolve existing tensions, but also result in the significant loss of apes and ape habitat.

A common characteristic across the countries under review is the concentration of power in state institutions. This aspect is primarily due to the fact that land and forest ownership in most of these countries is predominantly public, while collective land and resource rights based on customary laws are not sufficiently strong to protect communities. Concentration of power is also linked to the extensive prerogatives of the executive, and the limited opportunities for democratic scrutiny through parliament, public participation and other deliberative and accountability mechanisms. This legal context facilitates very large land deals that fly in the face of social and environmental concerns.

Similarly, shortcomings in the articulation between land and forest legislation and decision-making create spaces for abuse by governments and companies, while productive use requirements can create perverse incentives and unintended consequences for ape conservation. World-class environmental legislation may be designed in ways that are difficult to implement, particularly in resource-constrained countries. And legislation aimed at protecting individual species provides few, if any, remedies to address the destruction of ape habitats, which industrial agriculture has exacerbated. In other words, the design of legal frameworks, not just their implementation, matters a great deal in tackling the interface between industrial agriculture and ape conservation.

At the same time, the agribusiness–conservation interface is also affected by gaps

Photo: Public authorities filed legal cases against the major palm oil companies operating in Tripa, mostly based on the illegal use of fire to clear land.
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“Ultimately, the country reviews highlight the pressing need to develop regulatory and enforcement strategies that can stem a tide underpinned by strong economic interests.”

in the capacity of government institutions to implement and enforce legislation, by political economy considerations affecting incentives for government agencies to apply and enforce legislation, and by uncoordinated government or legislative action that creates legal uncertainty capable of undermining conservation efforts. In these contexts, mechanisms to ensure transparency, public scrutiny and accountability become crucial in advancing ape conservation.

Overall, there is an urgent need to strengthen both procedural and substantive safeguards—in terms of their design and their implementation—to ensure that ape conservation considerations are properly factored into decision-making about development pathways, including in relation to industrial agriculture. Procedural safeguards include not only impact assessment studies, such as project-specific EIAs and SIAs, but also strategic environmental assessments for macro planning decisions, and mechanisms to translate findings of these impact assessments into operational risk-mitigation tools. Substantive safeguards are designed to strengthen local rights to land and resources, which would make it more difficult for governments to allocate very large areas of land; they also involve the rethinking of approaches for the protection of apes in contexts where the main threat is not to individual apes as a protected species, but to their habitat. The case study from Aceh, Indonesia, highlights that some of the more promising enforcement mechanisms may come not from legislation that specifically protects apes from killing or hunting, but from forest fire regulations or public moratoria that indirectly protect ape habitats.

The case study also suggests that three specific factors can help to promote better law enforcement, namely accurate documentation of illegal activities; public campaigns that call on action from the government; and government agencies that are willing to

act on the documentation of illegal activities. The case study shows that in contexts of limited enforcement and widespread impunity, effective action for ape conservation is possible and can deliver some tangible results.

Ultimately, the country reviews highlight the pressing need to develop regulatory and enforcement strategies that can stem a tide underpinned by strong economic interests. This task requires not only imaginative solutions, but also political action and alliances among multiple stakeholders to give real leverage to legal arrangements.

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Case study 4.1: Ian Singleton, with SOCP

Reviewers: Sam Lawson, Elisa Morgera, Nancy Lee Peluso and Denis Ruysschaert

Endnotes

- 1 For example, Myanmar is debating a new National Land Use Policy, which, if adopted, would lead to reform of land legislation; see Myanmar (2014).
- 2 See Cambodia (1993a, art. 58); DRC (2006c, art. 9); Indonesia (1945, art. 33); Liberia (1984, art. 7); Malaysia (1957, art. 76; pt. IV, ch. 4); and Myanmar (2008, art. 37).
- 3 See DRC (2006c, art. 9) and Myanmar (2008, art. 37).
- 4 For relevant regulatory instruments, see Cameroon (1974, 1994); see also Cotula and Mayers (2009). In Gabon, the land tenure regime is set out in a range of decrees, while Gabon (2001) regulates forestry; see also Alden Wily (2012).
- 5 The countries that do not allow private land ownership are Myanmar (Oberndorf, 2012) and the DRC (USAID, 2010a).
- 6 This observation applies to the ownership of land; private ownership of forests is explicitly allowed only in Cambodia (Oberndorf, 2006), Cameroon (USAID, 2011) and Liberia (USAID, 2010b).
- 7 The relevant laws are Cameroon (1974, art. 16) and DRC (2011c, arts 16–25).

- 8 For relevant regulations, see Gabon (1967, 1987a); Indonesia (1999, arts 5, 67); Liberia (1904, 1956); Malaysia (1930, 1965a); and Sarawak (1958).
- 9 Cameroon (1974) is one example.
- 10 For instance, it has been noted that communities in Myanmar are required to harvest certain valuable plant species in the forest. While this approach makes the forests better suited for commercial purposes in the long run, such “productive use” is of little benefit to the community, which perceives it as a “price” for securing their land tenure (Burma Environmental Working Group, 2011). Similar productive use requirements feature in relevant legislation in Cambodia, the DRC and Indonesia (Indonesia, 1960; Cambodia, 2002; DRC, 2011c).
- 11 The examples refer to Gabon (1961, art. 1) and Indonesia (1999, art. 4).
- 12 Concession contracts from Liberia and Cameroon, reviewed by the authors.
- 13 See Liberia Extractive Industries Transparency Initiative (LEITI n.d.).
- 14 See, in particular, Liberia (2009a, art. 5.4).
- 15 The two most recently adopted stand-alone general laws on environmental protection are the DRC’s Law on Basic Principles of Environmental Protection of 2011 and Myanmar’s Environmental Conservation Law of 2012 (DRC, 2011d; Myanmar, 2012b).
- 16 Indonesia (2009) is an example of the inclusion of “best practice.” For a thorough overview, see Syarif (2010).
- 17 Malaysia, which is a federal state, has transferred much of the competency on these matters to its autonomous states; in contrast, Indonesia has drawn up separate EIA processes for each of its autonomous regions. See Indonesia (1945, 1960, 1999, 2009); Malaysia (1930, 1957, 1965a, 1968a, 1968b, 1980, 1984, 2002); and Syarif (2010).
- 18 For instance, the DRC’s Law on Basic Principles of Environmental Protection of 2011 makes no reference to the areas set out in the Forest Code of 2002, nor does it explicitly state how areas designated under the Protected Areas Decree of 2008 link back to the protected forest zones regulated under the forest legislation (DRC, 2002, 2008b, 2011d).
- 19 The following countries clearly single out national parks as separate areas that require the highest level of conservation, and therefore particular procedures for their designation: Cameroon, where parks are established by a decree of the prime minister (Tieguhong and Betti, 2008); Gabon, where all national parks are designated or changed by law based on the National Parks Law (Gabon, 2007, art. 4); Indonesia, where changes of “significant impact, scope and strategic value” can be made by the House of Representatives based on the National Law on Forestry (Indonesia, 1999, art. 19); and Liberia, where they are established by recommendation of the Forest Development Authority, through the declaration of the president, and adopted by the legislature, based on the National Forestry Reform Law (Liberia, 2006, ss. 9.2–9.5).
- 20 Examples of this sort of decision-making procedure are the rules on forest zoning set out in Cambodia’s Law on Forestry of 2002, which specifies that the physical condition of a forest is the sole factor that determines to which zone—production or conservation—the area belongs (Cambodia, 2002, art. 12), and Indonesia, where the decision is based on the outcome of “integrated research,” as stipulated in the Regulation on Procedure for Changing Function of the Forest Zone (Indonesia, 2010).
- 21 See Stevens *et al.* (2014).
- 22 Exceptions apply in rare circumstances, when apes are perceived to threaten human life or property; see Table 4.4.
- 23 There are some exceptions; in Indonesia, for example, the EMA clearly mandates general institutions to monitor environmental compliance (Indonesia, 2009).
- 24 See, for example, DRC (2002, art. 134); Gabon (2007, art. 72); Indonesia (2009, arts 91–93); and Liberia (2006, s. 20.10).
- 25 The case was *Foundation for Environment v. China Road and Bridge Corporation*; for an extensive analysis, see Fuo and Semie (2011).
- 26 See Transparency International (2014).
- 27 National Law No. 11 was essentially the Aceh Special Autonomy Law required in the 2005 Helsinki peace agreement.
- 28 The National Law No. 26/2007 on Spatial Planning is part of the ongoing reversal of the decentralization trend that occurred in the years following the fall of President Soeharto (apparently his preferred spelling, “Suharto” is more commonly used in the international English-language media) in 1998, under which wide powers to allocate and grant permits to use land were devolved to the provincial and especially to the district level. Recent legislation, such as the abovementioned Law No. 26, has increasingly required local governments to conform to national guidelines on land use allocation and permits, even in areas with special autonomy, such as Aceh. National legislation such as the ban on the use of fire for land clearing, the ban on the conversion of deep peat, the requirement to maintain riparian buffers in plantations and other concessions, the criteria for determining areas requiring environmental protection (including national strategic areas for this purpose) and national conservation legislation protecting species and habitats should now be universally followed. While some confusion and apparent contradictions remain in the legislation and regulation of different sectors, there is no doubt that today’s wealth of legislation can be employed to enforce better environmental practice in Indonesia.

Photo: Two countries alone account for 85% of the global palm oil production: Indonesia (54%) and Malaysia (31%), Riau, Indonesia. © Kemal Jufri/Greenpeace

